



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
FAMILY DIVISION
CIVIL CASE NO 37 OF 2013 (OS)

T M N.....APPLICANT

VERSUS

M K.....RESPONDENT

RULING

PLEADINGS

This Court in its Ruling of 28th October 2014 upheld the Preliminary Objection filed on 6th September 2013 that the relevant law cited was repealed and allowed the Respondent to amend the pleadings within 30 days and serve the Applicant.

By an application filed on 27th November 2014, the Applicant Respondent raised another Preliminary Objection on the following grounds;

- a. The Court lacks jurisdiction to hear and determine the amended originating summons dated 14th November 2014 for the reason that it is *res judicata*.
- b. The amended Originating Summons dated 14th November is a nullity and should be dismissed with costs

During Oral Submissions Learned Counsel for the Respondent /Applicant Ms Mbulu informed the Court that pursuant to the Court's ruling of 28th October 2014, the Court upheld the Preliminary Objection that the pleadings were not competent before the Court as the law cited was now repealed, namely **Married Women Property Act of 1882**.

Counsel held the view that since the pleadings were a nullity, the amendment would not cure the irregularity and nullity of the pleadings, as they are *void abinitio*. The documents are forceless and the party ought to file new pleadings.

Secondly, the matter is *res judicata*. This court's Ruling upheld the Preliminary Objection thus declaring the pleadings a nullity by virtue of repealed law. To allow amendment to regularize the pleadings is futile as one cannot amend what is null and void.

The Respondent /Applicant through Learned Counsel Ms Ngigi relied on the Court's Ruling of 28th October 2014 and the relevant provisions of law; **Article 159 (2) (d) of the Constitution 2010 and Section 23 of the Interpretation and General Provisions Act.**

The Respondent/Applicant objected to the Application, and stated the same was heard and determined, the pleadings were amended and served on the Respondent.

The Respondent relied on the case of **REPUBLIC VS. CITY COUNCIL OF NAIROBI; VINEYARD HOLDINGS LIMITED & DIRECTOR GENERAL OF NATIONAL MUSEUMS OF KENYA J.R. APPLICATION 4333 OF 2012 (NAIROBI)** where the Court extensively dealt with the principle of *res judicata* as follows;

“A plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation.”

DETERMINATION

This Court shall address the matter as follows;

a. **Section 7 of Civil Procedure Rules 2010 describes *res judicata* as follows;**

“No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

In **SULEIMAN SAID SHABAL VS. INDEPENDENT ELECTORAL & BOUNDARIES COMMISSION & 3 OTHERS CIVIL APPEAL 42 OF 2013** where the Court of Appeal stated about *res judicata*;

“To constitute res judicata, there must be adjudication, which conclusively determines the rights of the parties with regard to all or any matter in controversy...”

The present case is based on division of matrimonial property, which has not been heard and determined on its merits. The matter commenced with the Preliminary Objection whose Ruling on 26th September 2014 did not preclude hearing of the dispute but allowed amendment of the pleadings to conform to current existing law. The Preliminary Objection does not amount to *resjudicata* until the substantive issue in the Originating Summons of 27th June, 2013 is heard and determined.

b. The present application on the Preliminary Objection is *res judicata* as the issue before Court on whether the pleadings before Court are competent or not by virtue of being grounded on repealed law; the **Married Women Property Act 1882** was determined vide the Ruling of 28th October 2014. This is not a review of the Court's Ruling on the earlier application.

c. This Court found the pleadings incompetent because remedies sought from Court by the disputants could only be donated by existing law as **Section 19 of the Matrimonial Property Act 2013 repealed the Married Women Property Act 1882.**

d. The Originating Summons was valid, legal and regular at the time of filing the matter in Court by virtue of the existing law then. The repeal of the law thereafter cannot be attributed and visited on the Respondent with a view to defeat the ends of justice. Therefore they ought to have the opportunity to regularize proceedings under the new law for hearing of the substantive issue(s).

e. The arguments presented by the Applicant /Respondent would have carried the day during the Pre Constitution 2010 period where emphasis was laid on technicalities and not the substantive issues in dispute. Today, **Article 159 (2) (d) of Constitution 2010**, the supreme law of the land, prescribes that although form, procedure and technicality should not be disregarded, the Court should not pay undue regard to technicalities of procedure.

f. Therefore, informed by **Article 159 (2) (d) Constitution of Kenya, Order 2 Rule 14 of Civil Procedure Act 2010** on technicalities not overriding the issues in dispute **and Section 23 (3) (c) of Interpretation and General Provisions Act** which provides that where law is repealed, it does not affect a right, privilege, obligation or liability acquired or incurred under the written law so repealed; This Court is persuaded that the matter before Court; the substantive dispute ought to be heard and determined on its merits; and not camouflaged by want of form and procedure.

g. In ***P.N.N. VS. L.W. N. CIVIL CAUSE 49 OF 2013*** in a similar application this Court found that amendment of pleadings to conform to existing law would not prejudice the adverse party; the party would be served and given ample time to prepare pleadings and defense.

h. The import of **Section 17 of Married Women property Act 1882** now repealed is housed in **Section 93 (1) of Land Registration Act of 2012** which was in force when the Applicant herein filed the Originating Summons on 27th June 2013

i. **Section 93 (1) Land Registration Act 2012** provides;

“(1) Subject to the law on matrimonial property, if a spouse obtains land for the co-ownership and use of both spouses or, all the spouses—

a. There shall be a presumption that the spouses shall hold the land as joint tenants unless—

i. A provision in the certificate of ownership or the certificate of customary ownership clearly states that one spouse is taking the land in, his or her own name only, or that the spouses are taking the land as joint tenants; or

ii. The presumption is rebutted in the manner stated in this subsection; and

b. The Registrar shall register the spouses as joint tenants”

The rights vested in **Section 17 of the Married Women’s Property Act (repealed)** between husband and wife as to property are also vested on **Section 93 of the Land Registration Act 2012** which was in force when the Originating Summons was filed.

Section 17 of the Married Women’s property Act states;

“In any question as to between husband and wife as to the title to or possession of property, either party, or any Such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland.....”

j. The application of the **Married Women’s Property Act 1882** in Kenya was done by **Section 3 1(b) & (e) of the Judicature Act**. Therefore the issue that the **Matrimonial Property Act 2013** would operate retrospectively would not arise or apply as the vested rights in the repealed law are in other legislation that existed at the time the Originating Summons was filed.

COURT ORDERS

1) For the above reasons the Preliminary Objection is dismissed and the matter shall proceed for

hearing on dates parties obtain in the Registry.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF MARCH, 2016

M.W. MUIGAI

JUDGE

In the presence of

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