



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 13 OF 2013 (O.S.)

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT 1882

AND

IN THE MATTER OF AN APPLICATION FOR DECLARATION OF PROPERTY RIGHTS

BETWEEN

F W.....APPLICANT

-VS-

Z G.....RESPONDENT

RULING

1. The applicant and the respondent got married on 18th December 1982. The respondent filed divorce proceedings before the subordinate court and the matter has not been concluded. On 13th March 2013 the applicant filed the present originating summons under **section 17 of Married Women Property Act 1882** seeking a declaration that parcels LR RUIRU/KIU BLOCK *[particulars withheld]*, F800 vide share certificate No. *[particulars withheld]*, Map No. *[particulars withheld]* measuring $\frac{1}{4}$ acres situated in Embakasi Ranching Company in Ruai, LR No. *[particulars withheld]*, Milima Road, Langata Nairobi and motor vehicles *[particulars withheld]* – Mercedes Benz and *[particulars withheld]* – Toyota Vitz, all of which registered in the name of the respondent, are jointly owned in equal shares having been jointly acquired during the marriage. She sought that the properties be sold and the proceeds equally shared between them.
2. The respondent filed a replying affidavit to oppose the summons. Among other things, he claimed that he bought the two vehicles long after the couple had separated and therefore they are not matrimonial property. As for Ruiru/Kiu Block *[particulars withheld]*, he stated that this was their matrimonial home and that he handed the original title deed to the applicant who retains it up to now. As for the Ruai plot, he stated that he bought it with no contribution from the applicant. Regarding the Langata property, his case was that he is still struggling to pay for it and the same is yet to be transferred to him.

3. On 16th September 2013 the respondent filed a preliminary objection to the originating summons on the grounds that the **Married Women Property Act 1882** is a foreign and archaic **Act** that is unconstitutional as it denies him equal protection and benefit of law contrary to **Article 27(1), (2), (3), (4) and (5)** of the Constitution of Kenya 2010. Further, that the **Act** contravenes **Article 45(3)** in regard to equal property rights of spouses. The respondent feels aggrieved because the **Act** gives undue advantage to the wife to apply for and obtain orders against him which will deny him the fundamental right of equality and non-discrimination and of equal rights over property at the time of marriage, during the marriage and at the dissolution of marriage.
4. The applicant's position was that this was not a pure point of law as envisaged by the decision in **MUKISA BISCUIT MANUFACTURING CO. LTD V WEST END DISTRIBUTORS [1969] EA 696**; that the issue being raised can be substantively dealt with in the suit. In any case, the **Married Women Property Act 1882** has since been repealed and its place taken by the **Matrimonial Property Act**.
5. MR NJIRU for the respondent and MRS WAMBUGU for the applicant filed written submissions which I have read and considered.
6. In my view, that a wife has a claim to matrimonial property is not in dispute. Under **Article 45(3)** of the Constitution of Kenya 2010;

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.”

This is the right that the applicant is seeking to enforce through this suit. At the time that the suit was filed the applicable law was the **Married Women Property Act 1882**, which was a statute of general application applied to Kenya under the **Judicature Act (Cap 8)**. With the promulgation of the Constitution, the **Act** was found to be insufficient for our purposes. A new legislation giving equal status to spouses in relation to matrimonial property became necessary. That legislation is the **Matrimonial Property Act (No. 49 of 2013)**. Under **Section 19** of the **Act**;

“The Married Women Property Act shall cease to extend or to apply in Kenya.”

7. The enactment of the **Matrimonial Property Act**, and the repeal of the **Married Women Property Act**, did not take away any matrimonial rights that the applicant may have had during her marriage to the respondent. Such rights have to be enforced under the **Matrimonial Property Act** and the Constitution of Kenya 2010.
8. Whether the applicant and the respondent have any matrimonial property, and the extent of it, are issues that will be decided on evidence. It follows that the bid through this objection to end this suit is misconceived and without merit. The objection is therefore dismissed with costs.

DATED and DELIVERED at NAIROBI this 6th October, 2014.

A.O. MUCHELULE

JUDGE