



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 49 OF 2013 (OS)
IN THE MATTER OF MATRIMONIAL PROPERTY ACT
AND
IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN’S PROPERTY ACT (1882)

P. N. N.....PETITIONER

VERSUS

L. W. N.....PETITIONER

RULING

The Applicant filed a Notice of Preliminary Objection on 3/11/2014. The main grounds of the objection are;

The Amended Originating summons filed herein is a nullity in law and ought to be dismissed with costs as the Cause herein was filed prior to the enactment of the Matrimonial Property Act and cannot be adjudicated order the said Law as the same violates the principle of legality.

During the Oral Submissions Counsel for the Respondent informed the court that the matter was filed prior to the enactment of the Matrimonial Property Act, 2013 and therefore the same cannot be adjudicated under the New Act due to the principle of legality. The Originating Summons was filed on 13th August, 2014 and the New Act commenced on 28th January, 2014.

The counsel referred this court to the following case;

1. W.K.G. vs. J.W.G Civil Appeal 10 of 2003

Court of Appeal- Nairobi at page 5, states;

“We do not have any specific legislation dealing with distribution of Matrimonial Property. Other than the Constitution of Kenya 2010 which came into force long after this matter had been decided and whose provisions cannot thereafter be applied retrospectively to confer a benefit that was hitherto nonexistent or direct any accrued rights to any of the parties therein”.

On the same page reference is made to the Supreme Court of Kenya on the issue of retroactive/retrospective application of the Law in the case of;

2. SAMWEL KAMAU MACHARIA & ANOTHER vs. KENYA COMMERCIAL BANK LTD & ANOTHER.

Supreme Court at Nairobi, Appeal No. 2 of 2011.

The court observed;

“As for non criminal legislation, the general rule is than all statutes other than those which are merely declaratory or which relates only to matters of procedure or evidence are prima facie prospective and retrospective effect is not to be given to them unless by express word and necessary implication, it appears that this was the intention of the legislative.”

In the case of **P.W.M vs. E.M. HIGH COURT MURANGA- Civil Suit No.1 of 2013 (OS)**

The court observed;

“ As far as the Matrimonial Causes Act No. 49 of 2013 is concerned, Counsel for the Applicant did not cite any provision in that Act that supports the position he has adopted. Having come into force long after the applicant filed her suit, I could not see how this Act was going to apply to the applicant’s cause since then is no express provision in that Act providing for its retrospective application.”

In S.R.W. vs. S.W Civil Suit No. 62 of 2006.

The Court Observed;

“ The suit is predicated upon section 17 of the Married Women’s Property Act 1882. This was a section of general application which was applicable in Kenya. The Act is now repealed by the Matrimonial Property Act (Act No. 49 of 2013) However, since the suit was filed before the enactment of Matrimonial Property Act, this as it will be determined on the basis of the law as it was then applicable”.

The counsel for the Respondent told the court that to proceed with the matter under the new Law as demonstrated by the above cited authorities it would be against Section 23 of the Interpretation and General Provision Act Cap 2.

The Counsel of the Respondent opposed the Preliminary Objection on the following grounds; that there is no wrong without a remedy. It cannot be said that if an Act is repealed then the rights are obliterated.

The Counsel informed the court that the Applicant has filed an earlier Preliminary Objections of 17th September, 2014 and it was dealt with by the Presiding Judge Kimaru who confirmed the application be amended under the new law.

The Originating Summons in court today is the one amended by order of the court; to ask the court to set aside a judicial finding would not be legally possible.

This court has considered the evidence and oral submissions by both Counsel.

The Preliminary Objection filed on 3/11/2014 complies with requirement outlined in the case of Mukisa Biscuits Company Ltd vs. Westend Distributors Ltd 1969 E.A.696 that it is one that raises a pure point of Law that goes to the root of the substantive matter in court. Therefore the matter took precedence before the hearing of the substantive issue before the court.

The court has confirmed from the record that the Originating Summons was filed on 13th August, 2013 under the new repealed Married Women's Property Act of (1882).

The Respondent was served and the Advocate entered appearance on 9th September 2013 but to date have not filed the Replying Affidavit.

The matter was before Kimaru J for directions based on the application filed on 29th November, 2014. It is then that a Preliminary Objection was filed on 18th March, 2014. The Preliminary Objection stated thus;

“The Originating Summons filed herein is a nullity in Law and ought to be dismissed with costs as the parties herein are not subject to the provisions of the Married Women's Property Act.”

On 15th June, 2014 when parties and Counsel appeared before Kimaru J. in the presence of Ms. Ndegwa for the Respondent, the court granted leave for the applicant to amend the Originating Summons and bring it in conformity of the Matrimonial Property Act 2014. In fact the Preliminary Objection of 17th March, 2014 was upheld and the Amended Originating Summons is filed and served.

To turn around, Counsel raised another Preliminary Objection of 3rd November, 2014 which stated;

1. Amended Originating Summons cannot be litigated upon because the Cause was filed when Matrimonial Property Act 2014 was not in force and it cannot apply retrospectively is surprising.

Although this court appreciates the various cited either authorities on the issue of retrospection of new legislation and finds it provides this court a useful guide on determination of issues; the nature of the circumstances of this matter are peculiar such that though it is trite law it may not be applicable to be on that matter.

The reason is because, the Originating Summons of 13th August, 2013 was amended pursuant to a court Order of Kimaru J. of 15th June, 2014. The parties/ Court recorded a consent before the court.

A consent is valid order of the court unless it is a vitiated by fraud or illegality or concealment of material facts. Secondly, this is an Order of a court of competent and equal jurisdiction. To set aside, review or amend the court Order and subsequent action is to attempt to sit on appeal over the decision and this court lacks competent jurisdiction to do so.

Thirdly, the Matrimonial Property Act No. 48 of 2013 which come into effect on 16th January, 2014 at Section 19 explicitly states;

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

In the absence of transitional provisions in the New Act on the matters that were filed or heard but not determined at the time, they can only be regularized to conform to the existing valid law. As prayer or orders sought by the parties must be under the legal provisions of law in the New Act.

Fourthly, the party will not suffer any prejudice by amendment of the Originating Summons from the repealed law to the present valid law as their rights under the Married Women Property Act 1882 are intact under the Matrimonial Property Act, 2014.

Section 23 (3) (c) of the Interpretation and General Provisions Act Cap 2 states;

“ Where with law repeals in whole or in part another written law, unless a contrary intention appears; the repeal shall not; affect a right, privilege, obligation or liability acquired, occurred, or incurred under a written so repealed.”

Finally, under the Land Registration Act of 2012 which was in force at the time the Originating Summons of 13th August 2013 was filed Section 93 (1) of the Act imports the same provisions of the Married Women Property Act of 1882 repealed. The provisions relate to the co-ownership and other relationships between the spouses.

“ Subject to the law on Matrimonial Property if a spouse obtains land from the co-ownership and use of both spouses or all the spouses;

- i. . A provision in the certificate of ownership or the certification of customary ownership clearly states that one spouse is taking the land is 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 upshot of the matter is that the Preliminary Objection of 3rd November 2014 does not adversely impact the substantive matter under the Originating Summons of 13th August 2013. This is no prejudice as the repeal of the law, Married Women Property Act 1882 has not prejudiced the parties, their rights under the said law are found in existing laws. Finally, the Matrimonial Property Act 2013/2014 does not donate jurisdiction under the repealed Married Women Property Act under Section 19 of the Act. The amendment of the Originating Summons was pursuant enforcement of a court order arising from a consent of the parties through counsel. The Preliminary Objection is therefore dismissed with costs.

Mr. Murara Holding Brief for Ms Ndegwa for the Respondent and in The absence of the Applicant.

M. MUIGAI

JUDGE

Mr. Murara:

We wish to apply for leave to prepare Replying Affidavit and serve the Applicant within 21 days.

Court:

Leave granted to file Replying Affidavit and serve the Applicant within 21 days.

DELIVERED, READ AND SIGNED AT NAIROBI THIS 12TH DAY OF NOVEMBER, 2014.

M. MUIGAI

HIGH COURT JUDGE OF KENYA