



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**Civil Suit 205 of 200**

**GRACE WANJIKU WAINAINA.....PLAINTIFF/APPLICANT**

**VERSUS**

**BENSON WAINAINA KIBURI.....DEFEDANT/RESPONDENT**

**RULING**

The Defendant/respondent and the plaintiff/applicant are husband and wife married in 1963 under the Kikuyu customary law and blessed with eight children.

It is the plaintiff/applicant's contention that in January, 1973 they were allocated, by the Settlement Fund Trustee, plot (original) No.NYANDARUA/NDEMI/1392 (the suit land) measuring approximately twenty eight (28) acres. That the allocation was based on the fact that the couple was married. In other words single persons were not qualified for allocation. Secondly, the plaintiff/applicant has averred that only the name of one partner could be entered in the register as an allottee. In the same year (1973) the plaintiff/applicant occupied the suit land. Between 1973 and 1981 the couple was blessed with five (5) children while living in the suit land. Up to the 28<sup>th</sup> January, 1995, when the defendant/respondent **HCCC.205/08** ejected the plaintiff/applicant from the suit land, the latter lived on the suit land. Attempts by the plaintiff/applicant to return to the suit land have failed. Her efforts to preserve the suit land by the registration of a caution have also been frustrated. Consequently on 6<sup>th</sup> October, 2008, after the Senior Resident Magistrate, Court, Nyahururu removed the caution on the suit land, the plaintiff/applicant brought the present Originating Summons under section 17 of the Married Women's Property Act, 1882, in which she seeks that this court declares 75% share of the suit land as being held by the defendant/respondent in trust for her. She is also seeking that the defendant/respondent be restrained by an order of injunction from disposing of, transferring or dealing adversely with the suit land.

As I have already noted this move has been prompted by the fact that the caution on the suit land was discharged by the court. The plaintiff/applicant is further apprehensive that the defendant/respondent intends to dispose of the land as the same has been sub-divided into eighteen (18) parcels.

The Summons is premised further on the grounds that the suit land was fully developed by the plaintiff/applicant, who also, through hard work on the suit land, was able to settle the Settlement Fund Trustee loan. That three years after ejecting the plaintiff/applicant and her children from the **HCCC.205/08** suit land, the defendant/respondent caused the suit land to be registered in his name.

Despite the fact that the plaintiff/applicant sought in the Originating Summons an order of injunction pending the hearing and determination of the same, with the Originating Summons she has also brought

Chamber Summons seeking similar relief and an injunction pending the hearing of the Chamber Summons. The defendant/respondent opposed both the Originating Summons and also denied the allegations in the two applications, save for the fact that he got married to the plaintiff/applicant under the Kikuyu customary law on 3<sup>rd</sup> January, 1969. That at the time of that marriage he was already married to his first wife, Wambui Ndiritu. The defendant/respondent has also denied that the suit land was allocated to him after his marriage to the plaintiff/applicant. That all developments on the suit land were made by him. That the land measured only five (5) acres. That he repaid the loan. That the plaintiff/applicant deserted the matrimonial home on 28<sup>th</sup> January, 1995. These rival arguments are yet to be canvassed and determined and are not the subject of this ruling. This ruling has been prompted by arguments raised in a notice of preliminary objection filed by counsel for the defendant/respondent on 22<sup>nd</sup> October, 2008.

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It raises a single point, namely that the originating summons and the chamber summons are incompetent, bad in law and are an abuse of the court process as they have been brought when “***there are no pending or concluded matrimonial proceedings between the parties herein.***”

Learned counsel for the defendant/respondent relying on a recent Court of Appeal case of **Peter Mburu Echaria V. Priscilla Njeri Echoria**, Civil Appeal No.75 of 2001 and the English cases of **Wechtel V. Wechtel** (1973) 1 All ER 829 and **Trippas V. Trippas**, (1973) 2 All ER 1, submitted that the law, practice, procedure and case law are to the effect that Section 17 of the Married Women’s Property Act can only be invoked where matrimonial proceedings between the parties are either concluded or pending. Learned Counsel for the plaintiff/applicant does not share that view and insists, on the authority of **Nderitu V. Nderitu** (1997) LLR 606 (CAK), **Fribance V. Fribance** (1955) 3 All ER 787 and **Hichens V Hichens** (1945), All ER 451, that there is no requirement of the law, procedure, practice or even case law that before Section 17 aforesaid can be invoked there must be matrimonial proceedings pending or determined.

This dispute is premised on one of those English laws retained in our jurisprudence by virtue of Section 3(1) (c) of the Judicature Act under the rubric (rubric) “***statutes of general application***” in force in **England** on ***HCCC.205/08*** the 12<sup>th</sup> August, 1897. The jurisdictions of the courts in Kenya are to be exercised in conformity with, among other laws, the so called statutes of general application, the common law and doctrines of equity. But these statutes (passed and in force in England before 12<sup>th</sup> August, 1897);

***“.....shall apply so far only as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances may render necessary.”***

It is the continued application in the present day Kenya of the 1882 English Statute and other such statutes in resolving property disputes in a marriage that have baffled not only the common man in Migingo Island but also judges, advocates and law scholars, in equal measure, yet clearly the circumstances of Kenya and its inhabitants do not permit applications of such archaic law as has been demonstrated by recent local courts’ decisions on this subject.

Before the enactment of the 1882 Act, British law defined the role of the wife as a ‘***feme covert***’– an archaic French phrase loosely translated in English to mean a married woman. This law emphasized the subordination of a married woman to her husband. She was prohibited from entering into any form, of contract without the approval of her ***HCCC.205/08*** husband. She could not, therefore own, buy and sell her separate property. She was limited on what she could inherit. While men received real property (land) women only got personal property such as clothing, jewelry, furniture and movable goods. Upon marriage, the husband and wife became one person under the law and the wife’s hitherto property was surrendered to her husband, thereby distinguishing her legal identity.

Women who never married maintained control over their property and inheritance; owned own land and controlled property disposal. Once married, the only way that a woman could reclaim property was

through the death of her husband.

The dissolution of a marriage usually left the woman impoverished, as the law did not offer them any rights to marital property. After years of political lobbying to address this gender imbalance among British women, the 1882 Act was passed and with its passage the British woman's rights and identity were restored.

It is in the light of this background that this notice of preliminary objection ought to be seen and then resolved.

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The originating summons is yet to be determined hence its merit or otherwise is not in issue here. Being a notice of preliminary objection I have to be satisfied that it raises a pure point of law capable of disposing of the matter in terms of the strictures enunciated in the famous **Mukisa Biscuit Manufacturing Co. Ltd. V. West End Distributors Ltd.** (1969) EA 696.

The effect of the objection is that this court lacks jurisdiction to entertain the originating Summons and the Chamber Summons as the same have been brought prematurely – when there is no matrimonial proceedings pending (or determined) between the parties.

Jurisdiction is a question of law which if successfully canvassed is capable of disposing of a suit/application. The question in this preliminary objection is therefore, whether or not this court has jurisdiction to entertain this matter. Section 17 of the Married Women's Property Act, 1882 provides in pertinent part that:

***“17. In any question between husband and wife as to title to or possession of property, either party ..... may apply by summons or otherwise (in a summary way) to the High Court or such county court as may be prescribed and the court may on such application (which may be heard in private), HCCC.205/08 make such order with respect to the property as it thinks fit.” . . .*** (emphasis supplied).

I have underlined the words ***“In any question between husband and wife”*** to emphasis that the only requirement before an application under Section 17 aforesaid can be entertained is that the parties must be husband and wife.

In **Nderitu V. Nderitu** (supra) the Court of Appeal went further and gave three conditions to be satisfied in an application of this nature. It stated that:

***“The Act does not discriminate between statutory and customary law marriages. All that a wife has to show is that she is married to the husband at the time of launching her application; that the property in question was acquired during the subsistence of the marriage; and thirdly that she contributed directly or indirectly to the acquisition of the assets.*”** (Emphasis mine)

From the clear language of Section 17 it cannot be argued that an issue as to title or possession of property between a man and his wife can only arise where a petition of dissolution of the marriage has been filed or ***HCCC.205/08*** where the marriage has been dissolved. As a matter of fact and law where a marriage has been dissolved the parties are no longer husband and wife. See **Fribance V. Fribance** (Supra). The Section envisages, in my view, a situation where the parties are living as man and wife or where there are divorce proceedings pending or where the couple are judicially separated.

There may be occasions where a dispute as to title to or possession of property may arise between a couple who have no intention of ending their union. However, all the cases cited and those I have read the question naturally, appears to arise mainly in cases where the marriage has broken down and parties have commenced divorce or judicial separation proceedings. I reiterate that in view of the historical

background outlined at the beginning of this ruling, it must be clear that the law now recognizes the fact that a married woman can and is indeed entitled to own property in her name. The Married Woman's Property Act was specifically enacted for the married woman to protect their property. In its preamble the Act provides as follows:

***"An Act to consolidate and amend the Acts relating to the Property of married women."***

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It is of course inconceivable in an African setting for a married couple to isolate and identify property in the marriage as belonging either to the husband or the wife. This is so even where the property is registered in the name of one partner. It is also important that in interpreting the 1882 English legislation we must bear in mind the cultural practices of the populace it applied and the time of its enactment.

Finally, I wish to buttress the position I have taken in this matter by reiterating two things. First, the main consideration under Section 17 is that the parties must be husband and wife. Lord Pearce in **Strachan V. Strachan** (1965) All ER 77 said that;

***"In any question between husband and wife", it says. In my view the parties must be husband and wife when summons is taken out".*** (Emphasis Supplied)

In **Fribance v Fribance** (Supra) it is held that::

***"The court has jurisdiction to dispose of the matter if the parties were husband and wife when the summons was issued, notwithstanding the fact that at sometime thereafter their relationship is ceased."*** (Emphasis Supplied)

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It does not, however, mean that once parties cease to be husband and wife by divorce they have no recourse to recover or claim their property. They can do so in the normal manner as was stated recently in **Peter Mburu Echaria v Priscilla Njeri Echaria** (Supra). The court said:

***"After the dissolution of the marriage, the wife, as can be seen from the speech of Lord Diplock at page 783 . . . claimed one half undivided share in the house which was the matrimonial house for 10 years. The claim was made not under section 17 of 1882 Act but by an ordinary originating summons in the Chancery Division."***

The second point I am emphasizing is that Section 17 gives both the husband and the wife equal opportunity to move the court by summons to assert their rights even during the subsistence of the marriage.

An example given in 1882 Act is where the wife invests funds fraudulently obtained from the husband. Section 10 provides in the relevant part that:

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***"10. If any investment in such deposit or annuity as aforesaid, or in any of the public stocks or funds . . . or in any share, stock, debenture . . . of any corporation, company or public body, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this Act, order such investment, and the dividends thereof . . . to be transferred and paid respectively to the husband . . ."***

There is absolutely no bar for the wife also to sue her husband if he has fraudulently invested her funds without her consent. Such a suit will be entertained independent or in the absence of any matrimonial

cause that may be pending.

For these reasons the objection is overruled and dismissed with costs to the applicant.

DATED, SIGNED and DELIVERED at Nakuru this 6<sup>th</sup> day of July, 2009.

**W. OUKO**

**JUDGE**