

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 178 OF 1982 (OS)

G.O.....APPLICANT

VERSUS

E.O.....RESPONDENT

JUDGMENT

These proceedings were introduced to the court by means of a Chamber Summons in AC 98 of 1980, filed by Hayanga & Co on November 30, 1981 and by an Originating Summons filed by Khaminwa & Khaminwa on January 21, 1982. Hayanga & Co appear for the ex-wife whom I shall refer to as E and Khaminwa and Khaminwa for the ex-husband whom I shall call G. The parties were married in 1970 and divorced in 1982. The Chamber Summons and Originating Summons seek orders as the entitlement of the parties to the matrimonial property and are brought under Section 17 of the Married Women's Act 1882. They were consolidated into one proceedings by Mr Justice Megare.

Mr John Khaminwa very properly called my attention to the difference of judicial opinion as to the applicability of the Married Women's Property Act of Great Britain and Ireland (a country where monogamy is the rule) to Kenya. Mr Justice Trevelyan and Mr Justice Simpson have decided that the Act applies to Kenya as a Statute of General application under section 3 of the Judicature Act in J & J 1971 EA and *Karanja v Karanja* 1976 KLR 307 respectively. Mr Justice Trainor however dissented from this view in HCC No 407 of 1980. I propose however to propound a third view of the question.

In *Strachnin v Strachin* 1965 1W LR 646 at p649 Lord Pearce said;

“Section 17 is a procedural section whereby questions between husband and wife as to property may be decided in a summary way.”

In *Petit v Petit* 1970 AC 777 Section 17 of the Act was held to be a procedural section only and Mr Justice Simpson in *Karanja v Karanja* 1976 KLR 307 to whom the case was cited did not dissent from this view; see page 308(H).

Under Section 3 of The Judicature Act the jurisdiction of the high court is to be exercised not alone in accordance with the statutes of general application in force in England on the August 12, 1997 but also the procedure and practice observed in courts of justice at that date (so far the written law enumerated in the subsection extend). The High Court (the then CJ) in HCCC No 3688 *Charles Lichungu & others v Clement Gachanja* applied a procedural section of the Judicature Act 1873 following an earlier decision of Mr Justice Chesoni in a case reported only in 1978 *Commonwealth Law Bulletin* at p 580 on the basis that that section was part of the practice and procedure of courts of justice in England in 1897. Likewise I am prepared to claim jurisdiction to determine this suit under section 17 of the Married Women's Property Act.

Having decided that I have jurisdiction: How do I exercise it? I take as my guide a passage in Sir Raymond Evershod's M R judgment in *Rimmer v Rimmer* 1953 IQBD 63 (relying heavily on Buchnill L J). The passage appears in p 68 and is as follows”“That is the problem, and in regard to it I venture to take as my guide or test the observations of a wise judge, Buchnill LJ in a case which I think is not reported of *Newgrosh v Newgrosh*, decied on June 28, 1950. Buchnill LJ said: “That””– and he referred to

the citation I have just made –“ gives the judge““a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but, subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time, at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described here as ‘Palm Tree Justice’. I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case.”

G owns 2 properties, one at Eldoret and one at Simuti village Busia District. I am satisfied that neither of these properties have anything to do with the marriage. Likewise I feel that the movables have been divided albeit without good grace) between G and E and I propose to make no order in respect of them.

The only property I propose to make an order in respect of is a double storied house at Westlands held by G and E as joint tenants for a term of 43 years but subject to a mortgage in favour of the First National Bank of Chicago. This property was bought by G and E for Kshs 200,000, financed by a loan of Kshs 190,000 from the bank. A deposit of Kshs 10,000 was paid in 1975.

This property is now occupied by G. Its present value has been agreed at Kshs 650,000 and there is outstanding on the mortgage as a sum of Kshs 127,000. I am satisfied that G contributed slightly more to the purchase of the house than did E, but only slightly more. Taking into account the fact that E’s position as secretary in the bank enabled them to obtain a mortgage and that G has been the sole occupier of the house since before the divorce, I feel that E is better entitled to share in the increase in the value of the house since it has been purchased.

I do not intend to order G to vacate the house. I propose instead to make an order that G be entitled to purchase E’s share in the property on paying her Kshs 300,000 and giving her an indemnity against the mortgage payments still due on the property.

I shall now hear the parties on costs.

Dated and Delivered in Nairobi this 9th day of October,1986

J.F.SHIELDS

JUDGE