REPUBLIC OF KENYA

IN THE COURT OF APPEAL OF KENYA

AT NAIROBI

CIVIL APPEAL 24 OF 83[1]

BETWEEN

GIDEON MUNYAO MUTISO……..……..…….APPLICANT

AND

SARAH WANJIKU MUTISO……...…….……RESPONDENT

(Appeal from the Order of the High Court of Kenya at Nairobi (Nyarangi, J) dated 17th February, 1983 In High Court Miscellaneous Suit No.448 of 1981) _____

JUDGMENT OF THE COURT

This matter now comes before us on four substantive grounds of appeal, plus one relating to costs. We invited counsel to address us on ground 3, only, reserving the other grounds. That ground relates to whether the Judge was entitled in law to make his second order of 17th February, 1983, suo moto, dismissing the husband's Originating Summons, without hearing the parties, and in particular, without inviting the appellant to make his submissions against such dismissal.

Without deciding the matter, we think that Rule 10 of Order 36 (Cap 21) is wide enough to cover a case where the Judge, having decided that an Originating Summons is the correct procedure, after hearing further evidence or material, can, quite legitimately, reach the opposite conclusion, namely that the case has become such that it is not appropriate to decide, for example, complicated issues of disputed fact on an Originating Summons. If he does come to that conclusion, then he may, under Rule 10, dismiss the summons.

We do not agree with Mr Lakha that that which Nyarangi J (as he then was) did on the 17th February, 1983, amounted to a recall, withdrawal or modification of his earlier ruling, as occurred in Re HARRISON'S SETTLEMENT [1955] 1 AER, 185 (to pages 187, 188 and 192 of which report, Mr Lakha referred us) and in RAICHAND LAKHAMSHI v ASSANAND [1957] EA 82 at p 85. It was a further consideration of the situation as, in our opinion, is envisaged by Rule 10. This is manifest from Nyarangi J's opening words on 17th February:- "This matter has reached the stage of considerable contest."

Clearly, he came to this view because of the way in which the case had developed, that is to say, the nature of the husband's (the Appellant's) relating to the privilege of advocate and client, both of which had arisen in the period intervening between the two decisions. Having said that, we nevertheless consider that it is a fundamental principle of justice that before an order or decision is made, the parties and particularly the party against whom that decision is made, or is going to be made, should be heard. Mr

Lakha sought to persuade us that, whether or not the parties had been heard, it could not be possibly have made any difference to the result, because in the meantime two judgments of this Court, regarding the appropriateness of an Originating Summons, namely, Kenya Commercial Bank v James Osebe, CA 60/82 and Kibutiri v Kibutiri CA 30/82, had been delivered. They showed that the Originating Summons procedure should clearly not be used where there are seriously disputed questions of fact: See in particular – Law J at p 2 of this judgment in the latter case. Thus, Mr Lakha said, the Judge would necessarily have reached the same result even if he had heard the Appellant, and therefore the normal rule audi alteram partem would not have obtained.

This is an attractive argument, but after consideration of Mr Lakha's very able submissions, we are unable to say that, because, inter alia, of that which had occurred in the intervening period, the Judge would inevitably have dismissed the summons on 17th February, 1983, if he had heard both sides, as this Court's predecessor said in LAKHAMSHI's Case. We cannot say, as Roxburgh J was able to do in Harrison's Case (1954) 2 AER at P 457, that the result before Nyarangi J would have been a foregone conclusion whether the parties had addressed him or not. We observe also that in that case, counsel were given an opportunity to address Roxburgh J, but did not wish to do so. Here there was no such opportunity. Tempting, therefore, as it is to decide here and now the question of whether the words "may apply by summons or otherwise in a summary way" in s 17 of the Married Women's Property Act, 1882, mean that questions arising thereunder must always be determined on an originating summons, as it was for instance in KARANJA v KARANJA [1976] KLR p 307, we have no doubt that the fundamental principle that both parties should be given an opportunity of being heard before a decision is reached, was applicable in this case, and was not observed.

Accordingly, we allow the appeal on ground 3 of the Memorandum of Appeal and set aside Nyarangi J's Order of 17th February, 1983. We remit the case to the High Court to be decided according to law, under Order 36 Rule 10, or otherwise, as the case may be. Since Mr Khaminwa does not seek them, (rightly in our view since neither party was to blame), we make no order for costs.

Dated at Nairobi, this 4th day of May, 1984.

A A KNELLER

JUDGE OF APPEAL

A R W HANCOX

JUDGE OF APPEAL

Z R CHESONI

AG JUDGE OF APPEAL