IN THE COURT OF APPEAL

AT NAIROBI

(Coram: Kneller, Hancox JJA & Chesoni Ag JA)

CIVIL APPEAL 24 OF 1983

BETWEEN

MUTISO.....APPELLANT

AND

MUTISO.....RESPONDENT

(Appeal from the High Court at Nairobi, Nyarangi J)

JUDGMENT

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 February 17, 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 XXXVI 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 February 17, 1983, amounted to a recall, withdrawal or modification of his earlier ruling, as occurred in *Re Harrison's Settlement* [1955] 1 All ER, 185 (to pages 187, 188 and 192 of which report Mr Lakha referred us) and in *Raichand Lakamshi v Assanand* [1957] EA 82 at page 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 February 17:

> "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) evidence and of the point as to section 134 of the Evidence Act (cap 80) 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 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 serious disputed questions of fact: see in particular – Law JA at page 2 of his 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 February 17, 1983, if he had heard both sides, as this court's predecessor said in *Lakhamshi's* case. We cannot say, as Roxburg J was able to do in *Harrison*'s case ([1954] 2 All ER 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 Roxburg 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 section 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 p307, 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 February 17, 1983. We remit the case to the High Court to be decided according to law, under order XXXVI 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 and Delivered at Nairobi this 4th day of May 1984.

A.A.KNELLER

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JUDGE OF APPEAL

A.R.W.HANCOX

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JUDGE OF APPEAL

AG. Z.R.CHESONI

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JUDGE OF APPEAL

I Certify that this is a true copy

of the original.

DEPUTY REGISTRAR.