



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT KERUGOYA**  
**MATRIMONIAL CAUSE NO. 1 OF 2014**

M W K..... APPLICANT

-VERSUS-

A M W .....RESPONDENT

**RULING**

Before this court is a preliminary objection dated 17<sup>th</sup> September 2014 raised by the respondent to the originating summons taken out by the applicant herein and dated 26<sup>th</sup> February 2014.

In the originating summons, the applicant is inter alia seeking a declaration that property known as **L.R NO. [Particulars Withheld]** was acquired through the joint efforts of the parties herein and that the same is a matrimonial property which should now be divided equally since the marriage between them broke down making them live separately.

The preliminary objection to the suit is on the following grounds:

- i. *That the issues for determination in this cause were heard and determined in Thika CM CC NO. 920 of 2009 which was previous suit between the same parties herein.*
- ii. *That no appeal was preferred against the decision delivered in Thika CM CC NO. 920 of 2009.*
- iii. *That the same issues cannot once more be re-canvassed in another court other than on appeal.*
- iv. *That the originating summons offends the provisions of Section 6 and & of Civil Procedure Code.*
- v. *That litigation must come to an end.*

The respondent through Mr Makumi put more emphasis on ground four above. In so doing he referred this court to annexure marked as “AMM5” in his replying affidavit which is a judgment delivered in Thika CM CC NO. 920 of 2009. Mr Makumi pointed out the subordinate in Thika decided that the applicant herein (who was the defendant in the lower court) had not demonstrated “registrable interests” on the suit which was capable of being registered. The caution lodged in the register against the title of the respondent herein was ordered removed. Mr Makumi therefore contended that in view of the fact that the property in question is the same one here and that in view of the fact that a decision was made on it without any appeal being preferred by the applicant herein, this suit is bad in law and resjudicata. According to the respondent herein, the matter in issue is this present suit is either the same matter that was directly and substantially and/or deemed to have been substantially in issue in the former suit pursuant to provisions of **Section 7(4) of the Civil Procedure Act**. He cited the authority of **MIRIAM WAHU NGAE & 3 OTHERS –VS- WANGARI NJUGUNA MBOTHU (2014) e KLR** to buttress this argument.

The applicant /plaintiff through Mr Muturi opposed the preliminary objection raised above contending

that the suit herein was filed before the decision in Thika CM CC was delivered. Her contention is that the suits though involving the same parties addresses different issues. In the suit in Thika , the respondent says that the respondent was seeking to remove a restriction on the suit land while in this present suit she is seeking a declaration that the suit land is matrimonial property which should be shared between the parties herein as spouses whose differences are irreconcilable. The applicant /plaintiff urged this court to find that the issues are distinct and that the issue now before court could not have been litigated upon at Thika CM CC for want of jurisdiction. Mr Muturi added that the plea of res judicata cannot be sustained since for the plea to be sustained the issue alleged to have been determined must have been done by a court of competent jurisdiction. He referred this court to the definition of the term res judicata and its application as defined by Blacks Law Dictionary to support his argument and further cited the provisions of **Matrimonial Causes Act NO. 49 of 2013**, on the issue of lack of jurisdiction by subordinate courts to determine matrimonial causes.

The issue of determination by this court as per the arguments of both parties highlighted above is whether the originating summons filed herein is bad in law and res judicata as per **Section 7 of Civil Procedure Act Cap 21 Laws of Kenya** and whether **Married Woman Property Act (1882)** is still applicable here in Kenya.

### **Doctrine of “Res judicata” defined**

Res judicata is a latin word defined in Black’s Law Dictionary as;

“a thing adjudicated or an issue that has been definitely settled by a judicial decision and therefore an affirmative defence barring the same parties from litigating a second law suit on the same claim or any other claim arising from the same transactions and that could have been -but was not raised in the first suit”. (six) the dictionary gives three essential elements of the plea of res judicata these are:

- i. Presence of an earlier decision on the issue.
- ii. A final judgment on the merits.
- iii. Involvement of the same parties or parties in purity with the original parties.

According to KULOBA JUDGE (retired) in judicial hints to Civil Procedure the expression “Res judicata” means “a thing or matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. He went on to observe that re judicata is essentially a bar to a subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives .

To apply the above definitions or the description of the doctrine, this court is called upon to look at the issues before it in this case and compare it with the issues before the subordinate court and the decision made on the issues. Issues in a suit can be deduced from the pleadings filed. This court can clearly deduce issues for determination in this suit. However the same cannot be said of the suit before Thika CM CC NO. 920 of 2009 for the simple reason that the respondent did not enclose the copy of the pleadings filed before the subordinate court. This court has looked at judgment annexed as “AMM5” in the replying affidavit of the respondent. But this court is unable to tell with certainty what the issues were at that court Apart from the fact that the subordinate decided that the interests disclosed were not registrable under the now repealed **Act ( Registered Land Act Cap 300 )** and that general damages pleaded had not been proved, there is little else this court can make of the said judgment in so far as the issues are concern . This court prompted the respondent at the hearing of this preliminary objection as to the importance of enclosing of pleadings and the counsel agreed that it was an over sight on their part and that the same could have aided him and this court in determining the preliminary objection raised.

All the same, this court has considered the objection raised by the plaintiff/applicant herein particularly on the issue of jurisdiction of the CM CC in Thika to determine matrimonial causes. It is true **Section 17 of Married Women Property Act (1882)** and the **Matrimonial Causes Act NO. 49 of 2013** the jurisdiction to determine matrimonial disputes on matrimonial property is placed in this court. A

subordinate court is not competent to determine such disputes. **Section 7 (4)** of the **Civil Procedure Act** cannot be interpreted to bar a litigant from seeking justice in a proper court with jurisdiction. In the case of **GICHUKI –VS- GICHUKI (1982) KLR 285**, the court of appeal observed that the doctrine of *res judicata* operates where the dispute between the parties involving the same cause of action as another matter which had previously been adjudicated by a court of competent jurisdiction. In this quoted decision the appellant was challenging the trial judge’s ruling in an application to have the dispute referred arbitration by elders. The judge had found that the matter in question had been decided previously by a Resident Magistrate competent to make the said decision. The court of appeal upheld the trial judge’s decision.

This court finds that the issue for determination in this present suit cannot be said to have been same issue for determination in Thika CM CC for two reasons

- i. There are no pleadings placed before me by either party to demonstrate what the issues were for determination. This court does not consider it appropriate or correct to speculate on the issues that were subject to the judgment enclosed by the respondent and marked “AMM5”. This court is unable to tell with certain what the cause of action was in the subordinate court as opposed to the cause of action in this suit which is clearly a matrimonial cause based on **Section 17 of Married Women Property Act (1882)**.
- ii. Even if the issue of matrimonial cause had been raised in the subordinate court, the court did not have the jurisdiction to entertain it and the doctrine as afore stated above cannot apply in such situations .

This court notes that the respondent has raised a preliminary objection on the basis that the suit herein is *res judicata* which has been overruled for the aforesaid reason. However, there is an issue that was not raised which this court considers important as the matter is likely to feature at some stage in the proceedings. So in order to give effect to **Section 1 A & 1 B** of the **Civil Procedure Act** on the overriding objective of the **Act** and save on judicial time this court deems it fit to determine the issue now rather later. This is the question of jurisdiction of this court to determine this cause as brought under **Section 17 of Married Women Property Act (1882)** a statute that has since been repealed with the coming into force of the **Matrimonial Property Act, 2013 ( NO. 49 of 2013)**.

I have considered this issue for the sake of putting matters in clear perspective in view of the fact that the marriage between the applicant and the respondent ceased after dissolution made prior to the filing of this cause. This point is established in the annexure marked “AMM2” which shows that the marriage between the parties was indeed dissolved on 16<sup>th</sup> August 2012. **Section 17** of the now repealed **Married Women Property Act of 1882** provided as follows:

*“In any question between husband and wife as to the title to or possession of property either party may apply by summons or otherwise in a summary way to any judge of the High court..... and the judge may make such order with respect to the property in dispute and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time and any inquiry touching the matters in question to be made in such manner as he thinks fit.....” (Emphasis added).*

It is elementary from the above quoted section that a cause brought under the sections involves parties that are husband and wife who could be either separated or living together but having differences that justify be sorted out by dividing the matrimonial property between the two according to the contribution of cash party to the marriage. My understanding from the reading of the above section is that where marriage has been dissolved **Section 17** could not be invoked as the parties can no longer be described as husband and wife. A look at the book “Divorce “8th edition RAYDEN clearly explains that an application under Section 17 can only be made if the parties are husband and wife and that the procedure is unavailable for those parties who have already divorced. Similarly in the case of **MARY FLORENCE WAMBUI NJENGA -VS- JOHN NJENGA KANGARA (2005) e KLR** Justice D. Musunga ( as he then was ) decided that the court lacked jurisdiction to entertain an originating summons taken out pursuant to **Section 17 of Married Women Property Act (1882)** by parties whose

marriage had already been dissolved. In making the decision Justice Musinga agreed with the position earlier taken by Ringera Justice ( as he then was ) in an unreported case of **HEZHVO YING –VS- QIV WENREN** where the court held that it had no jurisdiction to entertain an application that had been commenced under **Section 17** of the **Married Women Property Act of 1882** after the marriage had been dissolved. In making the decision, the court observed that courts in Kenya had for a long time acted on supposition that an application under Section 17 of the Married Women property Act of England could be made by former spouses or ex husbands for ex wives after dissolution of their marriage but that was not the true position in law.

This court finds that the Originating Summons filed herein is hinged on an act that has since been repealed and though both counsels were silent on this point , they are aware of the current position in this Country and the plaintiff's counsel ought to advise his client accordingly. The parties herein are no longer in coverture and the suit is incompetent. This suit was filed on 26th February 2014 while the law under which it was brought ceased to have effect with the commencement of the new **Matrimonial Property Act, 2013** on 16<sup>th</sup> January 2014.

The upshot of the above is that the preliminary objection raised by the respondent herein is overruled but, for the reasons aforesaid, this court finds that the suit herein is incompetent and unsustainable. It is struck out with no order as to costs.

**R.K. LIMO**

**JUDGE**

**DATED, SIGNED AND DELIVERED AT KERUGOYA THIS 23<sup>RD</sup> DAY OF APRIL 2015** in the presence of

Mr Ngigi holding brief for Mr Makumi advocate for the respondent

Willy Court Clerk