



**JMK v HWM (Matrimonial Cause 4 of 2024) [2024] KEHC 9377 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9377 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MATRIMONIAL CAUSE 4 OF 2024**

**HM NYAGA, J**

**JULY 29, 2024**

**BETWEEN**

**JMK ..... APPLICANT**

**AND**

**HWM ..... RESPONDENT**

**RULING**

1. Vide my Ruling delivered on 30<sup>th</sup> April 2024, I directed that this suit be consolidated with the suit filed in the High Court, being HCC No. 4 of 2023.
2. The said suit had a pending application dated 27<sup>th</sup> February 2023. When this suit was filed, it was alongside an Application dated 27<sup>th</sup> February 2024. I will refer to the said Application as the first and second application respectively.
3. In the first application, the Respondent/Applicant has sought the following orders;
  1. That the application be certified urgent and be heard on priority basis.
  2. That pending the hearing and determination of this application interpartes, the court do issue an order removing the restriction placed on account number 1101\*\*\*\* Kenya Commercial Bank Limited by the 1<sup>st</sup> defendant on 7<sup>th</sup> February 2023 to allow the payment of suppliers by the applicant.
  3. That pending the hearing and determination of this suit, there be orders removing the restriction placed on account number 1101\*\*\*\* Kenya Commercial Bank Limited by the 1<sup>st</sup> defendant on 7<sup>th</sup> February 2023 to allow the payment of suppliers by the applicant.
  4. That there be orders of injunction restraining the 1<sup>st</sup> defendant/respondent from interfering with the business (Reducted) situated in (Reducted), operated and ran by the applicant.
  5. That costs be provided for.



4. The application is propped by the ground set out on the face of it and supported by the said applicant's affidavits sworn on 27<sup>th</sup> February 2023.
5. In a nutshell, the 1<sup>st</sup> applicant states that she is the legal wife of the applicant in this suit. That as a couple, they started running a business known as (Reducted) which had a branch at (Reducted) and another at (Reducted). That the 1<sup>st</sup> respondent mismanaged the branch at (Reducted) and it accumulated debts.
6. The applicant further states that they as a couple have been operating Account No. 1101\*\*\*\* at Kenya Commercial Bank. That sometime on 7/2/2023, the respondent wrote to the said Bank restricting any withdrawal from the said account. That the instructions to the Bank have left the business crippled as it has debts that are owed to suppliers.
7. The applicant states that the said account has been run by the parties together, but she is the one who has been running the business, making orders and issuing cheques. She fears that the respondent's instructions will expose the business to the creditors. She thus sought that the restriction placed on the said account, be lifted.
8. In response thereto, the respondent swore a Replying Affidavit on 8<sup>th</sup> March, 2023.
9. In a nutshell, the respondent states that the Business in question is a sole proprietorship in his name and that the Bank Account in question is in the name of that Business name.
10. The respondent further avers that for smooth management of the business, he signed a banking mandate making the application on signatory to the said accounts but this did not make her a co-owner of the business in question.
11. The respondent stressed that the contract regarding the Bank Account is between him and the said Bank. Further, that if any debts are owed by the Business, he is the one, as the proprietor, obligated to pay the same, and not the applicant.
12. The respondent further avers that the applicant had engaged in acts of pilferage of funds from the business, in question directed funds to her personal accounts and this is what led to the decline of the business.
13. The respondent thus prayed that the application be dismissed with costs.
14. The 2<sup>nd</sup> respondent therein (The Bank) also filed a response to the said applications through a Replying Affidavit sworn by one Linus Odhiambo Odera, on 18<sup>th</sup> April, 2023.
15. The deponent stated that he was service administration manager with the bank branch where the account in question is held.
16. In a nutshell, the 2<sup>nd</sup> respondent states that the account in question was jointly opened by the applicant and the 1<sup>st</sup> respondent in the 1990s and both were signatories to the said account.
17. It is further deponed that the 1<sup>st</sup> respondent did issue instructions against any withdrawals from the account, to which the bank complied pursuant to clause 30 of the account opening, terms and conditions. That save for bank customer relationship, the bank has no interest on the matter and the differences between the 2 parties do not meet the threshold for grant of the orders sought by the applicant.
18. The bank also sought to have the application dismissed.
19. I will now turn to the 2<sup>nd</sup> application, dated 27<sup>th</sup> February, 2024.



20. The application is premised on the grounds set out therein and it seeks the following orders;
  1. That this Notice of Motion is certified urgent and heard on a priority basis given its urgent nature and service of the same be dispensed with in the first instance.
  2. That this Honourable Court be pleased to issue an order lifting and freezing orders and or any encumbrances in the Applicant's Account Number 1101\*\*\*\* at the Kenya Commercial Bank Ltd Branch so that the Applicant can get free access thereto and withdraw such funds as shall be necessary to enable the Applicant meet immediate financial requirements such as Hospital expenses, payments of taxes and payments of rates on properties. The Account name is (Reducted).
  3. That this Honourable Court do grant temporary injunction to restrain the Respondent from selling, leasing, mortgaging, charging, or transferring any property acquired during the substance of her marriage to the Applicant pending the hearing and determination of this Application; said properties include but are not limited to;- (Reducted)
  4. That this Honourable Court do grant temporary injunction to restrain the Respondent from selling, leasing, mortgaging, charging, or transferring any property acquired during the substance of her marriage to the Applicant pending the hearing and determination of this suit; said properties include but are not limited to;- (Reducted)
21. The application is supported by the applicant's affidavit sworn on even date.
22. In a nutshell, the applicant states that he contracted a marriage with the respondent therein.
23. That at the time, he was already running a business known as (Reducted). That in the course of expansion he asked the respondent to take up running the shop as he went about sourcing for more business. That the proceeds of the business, were to be channeled towards the growth of the business but the respondent opened other bank accounts where she would divert funds to the. He listed down the banks but gave no details.
24. The applicant further states that the respondent used the funds to acquire and develop several properties, which he has listed. That the respondent proceeded to conceal title documents of the said properties.
25. The applicant claims that the marriage between the parties deteriorated and he chose to move out of the matrimonial home and settled in (Reducted). That the respondent has denied him access to the business and being without any other source of income.
26. The applicant further avers that he has commenced divorce proceedings. He believes that the respondent's actions are aimed to frustrate him, with the aim of disposing of them to his detriment. He thus sought conservatory orders to preserve the listed properties.
27. In response thereto, the respondent swore a Replying Affidavit on 19<sup>th</sup> March 2024.
28. In a nutshell, she states that at the time the parties got married, the applicant had no property to speak of. That they jointly opened the business in question and while the applicant did the field work, she was managing the shop.
29. The respondent further states the parties jointly operated a bank account at KCB for the shop at (Reducted), while the other branches had separate accounts. That one branch was ran aground by the applicant and his son and it accumulated huge debts. That the applicant also opened a bar business that drained funds so much that they had to sell some property.



30. It is further averred that for no apparent reasons, the applicant moved to (Reduced), a property they jointly own.
31. The respondent states that she involved the applicant in account transactions for purchase of property. That in 2019, the applicant said that their homestead belonged to the children of his first house and this compelled her to construct a house for herself.
32. The respondent denies that the applicant contributed to the purchase or development of the properties he has listed, stating that they were as a result of her own effort alone.
33. The respondent further states that some of the property listed belong to other people and do not constitute matrimonial property.
34. In regard to the Bank Account in question, the respondent points out that it is the applicant himself who wrote to the Bank instructing it to freeze any withdrawals and so she moved the court vide the first suit herein.
35. She concluded by stating that the applicant has not placed any evidence to show that he contributed to the acquisition of the property and so she seeks that the 2<sup>nd</sup> application be dismissed with costs.
36. When the consolidated suits came up for directions, the parties were directed to file their submissions on both applications. I will not rehash the same here. It suffices to state that I have considered them and will where necessary, refer to them.

### **Issues for Determination**

37. The first issue for determination is whether the 1<sup>st</sup> applicant has established a case for conservatory orders to issue in respect to the property listed.
38. The second issue is whether the 2<sup>nd</sup> applicant has established a case to warrant the removal of the restriction in respect to the Bank Account in question.
39. After answering the questions to the 2 issues, the court will have to determine what orders are best suited in the interest of justice.
40. There is no dispute that the parties were and are still legally married since the divorce cause between them is ongoing.
41. The unique feature of this cause is that unlike in most cases where it is the wife seeking a declaration of matrimonial property, here it is the husband doing so.
42. However, by the deliberate wording of the *Matrimonial Property Act*, reference is made to the word “spouse” and under Section 2 thereof, that term refers to a husband or a wife.
43. Therefore, an application under the Act can be made by any spouse. The same principles would then apply to either case.
44. The Law is that a spouse may approach the court either during the existence of the marriage or after the marriage is dissolved.
45. If a marriage is still in existence, the court is only empowered to make a declaration under Section 17 of the *Act*, which provides as follows;

“S.        Action for declaration of rights to property  
17.



- (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
- (2) An application under subsection (1)—
  - (a) shall be made in accordance with such procedure as may be prescribed;
  - (b) may be made as part of a petition in a matrimonial cause; and
  - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

46. If the parties are no longer married, then the court may give orders under Section 7 of the Act and divide the matrimonial property. The Section provides as follows;-

“S. Ownership of matrimonial property

7 Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

47. The position in law on the above was set out in AKK v PKW [2020] eKLR where the Court of Appeal stated as follows;

“A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act. In *PNN v. ZWN* [2017] eKLR, Waki, JA stated that:

An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit v. Petit* [1970] AC 777:

“One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?”

The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or



pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act."

48. As to what amounts to matrimonial property, the definition is found under Section 6 of the Act, which provides as follows:-

"s. Meaning of matrimonial property

6. (1) For the purposes of this Act, matrimonial property means—
  - (a) the matrimonial home or homes;
  - (b) household goods and effects in the matrimonial home or homes; or
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
- (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
- (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
- (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust."

49. The key words are property jointly owned and acquired during the subsistence of the marriage. Section 14 of the Act provides for presumptions as to property acquired during marriage. It states as follows:-

- "S. Presumptions as to property acquired during marriage Where matrimonial
14. property is acquired during marriage—
    - (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
    - (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal."

50. There have been several decisions as to what constitutes matrimonial property. For instance Musyoka J. in P.O.M v M.N.K (2017) eKLR stated that:

"This is a suit for division of matrimonial property...The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during



coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made...”

51. Similarly, in the case of *T.M.V. v F.M.C* (2018) eKLR, Nyakundi J. opined that: -

“...for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of matrimonial property.”
52. At this stage the court is not to really go into details as to what amongst the listed property qualifies as matrimonial property and who should be declared the owner of this or that. It will suffice for the court to find that there is prima facie evidence that the property in question is matrimonial property. That presumption can be rebutted by the evidence to the contrary, as the respondent to the cause has tried to do. I believe that will come out clearly upon the parties tendering evidence.
53. What is not in dispute is that the parties have been married since 1989. The couple were blessed to have acquired property, which from the pleadings, is allegedly either registered in the name of the Applicant in the cause is the respondent therein, or jointly.
54. Applying Section 14 of the *Act*, then there is a rebuttable presumption that all the property acquired, whether in the name of either party, during the subsistence of the marriage, is matrimonial property. As I have stated, that presumption can be rebutted by either party during the hearing of the cause.
55. Therefore, having considered the matter, I find it prudent that all the property of the couple be preserved pending the determination of the cause.
56. Accordingly, I allow the application dated 27<sup>th</sup> April, 2024 in respect to the listed property and any other property that may not be listed.
57. By the same measure, the same orders will apply to any property registered in the name of the Applicant therein.
58. I will now deal with the thorny issue of the Bank Account in question. This was a hotly contested issued.
59. From the documents tendered, the said account is in the name of (Reducted). It is said to be a Business Account.
60. From the material before me and especially the response from the bank vide the affidavit referred to earlier, the account was jointly operated by the parties.
61. Therefore, the distribution sought to be drawn by ether party, claiming sole “ownership” of the funds may not have a basis.
62. What are their respective claims?
63. The Applicant herein states that the Business name is a sole proprietorship in his name only. The respondent herein purports that she is the one who has been operating that account by herself.
64. As I have stated, the Bank was operated by the parties jointly. It is thus difficult to tell whose money is in the account. No party ought to feel more entitled to the same than the other.
65. I think that for now, the account is presumed to form joint property of the parties.



66. The respondent herein had raised the issue of pending payments to suppliers. The statement of account she provided has payments which cannot be singled out as belonging to an individual supplier. So, it is difficult to find that there is money due as alleged.
67. Having considered the matter, I believe that in the interest of both parties, they should have equal access to the said funds. It is of no use to keep the funds in the said account yet the bank has expressly stated that it has no interest in the funds in any way. I believe that orders that will enable each party access the funds may be the best way forward at this stage. The same shall be taken into consideration when the time comes for other orders to issue, if any will.
68. Therefore, I make the following orders in respect to the said account;
- a. The parties shall have equal access to the funds in the said account number 1101 at the Kenya Commercial Bank Ltd Branch, to be shared equally between them.
  - b. Prior to the orders above, provision for Bank Charges and costs incurred by the interested party shall be made and be deducted from the said account.
  - c. The said interested party's costs if not agreed upon shall be taxed. Reasonable provision to be made and set aside in the account for the same as the parties share the money in the account.
  - d. The share of the funds distributed to each party shall be taken into account when the main cause herein is heard.
  - e. There shall be no orders as to costs as between the Applicant and Respondent herein.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 29<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

In the presence of;

Court Assistant Jeniffer

Mr. Maina for N. Njoroge for Respondent/Applicant

Mr. K. Mbugua for Applicant/Respondent

Mr. Ojou for interested party

