



**WNS v DNS (Matrimonial Cause E012 of 2023)
[2024] KEHC 13466 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13466 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E012 OF 2023
HI ONG'UDI, J
OCTOBER 29, 2024**

IN THE MATTER OF AN APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

WNS APPLICANT

AND

DNS RESPONDENT

RULING

1. This ruling is in respect of a Preliminary Objection dated 15th January, 2024 filed by the respondent on the grounds that;
 - i. The applicant lacks the necessary legal Locus Standi to institute the matrimonial proceedings herein since there exists no legally recognized marriage between the applicant and the respondent.
 - ii. The applicant has invoked this honourable Court's jurisdiction prematurely contrary to the provisions of Section 7 of the Matrimonial Property Act No. 49 of 2013.
 - iii. The originating summons filed herein is fatally and incurably defective and the same is ripe for sticking out with hefty cost.
2. In response the applicant herein filed a further affidavit dated 24th April 2024. She deposed that their union was formalized as a Kikuyu customary marriage. Further, that the respondent introduced himself in the company of elders. Negotiations for dowry were done and part payment of the same made. She annexed copies of photographs marked as "WNS 2".
3. She deposed further that she had filed a divorce petition being Nakuru Magistrates Court Divorce Cause No. E016 of 2024; W.N.S versus D.S which was pending hearing and determination. She added



that the application and petition are meritorious and unless the court issues an injunction, she risked losing property which she had equally invested in and taken part in its acquisition and development.

4. The preliminary objection application was disposed of by way of written submissions.

Respondent's/Applicant's submissions

5. These were filed by Murunga Mwangi & Associates Advocates and are dated 28th February, 2022. Counsel gave brief facts of the case and identified two issues for determination.
6. The first issue is whether the applicant had invoked this court's jurisdiction prematurely contrary to the provisions of section 7 of the Matrimonial Property Act No. 49 of 2013. Counsel submitted in the affirmative and cited section 7 of the Matrimonial Property Act 2013 which provides as follows;

“...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.....”
7. The court's attention was also drawn to the case of ZSN v WNO [2019] eKLR where the court held as follows;

“...In the originating summons, the Applicant relied on Section 17 of the Matrimonial Property Act. However, in her prayers, she sought a declaration of rights and distribution of the property alleged to be matrimonial in accordance with Section 7 of the Matrimonial Property Act. Her prayer for distribution of property is therefore premature. At this particular time, this Court cannot exercise its jurisdiction to hear and determine the application related to the substantive Originating Summons filed on 4th October 2019 before the divorce proceedings are determined.....”
8. The second issue is whether the applicant has the necessary legal locus standi to institute the matrimonial proceedings herein whereby counsel submitted in the negative. He further submitted that the applicant had not demonstrated that she was a spouse within the meaning of provisions of the Marriage Act 2014.
9. Additionally, that at the time of instituting the matrimonial proceedings herein the applicant had not sought for dissolution of the alleged marriage between her and the respondent. That the applicant should first prosecute the divorce matter to establish her locus as a spouse.
10. In conclusion, he urged the court to uphold the preliminary objection in its entirety and strike out the matrimonial proceedings herein with cost.

Applicant's/Respondent's submissions

11. These were filed by Muiruri, Cheserek & Company Advocates and are dated 2nd May, 2024. Counsel gave brief background of the case and identified one issue for determination that is whether the notice of preliminary objection is merited.
12. She submitted that the applicant has locus standi to institute matrimonial proceedings and has invoked this court's jurisdiction pursuant to the provisions of section 17 of the Matrimonial Property Act. The



court's attention was drawn to several cases among them being the case of *BWM v RM* [2021] eKLR, where the court stated as follows: -

“I do agree with the defendant that pursuant to Section 7 of the *Matrimonial Property Act*, this court has no jurisdiction to make a determination on issues of division of matrimonial property the subject of this suit. However, this court has jurisdiction to make a determination on the issues of division of matrimonial property for declaratory rights under matrimonial property. This aspect of the law under Section 17 of the *Matrimonial Property Act* does not necessarily require parties to first dissolve their marriage”.

Also see *AKK V PKN* [2020] eKLR, *PWN V ZWN* [2017] eKLR

13. She submitted further, that in view of the cases cited in the submissions, the applicant was entitled to ventilate her claim on proprietary rights under section 17 of the *Matrimonial Property Act*. Thus, the applicant had necessary locus to bring the instant suit before this court.
14. In conclusion, she urged the court to dismiss the preliminary objection with costs to the applicant.

Analysis and determination

15. I have considered the preliminary objection herein, the response and the submissions by both parties. I find the issue for determination to be whether the preliminary objection dated 15th January, 2024 is merited.
16. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection is to be argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.
17. In *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:

“So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
18. Further, in *Oraro vs. Mbaja* [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop... The principle is abundantly clear. A “preliminary



objection” correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point ...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence..”

19. Going by the law and the above decisions this Court acknowledges that a preliminary objection must stem from the pleadings and raise a pure point of law. It should not deal with disputed facts nor derive its foundation from factual information.
20. The respondent contends that the applicant lacks the necessary legal locus standi to institute the matrimonial proceedings herein since there exists no legally recognized marriage between them, a fact the applicant disputes. For this Court to be able to ascertain whether or not the applicant has locus standi, it will have to ascertain this from the facts as pleaded by the respondent and those raised by the applicant. In doing so, the Court will be probing into the evidence.
21. I am well guided by the holding in the case of Oraro vs. Mbaja (supra), which is that a preliminary objection cannot be raised on disputed facts as to whether or not the applicant has locus standi to institute matrimonial proceedings. This should be very clear and without any controversy for it to require evidence to be adduced. This point was clearly set out in the case of N.C.K. Vs G. V. K. [2015] eKLR where Muchelule J (as he then was) held as follows:

“ 12. In England, under the Matrimonial Causes Acts 1973, in instances were parties, for religious or other reason, do not want divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The Family Law Act 1996 at section 33(4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of Arif V Anwar [2015] EWHC 124 (FAM) the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same. Further in L (Children), RE [2012] EWCA CIV 721 where a married couple were having considerable differences to the point of not being able to cohabit together, the judge issued an occupation order pursuant to section 33 of the Family Law Act 1996 requiring the husband to vacate the matrimonial home forthwith and to remain from it until a certain period, and gave a shared residence order.

13. It would appear to me tat a spouse can, under section 17 of the Matrimonial Property Act 2013, either where there is a divorce matter that is pending, or where, for whatever reason, he can no longer live together with the other spouse but is not seeking to divorce, come to court to resolve any questions about the beneficial entitlement to their property. He can seek declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. The court will declare each party’s beneficial interest in the matrimonial property without severing the same. Such a declaration is not, in



my view, inconsistent with Article 45(3) of *the Constitution* of Kenya 2010. In other words, both sections 7 and 17 of the *Matrimonial Property Act* 2013 are consistent with, and seek to reinforce, Article 45(3). One deals with the distribution of matrimonial property upon divorce and the other protects the rights of spouses in relation to matrimonial property where the marriage is still in existence. Once again, the court is not dealing with an application under section 17 of the *Matrimonial Property Act* 2013.” Emphasis ours

22. Following the above analysis, it is my finding that the preliminary objection raised herein falls short of the requirement as set out in the Mukisa Biscuit Manufacturing Co. Ltd case (supra).
23. The upshot is that the preliminary objection lacks merit and is dismissed. Costs in the cause.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 29TH DAY OF OCTOBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

