



**CWM v PMMO (Civil Suit E042 of 2022)
[2023] KEHC 114 (KLR) (Family) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 114 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT E042 OF 2022
MA ODERO, J
JANUARY 20, 2023
IN THE MATTER OF THE ESTATE OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF LAND PROPERTY ACT**

BETWEEN

CWM APPLICANT

AND

PMMO RESPONDENT

RULING

1. Before this court for determination is the notice of preliminary objection dated September 14, 2022 filed by the respondent PMMO.
2. The Plaintiff CWM opposed the Preliminary Objection. Pursuant to directions issued by the court, the matter was canvassed by way of written submissions. The Respondent filed written submissions dated November 9, 2022 whilst the Plaintiff relied upon her written submissions dated October 17, 2022.
3. The Respondent opposed the summons through the Replying Affidavit dated September 14, 2022.
4. Before the Originating Summons could be heard the Respondent filed the Notice of Preliminary Objection dated September 14, 2022 arguing that this court has no jurisdiction over the matter as the fact of the Plaintiffs purported marriage to the Respondent is contested and as such the orders being



sought in the originating summons cannot be granted. The Preliminary Objection was premised on the following grounds:-

- “ 1. That both the originating summons and the Notice of Motion are vexatious, frivolous and an abuse of the court process and ought to be dismissed with costs.
 2. That the jurisdiction of this Honourable court is ousted by virtue of the fact that the Applicants purported marriage to the Respondent is contested and the orders sought cannot therefore be granted.
 3. That the orders sought in the summons and in the Notice of Motion are premature, unenforceable and defeats the purpose and intent of the provisions of the *Matrimonial Property Act*, which the said applications are premised.
 4. That the properties referred to in the said applications are neither matrimonial properties nor matrimonial homes.
 5. That the summons does not meet the criteria provided for under section 17 of the *Matrimonial Property Act*, No 49 of 2013.
 6. That the orders sought cannot be granted in the circumstances.”
5. The Plaintiff in her originating summons claimed that she was married to the Respondent and that the properties in question were acquired by the joint efforts of the two during the subsistence of their marriage.
 6. On his part the Respondent strenuously denies that he was ever married to the Plaintiff though he concedes that the two were involved in an intimate relationship, which resulted in the birth of two (2) children.
 7. The Respondent categorically denies the Plaintiff's claim that she contributed to the acquisition of the named assets. He insists that he singlehandedly purchased the named properties and assets that the same belong entirely to him.

Analysis and Determination

8. I have carefully considered this notice of Preliminary Objection as well as the written submissions filed by both parties.
9. The definition of what constitutes a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd* [1969] EA where it was held that:-

“ 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 practice of raising points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop.”
10. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.
 - i. The Preliminary Objection should raise a pure point of law.



- ii. The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
 - iii. The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - iv. A valid Preliminary Objection ought to be successful disposal of the entire suit.
11. The Respondent's objection is premised on grounds that no marriage ever existed between himself and the Plaintiff, that the properties referred to in the originating summons are not matrimonial properties and that the originating summons dated June 17, 2022 does not meet the criteria set out by Section 17 of the *Matrimonial Property Act, 2013*.
 12. Firstly the issues raised in the Preliminary Objection cannot be taken to be pure points of law. The question of whether a marital union existed between the parties and the question of whether the properties in question constitute matrimonial properties are all questions of fact, which can only be determined after hearing evidence from both parties.
 13. The Respondent also argued that the originating summons filed by the Plaintiff did not meet the criteria set out in Section 17 of the *Matrimonial Property Act*, which provides as follows:-
 - (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.
 - (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.” (own emphasis)
 14. The Kenyan Court has severally interrogated the provisions of Section 17. In *PNN v ZWN* [2017] KLR the Court of Appeal held as follows:-

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

“One of the main purposes of the Act of 1882 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 negatives 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 this be given?”
 15. The court added:-

“The purpose of the Section [17 of the Act] is not to defeat rights but to provide a machinery for ascertaining rights and once ascertained, then the register would be changed to take account of them.” (Own emphasis)



16. Likewise in Nairobi Court Civil Suit 14 of 2013 (0.s) *CK v AGM* [2018] eKLR the Court of Appeal held as follows:-

“The above case demonstrates that a declaration under section 17 of the repealed Act is not pegged on the subsistence of a marriage. The effect of this section is such that the court can make a declaration with regard to the suit property in this case even though the parties are still married, it does not however provide for the sharing of such property. The Applicant cited the court’s lack of jurisdiction to distribute matrimonial property under section 7 of the *Matrimonial Property Act* during the subsistence of a marriage. The contested originating summons was however brought under the equivalent of section 17 of the Act, which is not dependent on the status of a marriage. In this case therefore, I find that this court is properly equipped with jurisdiction to resolve any questions about the parties’ beneficial entitlement to suit property without severing the property.” (Own emphasis)

17. Based on the foregoing I find that the court is clothed with jurisdiction to grant the orders sought in the Originating Summons. Accordingly, I find no merit in the Notice of Preliminary Objection dated September 14, 2022. The same is dismissed in its entirety. The costs will be borne by the Respondent.

DATED IN NAIROBI THIS 20TH DAY OF JANUARY 2023.

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MAUREEN A. ODERO
JUDGE

