



**ENN v ENK (Civil Suit E028 of 2021)
[2023] KEHC 18677 (KLR) (Family) (29 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18677 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

CIVIL SUIT E028 OF 2021

PM NYAUNDI, J

MAY 29, 2023

IN THE MATTER OF THE MARRIAGE ACT, 2014

AND

THE MATRIMONIAL PROPERTY ACT, 2013

BETWEEN

ENN APPLICANT

AND

ENK RESPONDENT

RULING

Background

1. This matter was initiated by ENN (deceased) *vide* originating summons dated May 24, 2021 in which she sought the following orders
 - a. That a declaration do issue that the applicant is entitled to 50% or such proportion as this honourable court might deem appropriate of the properties listed herein with all the buildings and developments thereon acquired and developed by the joint funds and efforts of the applicant and respondent during their marriage and all registered in the joint names of the applicant and the respondent: -
 - a. LR No xxxx
 - b. LR No xxxx
 - c. LR No xxxx and



- d. LR No xxxx
- b. That a temporary injunction do issue restraining the respondent, his servants and /or agents from in any manner of alienating, wasting, damaging and /or otherwise interfering with the above mentioned properties pending the hearing and determination of the originating summons.
 - c. That an order do issue declaring that the respondent is accountable to the applicant in respect of all the income and rent proceeds received from the properties aforesaid.
 - d. That this honourable court be pleased to order that the applicant is entitled to 50% of all the rental proceeds that the respondent has been collecting from the properties aforesaid from November 2017.
 - e. That this honourable court be pleased to order the respondent to return motor vehicle KCD 180B registered in the name of the applicant to the applicant's possession
 - f. That the respondent be condemned to provide the costs of the summons.
2. At the time of presenting the petition the deceased and the respondent had pending divorce proceedings *vide* Divorce Cause No exxx of 2020 at Chief Magistrate's Milimani Law Courts.
 3. Following the death of the petitioner/ applicant in the originating summons on August 8, 2021, MMG and ANN (her mother and brother) applied for an were granted letters of administration on May 16, 2022.
 4. Vide notice of motion dated July 6, 2022 presented under section 2 of the Law Reform Act, section 7 of he Matrimonial Properties Act, 2013 order 24 rule 3 of the Civil Procedure Rules, 2010, the applicants herein, have moved court seeking the following orders
 - a. That leave be granted to MMG and ANN to substitute the name of the applicant in the Suit.
 - b. That cost of this application be in the cause
 5. The application is supported by the joint affidavit of the applicants sworn on the July 6, 2022.
 6. The applicants make this application in their capacity as joint administrators of the estate of ENN.
 7. At the time of the presentation of this application the respondent had been charged with the murder of the deceased herein.
 8. The respondent opposes the application and filed grounds of opposition dated January 19, 2023. The respondent raised 6 grounds namely
 - a. That at all material times the applicant (deceased) died before her marriage to the respondent was dissolved Milimani Commercial Court Divorce Cause No exxx of 2020
 - b. That as such, pursuant to section 16 (a) of the Marriage Act No 4 of 2014 the marriage between the applicant and the respondent ceased after the death of the applicant
 - c. That consequent to the discontinuance of the said marriage the Matrimonial Act cannot be in effect of the distribution of the deceased property as the same comes about if spouses divorce/ and or their marriage is otherwise dissolved
 - d. That in the premises, the personal representatives and/ or administrators of the applicant's (deceased) estate can only acquire the deceased property vide Succession Act Cap 160



- e. That in addition, the applicants application dated July 6, 2022 is defective devoid of merit, null and void because as per section 7 of the [Matrimonial Property Act](#) when filing this suit there were still ongoing divorce proceedings in Milimani Commercial Court divorce cause No Exxx of 2020 and the same were not concluded.
 - f. That in view of the foregoing, the application herein is defective, bad in law, misplaced, devoid of merit, malafides, frivolous, vexatious and abuse of the court process therefore this honourable court should dismiss the application dated July 6, 2022 and in effect close the register for this irregular instituted application
9. The parties agreed to canvass the application by of written submissions. The applicants’ submissions are dated April 14, 2023 and those of the respondent are dated April 26, 2023.

Applicant’s Submissions

10. The applicants identify the following issues for determination
- a. Whether the OS dated May 25, 2021 is defective for having been filed prior to the dissolution of the parties marriage in CMCC Exxx of 2020
 - b. Whether the administrators Magdalene Muthoni Gichamba and Anderson Njeru Nyaga can acquire property through this suit or the same is the preserve of the la of Succession
 - c. Whether the [Matrimonial Property Act](#) can apply in distribution of the properties subject of the OS where the marriage has ceased upon death as oppose to divorce of the spouses; and
 - d. Whether the application herein properly before the court
11. The OS dated May 25, 2021 is not defective for having been filed prior to the dissolution of the parties’ marriage in Milimani CMCC Exxx of 2020:
The applicant submits that the originating summons is not defective and cites section 17(1) of the matrimonial causes act which empowers parties to a marriage to move the court for declarations of rights to matrimonial property during the subsistence of marriage.
12. The applicants rely on the decisions in [BWM v RM](#) [2021] eKLR, [PWN v ZWN](#) [2017]eKLR and [AKK v PKN](#) [2020], where the Court of Appeal stated as follows
- “A plain reading of section 17 enables a spouse, subsistence of the marriage notwithstanding to make an application for declaratory orders. It further stated that that application may be made as part of a petition in matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that 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.”
13. The administrators can acquire the property subject of this suit in place of the applicant.
14. The applicants rely on section 2(1) of the [Law reform Act](#) which provides
- Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against or as the case may be for the benefit of the deceased.



15. Further the applicants rely on the provisions of order 24 rule 1 of the [Civil Procedure Rules](#) which states that a suit does not abate if the cause of action survives or continues. The applicants further rely on the decisions in [Regine Butt v Haroon Butt & Anor](#) [2015] eKLR; [Esther Wanjiru Kiarie v Mary Wanjiru Gitshatu](#) [2016] eKLR.
16. The applicants aver that the cause of action filed in the originating summons survives for the benefit of the estate
17. The [Matrimonial Property Act](#) can apply in distribution of the properties subject to the OS where the marriage ceased upon death as oppose to divorce of the spouses

The applicants contend that death is one of the ways that a marriage can be dissolved and for this assertion they rely on the decision in [Esther Wanjiru Kiarie v Wnjiru Gitshatu](#) (supra) where the court found: _

An originating summons for division of matrimonial property can only be presented in the course of a dissolution of a marriage. The marriage between the parties herein has been dissolved by death.

18. The application herein is properly before court

The applicant while alluding to the fact that the respondent has been charged with the murder of the deceased contends that dismissing the application would be tantamount to allowing the respondent to benefit from his criminal action of murdering the deceased. The applicant at the same time acknowledges that the applicant has a right to be presumed innocent, until convicted of the offence.

Respondents Submissions

19. The respondent identifies the following issues for determination
 - a. Whether the property in question can legally be subjected to proceedings under the [Matrimonial Property Act](#)?
 - b. Whether these proceedings are barred by the doctrine of sub-judice in the light of the existence of High Court succession cause No 2273 of 2021
 - c. Cost of the application
20. Whether the property on question can legally be subjected to proceedings under the matrimonial property cause

The respondent submits that under section 60 of the [Land Registration Act](#), if a joint tenant to any land lease or charge dies, the registrar shall upon proof of death delete the name of the deceased tenant from the register by registering the death certificate. The respondent also relies on the decision in [Isabel Chelanget v Samuel Tiro](#) [2012] Eklr and [Winfred Njeri Njogu v Lucy Wangithi Mugeru](#).
21. It is contended that in the instant case since the marriage had not been dissolved at the time of death this resulted on the automatic transfer of the property to the defendant as the surviving joint tenant.
22. It is submitted that the administrator have no locus and in any event they are not well place to testify as to the contribution of the deceased towards the acquisition of the properties.
23. Whether these proceedings are barred by the doctrine of sub judice in light of the existence of High Court succession cause No 2273 of 2021



The respondents submit that this case runs afoul of section 6 of the *Civil Procedure Act* and charges that the applicants are forum shopping as the issues in the current matter are the issues in succession cause No 2273 of 2021.

24. The respondent relies on the decision in the case of *Satya Bhama Gandhi vs Director of Public Prosecution & 3 others* [2018] eKLR on instances where having a multiplicity of actions will amount to abuse of court process. Further on this point the respondent cites the decision in *Stephen Somek Takwenyi & Anor v David Mbutia Githare & 2 others* Nairobi Milimani HCCC No. 363 of 2009 as quoted in *Asif Sadia v Mumbi Holdings Ltd & Anor* [2012] Eklr
25. Finally, the respondent refers the court to article 50 (2) (a) in urging the court not to be clouded by the pending criminal case and instead uphold the *Constitution* in arriving at its decision.

Analysis and Determination

26. Having considered the pleadings herein and the rival submissions I derive the following as the issues for determination
 - a. Whether the cause of action herein abated upon the death of the applicant
 - b. Whether the application dated July 6, 2022 is sub judice or otherwise an abuse of court process
 - c. Whether the applicants have met the threshold for the grant of the orders sought
27. From the outset, I deem it necessary to state that although the parties have made reference to the criminal charges facing the respondent, I do not consider them relevant at this stage of the proceedings.
28. I also do not think that at this stage I am required to consider the merits of the originating summons. The prime issue for determination is whether the applicants can substitute the deceased and continue the proceedings herein.
29. It is not in dispute that at the time of her death the deceased was the spouse to the respondent, with divorce proceedings pending and that she had initiated this matter for the purpose of obtaining declaration as to her entitlement to the share of the matrimonial property.
30. Oder 24(1) of the *Civil procedure Rules* recognises that a suit will not abate if the right survives. Section 2 (1) of the *Law Reform Act* also provides that

Subject to the provisions of this section, on the death of any person after the commencement of this Act, all causes of action subsisting against or vested in him shall survive against or as the case may be, for the benefit of his estate
31. In my view these statutory provisions pronounce very neatly and concisely, the applicable law. It is the respondents position that since the properties were held jointly, then upon her death the land vested in him under the principle of survivorship.
32. As has been observed the claim for declaration of the deceased's share in the matrimonial property was filed prior to her death. I do not imagine that the law on joint ownership of property precludes or bars parties from seeking a pronouncement on their respective shares and securing separate titles when circumstances so demand.
33. This I imagine is the essence of the originating summons filed in court. On the 1st Issue therefore I find that the matter has not abated



34. The 2nd Issue is whether the matter is sub judice. It is the contention of the respondent that there is pending before court succession cause No 2273 of 2021. The existence of the succession matter is confirmed as it is the origin of the grant of letters of administration to the applicants herein in respect of the estate of Esther Njigi Nyaga. Nothing has been placed before the court that would demonstrate that the applicants are seeking the same orders in the succession cause as they are in the originating summons. In any event a succession court does not have jurisdiction to distribute any of the assets in this originating summons until a declaration is made on the ownership.
35. The final issue is whether the applicants have met the legal threshold so as to be granted the orders they are seeking. The deceased died on August 8, 2021 and this application was presented on July 6, 2022. I find therefore that the application as presented complies with order 24(3) of the Civil Procedure Rules.
36. Based on the above I allow the application dated July 6, 2022, and grant leave to MMG and ANN to substitute ENN (deceased) and take over the conduct of the suit.
37. Each party to bear their costs.

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29TH DAY OF MAY, 2023.

P M NYAUNDI

JUDGE

In the presence of :

.....**Advocates for the Appellant/ Applicant**

.....**Advocates for the Respondent**

Karani Court Assistant

