



REPUBLIC OF KENYA



**GKM v MM alias MM (Matrimonial Cause 14B of 2020)
[2023] KEHC 21957 (KLR) (30 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21957 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MATRIMONIAL CAUSE 14B OF 2020
EM MURIITHI, J
AUGUST 30, 2023**

BETWEEN

GKM APPLICANT

AND

MM ALIAS MM RESPONDENT

RULING

1. This is a ruling on a preliminary objection dated December 13, 2022 taken by the respondent’s counsel in terms as follows:
 1. That this court lacks jurisdiction to grant the orders sought in light of section 7 of the [Matrimonial Property Act](#), 2013.
 2. The suit is filed within [Matrimonial Property Act](#) where the existence of a marriage relationship is fundamental.
 3. That the proceedings herein is sub judice in light of divorce cause 19/2020 pending in a court of competent jurisdiction between the parties herein.
 4. That in view of the foregoing the defendant prays that the suit herein is struck off with costs to him.”
2. Counsel for the respondent, M/s Chweya & Associates, filed submissions dated March 8, 2023 on the preliminary objection highlighting the Court of Appeal decision in [AKK v PKW](#) (2020) eKLR [which this court has considered in an earlier application as shown below] and the High Court decision in [NCK v GVK](#) [2015] eKLR for the proposition that a suit for division of matrimonial property is subject to a dissolution of marriage, and concluded that “it is not in dispute that there exists divorce cause 19 of 2020 pending in the Chief Magistrate’s Court in Meru which has yet to be determined as at the date as no decree nisi or absolute has been provided. It is our humble submission that



divorce proceedings having not been concluded the court does not have jurisdiction to grant the orders sought.”

3. Despite several adjournments on December 14, 2022, March 20, 2023, May 4, 2023 and May 18, 2023 to allow the applicant’s counsel, as she prayed, to file replying affidavit and submissions, none were forthcoming.

4. The originating summons dated August 12, 2020 seeks specific reliefs as follows:

“1. That it be declared that the properties (movable and immovable) acquired by the joint fund and effort of the applicant and the respondent during the subsistence of their marriage and registered in the sole name of the respondent and in respondent possession more particularly shown in the annexed affidavit of the applicant the same be subdivided and shared equally and/ or sold and the proceeds of the sale be shared equally.

The properties are as follows:

i. Timau Settlement Scheme plot No 73 measuring approximately 18.0 hectares.

2. That the respondent be restrained by an order of injunction from alienating, encumbering and disposing of, selling or in any other manner dealing with those properties until the case is heard.

3. That this court be pleased to give such other orders for the reliefs it may deem just to grant in the circumstances for interest of justice to be met.”

5. The summons was based on grounds set out in the summons as follows:

“1. That the applicant and the respondent are husband and wife.

2. That the properties set out in the originating summons herein above were acquired, developed, and or improved by joint efforts of the applicant and the respondent during the [course] of their marriage.

3. That the respondent evicted/chased the applicant from the matrimonial home and barred (sic) her involvement in the matrimonial properties and assets forming this suit.”

6. The preliminary objection is unanswerable in view of the clear provisions of section 7 of the [Matrimonial Property Act](#) which provides as follows:

“7. Ownership of matrimonial property

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. This court has had opportunity previously to consider the same issue of jurisdiction of court in view of section 7 of the [Matrimonial Property Act](#) and held in Meru HCCC No 1 of 2020 (OS) [RMM v HKF](#) that:



6. “What the applicant seeks is not division of the suit properties, but a declaration that they are matrimonial properties.
7. Therefore, the provisions of section 7 of the *Matrimonial Property Act* does allow division of [determination of rights in] property in the circumstances of this case. Section 7 of the *Matrimonial Property Act*, 2013 provides as follows:

“7. Ownership of matrimonial property

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.”

Division of property arises when the spouses “divorce or their marriage is otherwise dissolved.” The parties in this case are divorced.

8. The issue of the ownership of the suit properties is not in dispute, as it can be seen that they are both registered in the name of Konkod Limited, a limited liability company.
9. This court finds that it has the requisite jurisdiction to declare the rights of a spouse in any property, whether matrimonial or not, in line with the provisions of section 17 of the *Matrimonial Property Act*, which provides that:

“17. (1) A person may apply to a court for 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 notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

10. This court has noted that the decision of the High Court in *AKK v PKW* (2018) eKLR (M.W Muigai J) relied on by the respondent, was reversed on appeal in *AKK v PKW* [2020] eKLR (Warsame, Kiage & Gatembu, JJ.A) where the Court of Appeal held:

“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.....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.”

8. A suit for division of matrimonial property under the *Matrimonial Property Act* is incompetent while the marriage between the parties is still in existence. From petition dated August 12, 2020 attached in the applicant’s interlocutory notice of motion herein it is shown that the applicant filed for divorce at the Meru Chief Magistrate’s Court on August 14, 2020, on the same date as the property suit herein, and it is not shown that the divorce cause has concluded and the alleged marriage dissolved as prayed therein.



9. To the extent that the principal relief in the suit herein seeks an order that the named property “be subdivided and shared equally and or sold and the proceeds of sale be shared equally” during the subsistence of the marriage, the originating summons is incompetent and must be struck out.

Orders

10. Accordingly, for the reasons set out above, the court upholds the preliminary objection dated December 13, 2022 and the suit by summons dated August 12, 2020 is struck out.
11. The court does not make any order as to costs in view of the matrimonial nature of the dispute herein.
Order accordingly.

DATED AND DELIVERED ON THIS 30TH DAY OF AUGUST, 2023.

EDWARD M. MURIITHI

JUDGE

Appearances:

Mrs. Kaume Advocate for the applicant.

Ms. Wachira Advocate for the Respondents.

