



**AAAS (Suing as the next friend of SMO (A person of unsound mind) v AAS (Miscellaneous Civil Application E03 of 2023) [2023] KEHC 24685 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MISCELLANEOUS CIVIL APPLICATION E03 OF 2023  
RE ABURILI, J  
OCTOBER 31, 2023**

**BETWEEN**

**AAAS (SUING AS THE NEXT FRIEND OF SMO (A PERSON OF UNSOUND MIND) ..... APPLICANT**

**AND**

**AAS ..... RESPONDENT**

**RULING**

**Introduction**

1. By Notice of Motion dated 16<sup>th</sup> May 2023 and filed on the 18<sup>th</sup> May 2023, the applicant herein AAAS [suing as next friend of SMO a person of unsound mind] seeks the following orders:
  - a. Spent
  - b. Spent
  - c. That this court issues an order declaring that the respondent is accountable to the applicant in respect of all the income derived from the said matrimonial properties and compel the respondent herein to produce to the court a full and accurate inventory of the assets and liabilities in the listed matrimonial properties as well as for those properties not listed and whose details are solely in the knowledge of the applicant as well as a full and accurate account of all the business dealings therewith up to the date of the account.
  - d. That this Honourable Court do issue and order declaring that the properties listed in the application with all the developments thereon were acquired jointly by the parties herein during the subsistence of their marriage but registered in the name of the respondent to hold in trust for the applicant.



- e. That the listed properties although registered in the name of the respondent and currently solely occupied and/or used entirely by the respondent are for the beneficial interest of the applicant and therefore held in trust and ought to be preserved pending determination of the question of division of matrimonial property.
  - f. That this court do issue orders restraining the respondent herein either by himself, his agents, representatives, assignees and/or servants or whoever claiming title or acting on his behalf from selling, disposing off, interfering with the vehicles subject matter of this application and land parcels subject matter of this application pending hearing and determination of the divorce cause in Kisumu Kadhi's Court Divorce Cause No. 5 of 2023 and pending subsequent filing of the division of matrimonial property cause in the High Court.
  - g. That this honourable court be pleased to order in the interim that proceeds/income from the businesses to be shared on 50 – 50 basis or as the court may deem fit to cater for the applicant's medical treatment and other needs pending subsequent determination on the question of division of matrimonial property.
  - h. That this honourable court be pleased to order the respondent to release all the applicant's documents in his possession to the applicant's next friend for safe custody.
  - i. The costs of this application be in the cause.
2. The Application is founded on the grounds set out on the face of the Application and on the Supporting Affidavit sworn by AAS on 16<sup>th</sup> May, 2023.
  3. The applicant averred that SMO and the respondent solemnised their Islamic Marriage in Busia District, Busia County on the 29<sup>th</sup> March 1986 in accordance with Islamic Law and that during the subsistence of the marriage, SMO and the respondent jointly acquired the matrimonial properties listed in the application.
  4. It is the applicant's case that the respondent had in disregard to the SMO's interest and without SMO and/or her guardian's express permission, proceeded to evict SMO from the matrimonial home situated on land parcel number Kisumu/Municipality Block 10/1 despite her poor mental health status.
  5. The applicant averred that the respondent had started disposing off some of the matrimonial assets specifically two vehicles registration numbers KCP 508R (Probox) and KAR 638Y (Mitsubishi FH Truck) without SMO's and/or guardian's express permission.
  6. The applicant further averred that the respondent had advertised for lease of Land Parcel Kisumu/Dago/1908 and Kisumu/Dago/1909 to the detriment of the beneficial owners and further gone ahead to waste and/or damage Land Parcel No. Kisumu/Dago/2243, 2330,1248, 2249, 1908 and 1909.
  7. The applicant averred that the respondent had forcefully detained all documents belonging to SMO (a person of unsound mind) and had denied the applicant access to the said documents to the detriment of SMO, and her welfare and best interest.
  8. It was the applicant's case that the respondent had attempted to lift cautions placed on the suit properties in total disregard to SMO's beneficial interest over the said suit parcel and to the detriment of the children and her interest.
  9. It was the applicant's further case that it was in the interest of justice that the court issue the orders sought to protect the listed assets that were acquired during the pendency of the marriage and pending



the hearing and determination of the divorce cause in Kisumu Kadhi's Court Divorce Cause No. 5 of 2023.

10. In response, the respondent filed a replying affidavit sworn on the 20<sup>th</sup> September 2023 in which he contended that the applicant had employed the wrong procedure on behalf of SMO as he has not been appointed as her guardian ad litem by the court and further that as he, the applicant, had proceeded on the assumption that SMO had been adjudged to be a person of unsound mind which had not been done.
11. The respondent further deposed that the instant application lacked merit and had been brought in bad faith since the right to seek divorce under Sharia Law belonged solely to SMO whereas the applicant had not sought to be appointed as SMO's guardian either before this court or the Kadhi's court as provided for under Order 32 Rule 15 of the Civil Procedure Rules.
12. It was the respondent's contention that it was necessary for the Court to conduct a judicial inquiry so as to form an opinion as to an individual's capacity to protect her own interests and it was not upon the applicant to arrogate himself that role.
13. The respondent deposed that as both he and SMO professed the Islamic faith, the Kadhi's Court had competent jurisdiction to determine disputes on matrimonial property between the parties herein. It was further deposed by the respondent that it defeated purpose for SMO to file for divorce in the Kadhi's Court at Kisumu in Divorce Cause No. 5 of 2023 and at the same time seek declarations from the High Court with respect to matrimonial property.
14. The respondent further deposed that the assets listed by the applicant did not constitute matrimonial property as the applicant had not demonstrated any evidence of direct or indirect contribution towards acquisition of the aforesaid properties.
15. The parties herein informed court that they had filed their submissions but the same were not available. Nonetheless, the issues to be determined in this application and suit are straightforward as they are purely points of law hence submissions or no submissions, the court is not hampered from determining the issues raised in the application and the suit brought by way of Originating Summons.

### **Analysis & Determination**

16. I have considered the pleadings filed herein and it is my view that the issues for determination are as follows:
  - i. Whether this court has jurisdiction to entertain the instant application
  - ii. Whether the applicant has locus to present this application

### **Whether this court has jurisdiction**

17. The main issue for determination is the place where the dispute can be heard. Thus, whether this court or it is the Kadhi's Court that has jurisdiction to hear and determine matters of this nature. Whereas the applicant filed his application before this court, the respondent seeks to have the dispute referred to the Kadhi's court where there is a pending divorce cause specifically Kisumu Kadhi's Court Divorce Cause No. 5 of 2023.
18. It is not in dispute that both parties to this suit, being the respondent and SMO profess the Islamic religion. The parties are not formally divorced. However, that does not bar the applicant from seeking



orders relating to distribution of the property. This is so because Section 3 of the [Matrimonial Property Act](#), 2013 (Act No. 49 of 2013) provides that:

“A person who professes the Islamic faith may be governed by Islamic law in all matters relating to matrimonial property.”

19. In addition, although Article 170 (5) of [the Constitution](#) gives the Kadhi’s jurisdiction to determine only four issues namely personal status, marriage, divorce and inheritance, section 3 of the [Matrimonial Property Act](#) adds another jurisdiction to the Kadhi’s court to deal with matters relating to the matrimonial property where a person professes the Islamic faith.
20. It is true that section 3 of the [Matrimonial Property Act](#) does not limit the power to determine matters relating to matrimonial property of a Muslim to the Kadhi’s court only. However, the best court that can determine issues involving the Islamic faith is the Kadhi’s court.
21. As was held in the case of [MSR v NAB](#) [2017] eKLR, a dispute involving Matrimonial Property of a Muslim can be heard by either the subordinate court including the Kadhi’s Court or the High Court provided that the Islamic law is used as the determinant factor.
22. In this case, both parties profess the Islamic faith. There is a dispute relating to the assets listed in paragraph 5 of the application. Whether the dispute is heard by this court or by the Kadhi’s court does not matter as both courts have jurisdiction to hear and determine the issue thereof. This is because although Section 3 of the [Matrimonial Property Act](#) allows for the application of Islamic Law on Matrimonial property, the Act does not define the Court where such disputes are to be heard.
23. On the other hand, Section 17 of the Act provides that a person may apply to a Court for a declaration of rights to any contested property. Section 17 of the [Matrimonial Property Act](#) 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 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” [emphasis added].
24. Section 17 of the [Matrimonial Property Act](#) 2013 thus grants a party the right to file an application before division of matrimonial property proceedings commence. This therefore allows the Petitioner to file the matter before this court regardless of whether or not other actions have been commenced in another court.
25. In [R.M.M v B.A.M](#) [2015] eKLR, Waki, G.B.M. Kariuki, Mwilu, M’inoti & Murgor, JJ.A; the Court of Appeal held:

“At the root of the issue is whether it was the High Court or the Kadhi’s Court which has jurisdiction to determine the matter of distribution of the matrimonial property....” ..If their marriage was purely Muslim, and the property in issue was acquired during the currency of



that marriage, the Kadhi's Court would be the most efficacious in handling and determining the dispute.”

26. 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 vs. 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?”

27. 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.

28. Accordingly, I find and hold that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, issues of distribution of the property would then only be determined upon dissolution of a marriage.

#### **Whether the applicant has locus or capacity to present the instant application**

29. It is the applicant's case that he brought the instant suit on behalf of his mother SMO. whom he claims had been adjudged to be a person of unsound mind and that he had accepted to act as her next friend so as to manage her affairs in her welfare and best interest.

30. The respondent on his part deposed in contention that the applicant had employed the wrong procedure on behalf of SMO. as he has not been appointed as her guardian ad litem by the court and further that the applicant had proceeded on the assumption that SMO. had been adjudged to be a person of unsound mind which had not been done.

31. The law governing the custody and guardianship of persons of unsound mind or subjects and the management of their affairs is the *Mental Health Act*, Cap 248. The *Mental Health Act* provides for the care of persons who are suffering from mental disorder, custody of their persons and for the management of the estate of such persons.

32. Section 2 of the Act defines “person suffering from mental disorder” as follows:-

“person suffering from mental disorder” means a person who has been found to be so suffering under this Act and includes a person diagnosed as psychopathic person with mental illness and person suffering from mental impairment due to alcohol or substance abuse.”

33. Section 26 provides for custody, management and guardianship of persons suffering from mental disorders as follows:

1) The Court may make orders-



- a) For the management of the estate of any person suffering from mental disorder; and
  - b) For the guardianship of any person suffering from mental disorder by any near relative or by any other suitable person.
- 2) Where there is no known relative or other suitable person, the court may order that the Public Trustee be appointed manager of the estate of the guardian of any such person.
  - 3) Where upon inquiry it is found that the person to whom the inquiry relates is suffering from mental disorder to such an extent as to be incapable of managing his affairs, but that he is capable of managing himself and is not dangerous to himself or to others or likely to act in a manner offensive to public decency, the court may make such orders as it may think fit for the management of the estate of such person, including proper provision for his maintenance and for the maintenance of such members of his family as are dependent upon him for maintenance, but need not, in such case, make any order as to the custody of the person suffering from mental disorder.
34. Section 27 of the same Act provides that:
- “Where a manager is appointed under this Part, the court may order that the manager shall have such general or special powers for the management of the estate as the court considers necessary and proper.”
35. The affected individual’s mental status must be determined by a medical Doctor or by the court upon inquiry. In this case, the applicant has not adduced any evidence to show that SMO was ever presented to the court for inquiry into her mental status nor was any evidence presented to demonstrate that SMO had been adjudged to be of unsound mind and incapable of protecting her own interests and therefore managing her affairs, necessitating appointment of a guardian.
36. That being the case, the question is, what is the position regarding filing of suits by persons of unsound mind?
37. Where the plaintiff is the person alleged to be of unsound mind, then the suit must be brought on his or her behalf by a guardian or next friend whereas where the defendant is of unsound mind, then the suit must be defended by guardian ad litem. The omission here is that the applicant’s mental status had not been determined as required by law; and the provisions of sections 26 and 27 of the *Mental Health Act* had not been complied with.
38. Accordingly, I hold that the suit was not properly instituted. Consequently, the application dated 16th May 2023 cannot be sustained and the same is hereby found to be incompetently and prematurely filed. It is hereby struck out. In the same vein, having found that this entire suit is fatally incompetent, the same is hereby struck out with an order that each party bear their own costs of the suit.
39. File closed.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 31<sup>ST</sup> DAY OF OCTOBER, 2023**

**R.E. ABURILI**

**JUDGE**

