



REPUBLIC OF KENYA



BWM v JMC (Civil Case E009 of 2021) [2023] KEHC 25596 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEHC 25596 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL CASE E009 OF 2021
J WAKIAGA, J
NOVEMBER 22, 2023**

BETWEEN

BWM PETITIONER

AND

JMC RESPONDENT

RULING

1. The Petitioner took out an originating summons under the provision of *Matrimonial Property Act* for declaration that the property named thereunder were acquired during the subsistence of their marriage and therefore constitute matrimonial property save that Makuyu /Makuyu /BLK1V /xxx and xxx are not matrimonial property as they were acquired through the sole efforts and funds of the Petitioner.
2. The Respondent filed replying affidavit to the petition together with a notice of Preliminary Objection on the following points:
 - a. The suit is res-judicata having been determined in the following cases;
 - i. Kigumo Civil Suit Number 168 of 2020 (OS) in the matter of Division of Matrimonial Property, ruling thereon delivered on 5/8/2021.
 - ii. Muranga Environment and Land Case No 376 of 2017 B W M v J M C in which the Petitioner's suit was dismissed on 26/5/2021.
 - iii. Nyeri Civil Appeal No 39 of 2018 J C M v B W M.
 - b. That this Court lacks jurisdiction to determine or adjudicate on matters involving land.
3. The Petitioner filed grounds of opposition to the Preliminary Objection and stated that:
 - a. The Court has jurisdiction.
 - b. The suit has not been heard and determined on merit and therefore not res-judicata.



- c. The Petitioner’s civil suit No 168 of 2020 was struck out for lack of jurisdiction and not determined on merit.
- d. The Petitioner’s suit ELC No 379 of 2017 was attacked by way of Preliminary Objection by the Respondent which Preliminary Objection was dismissed and is subject of application in Nyeri Misc. Application No 39 of 2018 for leave to file an appeal out of time which is pending Ruling.
- e. Suit No 379 of 2017 was dismissed for want of prosecution and not on merit.

Submissions

4. Directions were issued on the Preliminary Objection to be heard by way of written submissions. Respondent Objector, it was submitted that the Petitioner filed Murang’a High Court ELC Suit No 379 of 2017 B W M v J M C involving the same parties which was dismissed for want of prosecution. The Petitioner filed and prosecuted Kigumo CMCC NO 168 of 2020 (OS) which was struck out for want of jurisdiction upon which she filed Nyeri Court of Appeal Civil Application No. 39 of 2018.
5. On behalf of the Petitioner, it was submitted that the suit herein was not res-judicate as the same had never been heard and determined on merits by any Court and that Civil Suit No 168 of 2020 (OS) filed in Kigumo Law Courts was struck out for lack of jurisdiction while ELC NO 379 of 2017 was dismissed for want of prosecution. In support of the submissions reference was made to the case of *Michael Bett v Jackson Koech* [2019] eKLR where the Court stated that dismissal of suit for non-attendance or for want of prosecution does not satisfy the requirements of section 7 of the *Civil Procedure Act*.

Analysis And Determination

6. The issue for the Court’s determination is whether the matters raised by the Objector qualify as a Preliminary Objection and if so whether the suit herein is res-judicata?
7. What constitute a Preliminary Objection was stated in *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* 1969 EA 696 where the court stated that it raises purely point of law which is argued on the assumption that all the facts pleaded by the other side are correct and cannot be raised if any of the facts has to be ascertained or if what is sought is the exercise of judicial discretion.
8. In *Peter Mungai v Joseph Ngaba Kuria & another* [2022] eKLR the court had this to say on the Preliminary objection “for preliminary objection to succeed the following test ought to be satisfied. Firstly, it should raise a purely point of law. Secondly it is argued on the assumption that all the facts pleaded by the other side are correct”
9. The issue then is whether the objection herein is purely on point of law? whereas the objector has pleaded that the matter is res-judicate, the Petitioner has contested the same and therefore the determination thereof will depend on the facts as will be placed before the Court upon the examination of the pleadings and the decisions of the Courts.
10. It is therefore clear to my mind that the issue raised by the Objector does not qualify as a purely point of law as the Court will have to examine the facts, the pleadings and the determination of the suits listed herein.
11. I therefore find and hold that the Preliminary Objection herein is not merited and is dismissed with costs being in the cause and it is ordered.



DATED, SIGNED AND DELIVERED AT MURANGA THIS 22nd DAY OF NOVEMBER 2023

J. WAKIAGA

JUDGE

