



**NKC v EWK (Matrimonial Cause 7 of 2020)
[2022] KEHC 10958 (KLR) (24 March 2022) (Ruling)**

Neutral citation: [2022] KEHC 10958 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MATRIMONIAL CAUSE 7 OF 2020
MM KASANGO, J
MARCH 24, 2022
IN THE MATTER OF MATRIMONIAL PROPERTY ACT
NO. 49 OF 2013**

BETWEEN

NKC PETITIONER

AND

EWK RESPONDENT

RULING

1. NKC (the petitioner) is the husband of EWK (the respondent). The petitioner commenced this action by filing a petition and sought the following orders:-
 - (a) A declaration that plot Nos. (withheld) are the matrimonial property of the petitioner and respondent.
 - (b) A declaration that plot Nos. (withheld) be subdivided and shared equally between the petitioner and respondent.
 - (c) In the alternative of (b) above plot (withheld) be sold and the proceeds thereof be equally shared between the petitioner and the respondent.
2. The ruling is for determination of the respondent's preliminary objection dated 23rd November, 2020. That objection is as follows:-

“Notice of Preliminary Objection

Take Notice that the respondent shall raise a preliminary objection to the Petitioner's petition dated 10th August, 2020 and seek the same to be struck out on the grounds that:-



1. The petitioner and the respondent are still husband and wife whereas section 7 of the *Matrimonial Property Act* No. 49 of 2013 provides that division of matrimonial property can only be entertained by this Honourable Court if the parties have obtained a divorce or their marriage is otherwise dissolved.
2. The application is on the face of it fatally defective, incompetent and in bad law as the Practice Rules provide that an applicant seeking division of matrimonial property should do so by way of Originating Summons and not a Petition.
3. The subject matter and the parties herein are similar to those in MCL&E No. 35 of 2020 and therefore the principle of sub judice forms part of the Preliminary Objection.”

3. Parties were directed to file written submissions to those objections.

Respondent’s Submissions

4. The respondent began in her submissions by citing the celebrated case and indeed the locus classicus on preliminary objection of *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd* (1969) EA 699. The holding of that case was that a preliminary objection consists of a pure point of law which has been pleaded, which arises by clear implication out of the pleadings and which if successful would dispose of the suit.
5. The respondent on posing the question: whether the court can divide matrimonial property when the marriage is subsisting referred to the Court of Appeal case *AKK VS. PKW* (2020) eKLR. In the respondent’s view, the Court of Appeal decision in that case was to the effect that the court cannot order subdivision of matrimonial property during the subsistence of the marriage. Respondent confirmed that there is a pending divorce cause before the Thika Chief Magistrate’s court. The respondent submitted that in view of that divorce cause, which has not yet been concluded, the prayers sought by the petitioner cannot be granted. The respondent also cited the High Court decision in the case of *TMW VS. FMC* (2018) eKLR and relied on the following part of holding:-

“In the premises, I’m of the view that the Petitioner herein is entitled to a share which may not be equal to that of the Respondent if at all the matrimonial property is to be distributed. The suit property herein cannot be subject to distribution without proof of divorce.”
6. The respondent submitted that if the court does entertain this cause, the end result would be to break up and separate the parties’ family. Respondent cited Article 45 of *the Constitution* in support of that submission. That Article provides:-

“The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.”
7. In further submissions, respondent stated that this present suit is sub judice and contrary to provisions of section 6 of the Civil Procedure Code Act because the petitioner “had filed” two other suits before filing this present action. Respondent named those two previous suits as MCL & E No. 35 of 2020 and ELC No. 34 of 2020. The respondent referred to the first case as “spent” and the latter as “spending”. Respondent stated that those two cases were involving the same parties and the same properties as in this action.



Petitioner's Submission

8. The petitioner whilst referring to the Court of Appeal case cited by the respondent that is AKK VS. PKW, stated that contrary to submissions of the respondent the Court of Appeal referring to Section 17 of the *Matrimonial Property Act* No. 49 of 2013 held that, that Act was not limited to making declaration of rights of a spouse's interest in Matrimonial Property only after divorce. In this regard, petitioner made reference to the prayers in the petition and highlighted that in his prayers he also seeks declaration that the property was matrimonial property of both him and the respondent.
9. The petitioner further submitted that the case number CM ELC 35 of 2020 was not subsisting but that it is "spent". In respect to the case No. ELC 34 of 2020 the petitioner denied knowledge or the existence of the same. Accordingly, the petitioner stated that there is no subsisting suit which would make this cause to be in violation of Section 6 of *Civil Procedure Act*.

Analysis

10. The respondent is indeed aware that her objection ought to have been on a pure point of law which has been pleaded or which arises by clear implication out of the pleadings. See the case Mukisa Biscuits Manufacturing Co. Ltd(supra). It follows that a preliminary objection begins and ends with the pleadings presented by the parties. Bearing this in mind, I will begin by considering the third objection raised by the respondent, that is, whether this suit is sub judice.
11. The petitioner by his petition pleaded: "I had filed a civil case against the respondent in Thika MCL & E 35 of 2020." I emphasize that the respondent by that pleading said "I had." In other words, that pleading communicates that the petitioner had in the past filed that case in Thika against the respondent. The respondent herself in her written submission acknowledge that fact because in citing that case, she indicated the word "spent". It follows that that case is not subsisting and accordingly, this cause is not sub judice to that Thika case.
12. Contrary to what is a recognized preliminary objection, the respondent further cited another case, namely, ELC 34 of 2020. That case is not pleaded in the petition nor in the respondent's answer to the petition. The existence of that case therefore is not part of those pleadings and therefore does not raise a pure point of law. It is therefore rejected. This Court finds and holds that this petition is not sub judice.
13. Secondly, I will consider the second objection raised by the respondent, that is, whether the petitioner erred to bring this action by way of petition and not through an Originating Summons.
14. The respondent did not submit in support of this second objection and I therefore find that the respondent abandoned that objection. However, in order to dispel doubt on whether the petitioner's suit is incompetent, I will proceed to consider that objection notwithstanding the parties did not submit on the same.
15. I will begin by stating that in our present constitutional dispensation, more particularly bearing in mind the provisions of Article 159(2)(d), a claimant in an action should not easily be driven from the judgment seat without being heard unless the action is irredeemably bad.
16. Further, although the respondent in that objection stated that the petitioner in filing this petition, the action was fatally defective for not having been filed as provided by the Practice Rules, the respondent did not specify which those procedure Rules are. I am therefore lost as to the exact meaning of that objection.



17. Section 17(2) of Act No. 49 of 2013 provides that an action under that Section 17(2) “shall be made in accordance with such procedures as may be prescribed.” I was unable to find such a prescribed procedure. It follows that, the Act No 49 of 2013 has not prescribed a procedure and the petitioner did not err in filing a petition.

18. Further, even if the petition was filed contrary to procedure, I am of the view justice would require for ordering an amendment in order to cure the error, rather than striking out. In this regard, I rely on the holding in the case *Parbat & Company Limited vs. Kenyatta University* (2000) eKLR thus:-

“The Chamber Summons was taken out under section 3A of the Civil Procedure Act and order 21 rules 18 and 22. It is only in applications under rule 22 that the Rules provide for a Chamber Summons to be filed.

The other provisions require a Notice of Motion. But such situation has previously been considered by the Court of Appeal when similar objection was made, amongst other cases in CA 284/97, *Johnson Kinyanjui & Anor Vs Rachel Thande & Others* (UR). It was stated:

“If an application is brought under different rules one calling for a Notice of Motion and another calling for a Chamber Summons application, then the party applying has a choice to use a Notice of Motion procedure. If during the course of the hearing the party abandons the application under a rule which entitles him to apply by way of Notice of Motion the application does not become incompetent.... It can be seen that no application is to be defeated by use of wrong procedural mode and the judge has the discretion to hear it either in Court or in chambers.”

With respect this is not a serious issue as it is curable by amendment even if the wrong form of application was adopted. The Court also has the discretion to consider the substance of the application, the defect in form notwithstanding.”

19. In respect to the first objection of the respondent the respondent argued that since the parties’ marriage is still subsisting, this cause is premature and should be struck out.

20. I find it surprising that the respondent would cite the Court of Appeal Case A.K.K. VS. P.K.W. (supra) and fail to capture the correct holding of that. The main holding of the Court of Appeal in that case is as follows:-

“It is our opinion that the 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. ...

35. 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. 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. (underlining mine) However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. 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.



36. In the persuasive case of *N.C.K. vs. G.V.K* [2015] eKLR, Muchelule, J. observed thus:-

“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The Family Law Act 1966 at Section 33 (4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of *ARIF VS. ANWAR* [2015] EWHC 124 (FAM) the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same ...

It would appear to me that a spouse can, under section 17 of the *Matrimonial Property Act* 2013, either where there is a divorce matter pending, or where, for whatever reason, he can no longer live together with the other spouse but it is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same.” (Emphasis).

37. In our opinion, the trial court had jurisdiction to make declarations in so far as the interest in the property during the pendency of a marriage is concerned. The issues of distribution of the property would then only be determined upon dissolution of a marriage.”

21. The petitioner, by this petition sought declaration that the property in question is matrimonial property. By that prayer, the petitioner invoked Section 17 of Act 49 of 2013. By the above holding of the Court of Appeal, this Court has jurisdiction to hear and determine that prayer (a) of the petition.
22. It becomes obvious from the above discussion that there is no merit in the objection dated 23rd November, 2020 and neither is there basis of arguing that to entertain this action will lead to the breakup of the marriage of these parties.
23. The preliminary objection dated 23rd November, 2020 is without merit and is dismissed with costs.
24. At the reading of this Ruling, a pre-trial date shall be fixed.

RULING DATED and DELIVERED AT KIAMBU THIS 24TH DAY OF MARCH, 2022.

MARY KASANGO

JUDGE

Coram:

Court Assistant : Mourice

For Petitioner: - Mr. Mboha

For Respondent: - Ms. Wangechi

RULING delivered virtually.

MARY KASANGO

JUDGE

