



**JMD v JFD (Civil Suit E024 of 2021)
[2022] KEHC 12272 (KLR) (Family) (27 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 12272 (KLR)

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

FAMILY

CIVIL SUIT E024 OF 2021

LA ACHODE, J

APRIL 27, 2022

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT

BETWEEN

JMD APPLICANT

AND

JFD RESPONDENT

RULING

1. On the 5th of May 2021, the applicant moved this court under sections 2,6,7,9 and 17 of the Matrimonial Property Act, 2013 and all other enabling provisions of law seeking orders that:-
 - i. The courts do set aside the pre-nuptial agreement entered into by the parties on June 24, 1974.
 - ii. A declaration do issue that the following properties constitute matrimonial property;
 - a. Residential property located at [Particulars Withheld]78600, France registered under fiscal no. XXXXXXXX518158C and owner no. XXXD02113U.
 - b. A family home known as L and located in LSR XXX30, France registered under fiscal No XXXXX518C and owner No XXXXXXX060L.
 - c. ½ share in Falcon properties managed by CRM LLC located at XXX03 N. DPS XX50 Addison. TX 75XXX USA.
 - d. Final financial statement for DC LLC (of which the parties are joint sole partners) received from ABM, NA and AB Held in trust by SBll, PA 1XXS Washington Avenue, Suite No. 3XXX Minneapolis, MN 5XXX USA valued at USD 12,000.



- iii. The above properties be apportioned to the parties as the court deems fit.
 - iv. The court do order the respondent to account for proceeds of the sale of any of the matrimonial properties above sold
 - v. The court do declare the applicant entitled to proceeds of any sale/transfer of any of the matrimonial property above.
 - vi. The court do declare the respondent accountable to the applicant in respect of all income derived from the above-mentioned matrimonial properties.
 - vii. Costs be provided for.
2. In response, the respondent filed a preliminary objection dated October 16, 2021 on grounds that this court lacks jurisdiction to determine this suit as the impugned properties are immovable properties located in foreign jurisdiction. It was also his case that the prenuptial agreement dated June 24, 1974 is time barred under section 4(2) of the Limitations of Actions Act. That the law applicable under the prenuptial agreement is French Law. This is the application that is subject to ruling today.
 3. The preliminary objection was canvassed by way of written submissions. The respondent was represented by the firm of Amany and Co. Advocates while the Applicant was represented by the firm of Kimani & Muchiri Advocates.
 4. Counsel for the respondent filed written submissions dated October 26, 2021. Counsel identified two issues for determination being; i) whether this court has jurisdiction to entertain the application and, ii) whether the prenuptial agreement dated June 24, 1974 is time barred under the Limitations of Actions Act.
 5. On the 1st issue, Counsel cited the case of Owners of Motor Vessel "Lilian S" v Caltel Oil (Kenya) Ltd (1989)KLR 1 and submitted that this court lacks jurisdiction to entertain the applicant's application because the impugned properties are located in foreign jurisdiction to wit France and United States of America.
 6. Touching on the prenuptial agreement, it was counsel's view that section 4(2) Limitation of Actions Act limits contractual obligations to a period of 6 years thus the prenuptial agreement dated June 24, 1974 is time barred. Counsel urged this court to dismiss the application in its entirety.
 7. Kimani & Muchiri Advocates, LLP filed written submission dated January 27, 2020 where they submitted that International Principles and Laws form part of Kenyan Law by virtue of article 2(5) Constitution. That the principle of comity allows for political entities to mutually recognize each other's legislative, executive and judicial acts. That comity assures courts that judicial decisions and decrees will be recognized and given effect in other jurisdictions on the basis of international relations and good will. To support this assertion, counsel relied on the case of Christopher Sales & Another vs. The Attorney General of Uganda HCCC No. 91 of 2011.
 8. Counsel further submitted that the concept of domicile under Private International Law links different legal systems and allows a jurisdictional link. He stated that both parties have been domiciled in Kenya since 2006 and their divorce proceeding were conducted in and concluded in Kenya despite their being foreign nationals and having solemnized their marriage in France. It was therefore his case that this Court has jurisdiction to entertain the Application. He relied on the cases of CH vs. RGH (2018) eKLR and Lanfer vs. Eilers, 2021 BCCA 214 (Can LII) in support of his assertion.



9. On the law applicable to the prenuptial agreement, Counsel urged that the court ought to distinguish between choice of law and exclusive jurisdiction. He cited the cases of *Captain (RTD) Charles KW Masinde vs. Intergovernmental Authority on Development* (2018) eKLR, *Dorcas Kemunto Wainaina vs. IPAS* eKLR, *Raytheon Aircraft Credit Corporation & Another vs. Air Al-Faraj Limited* and *Kanti & Co. limited vs. South British Insurance Co. Limited*. Counsel stated that what is in the prenuptial agreement is a choice of law and not a clause on exclusive jurisdiction. That in the absence of an exclusive jurisdiction clause, this court has jurisdiction to determine the application. In the alternative, counsel noted that this court has the option of applying French Law in exercising its jurisdiction.
10. Making reference to Court of Appeal decision in *Jayesh Hasmukh Shah vs. Navin Haria & another* (2016) eKLR Counsel asserted that the principle of reciprocity allows for foreign decisions to be upheld and enforced in jurisdictions contemplated under the *Foreign Judgments (Reciprocal Enforcement) Act*. Counsel also cited the cases of *EMM v GWM* (2018) eKLR and *ENM v PMM* (2021) eKLR, and submitted that the Kenyan Courts recognized and enforced Judgments emanating from the USA and made orders relating to matrimonial property. He further urged this court to consider the conditions for recognition of foreign decisions laid down in the case of *Cornelissen vs Avianca Inc* and find that the decision of this court shall not be in vain.
11. On the issue of limitation of time in enforcing the prenuptial agreement, Counsel submitted that section 4(2) *Limitation of Actions Act* is an incorrect premise as it relates to torts, which has no bearing on a contract such as a prenuptial agreement. He stated that to consider the prenuptial agreement as time barred based on the time it was entered would be prejudicial and stated the time should start running as to when the action accrued. Counsel contended that the action accrued once the marriage was dissolved that is on September 14, 2018.
12. I have carefully considered the pleadings and rival submissions filed by the advocates on record for the respective parties. This P/O turns on the question as to whether this court has jurisdiction to hear and determine the application dated May 5, 2021.
13. It is important to state that this being a preliminary objection, its object ought to be a point of law capable of dispensing of the suit if it succeeds. A preliminary objection was described in the leading case of *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Ltd* (1969) EA 696 in the following terms:-

“So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir Charles Nebbold, JA stated that:-

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

The primary issue for determination as noted above touches on jurisdiction of this court which, to my mind, is a pure point of law which if determined in favor of the objector, would dispose of this suit without giving parties the opportunity to be heard.



14. Jurisdiction is the foundational pillar of any court. It is primordial in every suit and without it, then the court has no authority to rule on a matter. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel Lillian S vs. Caltex Oil (Kenya) Ltd* (1989), where the court held as follows; Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”
15. The applicant is seeking a declaration that the impugned properties are matrimonial property and also for this court to divide the property between herself and the objector. It is not in dispute that all the impugned properties are located in foreign jurisdiction. In her prayers the applicant sought orders relating to the following properties;
- i. A residential property located at x avenue BMF 78XXX, France registered under fiscal no 051752XXXX and owner no. 3XX D02XXXX.
 - ii. A family home known as L and located in LSC 41XXX, France registered under fiscal No 0517520XXXX and owner No 112D00XXXX.
 - iii. ½ share in F properties managed by CRM LLC located at 15XXX N Dallas Parkway Suite 1XXX A TX 75XXX USA.
 - iv. Final financial statement for DC LLC (of which the parties are joint sole partners) received from ABM, NA and Associated Bancorp Held in trust by SB, PA 1XX S Washington Avenue, Suite No 1XXX Minneapolis, MN 55XXX USA valued at USD 12,000.
16. The question is then whether this court is clothed with the necessary jurisdiction to make a determination on the above-mentioned properties. The properties are located in the USA and in France. A court's jurisdiction flows from either the Constitution or legislation or both. The Supreme Court of Kenya in the case of *Samuel Kamau Macharia vs KCB & 2 others*, Civil Application No. 2 of 2011 stated thus:
- “A court's jurisdiction flows from either the Constitution or Legislation or both. Thus a court of Law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by Law”
- This court draws its jurisdiction from the *Constitution*. article 165(3) provides that:
3. Subject to clause (5), the High Court shall have:
 - (a) Unlimited original jurisdiction in criminal and civil matters;
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
17. Jurisdictional question of property held in foreign land has been deliberated on widely world over. The Objector pointed out that this courts jurisdiction is ousted by the fact that the impugned properties exist outside the borders of Kenya in specifically in France and USA where enforceability of this courts orders would be in vain. The Applicant on the other hand argued that the principle of comity and reciprocity allows for foreign decisions to be enforced and adopted. The general consensus is that courts have cross border jurisdiction in personam. The prayers sought in this application however are not as against the Objector in person rather they seek declaratory orders in relation to property.



18. The rule of private international law now known as the rule in the Mozambique Case, provides that, subject to various exceptions, a court has no jurisdiction to entertain an action for the determination of title to, or the right to the possession of, any foreign land or other immovable property (see *British South Africa Co vs Companhia de Mozambique*). The same principle has been cited time and again in relation to declaratory orders against movable property.
19. Counsel for the applicant asserted that the *Foreign Judgments (Reciprocal Enforcement) Act* allows Kenya to uphold and enforce foreign judgment, which Kenya has done and thus Kenyan decisions should also be enforced based on the principle of reciprocity. It is true the primary statute governing recognition of foreign judgments in Kenya is the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap 43 Law of Kenya.
20. Under section 3 of the Act however, it is provided that the provisions of the Act are not applicable to inter alia a matrimonial cause. Moreover, the Countries in question in this suit are also not contemplated under Section 13 of the Act nor are they commonwealth countries in order to qualify for recognition and registration by dint of the Ministerial extension of reciprocity powers under the Act. Therefore, even if it were that the matrimonial proceedings were not exempted from the Act, France and the USA do not enjoy reciprocity with Kenya and vice versa.
21. The whole purpose of determination of cases is that the prevailing party enjoys the fruits of enforcement. If enforcement is not capable of being attained, then this court would be acting in vain. Of persuasion to this court is the Canadian case of *Duke vs Andler* 1932 (Scr) 734 where Justice Smith of the Supreme Court of Canada held at page 738 that:-

“The general rule that the courts of any country have no jurisdiction to adjudicate on the right and title to lands not situate in such country is not in dispute.”

Courts ought not to make orders in vain. This court is not convinced that the countries the properties are situated would enforce the orders of this court.
22. The upshot of the above analysis is that, this court has no jurisdiction to make cross border declaratory orders in rem. To do so would be to encroach into the jurisdiction that rightfully belongs to the USA and French courts.
23. In the premise, the preliminary objection dated October 16, 2021 is meritorious and succeeds. The application dated May 5, 2021 is hereby dismissed.
24. There shall be no order as to costs.

DATED SIGNED AND DELIVERED IN VIRTUAL COURT ON THIS 27TH DAY OF APRIL 2022

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L.A. ACHODE

HIGH COURT JUDGE

In the presence of Advocate for the Applicant

In the presence of Advocate for the Objector

