



REPUBLIC OF KENYA



**KENYA LAW**  
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**PLMM v AMN (Civil Suit 5 of 2017) [2022] KEHC 3392 (KLR) (26 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3392 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL SUIT 5 OF 2017  
LM NJUGUNA, J  
APRIL 26, 2022**

**BETWEEN**

**PLMM ..... PLAINTIFF**

**AND**

**AMN ..... DEFENDANT**

**RULING**

1. This ruling is for the preliminary objection dated 21<sup>st</sup> day of July, 2021 by the defendant herein on the following grounds;
  1. That this suit is incurably bad in law ab initio, is an abuse of the process of this court and should be dismissed with costs as it is in contravention of Section 7 of the Matrimonial Property Act.
  2. That the court has no jurisdiction.
2. When the same came up for hearing, the court gave directions on filing of submissions to which both parties complied.
3. The brief history of the case before the court is that, on the 20<sup>th</sup> April, 2017, the plaintiff herein filed an originating summons under the Matrimonial Property Act 2013 and under Article 45(3) of the Constitution of Kenya seeking the following orders;
  1. That a declaration that the properties known as
    - a. Mbeti/Gachuriri/xxx
    - b. Mbeti/Gachuriri/xxx
    - c. Motor vehicle Kxx xxxx Toyota Hilux Pickup
    - d. Motor vehicle Kxx xxxx Toyota Station Wagon
    - e. Motor vehicle Kxx xxxx Toyota Hilux Pickup



- f. 13 cows and 43 goats
  2. With all the buildings and developments thereon were acquired by the joint funds and efforts of the plaintiff and defendant during their marriage and all registered in the name of or in possession of the defendant are owned jointly by the plaintiff and defendant.
  3. That a declaration do issue that the respondent holds the said properties in trust for the applicant.
  4. That the properties be settled to the benefit of the applicant in such manner and proportions as this Honourable Court deems fit and just.
  5. That the defendant himself, his agent and/or servants be restrained from alienating, encumbering or in any other manner disposing off the said properties.
  6. That the defendant be condemned to pay costs of this summons and other incidentals thereto.
4. The same is based on the annexed affidavit of PLMM, the plaintiff herein. She avers that she started cohabiting with the defendant as a man and a wife on the January 22, 1994 and their union was thereafter solemnized on the April 12, 2008. That their marriage was blessed with two children namely EMNM and DMM.
  5. She further deposes that the above properties were acquired and/or substantially developed during the subsistence of their marriage and that she contributed both directly and indirectly to their acquisition. That they are no longer cohabiting with the defendant who is currently cohabiting with another woman and she is apprehensive that the defendant might transfer all the properties to his concubine thereby rendering her destitute.
  6. The defendant filed a replying affidavit sworn on the 23<sup>rd</sup> July, 2017 in which he denied the allegations and sought for dismissal of the same. That since the originating summons was filed, a number of applications have been filed and heard by the court.
  7. The preliminary objection is mainly on the issue of jurisdiction and the defendant has pegged it on the provisions of Section 7 of the *Matrimonial Property Act*.
  8. In his submissions, he contends that the plaintiff's suit is incurably defective as it contravenes the aforesaid section. He argues that though the family court is clothed with the requisite jurisdiction to hear and determine matters concerning the division of Matrimonial Property, the court can only exercise its jurisdiction upon proof of a court order on dissolution of marriage.
  9. Further that under Section 7 of the *Matrimonial Property Act*, the court cannot distribute matrimonial property without first dissolving the marriage.
  10. He further submitted that, to determine the issue in question, the court has to be satisfied on a number of factual matters based on the test set out in the case of *ZSN v WNO* [2019] eKLR in which the court set out the facets to be proved by either party with regard to the division of matrimonial property which are;
    - a. The fact of a valid, legal, regular marriage in law.
    - b. Dissolution of such marriage by/through the court;
    - c. That earmarked/listed property constitutes matrimonial property; acquired and developed during subsistence of the marriage.



- d. Contribution by each party to the acquisition/ development.
11. He submitted that though the plaintiff has satisfied the court that she is married to the defendant, the said marriage has not been dissolved. He asked the court to uphold the preliminary objection and dismiss the suit.
  12. On her part, the plaintiff submitted that the suit is properly before the court and that the court has jurisdiction to hear and determine the matter. She has relied on Article 45(3) of *the Constitution*, Section 3 of the *Marriage Act* 2013, and Sections 6, 2(2) and 17 of the *Matrimonial Property Act*, 2013.
  13. He submitted that the effect of Section 17 of the *Matrimonial Property Act* 2013 is that where proceedings are pending, or the spouse is not seeking a divorce, they may come to court to resolve any questions about the beneficial entitlement to their property.
  14. That a spouse can seek declaratory orders which are intended only to declare the nature of the interest that is claimed. Reliance was made on the case of *AKK v PKW* [2020] eKLR in which the court observed that Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders.
  15. Further, the plaintiff relied on the case of *PWN v ZWN* [2017] eKLR and that of *WCK v GVK* [2015] eKLR to buttress the above position.
  16. The court has considered the preliminary objection and the submissions by the parties together with the authorities relied on.
  17. A preliminary objection was defined in the case of *Mukbisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 as follows;

“A preliminary objection consists of a point of law which has been pleaded, or which arises by a 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”.
  18. Further, in the case of *Ahmed Noorani & another v Rajendra Ratilal Sanghani* [2020] eKLR, the court observed thus;

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.
  19. The purposes served by a preliminary objection are twofold;
    1. It serves as a shield for the originator of the objection against profligate deployment of time and resources.
    2. It serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement.



20. As earlier stated, the defendants objection is premised on Section 7 of the *Matrimonial Property Act* which reads;

“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.”

21. On the other hand, the plaintiff’s opposition to the preliminary objection is premised on Section 17 of the *Matrimonial Property Act* which reads;

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 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.

22. In my view, from the reading of the two sections, it is clear that section 7 deals with the distribution of matrimonial property upon divorce whilst section 17 protects the rights of spouses in relation to matrimonial property during the subsistence of the marriage.

23. It enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It is not in dispute that the parties herein are a husband and wife. A certificate of marriage has been annexed to the affidavit in support of the originating summons and the only complaint by the defendant is that the marriage has not been dissolved.

24. In the case of *PWN v ZWN* [2017] eKLR the court while dealing with Section 17 of the *Matrimonial Property Act* stated; an enquiry may thus be made under Section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris Borthy – avest in *Petit v 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 the spouse to another. In a question as to title to property the question for the court was who this is and not to whom shall it be given?

25. The court has perused through the authorities relied on by the defendant. It is clear that the orders sought therein were for division of the matrimonial party. In the originating summons before me, the plaintiff has sought inter alia; declaratory orders that the properties listed therein with all the buildings and developments therein were acquired by joint funds and efforts of both the plaintiff and the defendant and they own them jointly. She further sought for a declaratory order to the effect that the respondent hold them in trust for her.



- 26. In my considered view, the court has jurisdiction to make declaratory orders in so far as the interest in the matrimonial property during the pendency of a marriage is concerned. The issue of the distribution of the property would then only be determined upon dissolution of the marriage.
- 27. In the premises foregoing, I find that the preliminary objection is devoid of merit and the same is hereby dismissed with costs.
- 28. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF APRIL, 2022.**

**L. NJUGUNA**

**JUDGE**

.....for the Plaintiff

.....for the Defendant

