



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

ORIGINATING SUMMONS NO. E015 OF 2021

ECK.....APPLICANT

VERSUS

JLK.....RESPONDENT

RULING

Notice of Preliminary Objection

The Respondent filed a Notice of Preliminary Objection (PO) dated 27th April 2021 set out as follows:-

1. That this honourable court lacks the requisite jurisdiction to hear and determine the matter on grounds of absence of decree nisi.
2. That the suit is a non-starter
3. That the Application offends Section 7 of the matrimonial Properties Act, 2013 since the marriage is still in existence.
4. That the application is prematurely brought for determination.
5. That the suit is an abuse of the courts process.

Background

While Divorce Cause E015 of 2021 seeking dissolution of the marriage between the Applicant and the Respondent is still pending determination, the Applicant brought this application by way of a Notice of Motion dated 29th March 2021. The Applicant has based the Notice of Motion under **sections 1A, 1B, 3A and 63 of the Civil Procedure Act and order 40 Rule 1 (a) and (b) the Civil Procedure Rules; Sections 2, 6(1), 7, 12(1) (3), 14 and 17 of the Matrimonial Property Act 2013**. She is seeking restraining orders against the Respondent in respect of property claimed to have been acquired during the pendency of the marriage to preserve the said property.

Contemporaneously with the Notice of Motion, the Applicant brought an Originating Summons (OS) dated 29th March 2021, under **sections 6,7,9,13,14 and 17 of the Matrimonial Property Act of 2013; Article 45(3) of the Constitution** seeking, inter alia, declaratory orders as set out therein in respect of properties listed in the OS.

Submissions

This court directed that the PO be determined first and that the same be canvassed by way of written submissions. Rival submissions have been filed herein. In his submissions dated 2nd June 2021 the Respondent has identified three issues for determination as follows:

- i. Whether the honourable court has jurisdiction to hear and determine this matter on the grounds of absence of decree nisi.**
- ii. Whether the application offends section 7 of the matrimonial property act, 2013 since marriage is still in existence**
- iii. Whether the application is prematurely brought from determination.**

On the 1st issue, the Respondent submitted that jurisdiction is everything and without jurisdiction a court should not entertain a dispute. He

relied on the case of **John Kipng'eno Koech and 2 others Vs Nakuru County Assembly and 2 others (2013) eKLR** where the court held that;

“Jurisdiction is the practical authority granted to formally constituted body to deal with and make pronouncement on legal matters and by implications to administer justice within a defined area of responsibility. It is a scope, validity, legitimacy or authority to persuade or adjudicate upon the matter.”

He submitted that their marriage has not been dissolved and thus the court should be hesitant to make orders as to distribution of the properties. Further that the court is estopped from exercising jurisdiction and determining the application related to the OS herein as was held in **AKK V PKW (2018) eKLR** where the court upheld the preliminary objection on the basis that the marriage had not been dissolved. He also relied on **TMW v. FMC Matrimonial Cause No. 4 of 2018 eKLR**.

On the 2nd issue, it is his submission that division of matrimonial property is premised on fact that parties are divorced and evidenced by issuance of decree nisi. He relied on Section 7 of the Matrimonial Property Act that provides that:

“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.”

He submitted that entertaining the Application brought under the OS seeking division of matrimonial property in the absence of a decree nisi is equivalent to encouraging destruction of families and giving a blind eye on the mischief of divorce and defeating the spirit of Article 45(1) of the Constitution.

The Applicant filed her submissions dated 15th June 2021. He has raised two key issues for determination;

1. Whether the preliminary objection meets the threshold and essence of a Preliminary Objection *locus classicus* as well set out in the case of Mukisa Biscuits Manufacturing Co Ltd V. West End Distributors (1969) EA 696, to the effect that “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.”

2. Whether court has jurisdiction.

On the 1st issue, the Applicant submitted that the Respondent has not made out a case for orders sought as the PO has not met the threshold set out in the **Mukisa Biscuits Manufacturing Co. Ltd, v. West End Distributors (1969) E.A 696** where it was held that:

“So far as I’m 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 case may dispose of the suit.

The first matter related to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way or Preliminary objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point which if argued on the assumption that all 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 improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse the issue. The improper practice should stop.”

She also relied on the case by Supreme Court of Kenya, **Aviation & Allied Workers Union Kenya v. Kenya Airways Ltd & 3 others (2015) eKLR 50 of 2014** where the court disallowed the PO by stating;

“This Court has had occasion in the past, to consider the nature of a preliminary objection. The Court endorsed the long-standing jurisprudence set in the *Mukisa Biscuit case*, on the nature of a preliminary objection. In *Hassan Nyanje Charo v. Khatib Mwashetani & 3 Others*, Sup. Ct. Application No. 23 of 2014, the Court cited its earlier decision in the *Joho case* thus [paragraph 51]:

“The principles in the *Mukisa Biscuit case* were restated by this Court in the *Joho case* [as follows...] ‘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 ... 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 has to be ascertained or if what is sought is the exercise of judicial discretion’.” Thus a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are *prima facie* presented in the pleadings on record.”

It is her contention that the Respondent deliberately failed to file a Replying Affidavit but filed a PO narrowly on section 7 of the Matrimonial Property Act yet section 17 of the Act which is not pegged on subsistence of marriage empowers this court to make declaratory orders on interest in matrimonial property. She also contended that the Respondent has neither pleaded nor raised any issues out of pleadings capable of being argued as a preliminary point of law.

On the 2nd issue, she submitted that in **AKK V. PKW (2018) eKLR** the Court of Appeal set aside and dismissed the PO because of application of section 17 of the Matrimonial Properties Act to the effect that it enables a spouse, subsistence of marriage notwithstanding, to make an application for declaratory orders and that a divorce cause does not prevent a party from bringing an action for declaration of rights. She further relied on **GKS V. JMBB Matrimonial Cause 2 of 2020** which also reiterated that court's jurisdiction should not be limited on the basis of section 7 when section 17 is also pleaded. It was also her submission that the PO has no merit as the applicants case is properly before this honourable court

Analysis and Determination

I have carefully read and understood the submissions of both parties. To my mind, two main issues arise from the rival submissions: the first issue relates to jurisdiction of this court to entertain this matter and the second issue is whether the PO meets the threshold of a PO. The other issues raised by the parties will be resolved in the course of determining the two issues I have picked. But before I resolve the issues identified I wish to point out that the Respondent seems to concentrate on the OS instead of the Notice of Motion. Nevertheless, this court will proceed to deal with the issues identified.

On the issue of jurisdiction, I totally agree with the view that jurisdiction is everything and without it this court has no business handling this matter. I also agree with the reasoning in the authorities cited by the parties on this point save to clarify that **AKK v PKW [2018] eKLR** relied on by the Respondent has been overturned by the Court of Appeal as argued by the Applicant. This will become clearer in the course of this Ruling.

I also agree that until a marriage between parties is dissolved, this court cannot entertain a suit on division of matrimonial property. As I have pointed out, the Respondent seems to have overlooked the Notice of Motion whose prayers seek to preserve the properties enumerated therein pending hearing and determination of the Notice of Motion as well as the OS. He seems to have overlooked the fact that the main prayers in the OS are declaratory in nature. It is true that Section 7 of the Matrimonial Property Act provides for division of matrimonial property upon divorce of the parties to a marriage or where their marriage is otherwise resolved. Section 7 provides as follows:

7. Ownership of matrimonial property.

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.

It is true as argued by the Respondent that the marriage between him and the Applicant is subsisting though there are on-going divorce proceedings. Reading Section 7 in isolation would lead to resolving this matter in favour of the Respondent. However I have read the OS and the Notice of Motion and appreciated the prayers sought therein. Further I have read Section 17 of the Matrimonial Property Act that the Applicant has relied on in her arguments. This section provides as follows:

17. Action for declaration of rights to property.

(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.

The above section is clear that even where a petition in a matrimonial cause has been filed, a party may apply for declaration of rights in any property that is contested between spouses. My understanding is that this section enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It is so submitted by the Applicant. She has cited the same authority relied on by the Respondent, **AKK v. PKW**, but she has brought out the difference in reasoning in that authority between the High Court and the Court of Appeal. Under paragraph 32 the Court of Appeal in the **AKK v. PKW** case stated that:

“..... The trial court found that it had no jurisdiction under Section 7 to make orders as to the division of property. It is also correct that the orders concerning division of matrimonial property pursuant to Section 7 of the Matrimonial Property Act was unavailable to the appellant until the determination of the Divorce Case No. 867 of 2017 between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant's prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court's jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make a declaratory order sought.”

In paragraph 35 of the Judgment of the Court of Appeal in the above authority, the Court, in reference to **PNN v. ZWN [2017] eKLR** stated that:

“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. 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 Applicant’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.”

I have said enough to demonstrate that the Respondent has misapprehended the law in his arguments. It is clear to me that indeed this court has jurisdiction to entertain this matter given the reasoning above.

The second issue relates to whether this PO meets the threshold. I wish to point out that the issue of jurisdiction of the court, when raised in a PO, is a point of law which is argued on the assumption that all the facts pleaded by the other side are correct as held in the **Mukisa Biscuit case**. It is clear to me that if this court were to find that it did not have jurisdiction to entertain this matter, then the PO raised here would have disposed of this suit. I am therefore satisfied that the PO raised by the Respondent meets the threshold the only problem being that the arguments made by the Respondent that this court does not have jurisdiction fall by the wayside. This is because the Respondent based his arguments on Section 7 of the Act and failed to consider Section 17 of the Act as well as the prayers sought in the OS.

My conclusion of this matter is that the Preliminary Objection dated 27th April 2021 is not merited and must fail. It is hereby dismissed. As shown above in this ruling this court does not lack the requisite jurisdiction to hear and determine this matter notwithstanding the absence of decree nisi. Secondly this suit is not a non-starter nor does the Application offend Section 7 of the Act. Finally, the Application is not premature and the suit is not an abuse of the court process.

The consequence of dismissing the PO herein is that the Notice of Motion dated 29th March 2021 and the OS of the same date shall be heard and determined on merit. Each party to bear own costs.

DATED, SIGNED AND DELIVERED THIS 23RD SEPTEMBER,2021

S. N. MUTUKU

JUDGE