



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**(Coram: A. C. Mrima, J.)**

**MATRIMONIAL CAUSE NO. 2 OF 2020**

**GKS.....APPLICANT**

**-VERSUS-**

**JMBB.....RESPONDENT**

**RULING NO. 1**

1. This ruling is in respect of the Respondent's Notice of Preliminary Objection dated 27/07/2020 (hereinafter referred to as '**the objection**'). The objection was set out as follows: -

**1. That this Honourable court lacks jurisdiction to entertain both Originating Summons and Notice of Motion dated 22<sup>nd</sup> July 2020 as no marriage ever existed, none has been found and none has been dissolved between the Applicant and the Respondent to enable this Honourable Court to deal with such matters as placed before it.**

**2. Filing a suit for separation cannot be the basis for filing the O.S. and the said motion dated 22<sup>nd</sup> July 2020 as such can only lie after dissolution of marriage.**

**3. The O.S. and the motion are bad in law and incurably defective as they offend the mandatory provisions of Matrimonial Property Act.**

2. A brief background of the objection is befitting. The Applicant herein, GKS, instituted *Kehancha Principal Magistrates Maintenance Cause No. 4 of 2020* (hereinafter '**the suit**') against the Respondent herein, JMBB. The suit was on separation and maintenance.

3. Before the suit was heard, the Applicant moved this Court by way of an Originating Summons (hereinafter "**the O.S.**"). The O.S. was dated 22/07/2020 and sought the following: -

**1. That an injunction do issue restraining the Respondent by himself, his servants, agents, offspring or howsoever otherwise from evicting, expelling or in any way removing the Applicant and/or her children from her matrimonial home.**

**2. That an order do issue declaring that the Applicant has equal beneficial interest in the property and the proceeds from the join matrimonial properties listed below;**

**a) Part of BUKIRA/BWISABOKA/ [...] measuring app 1/2 an acre.**

**b) Building on the said parcel of land**

**c) Crops i.e. maize on 1 acre leased farm**

**d) Cattle i.e. 12 sheep, 1 cow**

**e) Household items in the house**

**3. That an order do issue declaring that all the above properties in the possession of the Respondent and of which some are in the name of the Respondent are held on trust of the Applicant.**

4. That an order do issue declaring that the Applicant is entitled to 50% of all properties, income or proceeds therefrom and properties held in trust for her.

5. That the Honourable court be pleased to grant such further or other reliefs as may be just in the circumstances.

6. That the Respondent be ordered to pay costs of this suit.

4. Contemporaneously with the O.S. the Applicant filed a Notice of Motion dated 22/07/2020 (hereinafter referred to as '**the application**'). The application was brought under certificate of urgency and sought the following orders: -

(a) That this application be certified as extremely urgent and be heard ex parte at the first instance.

(b) That pending the hearing and determination of this Application, this Honourable Court be pleased to issue an order of injunction restraining the Respondent from threatening the life of eh Applicant herein.

(c) That pending the hearing and determination of this suit, this Honourable Court be pleased to order an injunction against the Respondent from threatening the life of the Applicant herein.

(d) That pending the hearing and determination of this Application, this Honourable Court be pleased to order an injunction against the Respondent herein to refrain from threatening to evict and/or allow the Applicant unconditional access to her matrimonial home and property within which she resides with her children.

(e) That pending the hearing and determination of this suit, this Honourable Court be pleased to order an injunction against the Respondent herein to refrain from threatening to evict and/or allow the Applicant unconditional access to her matrimonial home and property within which she resides with her children.

(f) That costs of this application be provided for.

5. The objection was then filed against the O.S. and the application.

6. Directions were taken on the hearing of the objection and the application. Since the objection was in respect of the jurisdiction of this Court, this Court directed that the objection be first heard and determined.

7. The objection was orally heard. Counsel *Mr. Kisera* appeared for the Respondent whereas Counsel *Miss Okota* appeared for the Applicant.

8. In his address to Court, Mr. Kisera submitted that this Court was not seized of jurisdiction to deal with both the application and the O.S. Counsel submitted that **Section 7** of the **Matrimonial Property Act, 2013** (hereinafter referred to as '**the Act**') is couched in mandatory terms and a Court can only deal with the distribution/apportioning of matrimonial property only after dissolution of a marriage between the spouses.

9. He further submitted that the issue of marriage between the parties herein was not settled. Counsel pointed out that there were no proceedings, pending or otherwise, for dissolution of the marriage, if at all any existed. According to Counsel even the suit could not be treated as a proceeding for dissolution of marriage since it was only on separation and maintenance.

10. As regards the declaratory orders sought in the O.S., Counsel submitted that the same could not issue without first ascertaining the parties' rights. He argued that **Section 17** of the **Act** called for evidence of marriage as a first point of call after which it must be proved that the property was matrimonial property.

11. Counsel further submitted that the O.S was prematurely filed since there was no evidence of marriage and divorce between the parties. To that end he relied on the decisions in **Kajiado High Court (O.S) No. 3 of 2018 TMW -vs- FMC (2018) eKLR**, **Eldoret High Court Civil Case no. 84 of 2018 JJC -vs- SC (2019) eKLR** and **Machakos High Court Civil Case No. 23 of 2018 MWM -vs- EMK (2019) eKLR**.

12. Counsel prayed that the objection be allowed and the application and the O.S. be struck out with costs.

13. In response, Miss. Okota submitted that the O.S. and the application were both properly before Court. Counsel pointed out that the O.S. sought declarations of the parties' rights and not division or distribution of the matrimonial property. Counsel further relied on **Nairobi High Court Civil Case No. 53 of 2014 FNK -vs- DKN (2014) eKLR** where the Court stated that any party can approach the Court under **Section 17** of the **Act** for declaration of rights in property regardless of existence of any suit. Counsel also relied on **Milimani High Court Civil Court No. 46 of 2012 MNW -vs- WNM & 3 Others (2013) eKLR** where the Court distinguished between declarations of rights and division of property.

14. While seeking to buttress the import of **Section 17(2)(c)** of the **Act**, Counsel referred to **Kisumu High Court Civil Case No. 14 of 2017 M.O -vs- A.O.W.**, and submitted that a Court ought to grant a right and protect it.

15. Counsel further submitted that the questions as to whether parties were married or not and whether the property is matrimonial property were factual issues and could not be determined by way of the objection.

16. It was also submitted that **Article 45(3)** and **27(3)** of the **Constitution** gave parties equal rights at, during and on dissolution of marriage and protected marriages respectively.

17. Counsel prayed that the objection be dismissed an interim reprieve be granted to the Applicant as prayed for in the application.

18. In his rebuttal, Mr. Kisera submitted that the capacity to move Court under **Section 17** of the **Act** was predicated on a confirmed existence of marriage. He further distinguished **Kisumu High Court Civil Case No. 14 of 2017 M.O -vs- A.O.W** in arguing that unlike in this case there was no dispute as to the existence of marriage and matrimonial property in that case. Counsel prayed that the objection be sustained.

19. This Court has carefully read and understood the objection, the pleadings, the rival submissions and authorities relied on.

20. I therefore discern two issues for determination. They are: -

**i. Whether the objection is properly before the Court.**

**ii. If (i) above is answered in the affirmative, whether this Court has jurisdiction to deal with the O.S. and the application.**

21. I will first deal with the propriety of the objection.

22. In **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** Law, J had the following to say: -

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

16. In **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** the Court stated that: -

*The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.*

17. Before I leave this discourse, my attention has been drawn to the words of **Hon. Ojwang, J** (as he then was) in **Oraro vs- Mbaja (2005) KLR 141** where after quoting the statement of Law, JA. in the **Mukisa Biscuits case (supra)** went on to stay that: -

*A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point...*

*Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....*

23. The foregone is the settled law on preliminary objections. I will now subject the objection in this case to the law.

24. The objection is three-pronged. The first limb is that the marriage between the parties was yet to be proved.

25. Drawing from for the above legal guidance, this limb must fail. I say so since the limb is based on a disputed fact. The disputed fact being whether the parties herein were legally married. As well put by **Ojwang, J** (as he then was) '..... anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence'.

26. The second limb was that the O.S. was prematurely filed before the marriage between the parties, if any, was dissolved. This limb was predicated on **Section 7** of the **Act**. This limb passes the bar of a proper objection in law.

27. The third limb reinforced the second limb. I will hence consider it in tandem with the second limb.

28. The upshot is therefore that the first limb of the objection is a non-starter. It is hereby disregarded. However, the second and third limbs are for consideration.

29. The significance of a Court's jurisdiction always remains at the very fore in every dispute. Court's jurisdiction must be ascertained at the earliest stage.

30. Speaking on the jurisdiction of a Court, My Lordship **Ibrahim, JSC** in **Supreme Court of Kenya Civil Application No. 11 of 2016**

**Hon. (Lady) Justice Kalpana H. Rawal vs. Judicial Service Commission & Others** in demystifying jurisdiction quoted from the decision in **Supreme Court of Nigeria Supreme Case No. 11 of 2012 Ocheja Emmanuel Dangana vs. Hon. Atai Aidoko Aliusman & 4 Others** where **Walter Samuel Nkanu Onnoghen, JSC** and expressed himself as follows: -

*...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...*

31. The Court of Appeal in the case of **Kakuta Maimai Hamisi -vs- Peris Pesi Tobiko & 2 Others (2013) eKLR** had the following to say on the centrality of the issue of jurisdiction: -

*So central and determinative is the jurisdiction that it is at once fundamental and over-arching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.*

32. In **Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1**, it was stated that:

By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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.

33. On the sources of a Court's jurisdiction, the Supreme Court of Kenya in **Samuel Kamau Macharia & Another vs. Kenya Commercial Bank Limited & others (2012) eKLR** stated as follows:

*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. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.*

34. As stated, the second and third limbs were based on **Section 7** of the **Act**. The provision states 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.

35. The O.S. was *inter alia* brought under several provisions of the **Constitution** and **Sections 2, 6,7, 9, 14** and **17** of the **Act**. I have above reproduced the prayers sought in the O.S. As said the prayers sought are declaratory in nature.

36. **Section 17** of the **Act** 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.**

*(emphasis added).*

37. I believe **Section 17** of the **Act** settles the second and third limbs of the objection.

38. Be that as it may, Courts have also interrogated the said provision.

39. Addressing the nature of **Section 17** of the **Act** in **Nairobi Civil Appeal No. 128 of 2014 PNN vs ZWN [2017] eKLR** the Court of Appeal stated as follows:

*An inquiry may thus be made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in Petit vs. 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 one spouse to another. In a question as to title to property, the question for the court was whose is this? And not to whom shall it be given?*

40. The Court added: -

The purpose of the Section [17 of the Act] is not to defeat rights but to provide a machinery for ascertaining rights and once ascertained, then the register would be changed to take account of them.

41. The High Court in **NCK -vs- GVK [2015 eKLR]** the Court while distinguishing proceedings under **Section 7** of the **Act** from those under **Section 17** of the **Act** expressed itself as follows: -

*12. 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 1996 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 v 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. Further in L (Children), RE [2012] EWCA CIV 721 where a married couple were having considerable differences to the point of not being able to cohabit together, the judge issued an occupation order pursuant to section 33 of the Family Law Act 1996 requiring the husband to vacate the matrimonial home forthwith and to remain from it until a certain period, and gave a shared residence order.*

*13. 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 that is pending, or where, for whatever reason, he can no longer live together with the other spouse but is not seeking to divorce, come to court to resolve any questions about the beneficial entitlement to their property. He can seek declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. The court will declare each party's beneficial interest in the matrimonial property without severing the same. Such a declaration is not, in my view, inconsistent with Article 45(3) of the Constitution of Kenya 2010. In other words, both sections 7 and 17 of the Matrimonial Property Act 2013 are consistent with, and seek to reinforce, Article 45(3). One deals with the distribution of matrimonial property upon divorce and the other protects the rights of spouses in relation to matrimonial property where the marriage is still in existence. Once again, the court is not dealing with an application under section 17 of the Matrimonial Property Act 2013.*

42. And, in **Nairobi High Court Civil Suit 14 of 2013 (O.S) CK v AGM [2018] eKLR** the Court held as follows: -

*23. The above case demonstrates that a declaration under section 17 of the repealed Act is not pegged on the subsistence of a marriage. The effect of this section is such that the court can make a declaration with regard to the suit property in this case even though the parties are still married, it does not however provide for the sharing of such property.*

*24. The Applicant cited the court's lack of jurisdiction to distribute matrimonial property under section 7 of the Matrimonial Property Act during the subsistence of a marriage. The contested originating summons was however brought under the equivalent of section 17 of the Act, which is not dependent on the status of a marriage. In this case therefore, I find that this court is properly equipped with jurisdiction to resolve any questions about the parties' beneficial entitlement to suit property without severing the property.*

43. I am in total agreement with the foregone interpretation of **Sections 7** and **17** of the **Act**. For clarity, proceedings under **Section 17** of the **Act** are not only pegged on instances where the marriage is challenged. Such proceedings may be instituted even in the happiest of all marriages where a spouse can freely approach the Court under **Section 17** of the **Act** for appropriate declarations.

44. The above discussion certainly brings to the fore that the objection was misconceived. Respectfully, the objection was predicated on **Section 7** of the **Act** whereas the O.S. was brought in line with **Section 17** of the **Act**. The objection remains ill-founded.

45. I therefore find and hold that this Court is seized of the requisite jurisdiction to deal with the O.S.

46. Having so held, this Court shall as well consider interim reliefs as per the order made on 06/08/2020 and in line with *inter alia* **Articles 27(3), 28, 43 and 45** of the **Constitution**.

47. In the end, it is my sincere hope that the Counsels and the parties in this matter will take steps towards amicable resolution of the dispute.

48. The following orders do hereby issue: -

(a) **The Notice of Preliminary Objection dated 27/07/2020 be and is hereby dismissed with costs.**

(b) **An injunction be and is hereby issued restraining the Respondent herein, JMBB, from in anyway whatsoever threatening the life of the Applicant herein. GKS.**

(c) **The Respondent is hereby further ordered to grant the Applicant herein and her children unconditional access to the matrimonial home pending the hearing and determination of the Notice of Motion dated 22/07/2020.**

(d) **The Respondent is hereby granted leave to file and serve his response to the Notice of Motion dated 22/07/2020 within 14 days of this ruling.**

(e) **The Applicant is granted corresponding leave to file and serve a Supplementary Affidavit, if need be, within 14 days of service of the response by the Respondent.**

(f) **The Notice of Motion dated 22/07/2020 shall be heard by way of written submissions. To that end, the Applicant shall file and serve her written submissions within 14 days of (e) above.**

(g) **The Respondent shall file and serve his written submissions within 14 days of service of the Applicant's submissions.**

(h) **This matter shall be fixed for highlighting of the submissions on 4/11/2020.**

(i) **As this ruling is delivered by way of email transmission, I hereby grant leave to appeal to the Respondent in case he intends to prefer an appeal against the ruling.**

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of August 2020.**

**A. C. MRIMA**

**JUDGE**

**Ruling delivered electronically through: -**

1. [roabisai@yahoo.com](mailto:roabisai@yahoo.com) for the firm of Messrs. Abisai & Company Advocates for the Applicant.
2. [omondekiserawakili@yahoo.com](mailto:omondekiserawakili@yahoo.com) for the firm of Messrs. Omonde Kisera & Company Advocates for the Respondent.
3. Parties are at liberty to obtain hard copies of the ruling from the Registry upon payment of the requisite charges

**A. C. MRIMA**

**JUDGE**