



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERUGOYA

CIVIL CASE NO. 2 (O.S) OF 2019

EWM.....PLAINTIFF/APPLICANT

VERSUS

NMM.....DEFENDANT/RESPONDENT

RULING/DIRECTIONS

1. The Matrimonial Property Act No. 49 of 2013 was enacted to provide for the rights and responsibilities of spouses in relation to Matrimonial Property and for connected purposes, when their marriage has been dissolved.

2. **Section 7** provides that 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.

3. The procedure for application is provided under **Section 17**. It provides that:

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.

This signifies a petition is not the only mode of bringing a matrimonial action before the court.

4. In **EJT v JKL [2019] eKLR** the court was faced with a preliminary objection to strike out the plaint as the matrimonial property cause ought to have been instituted by way of an O.S application and not a plaint. The court gave reference to **Milcah Munich Munoko v Lawrence Ochokolo Oduma [2016] eKLR** that held

“The Court noted, and as also pointed out by both Parties, that the Matrimonial Property Act does not give the procedure or the mode of institution of any such proceedings under the Act and the same has thus been left to the parties and the Courts. It follows therefore that there is no explicitly outlined procedure to be followed in instituting proceedings under the Act and hence, this Court cannot dismiss a litigant on the basis that he or she ought to have instituted such proceedings using a particular mode as opposed to another.”

The court also gave reference to Article 159 and upheld substance over form or technicalities.

5. In **AKK v PKW [2020] eKLR** the Court of Appeal overturned a ruling on a preliminary objection where the respondent had challenged the Originating Summon application brought by the appellant for determination of matrimonial property on the grounds that a divorce had not been concluded thus the High Court lacked jurisdiction to determine the matrimonial property. The Court of Appeal held that **relying on Section 17 of the Act the court is not limited in respect to the declaration of rights of a spouse’s interest in matrimonial**

property. A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that an application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. 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.

6. In essence the Court dismissed the preliminary objection and held that a matrimonial action brought by way of an application can issue declaratory orders on the beneficial interest of each party to the matrimonial property.

7. By the above, it is evident that a party may bring an action for declarations under **Section 17** by any format may it be by Plaint, Petition, Originating Summons (O.S) or even by an application- courtesy of **Article 159 (2)(d) of the Constitution**.

8. I am therefore persuaded that the Originating summons filed hereto is competently before the court.

I shall not deal with the merits of the suit at this stage. Let the parties move the court for further progression of the cause.

Dated, Signed and Delivered at Kerugoya this 17th Day of December, 2020.

J. N. MULWA

JUDGE