



**REPUBLIC OF KENYA**

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

**FAMILY DIVISION**

**HCCC 75 OF 2014**

**MWM.....APPLICANT**

**VERSUS**

**HM & ANOTHER.....RESPONDENTS**

**RULING**

**PRELIMINARY OBJECTION**

By an application of Preliminary Objection filed on 16<sup>th</sup> July 2015, the Respondent raised the following issues;

1. There exists no valid divorce decree and therefore this Honorable Court cannot entertain an application seeking to sever matrimonial property;
2. The Application contravenes **Section 7 of the Matrimonial Property Act, 2013 and Section 60, 61 and 65 of the Marriage Act 2014**
3. The grounds are that the legality, enforceability and authenticity of the divorce decree are in issue.
4. The divorce decree ought to be registered in the Marriage Registry and the Registrar satisfied with the recognition of the foreign decree.
5. The Registrar of Marriages is deemed by design to determine the validity of a divorce decree.
6. The divorce decree was pursuant to a ground of divorce not recognized by Kenyan Law; incompatibility is not a ground for divorce in Kenyan Law.
7. The Applicant left the home 15 years ago for the US. She came back after developments had been carried out on the matrimonial property and she did not participate in these developments. She wants to reap where she did not contribute to the developed property.

The Respondent filed a Reply in form of skeleton submissions filed on 6<sup>th</sup> October 2015 and alluded to the following;

1. The divorce decree's validity can only be challenged in the Court that issued the same, **Kansas Family Court in HCDC No.02D 6109**
2. The divorce decree does not contravene **Section 7 of the Matrimonial Property Act 2013**, as it is a valid order of the Court. The marriage is dissolved, they have separated for 13 years and the Respondent has remarried.
3. **Section 60 & 61 of the Marriage Act 2014** does not make it mandatory that a divorce decree to be valid must be registered with the Registrar of Marriages. It is discretionary as the relevant provision uses the word '**may**' not '**shall**'.

4. The Application is not bad in law but properly filed before Court.
5. The definition of a Preliminary objection has been settled in the celebrated case of;

**MUKISA BISCUITS MANUFACTURING Co LTD vs WESTEND DISTRIBUTORS [1969] E.A. 696**  
where the Court held 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’***

In **ORARO VS MBAJA [2005] 1KLR** The Court held;

***‘A preliminary objection is now defined as and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event to be proved through the processes 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 that the Court should allow to proceed. Where a Court needs to investigate facts a matter cannot be raised as a preliminary point.’***

This Court finds from the Preliminary point raised it is not purely a matter of law. The crux of this matter is whether there is a valid divorce decree to pave way for division of matrimonial property proceedings. It is contended that for all intents and purposes the parties’ marriage is dissolved as they have separated for a long time. The issue of validity of the divorce decree is not within the purview of this Court.

Since the divorce decree is challenged, it is a matter of both law and facts and the facts require proof of evidence. It is also a matter of law and fact that the parties’ marriage is dissolved as required by **Section 7 of the Matrimonial Property Act 2013**

At this juncture then, the Preliminary objection is not upheld and the validity of the decree may be sought before the Trial Court or with the Registrar of Marriages as required by **Sections 60 & 61 of the Marriage Act 2014.**

The Preliminary Objection is dismissed, parties to pursue validity of the decree and or at the hearing of division of matrimonial property confirm to Court through evidence that the marriage is dissolved.

No orders as to Costs.

**DELIVERED DATED & SIGNED IN OPEN COURT ON 16<sup>th</sup> NOVEMBER, 2015**

**M.W. MUIGAI**

**JUDGE**

***In presence of;***

***Ms. Ng’ang’a for the Applicant***

***Counsel for the Respondent Absent***