



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

Hccc No. 58 Of 2014(O.S.)

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, 2013

AND

IN THE MATTER OF THE LANDS REGISTRATION ACT

A K N.....APPLICANT

VERSUS

J N M.....RESPONDENT

RULING

1. The Applicant by a Notice of Motion dated 3rd September, 2014 and brought under Section 3A of the Civil Procedure Act, Order 40 Rules 1, 2 and 3 of the Civil Procedure Rules, Sections 2, 6, 7, 8, 9, 12 and 17 of the Matrimonial Property Act 2013, Section 93(3) of the Land Registration Act and all other enabling provisions of the Law, sought several injunctive orders.
2. To that application, the Respondent by a Notice of Preliminary Objection dated 10th September, 2014 and filed in Court on 11th September, 2014, raised the following issues:
 - a. That this Honorable Court has no jurisdiction to entertain and hear the Originating Summons dated 3rd September, 2014, the Chamber Summons Application dated 3rd September, 2011, the Notice of Motion Application dated 3rd September, 2014 on account of the decree of divorce granted by the Honorable Court on 12th August, 1983 between the Applicant and the Respondent in Divorce Cause No. 5 of 1983 J N M vs. A K J.
 - b. That this Honorable Court has no jurisdiction to entertain and hear the Originating Summons dated 3rd September, 2014, the Chamber Summons Application dated 3rd September, 2014, the Notice of Motion Application dated 3rd September, 2014 on account of the fact that the Applicant and Respondent are not man and wife.
 - c. That the constitution of Kenya, 2010, Matrimonial Property Act, 2013 (No. 49 of 2013) of and the Land Registration Act, 2012 (No. 3 of 2012) do not have a retrospective application in law.
 - d. That the constitution of Kenya, 2010, Matrimonial Property Act, 2013 (No. 49 of 2013) of and the Land Registration Act, 2012 (No. 3 of 2012) do not have a retrospective application in law to a marriage that was dissolved on 12th August, 1983.

3. It was directed that the Notice of Preliminary Objection be heard first. It was heard on 26th September, 2014. Mrs. Judy Thongori appeared for the Applicant and Mr. Ochieng Oduol for the Respondent.
4. It is trite law that a preliminary objection should be based on pure points of law. Law JA in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 rendered himself thus:

“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 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.*”

5. Similarly Sir Charles Newbold in the same case said:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”

6. In *Oraro vs. Mbaja* [2005] 1 KLR 141 Ojwang, J (as he then was) expressed himself as follows on preliminary objections:

“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. The first matter relates to increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is 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 issues and this improper practice should stop... The principle is abundantly clear. A “preliminary objection” correctly understood, is now well 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 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...”

7. **This court is of the considered view that the issues raised in the Preliminary Objection herein are of a nature that would apparently require calling of evidence, it raises questions of fact and law in regard to which both the Applicant and Respondent are in several respects**

in disagreement. The court has to establish whether or not there is marriage relationship as to between the parties. The Preliminary Objection is thus not sustainable. A party, who raises a Preliminary Objection, must do so only on a pure point of law and nothing else.

8. Patently, the issues raised by the Respondent in the Preliminary Objection are contested by the Applicant; this court will therefore have to investigate these disputed facts. The Preliminary Objection does not meet what Law JA envisaged in the *Mukisa Biscuit case* cited above. Even though it is not disputed that a decree of divorce was granted in 1983, there are allegations of cohabitation, allegations which the court must investigate and a decision can only be made on the basis of a full knowledge of these facts such as can only be obtained from the proceedings on the merits. The court would then make a determination as to presumption of marriage based on the evidence so adduced before it. The court is therefore not satisfied that a proper preliminary objection has been raised or argued before it as would, if upheld, lead to the disposal of the suit.
9. It was submitted by Mr. Ochieng Oduol that the applicant ought to have obtained a declaration of marriage first before presenting the application for division of matrimonial property. That is not entirely necessary. I agree with the submission by Mrs. Thongori that the issue as to whether there existed a valid marriage between the parties can be dealt with within the suit for division of matrimonial property. The practice at the family court, with respect to probate and division of matrimonial property is that where a claim is founded on a marriage which is contested the party alleging marriage proceeds to prove the marriage within the proceedings without having to commence separate proceedings for a declaration that a marriage existed between her and the other party.
10. In light of the above and in the interest of administration of justice, the Preliminary Objection cannot stand. Consequently, this Court disallows the Respondent's Preliminary Objection dated 10th September 2014. The Applicant will have the costs of the Preliminary Objection.

DATED, SIGNED and DELIVERED at NAIROBI this 28th DAY OF October 2014.

W. MUSYOKA

JUDGE

In the presence of Mrs. Thongori advocate for the applicant.

In the presence of Mr. Ochieng Oduol, Ms. Andrew Karani and Ms. Mary Sheila Oduol advocates for the respondent.