



**Misigo v Achesa (Environment & Land Case 357 of 2016)
[2023] KEELC 16110 (KLR) (14 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16110 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 357 OF 2016**

JM ONYANGO, J

MARCH 14, 2023

BETWEEN

PHYLIS IMINZA MISIGO PLAINTIFF

AND

VICTOR KHAMUYA ACHESA DEFENDANT

RULING

1. This ruling is in respect of the Defendant's Preliminary Objection dated May 18, 2021 in which he raises the following grounds:
 - i. That the parties herein who are spouses of marriage have not divorced or otherwise dissolved their marriage hence this suit offends section 7 of the *Matrimonial Property Act*.
 - ii. That the Honourable court has no jurisdiction to entertain the instant suit as it is a matrimonial property cause which falls outside the scope of the jurisdiction of the Environment and Land Court as outlined in section 13 of the *Environment and Land Court Act* and under Section 17 of the *Matrimonial Property Act*.
2. Upon being served with the Notice of Preliminary Objection, the Plaintiff filed Grounds of Opposition and a Replying Affidavit in which he deponed that the Preliminary Objection was misconceived, a waste of valuable judicial time and contrary to laid down principles. He also filed a Replying affidavit in which he averred that the Defendant had previously filed a similar Preliminary Objection through his previous advocate but the same had been withdrawn.
3. The Preliminary objection was canvassed by way of written submissions and both parties filed their submissions.



4. Before delving into the merits of the Preliminary Objection it is important to examine whether the P.O meets the definition of a P.O as set out in the case of *Mukisa Biscuit Company Ltd v West End Distributors Limited* (1969) E.A 696. In the said case 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, 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.

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 Preliminary objections does nothing but unnecessarily increase the costs and occasions confusion of the issues. This improper practice should stop.

5. In the instant case the Defendant has raised the question of jurisdiction which is a pure point of law. He has contended that this court lacks jurisdiction to hear and determine this suit as it is a matrimonial property cause which falls outside the scope of the jurisdiction of the Environment and Land Court as outlined in section 13 of the *Environment and Land Court Act* and under Section 17 of the *Matrimonial Property Act*. The second point raised by the Defendant is that the suit offends the provisions of section 7 of the *Matrimonial Property Act*.

Defendant’s Submissions

6. In his submissions in support of the Preliminary Objection learned counsel for the defendant relied on the provisions of section 7 of the *Matrimonial Property Act* which presupposes that matrimonial property can only be divided if the parties to a marriage divorce or the union is dissolved. He contended that plaintiff and defendant had co-habited for over 20 years and a presumption of marriage therefore arose in line with the case of *Yawveh v Public Trustee*. However, they had not dissolved their union in order for them to apply for their matrimonial property to be divided.
7. He further submitted that section 13 of the *Environment and Land Court Act* sets out the jurisdiction of the Environment and Land Court and it does not mention cases dealing with division of matrimonial property. He added that the *Matrimonial Property Act* provides that a person may apply to court for a declaration of rights to any property contested between that person and a spouse or former spouse. He was of the view that the court referred to in the *Matrimonial Property Act* was the High Court as it had been the practice in Kenya for matrimonial property cases to be filed in the High Court. He relied on the cases of *EJT v JKL* (2019) eKLR and *Owners of the Motor Vessel Lillian “S” v Caltex Oil (Kenya) Ltd* (1989) eKLR.

Plaintiff’s Submissions

8. On the other hand, learned counsel for the Plaintiff submitted that the Preliminary Objection was based on disputed facts that could only be ascertained through a hearing. He referred to paragraph 3 the Plaintiff where the Plaintiff pleaded that she is married to the Defendant under Luhya (Tiriki) customary laws. He further submitted that the properties referred to by the Plaintiff were matrimonial properties and that she was entitled to equal ownership to the same by virtue of her contribution thereto. It was his contention that in his defence, the defendant denied the existence of a valid marriage and asserted that he is the sole proprietor of the properties in question. He submitted that parties are bound by



their pleadings and the defendant should not be allowed to depart from his pleadings by alleging that the parties are spouses to a marriage. It was his contention that since the plaintiff's suit is based on the [Matrimonial Property Act](#) where the existence of marriage is fundamental, the court would have to determine whether there is a marriage. This would therefore remove the P.O from the definition in the Mukisa Biscuits case.

9. On the question of the court's jurisdiction counsel argued that the court would not limit itself to section 7 of the [Matrimonial Property Act](#) but it would have to address the nature of reliefs sought as contemplated under section 17 of the Act. He argued that section 17 of the [Matrimonial Property Act](#) enables a spouse to make an application for declaratory orders with regard to his or her right to matrimonial property, subsistence of marriage notwithstanding.
10. He relied on the case of [Gladys Muthoni Kibui v Geoffrey Ngatia](#) (2021) eKLR where the Environment and Land Court held that it had jurisdiction to determine the dispute relating to matrimonial property so long as the dispute related to use, title and occupation to land. In the said case the court relied to the case of [Jane Wambui Ngeru v Timothy Mwangi Ngeru](#) (2015) eKLR where the court observed that no particular court is identified under the [Matrimonial Property Act](#) as having jurisdiction to determine matrimonial disputes and that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including the Land and Environment Court.
11. Counsel concluded that since the suit herein is not seeking division of matrimonial property but a declaration of the interest and right of the plaintiff in the properties under dispute, the same falls within the jurisdiction of this court.

Issues for determination

12. Having considered the Preliminary Objection, Grounds of Opposition, affidavits and rival submissions the issues for determination are;
 - i. Whether the suit offends section 7 of the [Matrimonial Property Act](#)
 - ii. Whether the court has jurisdiction to hear and determine this suit.

Analysis and Determination

13. With regard to the first question, section 7 of the [Matrimonial Property Act](#) 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.”
14. It is clear that parties to a marriage can only invoke the provisions of section 7 of the [Matrimonial Property Act](#) for division of matrimonial property upon divorce or dissolution of marriage. In the instant suit the marriage has not been dissolved although the defendant is said to have abandoned the plaintiff. In the circumstances therefore, it would be premature to invoke the provisions of section 7 of the [Matrimonial Property Act](#). In the case of [EJT v JKL](#)(20019 eKLR the court held that:

“What the plaintiff seeks is essentially the distribution of the property between herself and the husband but by virtue of the fact that they are not yet divorced, the property between them cannot be distributed between them”
15. The second question for determination is whether this court has jurisdiction to grant the reliefs sought by the plaintiff. According the plaint it is clear that that the Plaintiff is seeking declaratory orders



with regard to her rights to matrimonial property. This is in line with section 17 of the [Matrimonial Property Act](#).

Section 17 of the [Matrimonial Property Act](#) provides that;

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- (1) A person may apply to court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of that person.
- (2) An application under (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.

16. In the instant suit, the plaintiff has applied for a declaration that she is entitled to equal rights in respect of all properties acquired during their marriage and that the properties mentioned in the plaint be registered jointly in the names of the plaintiff and the defendant. As correctly submitted by counsel for the plaintiff a plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders.

In *PNN vs. ZWN* [2017] eKLR, Waki, JA stated that:

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.

17. As to whether this court has jurisdiction to hear and determine cases under the [Matrimonial Property Act](#), I am persuaded by the decision in the case of [Gladys Muthoni Kibui v Geoffrey Ngatia](#) (2021) eKLR where the Environment and Land Court held that it had jurisdiction to determine the dispute relating to matrimonial property so long as the dispute related to use, occupation of and title to land. In the said case the court relied to the case of [Jane Wambui Ngeru v Timothy Mwangi Ngeru](#) (2015) eKLR where the court observed that no particular court is identified under the [Matrimonial Property Act](#) as having jurisdiction to determine matrimonial disputes and that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including the Land and Environment Court.

18. This court’s jurisdiction is set out under Article 162 (2) (b) of [Constitution](#) which provides that:

“Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to



(b) the environment and the use and occupation of and title to land.”

19. Furthermore, the Environment and Land Court has the mandate to hear disputes relating to environment and the use and occupation of, and title to land.

Section 13 (1) of *Environment and Land Court Act* which elaborates the jurisdiction of the Court, provides that:

“The Environment and Land Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the *Constitution* and with the provisions of this Act or any other written law relating to environment and land.

- (2) In exercise of its jurisdiction under Article 162(2) (b) of the *Constitution*, the court shall have power to hear and determine disputes relating to environment and land, including disputes
- (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure boundaries, rates, rent, valuations, mining minerals and other natural resources.
 - (b) relating to compulsory acquisition of land
 - (c) relating to land and administration management
 - (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land
 - (e) any other dispute relating to environment and land

Section 13(7) of the Act provides that :

In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including –

- a. interim or permanent preservation orders including injunctions;
- b. prerogative orders;
- c. award of damages;
- d. compensation;
- e. specific performance;
- f. restitution;
- g. declaration; or
- h. costs

20. What can be discerned from the above-mentioned authorities and provisions of the law is that parties do not have to be divorced for the court to issue declaratory orders in respect of their rights to matrimonial property. Additionally, since the *Matrimonial Property Act* does not specify which court has jurisdiction to determine disputes relating to matrimonial property rights, the Environment and Land Court whose mandate covers disputes touching on use and occupation of, and title to land has



jurisdiction to issue declaratory orders on the rights of parties to matrimonial property during the pendency of a marriage.

21. In view of the foregoing, the Preliminary Objection lacks merit and it is hereby dismissed. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 14TH DAY OF MARCH 2023.

J.M ONYANGO

JUDGE.

In the presence of;

Miss Muthami for Mr. Amasakha for the Plaintiff

Miss Ruto for the Defendant

