



**LNM v NMD (Environment & Land Case E001 of 2022)  
[2023] KEELC 18804 (KLR) (10 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18804 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ISIOLO  
ENVIRONMENT & LAND CASE E001 OF 2022  
PM NJOROGE, J  
JULY 10, 2023**

**BETWEEN**

**LNM ..... PLAINTIFF**

**AND**

**NMD ..... DEFENDANT**

**RULING**

1. The notice of Preliminary Objection (PO) in this matter takes the following format:

"Notice of Preliminary Objection

Take Notice That;

1. That the plaintiff's claim falls under section 17 of the Matrimonial Properties Act, 2013 which is under the Jurisdiction of the High Court.
2. That the Plaintiff's claim is time-barred having been brought outside the statutory limitation of 12 years in view of Section 7 of the Limitation of Actions Act.
3. That the Plaintiff's suit is *res-judicata* and therefore incompetent, bad in law, barred in law and an abuse of the court process in that Nairobi High Court Civil Case OS No 439 of 2003 and Meru High Court ELC Case No 19 of 2020, involving the same parties and same subject matter, were competently dealt with and dismissed for want of prosecution thus it offends the provisions of Section 7 of the Civil Procedure Act.

Dated at Meru this 23<sup>rd</sup> day of January 2023

For: Kiogora Mugambia Co Advocates



For The Defendant"

2. The Preliminary Objection was canvassed by way of written submissions.
3. The defendant in his written submissions dated February 23, 2023 for his grounds 1,2 and 3 raised assertions congruent with what is canvassed in his 3 grounds. He asserted that his grounds in support of the Preliminary Objection Constituted pure points of law as established in the classic case of *Mukhisa Biscuits Manufacturing Company Versus West End Distributors Ltd* (1960) EA 696. He also asserted that the plaintiff's case falls within the ambit of Section 17 of the *Matrimonial Properties Act*. He also says that as the suit was brought under Article 45 (3) and 27 (1) of the *Constitution* and Section 2,6,7 and 14 of the *Matrimonial Property Act*, it is not disputed that the suit herein is a Matrimonial Cause. He proffers the case of *Jane Wambui Ngeru Versus Timothy Mwangi Ngeru* [2015] eKLR for his assertion that the Plaintiff's claim falls under Section 17 of the *Matrimonial Properties Act* which is under the Jurisdiction of the High Court.
4. The defendant asserts that the claim in this suit is time barred, having been brought to court outside the statutory time for limitation of 12 years in view of Section 7 of the *Limitation of Actions Act*. He says that this raises a pure point of law regarding want of jurisdiction as no other evidence would be needed except the fact that this claim was brought to court outside the statutory limitation period. He says that paragraph 4 of the plaintiff's supporting affidavit is unequivocal "a. That our union irredeemably broke down and we divorced in the year 2002" and also states that in Paragraph 7 of his replying affidavit the defendant admits; "That sometimes in 2002 our marriage irredeemably broke down and we parted ways.....Our divorce was finalized in the Kadhis Court at Isiolo".
5. The defendant proffered the Case of *AKK Versus PKW* [2002] eKLR for his assertion that by virtue of Section 7 of the Matrimonial Properties Act the High Court cannot "Divide Matrimonial Property between spouses until their divorce or their marriage is dissolved". To me this has reference to the court's decree in Meru ELC Case No 19 of 2020 which suit was definitely filed many years after the apposite marriage had been dissolved.
6. The defendant also proffered the case of *CWM Versus JPM* [2017] eKLR for his assertion that a claim for land even when it is Matrimonial Property falls under the ambit of Section 7 of the *Limitation of Acts Act*. It should be noted that this case being a court of Appeal decision binds this court. The defendant also proffered this case for his opinion that: "It cannot also be in public interest that a party can sleep on their rights and wake up one day after 30 years to pursue a claim in land." In this case it took the plaintiff 21 years to file this claim.
7. The defendant avers that this suit is *res-Judicata* Meru ELC Case Number 10 of 2020 involving the same parties and the same subject matter. I will come back to this issue when I later consider the decree in that suit.
8. Regarding ground 1 of the Preliminary Objection, the plaintiff asserts that this court has Jurisdiction to hear this matter as it relates to land. He also says that Section 17 of the *Matrimonial Properties Act* merely states that a person may apply to a court for a declaration of rights to any property contested between the person or former spouse of the person. She proffers the case of *Jane Wambui Ngeru Versus Timothy Mwangi Ngeru* [2015] eKLR. I however, wish to point out that in this case, the court pointed out that it is the High Court which has been granted Original and Unlimited Jurisdiction in Civil matters, including Matrimonial Property matters, by the *constitution*.
9. Concerning the ground in the Preliminary Objection that the claim is statute barred, the plaintiff argues that what is contested in this matter is a claim touching on Matrimonial Property and thus not



statute barred unlike in the case of a claim for land. I do not agree. As held by the Court of Appeal in *CWM Versus JPM* [2017] eKLR, even when where a claim for land touches on Matrimonial Issues, such a claim is bound by Section 7 of the *Limitation of Actions Act*.

10. Concerning the plaintiff's assertion that this suit is not *res-judicata* Meru ELC No 19 of 2020, the plaintiff, although not denying that the parties in this case and in that case are the same, claims that the subject matters were different. She asserts that in Meru ELC No 19 of 2021, the suit was challenging an Impending Sale whereas in this suit the plaintiff is claiming a share of the Matrimonial Property. By looking at the Decree in Meru ELC No 19 of 2020, the court will be able to discern if or if not, the plaintiff is merely involved in a veritable exercise in semantics.

11. The decree in Meru ELC No 19 of 2020 records as follows:

"Decree

Claim For; -

1. An injunction and a restraining order to stop any impending sale of all the Matrimonial Properties both within and outside Isiolo Town.
2. Reverse any completed sale of the Matrimonial Properties hereinabove mentioned and maintain status quo prior to sale.
3. Equal distribution of the Matrimonial Properties between the Plaintiff and the defendant as provided for by law.
4. General damages for causing the plaintiff mental torture over her properties.
5. Costs of the suit.
6. Any other relief the court deems fit.

Issued at meru this 8th day of November, 2022

Deputy Registrar

Environment and Land Court

Meru"

12. In her submissions, the plaintiff's advocate admits that what she is claiming in this suit is her share of Matrimonial Property. In her claim in Meru ELC Case No 19 of 2020, as shown in paragraph 1,2 and 3 of the Decree, it is clear that what was in issue in that case was matrimonial property concerning the suit land. I, therefore, find that this suit is *res Judicata* Meru ELC Case No 19 of 2020.

13. From what has been discussed in the earlier part of this ruling, I unequivocally uphold all the 3 grounds proffered in the Notice of Preliminary Objection by the defendant's advocate.

14. In the circumstances, the following orders are issued;

- a. This Preliminary Objection is upheld.
- b. This suit is dismissed in its entirety.
- c. Costs shall follow the event and are awarded to the defendant.

**DELIVERED IN OPEN COURT AT ISIOLO THIS 10<sup>TH</sup> DAY OF JULY, 2023 IN THE PRESENCE OF:**



Court Assistant: Balozi

Miss Mbogo holding brief for Kiogora Mugambi for the Defendant.

Abdullahi holding brief for Zainab Jirma for the Plaintiff.

**HON. JUSTICE P.M NJOROGE**

**JUDGE**

