



**ANI v PKM (Matrimonial Cause E008 of 2024)
[2025] KEHC 223 (KLR) (21 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E008 OF 2024**

**JM NANG'EA, J
JANUARY 21, 2025**

BETWEEN

ANI APPLICANT

AND

PKM RESPONDENT

RULING

1. After this Originating Summons (“the O.S.”) was brought the Respondent took out a Notice of Preliminary Objection dated 22nd April 2024 praying for striking out or dismissal of the O.S. on grounds that;-
 1. The Originating Summons seeks the division of matrimonial property against the provisions of Section 7 of the Matrimonial Properties Act, 2013 as parties were only judicially separated on 29th November, 2023 vide Nakuru Chief Magistrate’s Separation Cause No. 66 of 2023 and the marriage has not been dissolved.
 2. The Originating Summons as filed is an abuse of the process of this Honourable Court and cannot be sustained.
2. The court directed the Preliminary point to be argued by means of Written Submissions which the parties duly filed.
3. Before analyzing the Submissions, I will set out a brief background to these proceedings. Vide the O.S the Applicant craves orders as hereunder;
 1. That an order does issue declaring 50% or such other higher proportion of the properties listed below and held jointly by the Applicant and the Respondent is for the beneficial and/ or spousal interest of the Applicant:



- a. Property Title Number Miti Mingi/Mbaruk Block 5/xxx and all the structures erected thereon, registered in the joint names of the Applicant and the Respondent.
 - b. Plot No. xxx (Agriculture) (Banita Settlement Scheme).
 - c. Furniture, fittings and other household goods including but not limited to the items bought by the Applicant.
1. That the division to separate the interest in the properties be done within 90 days from the date of judgment at the Respondent's cost.
 2. That the Respondent be ordered to transfer the Applicant's share in the property to her within 60 days from the date of division.
 3. That in default, the Deputy Registrar High Court of Kenya or the Executive Officer Nakuru Law Courts be authorized to sign any transfer documents in place of the Respondent or any other person holding any title on behalf of the Applicant to effect all the orders of this court in favour of the Applicant.
 4. That an order does issue declaring the Respondent as accountable to the Applicant in respect of all the income derived from the said properties.
 5. That this honourable court be pleased to order that the properties and the income from the same be settled in proportions aforesaid or as the court may order.
 6. That the costs of the summons be provided for.
4. By affidavit supporting the O.S, the Applicant avers that the Respondent was her husband with whom she judicially separated on 29th November, 2023 vide Nakuru Chief Magistrate's Court's Separation Cause No. 66 of 2023. She now claims 50% share of property described as Miti Mingi/Mbaruk Block 5/1947 and Plot No. 127 (Banita Settlement Scheme) among other stated assets allegedly comprising matrimonial property acquired during the subsistence of the marriage. According to the Applicant, the described real property was registered in their joint names as at 24th May 2019 while title in respect of the latter property had not been issued. The applicant contends that she contributed to the acquisition of the two properties but titles thereto remained with the Respondent after she was forced out of the matrimonial home.
 5. Learned Counsel for the Respondent submit citing the Provisions of Section 7 of the *Matrimonial Property Act*, 2013, that the court has no jurisdiction to share out Matrimonial Property whilst marriage between the parties subsists. The enactment provides;

“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.”
 6. Counsel point out that it is an undisputed fact that the parties are only judicially separated but the marriage subsists in law. By dint of Section 17 of the *Matrimonial Property Act* Cap 150 courts can only declare proprietary rights of spouses but lack jurisdiction to distribute matrimonial property when the parties are still married according to the Respondent's counsel.
 7. In support of their submissions the advocates cite various judicial determinations to wit; *AKK vs PKW* [2020] eKLR, *NCK vs GVK* [2015] eKLR; *PWM vs RM* [2021] eKLR; *AKK vs PKN* [2020] eKLR and *PWN vs ZWN* [2017] eKLR. All these decisions reiterate the legal positions that matrimonial



property cannot be distributed whilst the marriage subsists. Courts are only empowered to declare proprietary rights of spouses in respect of contested property.

8. The Applicant responds through his advocates that this claim is properly before the court. While confirming the existence of marriage relationship between the parties, Counsel submit that being a Customary Law Marriage, the union between the parties herein cannot in law be dissolved under the *Marriage Act* since it had not been registered pursuant to the Provisions of Sections 12 (a), 59 and 96 (2) and (3) of the Act. According to Counsel unregistered customary law marriages are voidable in law, with the consequence that parties thereto are deprived of the avenue to seek dissolution thereof under Section 69 of the Act. The parties may not also seek annulment of the marriage under Section 73 in the circumstances as that application can only be brought within one year of marriage, which is inapplicable in the instant matter as implied in the Applicant's Submissions.
9. The Applicant therefore contends that in light of the Judicial Separation Orders and considering that the parties have been living separately since the year 2017, the marriage has been rendered null and it is unnecessary to obtain a formal decree of divorce. The court is urged to hear and determine the suit.
10. Section 3 (1) of the *Marriage Act*, defines "Marriage" as "the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act".
11. Under Section 12 (e) of the Act, the marriage is voidable if there was a failure to register the marriage.
12. Section 55 (1) of the Same Act provides that where parties to a customary marriage "have completed necessary rituals for their unions to be recognized as a marriage under the customary law of any of the parties both shall apply to the Registrar within six (6) months of their marriage for a certificate and both shall appear in person before the Registrar to be issued with the Certificate of Marriage."
13. Section 59 of the *Marriage Act* provides that marriage may be proven by a Certificate of Marriage or a certified copy of the Certificate, or an entry in a relevant register of marriage.
14. Section 96 (2) of the Act which is also relied upon by the Applicant stipulates that parties to a customary Law Marriage that is not registered shall apply to the relevant Registrar for registration of the marriage within three (3) years of coming into force of the Act. This period may, however, be extended under Sub Section 4 by the concerned Cabinet Secretary by notice in the Gazette.
15. Whereas the Applicant concedes that her marriage with the Respondent has not been registered and is therefore voidable under the law, the Respondent retorts that the marriage subsists and has not been dissolved to pave the way for distribution of any matrimonial property.
16. The Supreme Court in the case of *Ali Hassan Joho & Another vs Suleiman Said Shabal & 2 Others* Supreme Court of Kenya Petition No. 10 of 2013 [2014] eKLR reiterated the law on preliminary objections as hereunder;

"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."
17. In *Hassan Nyanje Charo vs Khatib Mwashetani & 3 Others* [2014] eKLR it was held that;

"A Preliminary Objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest as to facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record."



18. It seems to be common ground that the union between the parties entered into under Customary Law has not been registered contrary to the requirement of the law and may thus be voidable. It is not shown when the couple solemnized the customary law marriage but they were in customary law marriage relationship between 2005 and 2017 after which they were physically separated and thereafter obtained a judicial separation order on 29th November, 2023, according to the applicant. There is no evidence showing if there was extension of time for registration of the customary law marriage between the parties. The law allows for such extension at the discretion of the Cabinet Secretary concerned.
19. Whether or not the purported customary law marriage between the parties is voidable is a matter of evidence and the issue can only be determined at trial. The respondent has not filed a defence or reply to the O.S to formally state his position. In the circumstances it is proper to allow this important matter to go to full trial so that all relevant issues of fact and law are ventilated.
20. In the result, the preliminary point is dismissed. As this is a family matter, the parties shall bear their own costs of the objection.

RULING DELIVERED VIRTUALLY THIS 21ST DAY OF JANUARY, 2025 IN THE PRESENCE OF:

J. M. NANG'EA - JUDGE

The Applicant's Advocate, Mr Abuya.

The Respondent's Advocate, Absent.

Court Assistant, Jeniffer.

