



**BNM v BNM (Originating Summons E007 of 2024)
[2025] KEHC 2081 (KLR) (Family) (13 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2081 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

ORIGINATING SUMMONS E007 OF 2024

PM NYAUNDI, J

FEBRUARY 13, 2025

BETWEEN

BNM PLAINTIFF

AND

BNM DEFENDANT

RULING

1. This ruling relates the Preliminary Objection raised by the defendant dated 17th July 2024 and framed as hereunder-
 1. That this Honourable Court does not have jurisdiction to hear and determine the Originating Summons dated 14th May 2024 pursuant to the provisions of Section 68 of the Land Registration Act and Sections 13(2)(d), 13(2)(e) and 13(5)(a) of the Environment and Land Court Act.
 2. Pursuant to the Court’s directions that the Objection be canvassed via written submissions. The defendant’s submissions are dated 4th July 2024 while those of the plaintiff are dated 22nd October 2024.
 3. The only issue for determination is whether or not the Preliminary Objection has merit.
 4. The Defendant states that this Court lacks jurisdiction to determine the matter and that the Court that has jurisdiction is the Environment and Land Court.
 5. The Originating Summons is stated to be presented under, Section 70 and 75 of the Constitution of Kenya (Now repealed) and Articles 3, 10,19,20,21,22,23 (Enforcement of Bill of Rights of the Constitution of Kenya, 2010); Articles 40 and 50 of the Constitution of Kenya; Section 17 of Married Women’s Property Act 1882, the Land Act, Sections 68 and 69 of Land



Registration Act; the Trustee Act; the Government Lands Act, Registration of Titles Act and Order 37, rule 8 and 11 of the Civil Procedure rules and Section 3A of the Civil procedure Act.

6. In his submissions the Defendant states that the provisions under which the Originating Summons is presented oust the jurisdiction of this Court.
7. The Plaintiff on the other hands asserts that since the claim herein touches on matrimonial property, this court is vested with the requisite jurisdiction and relies on the decision in EMW v RMK [2022] eKLR.
8. As correctly stated by the defendant the locus classicus case on what constitutes a preliminary objection is the decision in of Mukisa Biscuits Manufacturing Company Limited v West End Distributors (1969) EA 696, the court stated 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”.

9. This position was further elaborated in John Musakali v Speaker County of Bungoma & 4 Others (2015) eKLR where the court stated:

“ The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

10. Similarly, in the case of Oraro v Mbaja (2005) KLR 141, Ojwang J. (as he then was) quoted the Mukisa Biscuit Case and expressed himself thus:

“ A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process 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...”

11. The clear position appears to be that for a preliminary objection to meet the threshold, it must; be hinged to a point of law pleaded or arising from the pleadings; and must be founded on an understanding that the facts are agreed or undisputed; and that it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.
12. In this case the Respondents have argued that this court lacks jurisdiction to entertain the Originating Summons dated 14th May 2024.



13. Jurisdiction goes to the core of every proceeding that comes before a court of law. A court is required to down its tools in respect of a matter the moment it holds the opinion that it is without jurisdiction - see Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989) eKLR.
14. The authorities cited by the Applicant must be distinguished as they related to pleadings and proceedings initiated under the *Matrimonial Property Act*, 2014. Parties are bound by their; in the instant matter the Originating Summons is presented under the repealed provisions of the Married Women’s Property Act and other provisions as cited in paragraph *para_1 subpara_5* above.
15. The orders sought are-
 1. This Honourable Court be pleased to issue Inhibition orders on the parcels of Land being LR. No. 1208-30462 Kamulu, LR. No. Tassia/11/97/207/543 and LR.No. Tassia/11/97/207/544 in any dealings by the Defendant or any other Party without the consent of the Plaintiff.
 2. The Defendant be restrained from interfering, disposing alienating and/or dealing with the parcels of land being LR. No. 1208-30462 Kamulu, LR. No. Tassia/11/97/207/543 and LR. No. Tassia/11/97/207/544
 3. This Honourable Court be pleased to issue a determination that the Plaintiff has beneficial interests in parcels of land LR. No. 1208-30462 Kamulu, LR. No. Tassia/11/97/207/543 and LR. No. Tassia/11/97/207/544
16. The principle that parties are bound by their pleadings is well settled. Parties must plead their case before proceeding to prove it. In Daniel Otieno Migore v South Nyanza Sugar Co. Ltd [2018] eKLR, Justice A C Mrima stated:

It is by now well settled by precedent that parties are bound by their pleadings and that evidence which tends to be at variance with the pleadings is for rejection. Pleadings are the bedrock upon which all the proceedings derive from. It hence follows that any evidence adduced in a matter must align with the pleadings. Any evidence, however strong, that tends to be at variance with the pleadings must be disregarded. That settled position was re-affirmed by the Court of Appeal in the case of Independent Electoral and Boundaries Commission & Ano. vs. Stephen Mutinda Mule & 3 others (2014) eKLR which cited with approval the decision of the Supreme Court of Nigeria in Adetoun Oladeji (NIG) vs. Nigeria Breweries PLC SC 91/2002 where Adereji, JSC expressed himself thus on the importance and place of pleadings: -“.....it is now(settled) principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.
17. On account of the following, I find that the Originating Summons is incurably defective as it is presented under a repealed statute and further it is presented under the *Land Registration Act* which ousts the jurisdiction of this Court.
18. Accordingly, the Preliminary Objection is allowed.



19. Owing to the relationship between the parties, there shall be no order as to costs.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 13TH DAY OF FEBRUARY 2025.

P M NYAUNDI

JUDGE

In the Presence of

Fardosa Court Assistant

