



REPUBLIC OF KENYA



**NC v LK (Civil Suit E061 of 2023) [2025] KEHC 1666 (KLR) (Family) (7 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1666 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**FAMILY**  
**CIVIL SUIT E061 OF 2023**  
**PM NYAUNDI, J**  
**FEBRUARY 7, 2025**  
**IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT (2013)**

**BETWEEN**

**NC ..... PLAINTIFF**

**AND**

**LK ..... RESPONDENT**

**RULING**

**Introduction**

1. Vide Notice of Preliminary Objection dated 7<sup>th</sup> May 2024, the Respondent herein has raised a preliminary objection, framed as hereunder;
  1. The Honourable Court does not have jurisdiction to entertain, hear and/or determine the originating Summons.  
Reasons Wherefore, the Respondent prays that the Originating Summons and the entire suit be dismissed with costs to the Respondent.
2. The Preliminary Objection was canvassed via written submissions. The Respondent's Submissions are dated 16<sup>th</sup> September 2024, while those of the Applicant are dated 2<sup>nd</sup> October 2024.

**Summary of the Respondent's Submissions**

3. The Respondent submits that the Preliminary Objection as framed is competent and relies on the Supreme Court decision in *Hassan Ali Joho & Anor v Suleiman Said Shabhal & 2 Others* [2014] eKLR, that cited with approval the decision in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696. Reliance is also placed on the



decision in *Peter Mungai v Joseph Ngaha Kuria & Another; Leah Njeri Ndichu* (Interested Party) [2022] eKLR.

4. On the substantive Preliminary Objection, Respondent contends that the Court lacks jurisdiction as the mandate of the Court is prescribed under Section 17 of the *Matrimonial Property Act*; Rule 4 (a), 5 (1)(a) and 5(2) as well as Rule 7 of the Matrimonial Property Rules, 2022.
5. It is the respondent's submission, that the Suit herein is premature as the parties are yet to finalise the divorce and the jurisdiction of the Court vests only after a Decree Absolute has issued. He prays therefore that the Originating Summons be struck out with costs to him.

### Summary of the Applicant's Submissions

6. The Applicant contends that the Preliminary Objection does not muster the test laid down in the Mukisa test. It is submitted that the issues raised can only be ascertained by way of evidence. Reliance is placed on the decision in *UF v LCN (Civil Suit 70 OF 2018)* [2019] KEHC 5865 (KLR)
7. On Jurisdiction, it is submitted that the Respondent misapprehended the law and that the Originating Summons as presented is competent. It is submitted that the matter is well settled by judicial precedent interpreting Section 17 of the *Matrimonial Property Act*.
8. The Applicant relies on the following decisions; AKK and PKW (Civil Appeal (Application 61 of 2019) [2020] KECA (KLR) (Family) (2 October 2020) and LWN v JNM (Civil Appeal 177 OF 2017) [2023] KECA 1399 (KLR).
9. In any event the Applicant submits that given the issues at stake, the matter ought to be heard on merits and not dismissed summarily. Reference is made to the decision in *D.T. Dobie & Co. Ltd v Machina* [1982] KLR 1. The Applicant further contends that the Court by dint of Article 159 of the *Constitution* is obligated to dispense substantial justice and makes reference to the decision in *JMM v LKM* (Matrimonial Cause E001 of 2021) [2023] KEHC 2662 (KLR)

### Analysis And Determination

10. Having analysed the Preliminary Objection and the respective submissions filed, I consider the following to be the issues for determination
  1. Whether the Preliminary Objection as framed is competent
  2. Whether the Preliminary Objection has merit and should be upheld
  3. Who should bear the costs herein
11. On the 1<sup>st</sup> issue the Respondent challenges the jurisdiction of the Court. In *Samuel Kamau Macharia & another vs Kenya Commercial Bank Limited & 2 others* (2012)eKLR the Supreme Court reiterated that jurisdiction is a question of law. The Court rendered itself as follows:

[68] A Court's jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.... Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament



confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

12. On the 1<sup>st</sup> issue therefore I find that the Preliminary Objection as framed is competent as it raises a point of law.
13. On the 2<sup>nd</sup> issue whether or not the Originating Summons is premature; Section 17 of the Matrimonial Property Act provides that;
  - 1) a person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.
  - 2) An application under Subsection (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.
14. It is evident therefore that where as in the instant case the applicant seeks declaratory orders, the same may be filed whether or not a suit has been filed to dissolve the marriage. In dismissing the Preliminary Objection, I find the words of Waki J (as he then was) in PWN v ZWN [2017] eKLR apt;  
  
An inquiry may thus be made under Section 17 and declarations may be issued, the subsistence of marriage notwithstanding...
15. The matter will proceed by way of hearing the substantive Originating Summons. Parties to file and exchange witness statements; list and bundle of documents within 45 days. Mention before the Deputy Registrar on 24<sup>th</sup> April 2025 to confirm that the parties have complied with Order 11 of the Civil Procedure Rules and to take further directions.
16. Costs will be in the cause  
  
It is so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 7<sup>th</sup> DAY OF February, 2025.**

.....

**M NYAUNDI**

**HIGH COURT JUDGE**

In the presence of:

Noel Court Assistant

