



AW v KMK (Matrimonial Case 11 of 2019) [2025] KEHC 5120 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 5120 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MATRIMONIAL CASE 11 OF 2019
A MSHILA, J
MARCH 21, 2025**

BETWEEN

AW APPLICANT

AND

KMK RESPONDENT

RULING

Background

1. KMK the Respondent herein filed a Notice of Preliminary Objection dated 27th February, 2024 based on the following grounds:-
 - a. That the Honourable Court lacks jurisdiction to entertain the suit.
 - b. That the suit herein contravenes the provisions of Section 7 and 17 of the Matrimonial Property Act as the properties subject to the suit herein do not fall within the purview of the Matrimonial Property Act as they are jointly owned properties.
 - c. That the nature of the Applicant’s case is for severance of joint ownership of the subject parcels of land as provided for under Section 13 (1) and (2) of the Environment and Land Court Act 2011.
 - d. That in the view of the foregoing the suit as presently instituted is incompetent misconceived and bad in law and ought to be dismissed with costs.
2. The parties were directed to canvass the Objection by filing and exchanging written submissions; hereunder is a summary of their respective submissions.



Objectors Submissions

3. The Respondent contends that the Originating Summons is premature and incompetent as it offends Section 7 and 17 of the Matrimonial Properties Act 2013 as the marriage between the Applicant and the Respondent is still pending hearing and determination.
4. Section 7 of the Act is very clear that the only time matrimonial property can be divided is after divorce or dissolution of the marriage.
5. The nature of the Applicant's case is for severance of joint ownership of the subject parcels of land as provided for under Section 13 (1) and (2) of the *Environment and Land Court Act* 2011. Therefore, this Court lacks the authority to adjudicate the present dispute and the case be directed to the appropriate forum.
6. The Objector urged the Court to uphold the Preliminary Objection in the best interest of justice and to dismiss the Originating Summons.

Applicants Submissions

7. In response to the Preliminary Objection filed by the Respondent/Objector the Applicant referred the Court to the main substance of the suit seeks for a declaration that the properties were matrimonial properties; and in accordance with Section 17 of the Matrimonial Properties Act, 2013 this can be done notwithstanding that a Petition relating to a Matrimonial Cause has not been filed or is pending hearing and determination;
8. The properties in question in the suit fall within the blanket definition as set out in Section 6 of the *Marriage Act* and Article 45(3) of *the Constitution* of Kenya 2010 which provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at dissolution of the marriage;
9. On the issue of declaration this Court has jurisdiction to hear and determine the suit and she prayed that the Preliminary Objection be dismissed with costs.

Issues For Determination

10. Having considered the Preliminary Objection and the written submissions by the parties herein the issues framed for determination are;
 - i. Whether the Preliminary Objection herein should be upheld on the issue of jurisdiction of this Court to hear and determine the matter herein.
 - ii. Whether the Originating Summons ought to be struck out.



Analysis

Whether the Preliminary Objection herein should be upheld on the issue of jurisdiction of this Court to hear and determine the matter herein.

11. It is trite law that a proper Preliminary Objection must be on pure points of law. In *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd* (1969) EA 696, the locus classicus on preliminary objections in this region, Law JA stated:-

“So far as I’m aware, 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.

12. For a Preliminary Objection to succeed it must satisfy the following tests in that it should only raise a pure point of law, it is argued on the assumption that all the facts pleaded by the other side are correct and lastly, it cannot be raised if any fact that has to be ascertained by evidence or if what is sought is the exercise of judicial discretion. A valid preliminary objection should dispose of the suit if successful.

13. The Respondent herein has challenged this court’s jurisdiction on the two grounds one being that division of property can only be done after the dissolution of the marriage; the second being, that this Court cannot grant the prayers sought by the Applicant as she effectively seeks the severance of joint ownership of the two (2) subject parcels of land. It was submitted that such a matter falls squarely under the jurisdiction of the Environment and Land Court as stipulated by Sections 13(1) and 13(2) of the [Environment and Land Court Act](#), 2011. Therefore, the Environment and Land Court was the only court with the jurisdiction to hear and determine this matter whereas this Court lacks the authority to adjudicate the present dispute and the case be directed to the appropriate forum.

14. The Respondent, however, did not deny the existence of the marriage between the parties herein but states that the Applicant has not satisfied the requirements of Section 7 making the Originating Summons incurably defective and it should be dismissed with costs to the Respondent.

15. Whereas in her response the Applicant argues that this Court has jurisdiction to hear and determine the said originating summons wherein she sought that the suit properties namely LR. GithungurI/ Kanjai/XXXX and XXXX be declared matrimonial properties; that the suit properties were acquired jointly during the subsistence of the marriage making them matrimonial properties, and that both be divided equally between the parties;

16. The substantive issue in essence relates to jurisdiction and it is trite law that jurisdiction emanates from [the constitution](#) or written law. Refer to the case of *The Owners Of The Motor Vessel “lilian S” –vs- Caltex Oil (kenya) Ltd* [1989] eKLR where Nyarangi JA held that:-

“Jurisdiction is everything and without it, a court cannot move any step further.”



17. There is no dispute between the parties that they were married; it is also not in dispute that the marriage is not dissolved and is still in existence and that the divorce cause is still pending hearing and determination; Section 7 of the *Matrimonial Property Act* which states 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.”
18. It is clear that for matrimonial property to be distributed, dissolution of marriage must have taken place. It is not in dispute that the marriage herein has not been dissolved. This means that pursuant to Section 7 of the *Matrimonial Property Act*, this court has no jurisdiction to make any determination on issues of division of matrimonial property. Reference is made to the case of ZSN –vs- WNO [2019] eKLR where the Court declined to proceed with determination of the suit before dissolution of marriage which was then pending.
19. The above notwithstanding the Applicant also seeks for a declaration that the suit properties were acquired jointly during the subsistence of the marriage; Declarations of matrimonial property rights is enshrined under Section 17 of the *Matrimonial Property Act* which 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.”
20. The view as provided for under Section 17 of the *Matrimonial Property Act* demonstrates that this court has jurisdiction to make determinations on a prayers for declaratory rights under matrimonial property in instances where parties have not necessarily first dissolved their marriage. Refer to the case of AKK –vs- PKN [2020] eKLR where the Court of Appeal stated as follows:-
- “A plain reading of Section 17 enables a spouse, subsistence of marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in Matrimonial Cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act”.
21. The law under Section 17 aforesaid therefore, grants this Court the requisite jurisdiction to issue declaratory orders, the subsistence of the marriage notwithstanding but it is estopped from making any determination on distribution or division of the said property until the marriage is dissolved.
22. This Court finds that the point of law raised on jurisdiction is devoid of merit and that this Court is seized with the requisite jurisdiction to hear and determine the suit and to issue a declaratory order on the Applicants rights to the subject properties, if any;



23. Further to the above it is this Courts considered view that the fact as to whether or not the properties are matrimonial property can only be ascertained after direct or documentary evidence is adduced by the parties.
24. For these reasons, this court is satisfied that the Preliminary Objection herein raises issues that are not pure points of law and the facts herein require to be ascertained by evidence.
25. This then puts the matters herein outside the threshold of a Preliminary Objection. As such the suit herein cannot be disposed of by way of a Preliminary Objection;

Findings & Determination

26. This court finds the Preliminary Objection raised does not meet the desired threshold and it is hereby overruled. There shall be no order as to costs.
27. Hearing on 17th November, 2025. Hearing Notice to issue to the Applicant.

Orders Accordingly.

DATED SIGNED AND DELIVERED VIA TEAMS AT KIAMBU THIS 21st DAY OF MARCH, 2025.

A. MSHILA

JUDGE

In the presence of;

Sanja – Court Assistant

N/A – by Kamuyu for the Applicant

Gikenye – for Objector

