



CWG v TIM (Civil Suit E059 of 2023) [2025] KEHC 5780 (KLR) (Civ) (9 May 2025) (Judgment)

Neutral citation: [2025] KEHC 5780 (KLR)

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

CIVIL

CIVIL SUIT E059 OF 2023

H NAMISI, J

MAY 9, 2025

BETWEEN

CWG APPLICANT

AND

TIM RESPONDENT

JUDGMENT

1. The dispute herein relates to assets held in the name of GM (Deceased). The purpose of the instant suit is to determine the net estate of the Deceased and what is available for distribution.
2. The Applicant has filed Originating Summons dated 11 August 2023 seeking the following orders:
 - i. That this Honourable Court be pleased to declare that the movable and immoveable properties listed below belong absolutely to the Applicant and were only held in trust for her by the Deceased (GM alias PGM) and do not form part the Deceased's net estate;
 - a. Nairobi/ Block 82XXX (Donholm Matrimonial home)
 - b. LR No.XXX, Delight ApartmentXXX
 - c. Title Number Iriain1/Chehe/XXX (Gatondo- Rural Matrimonial Home)
 - d. Title Numbers Nyer1/Ngaringiro/XXX To2316 (17 Properties) Mweiga.
 - e. IR 184701 (L/R No. 4XXXX) Thika(Makongeni Plot)
 - f. IR 184701 (L/R No. 4XXXX) Thika(Makongeni Plot)
 - g. Title Number Ruiru/Juja East Block X (Kamuthi)/XXX (Kamuthi Property")



- h. Plot NumbersXXX, XXX, XXX and XXX Within Title Number Kajiado/Kaputiei North/2XXXXHeld Under Certificates Numbers XXX, XXX, XXX and XXX Issued By Presby Investment Group.
 - i. Motor VehicleKAQ XXXR
 - j. Monies In Bank Accounts-03XXXX, 09XXXX and 09XXXX held at ABSA Bank Kenya Plc
- ii. That this Honourable court be pleased to declare that the Applicant is entitled to fifty percent (50%) of each movable and immovable properties listed here below and only the balance thereof should be available to form part of the net estate of the deceased (GM alias Professor GM) and be available for distribution.
- a. Apartment No.SPG22/LXXXX on LR No.209/XXXX- Lynx Apartments(Proceeds From Milimani CMCC XXX of2018);
 - b. Ihwagi Plot NumberXXX;
 - c. Title Number Mavoko Town Block XXX;
 - d. Number Mavoko Town Block XXX;
 - e. 50% shareholding in Batian Peak Pharmacy Limited(after paying Charity Wairimu Gichuru Kshs15.0 Millionand other liabilities)
- iii. That the Honorable Court be pleased to order that the properties listed in prayer (i) above be excluded from the properties forming part of the estate of GM alias ProfessorGM in Nairobi High Court Succession Case No. E539 of 2021;
- iv. Spent
- v. That this Honourable court be pleased to make such further orders as the interests of justice may require.
- vi. That the costs of the Summons are provided for
3. The Application is supported by the Affidavit of CWG and premised on the grounds on the face thereof.

The Applicant's Case

4. The Applicant avers that she and GM (Deceased) got married in 1977 in church and were blessed with four children. Her husband passed away on 15 July 2019. The Applicant filed a succession cause, Nairobi High Court Succession Cause E539 of 2021. Letters of Administration were issued therein to the Applicant on 26 July 2021. There is a pending application for confirmation of Grant. The Respondent objected to the confirmation of Grant claiming to be a son to the Deceased.
5. According to the Applicant, her late husband worked at the University of Nairobi as a lecturer, while she worked at the Teachers Service Commission. Additionally, the Applicant operated several businesses. The Applicant avers that she was the lead person in making investments for the family. She would look for properties and organise every bit of the financing for their purchase, most times without her husband's knowledge. The Applicant avers that she belonged to different self-help groups (Chamas) where members contributed monies, bought properties and subdivided among themselves or sold once the value had appreciated.



6. As a working woman, the Applicant made direct and indirect contribution to the acquisition of the various properties that were jointly acquired, but owing to the patriarchal African society, the properties were registered in the name of the Deceased only.
7. The Applicant was a member of several saving societies and “chamas”, where she managed to save large sums of money. She produced certificates, awards and records demonstrating her membership to the SACCOs and huge savings. It is through the SACCOs and ‘chamas’ that the Applicant was able to obtain funds to invest in various properties.

The Respondent’s Case

8. The Respondent avers that he is the first-born son to GM (Deceased). He produced a copy of birth certificate to confirm that the Deceased was his father. The Respondent avers that although his mother and the Deceased were married customarily and dowry paid, his mother left the Deceased and never went back. The Respondent’s mother has not petitioned the Court to be recognised as a wife and has no intention of doing so.
9. The Respondent avers that the Applicant was aware of his relationship to the Deceased but failed to notify the Respondent of the succession proceedings or include him as a beneficiary to the Deceased. According to him, the Deceased had all the listed properties registered in his name because he acquired these properties solely and wanted each of his children to get a share.
10. The case was heard by way of viva voce evidence. The Applicant and Respondent each testified solely without calling any witness. They relied on their respective Affidavits and documents. Parties then filed their respective submissions.

Analysis & Determination

11. From the pleadings, the testimonies and submissions, the following are the issues that arise for determination herein:
 - i. Whether the properties listed constitute matrimonial property?
 - ii. Whether the Applicant is entitled to a share of the listed properties as matrimonial property?
 - iii. Who shall bear the costs of the suit?
12. However, there is one preliminary issue that presents itself for determination before delving into the issues raised by the parties, that is, the competence of this cause.
13. In this suit, the Applicant, widow to the Deceased, has instituted these proceedings following an objection by the Respondent in the succession proceedings relating to the estate of the Deceased. From the pleadings attached, the succession cause had advanced to the point of confirmation of Grant. The Summons for Confirmation filed therein and presented herein by the Applicant indicate that the mode of distribution of estate as agreed upon by the Applicant and her four children was that the entire estate should be distributed to the Applicant absolutely.
14. It is at the point of confirmation of Grant that the Respondent objected, claiming to be a beneficiary to the estate and entitled to a share thereof, thus precipitating the current proceedings.
15. From the evidence, it is not in dispute that the Applicant and Deceased were married on 10 December 1977. The marriage subsisted until the Deceased passed away in July 2019. Now the Court is called upon to make a declaration of the rights of the Applicant to the property acquired and registered in the name of the Deceased during their marriage and the division of the said property as between the



Applicant and the Deceased. It is this declaration that will subsequently determine what the net estate of the Deceased is, and what is ultimately available for distribution amongst the Beneficiaries thereof.

16. Determination of this preliminary issue calls for scrutiny of the provisions of the *Matrimonial Property Act*. Section 17 of the Act provides that:

- “ 1. A person may apply to the court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
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” (emphasis added)

17. Subsection 1 envisages a scenario where a party wishes to have their interest or rights in matrimonial property ascertained, whether or not the marriage between the two individuals subsists. The provision presupposes that both parties, the applicant and spouse (or former spouse) are still alive.

18. Subsection 2(a) thereof together with Rules 4 and 5 of the Matrimonial Property Rules, lay out the procedure for making such an application. Rule 4 provides that:

- “ Any person, including the following persons, may institute civil proceedings claiming any right or relief in relation to matrimonial property—
- (a) a spouse;
 - (b) any person against whom a spouse has made a conflicting claim in respect of property; and
 - (c) a trustee in bankruptcy, an executor under a will or other testamentary grant, an administrator or a personal representative, of the estate of a spouse for an order or declaration relating to the status, ownership, vesting, or possession of any specific property by, or for the beneficial interest of, a spouse or former spouse.”

19. A keen reading of Rule 4 reveals that the provision relates to who can sue, but not who can be sued. In the instant case, the Applicant is the widow and Administrator of the estate of the Deceased. The conundrum here is who should be the respondent. Ideally, the respondent ought to have been the Deceased or the estate of the Deceased, which the Applicant represents. Presumably, it is for this reason that the Applicant chose to file the suit against the Respondent, a person claiming to be a beneficiary of the estate of the Deceased by virtue of being the Deceased’s son.

20. Rule 4(c) lends itself to the interpretation that an administrator, executor or personal representative of a deceased person may institute such proceedings for declaration in respect of property of the deceased spouse or former spouse.



21. Reading further on, Rule 5 stipulates when such applications can be made. Sub section 1 provides as follows:

- “(1) A spouse or former spouse may apply to a court for the determination or declaration of any right or claim over matrimonial property in accordance with rule 7—
- (a) at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the *Marriage Act* (Cap. 150);
 - (b) as part of the relief sought in a matrimonial cause under section 17 of the *Marriage Act* (Cap. 150), where the applicant is seeking a declaration of rights to any property that is contested between the applicant and the applicant's spouse or former spouse; or
 - (c) with respect to the persons specified in rule 4(b) and (c), during the subsistence of a marriage.”

22. The gist of the provisions of Rule 5, in particular Rule 5(c) is that the proceedings instituted by persons specified in rule 4(b) and (c) must be done during the subsistence of the marriage.

23. It goes without saying that the drafting of the two provisions does very little to shed light on whether or not the Applicant herein can competently file this cause against the Respondent. Nonetheless, having extensively read the Act and the subsidiary Rules, there is very little, if at all, to suggest that a party can competently mount a suit for declaration of rights or interest in matrimonial property after the death of a spouse.

24. In the case of FEO v ACO (Sued as Co-Administratrix of the Estate of the Late BPO) (Matrimonial Cause E006 of 2023) [2024] KEHC 14889 (KLR), faced with a similar situation, Hon. Musyoka, J stated thus:

“Death terminates a marriage. However, the remedy, of determination of matrimonial property rights, for the purposes of division, is only unlocked through divorce or dissolution of the marriage. That presupposes termination of a marriage during the lifetime of the parties. It is about dissolving a subsisting marriage, between parties who are alive. Death naturally ends a marriage, and, after that, the issue of terminating marriage, by divorce or other means, would not arise....

Under Rule 5 of the Matrimonial Property Rules, the proceedings for division of matrimonial property may be brought “at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the *Marriage Act*,” or “as part of the relief sought in a matrimonial cause under section 17 of the *Marriage Act*, where the applicant is seeking a declaration of rights to any property that is contested between the applicant and the applicant's spouse or former spouse.” “Spouse” and “former spouse,” in the context of these provisions, and these proceedings, can only be read to mean a person who is alive, and not one who is dead. If it was intended that the remedy would be available to and against a spouse who is dead, the law, meaning the *Matrimonial Property Act* and the Rules, would have expressly provided so.....

My view is that the remedy is available to the parties in the marriage, during their lifetime, and once one of the parties dies, the remedy would be unavailable to the survivor, and



any issues, relating to his or her claims to the property, can only be pursued in probate or administration proceedings, for reasons that should become apparent in the receding paragraphs of this judgment. The right to sue for determination of matrimonial property rights, in the instant cause, died with the deceased, and it robbed the applicant of any remedy under the *Matrimonial Property Act*, and the Rules made under it. She can only pursue her claims over such property through succession proceedings, if at all, through the route that has been opened by the courts,...

25. Without belabouring the point, this Court is of the same mind as Hon. Musyoka, J in the cited case. The rights under section 17 of the Act cannot accrue against a deceased spouse. Determination of rights in matrimonial property and division of such property is provided for the *Matrimonial Property Act*, which does not carry provisions relating to division of property after the demise of one spouse. The relevant statute in this situation would be the *Law of Succession Act*.
26. For that reason, it is my finding that there is no competent suit before this Court. The same is dismissed, with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 9 DAY OF MAY 2025

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Ms. Muthee h/b Mr. Kirimifor the Applicant

Danstan Omari for the Respondent

Libertine Achieng..... Court Assistant

