



REPUBLIC OF KENYA



**Tembo v Kaninu (Originating Summons E038 of 2024)  
[2025] KEHC 6594 (KLR) (Civ) (15 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 6594 (KLR)

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

**CIVIL**

**ORIGINATING SUMMONS E038 OF 2024**

**PM NYAUNDI, J**

**MAY 15, 2025**

**BETWEEN**

**DR FLETCHER ALEXANDER TEMBO ..... APPLICANT**

**AND**

**GLADYS KANINU ..... RESPONDENT**

**RULING**

1. The Respondent herein has challenged the competence of the Originating Summons herein Vide Notice of Preliminary Objection dated 29<sup>th</sup> August 2024 the essence of her Objection is that the property having been acquired prior to the solemnisation of the marriage between the parties it does not comprise matrimonial property.
2. The Respondent on his part seeks the dismissal on the preliminary objection on the basis that it is factually and legally erroneous.
3. The Application was canvassed via written submissions.
4. In her submissions the application frames the issue for determination as-
  - a. Whether the Notice of Preliminary Objection dated 29<sup>th</sup> August 2024 has merit?
5. It is submitted that the principles to guide a court on the elements of a preliminary objection were laid out in the decision of Rebecca Chuma v Christina Cheptoo Chuma [2021] which cited the celebrated decision of Mukisa Biscuits Manufacturing Ltd – vs- Westend Distributors (1969) EA 696.
6. The respondent submits that what constitutes matrimonial property is as defined under Section 6 of the *Matrimonial Property Act* and this was further elucidated upon in the decision of AWM v JGK [2021] KEHC 4780 (KLR).



7. It is further submitted that the parties have never lived in the subject property and that therefore it is not a matrimonial home within the meaning of Section 2 of the [Matrimonial Property Act](#).
8. The Respondent's Submissions are dated 11<sup>th</sup> January 2025. He submits that the Preliminary Objection herein as framed does not meet the criteria set out in the Mukisa Case (Supra) primarily because some facts are disputed and the factual basis upon which the Preliminary objection is based must be proved by evidence in Court. The respondent particularly challenges the assertion that the property was acquired outside of marriage and asserts that infact the final payment was made in June 2021, after the party solemnised their marriage on 20<sup>th</sup> February 2021.
9. The applicant relies on the decisions in Hassan Ali Joho & Another -v-Suleiman Said Shabal & 2 Others SCK Petition No. 10 of 2013 [2014] eKLR and Kalpana Rawal & 2 Others vs Judicial Service Commission & 6 Others [2016] eKLR. It is asserted that the property is matrimonial property and reference made to the decision in ENN vs SNK [2021] eKLR.
10. Having considered the preliminary objection and the rival submissions filed, the issue for determination is whether or not the preliminary objection has merit. When I reflected on the facts in this matter, I immediately drew parallels with the sad story of Simon Makonde, who was born on Monday and was buried and forgotten by Sunday.
11. The Couple herein commenced their relationship in 2019, formalised their marriage on 20<sup>th</sup> February 2021, within a year the marriage had broken down and if the respondent has her way within two years the issue of the property acquired in 2019 would have been resolved in her favour putting to rest or burying their short story as a couple.
12. To succeed however she has to satisfy the court that her objection falls within the parameters of the Mukisa Case and the decision in Independent Electoral and Boundaries Commission v Jane Cheperenger and others (2015) eKLR, where the Supreme Court stated;  

(21) ...The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection- against the profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially and on the merits.
13. According to the Cheperenger decision, a preliminary objection cannot be used to steal a march on the other party. It is clear from the affidavits sworn, that the issue of when the property was "acquired" is central to the suit. When did ownership pass, this is a matter that will require adducing of evidence and therefore this would not be a matter that can be resolved by the raising of preliminary objection as sought by the respondent.
14. For this reason, I will dismiss the preliminary objection and direct that the Originating Summons will proceed to hearing by way of viva voce evidence.
15. The respondent will file and serve their response within 14 days. The Applicant is granted leave to file further affidavit if necessary within 7 days of service.
16. The parties will file their witness statements and list and bundle of documents within 45 days and matter will be mentioned on 31<sup>st</sup> July 2025 before the Deputy Registrar to confirm compliance with Order 11 of the Civil Procedure Rules and take further directions on the hearing of the Originating Summons



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

It is so ordered

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 15<sup>TH</sup> DAY OF MAY, 2025.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

