



**JIA v MAA (Family Originating Summons E008 of 2024)
[2025] KEHC 8662 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
FAMILY ORIGINATING SUMMONS E008 OF 2024**

JRA WANANDA, J

JUNE 20, 2025

BETWEEN

JIA APPLICANT

AND

MAA RESPONDENT

RULING

1. This Ruling is in respect to a Preliminary Objection.
2. The background of the matter is that the Applicant, vide the Originating Summons dated 6/12/2024 filed through Messrs Kesse & Kesse Advocates, sought orders that several parcels of land and a motor vehicle be declared to be matrimonial property, that the Court declares that the Applicant made contribution, financial or otherwise, to the acquisition of the said properties and that he is therefore entitled to a share thereof, and that the properties be registered in the joint names of the Applicant and the Respondent.
3. The grounds of the Application are that the parties are a married couple and acquired the said properties during the subsistence of the marriage, that although the agreements of sale and title documents are in the name of the Respondent, the Applicant contributed to the acquisition of the properties in purchase and in development. It was also alleged that despite the above, the Respondent wants to evict the Applicant from the properties, and that the Respondent has filed a Divorce Cause seeking dissolution of the marriage.
4. Together with the Originating Summons, the Applicant also filed a Chamber Summons seeking, pending the hearing and determination of this matter, temporary injunction restraining the Respondent from disposing of the properties, an order directing the Respondent to furnish a true account of all income collected from two of the properties, and also an order that the income therefrom be deposited in a joint bank account.



5. In response to the Application for temporary injunction, the Respondent, through Messrs Betty Mwenesi & Co. Associates Advocates, filed the Preliminary Objection date 9/01/2025. It was then agreed that the Preliminary Objection be heard and determined first.
6. The Preliminary Objection is framed as follows:
 - i. The Court’s jurisdiction has not been invoked by the Applicant.
 - ii. The Application is incompetent and the Court lacks jurisdiction to hear the same.
 - iii. The Application offends the provisions for grant of injunctive orders.
 - iv. The Application is bad in law and ought to be struck out.
7. The Preliminary Objection was canvassed by way of written Submissions. The Respondent filed the Submissions dated 31/01/2025 while the Applicant filed the Submissions dated 17/02/2025.

Respondent’s Submissions

8. On what properly constitutes a “Preliminary Objection”, Ms. Mwenesi, Counsel for the Respondent, cited the case of Catherine Kawira v Muriungi Kirigia [2016] eKLR. She also cited the same case as regards application of Article 159 and 48 of the Constitution and Section 1A and 1B of the Civil Procedure Act to cure or excuse procedural lapses. She then submitted that the issues presently raised are pure issues or points of law. Counsel submitted that no “suit” exists on which the Applicant seeks the reliefs sought, that under the Constitution, suits are brought by way of a Petition and there is no Constitutional Petition filed herein to warrant invocation of Articles 159, 53(2) and 45(3) of the Constitution, that suits under the Matrimonial Causes Act, 2013 are brought by way of Originating Summons under Section 7 when the reliefs sought are for the “Division of Matrimonial Property”, and under Section 17 when the parties seek a “declaration of rights to any property that is contested between that person and spouse or former spouse”. She also cited Rule 7 of the Matrimonial Property Rules, 2022. She urged that on its part, Order 40 of the Civil Procedure Rules provides for “temporary injunctions” and “interlocutory orders” and that under Order 40 Rule 3(3), an Application made thereunder is to be made by Notice of Motion in the main suit. According to Counsel, the Applicant seeks prayers under the Constitution without a Petition, prayers under the Matrimonial Causes Act without an Originating Summons and “injunctive orders” in the absence of a main suit.
9. She urged that failure to properly file a suit or claim or not following the proper legal steps prevents the Court from assuming jurisdiction. She cited the case of Suleiman Mwamlole Warakah & 2 Others v Mwamlole Tchapu Mbwana & 4 Others [2018] eKLR. According to Counsel, the Applicant ought to have sought redress in the existing Divorce suit rather than circumvent the process by seeking orders in otherwise incompetent proceedings. On why the Court should not invoke the so-called “oxygen (O2) principle” under Article 59 of the Constitution to cure procedural lapses, she cited the case of Nicholas Kiptoo Arap Korir v IEBC & 6 Others, the case of Raila Odinga v IEBC & Others [2013] eKLR, and also the case of Jaldesa Tuke Dabelo v Independent Electoral & Boundaries Commission & Another [2015] eKLR and urged that Article 159 should not be the panacea for legislative provisions to be flouted, and that incompetence of form and procedure is sufficient to lead to dismissal of an Application on a point of law. On jurisdiction, she cited the case of Owners of The Motor Vessel “Lilian S” versus Caltex Oil (Kenya) [1969] KLR.
10. Counsel submitted further that both under the Matrimonial Causes Act and Rules and under the Matrimonial Property Act, the proper Court to handle the Application would naturally have the jurisdiction to handle an Application and/or reliefs sought under the Matrimonial Causes Act more



so as the reliefs sought herein have no bearing on the monetary value of the properties on which the Applicant seeks interim reliefs. She cited the case of CGM v FMM (Originating Summons 1 of 2017 [2023] KLR in which, she submitted, it was held that the subordinate Courts have jurisdiction to handle Matrimonial Property disputes. She also cited Rule 20(2) of the Matrimonial Properties Act.

11. Counsel further pointed out that in breach of the provisions of Order 40 Rule 3(3) of the Civil Procedure Rules, the Applicant has not brought the Application by way of Notice of Motion but conceded that this lapse can be easily cured under the “oxygen principle”. She however submitted that the temporary injunction can only be sought “in an existing suit” yet there is no such “existing suit” herein. She cited the case of Cresta Investments Limited vs Gulf African Bank Limited & Another [2020] eKLR.

Applicant’s Submissions

12. On his part, Counsel for the Applicant submitted that the Preliminary Objection is a mere gimmick aimed at wasting the limited and precious time of this Court. According to him, this matter is properly filed before this Court and which has the jurisdiction to deliberate over the same.
13. Counsel cited Rule 6(1) of the Matrimonial Property Rules, 2022 and submitted that considering the many properties involved in this matter, and which involve colossal monetary amounts, this is the Court with the requisite jurisdiction. He also cited Section 17 of the Matrimonial Property Act, Cap. 152 and opposed the Respondent’s assertion that Applications under that Section must only be made by way of a Petition. He also urged that the use of the word “may” in Section 17(2)(b) indicates that it is not an express mandatory requirement that Applications under the said Act must be filed through a Petition. He also cited Rule 7(1) of the Matrimonial Proceedings Rules, 2020 permitting the seeking of “ancillary reliefs” in matters filed under Part XII of the Act. He further urged the Court to invoke the provisions of Article 159 of the Constitution and administer justice “without undue regard to procedural technicalities”. He also cited the case of Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696 and urged that the instant Preliminary Objection has not raised a single point of law capable of disposing of the Applicant’s Application.

Determination

14. The issues arising for determination herein are evidently the following:
 - i. Whether the challenges raised by the Respondent meet the threshold for a Preliminary Objection.
 - ii. Whether the manner and form under which these proceedings have been commenced gives rise to the filing of a proper suit clothing this Court with the requisite jurisdiction to entertain an Application for a temporary injunction.
 - iii. Whether the Application for temporary injunction ought to have been filed within the Divorce Proceedings currently ongoing before the subordinate Court.
 - iv. If the manner and form under which these proceedings have been commenced is in breach of procedural requirements, can the proceedings still be cured and the Application for temporary injunction entertained?
15. Regarding the description of what a Preliminary Objection constitutes, the Supreme Court, in the case of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, while following the oft-



cited decision of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696, restated the following:

“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 ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

16. The Supreme Court, further in the case of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others* [2015] eKLR, guided as follows

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection—against 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.”

17. It is therefore evident from the foregoing that as was further held by Ojwang, J (as he then was) in the case of *Oraro vs. Mbaja* [2005] 1 KLR 141, a Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of the pleadings, and which, if argued as a preliminary point, may dispose of the action. An example is an objection to the “jurisdiction”, which is by implication, the ultimate ground raised herein. I therefore find and hold that the instant Preliminary Objection meets the requisite threshold to be treated as such.

18. Regarding the substantive issues, it is evident from its heading and also its content and prayers, that this matter falls under Section 17 of the Matrimonial Properties *Act, No. 49 of 2013*. That Section provides that “a person may apply to a 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”.

19. I note that one of the grounds raised by the Respondent in the Preliminary Objection is that the Applicant has relied on some provisions of the *Constitution*, namely, Article 159, 53(2) and 45(3) yet he has not filed a Petition as required under that procedure. I will right away dismiss this limb of the Respondent’s arguments since that argument would only apply in a Constitutional Petition case, which this is not. I say so because the mere citing of of a constitutional provision in proceedings, as done herein, does not and cannot by itself convert proceedings into a Constitutional Petition. This limb of the Submissions is therefore outrightly misconceived.

20. Counsel for the Respondent has also argued that suits brought under the Matrimonial Causes Act, 2013 suits are to be commenced by way of Originating Summons filed under Section 7 thereof when the relief sought is for “Division of Matrimonial Property”, and that the Respondent has not filed such Originating Summons under that provision. Again, this argument is misplaced as the “declarations” sought herein fall under Section 17 of the *Matrimonial Property Act*, and not under the Matrimonial Causes Act nor under Section 7 of the *Matrimonial Property Act* which deals with the separate and distinct relief of “Division of Matrimonial Property”, which is not the case herein.



- 21. The Respondent’s Counsel has also correctly conceded that even if the Application for temporary injunction herein was wrongly brought by way of Chamber Summons, instead of by Notice of Motion, that lapse can be easily cured under Article 159 of the Constitution. She has not therefore pursued that line of argument.
- 22. Regarding the substantive issues, it is evident, as aforesaid, that from its heading and also its content and prayers, this action falls under Section 17 of the Matrimonial Properties Act, No. 49 of 2013. That Section provides as follows:

Part V – Jurisdiction and Procedure

17. Action for declaration of rights to property

- 1. A person may apply to a 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.”

- 23. Part II of the Matrimonial Proceedings Rules, 2022 then has the following elaborate provisions which are relevant to these proceedings

Part II – Commencement of Proceedings

4. Persons by whom proceedings may be instituted

Any person, including the following persons, may institute civil proceedings claiming any right or relief in relation to matrimonial property—

- a. a spouse;
- b.
- c.

5. When applications may be made

- 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.
- 4. An application made in a matrimonial cause under section 17 of the *Marriage Act* (Cap. 150) as contemplated in paragraph 1(b), shall be in accordance with the Matrimonial Proceedings Rules (sub. leg).
- 6. Court to which application may be made
 - 1. An application to enforce a claim relating to matrimonial property may be made in any proceedings under the Act—
 - a. to the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate's court; or
 - b. to a magistrate's court having civil jurisdiction to adjudicate matters within the court's pecuniary jurisdiction.
 - 2.
- 7. Institution of claim
 - 1. Where, under section 17, a person seeks a declaration of any right to property that is contested between that person and a spouse or a former spouse in a petition made to a court for dissolution of the marriage under the *Marriage Act* (Cap. 150), the application may be made as part of the relief sought in the matrimonial cause in accordance with the Matrimonial Proceedings Rules (sub. leg).
.....”
- 20. Interlocutory applications
 - 1. Interlocutory applications under these Rules shall be made by way of notice of motion.
 - 2. A party to the proceedings may, before or after commencement of the proceedings under these Rules, but before the final determination of the respective claims, apply for temporary injunctions or other interlocutory orders in accordance with Order 40 of the Civil Procedure Rules (sub. leg), and the court may grant the orders sought on such terms or conditions as may be just in the circumstances.
 - 3. The court may, at any time it thinks fit, extend, vary, cancel, or discharge any interlocutory order made under paragraph (2), and may vary any terms or conditions upon or subject to which such order has been made.
- 24. From the above provisions, it is clear that although proceedings by a spouse or former spouse under Section 17 of the *Matrimonial Property Act* seeking a “declaration of rights to property” may be filed as part of a Petition in a matrimonial cause but also even where no Petition has been filed under any law relating to matrimonial causes. It is also evident that such Application can be filed either at the High Court where the value of the matrimonial property the subject matter thereof exceeds the pecuniary jurisdiction of a Magistrate's Court, or, in the alternative, before the Magistrate's Court subject to that Court's pecuniary jurisdiction. The other evident provision is that a party to such proceedings



may, before or after commencement of the proceedings, apply for temporary injunctions or other interlocutory orders under Order 40 of the Civil Procedure Rules.

25. I understand the gist of the Respondent's argument to be that since this action has not been instituted in the proper manner, there is no "existing suit" capable of sustaining an Application for a temporary or interlocutory order of injunction under Order 40 of the Civil Procedure Rules. The Respondent's argument is therefore, by extension, that this Court cannot assume jurisdiction to entertain this action. Order 40 Rule 1 provides as follows:

- " 1. Where in any suit it is proved by affidavit or otherwise—
- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.' [Emphasis mine]

26. I must admit that I have struggled to follow the Respondent's Counsel's arguments. First, she submits that there is no Constitutional Petition filed herein to warrant invocation of Articles 159, 53(2) and 45(3) of the Constitution. It is however clear that this is not a Constitutional case in the first place.

27. Counsel also submits that suits under the Matrimonial Causes Act, 2013 are to be brought by way of Originating Summons under Section 7 when the reliefs sought are for the "Division of Matrimonial Property". However, again, it is apparent that this is not a case under Section 7 of the Matrimonial Property Act seeking for the "Division of Matrimonial Property" since the marriage has not even been dissolved as yet. I agree that the Applicant has cited both Section 7 and 17 of the Matrimonial Property Act as some of the provisions of law he is relying on. However, looking at the heading, and also content of the Originating Summons, it is clear that this is a matter falling only under Section 17 of the Matrimonial Property Act as it seeks a "declaration of rights" to property "that is contested between" spouses.

28. Counsel also submits that proceedings under Section 17 of the Matrimonial Property Act seeking a "declaration of rights to any property that is contested between that person and spouse or former spouse" is to be brought by way of Originating Summons. However, it is clear that the Applicant has done just that - filed an Originating Summons under Section 17 of the Matrimonial Property Act.

29. Counsel's argument seems to be based on want of form. However, no such want of form has, in my view, been demonstrated.

30. The second limb of Counsel's argument is that the temporary injunctive reliefs sought herein ought to have been placed before the subordinate Court before which the Divorce proceedings between the parties herein is still currently ongoing, namely, Milimani Chief Magistrate's Court Divorce Cause No. E1054 of 2024. This is easy to determine. This is because, as already observed above, under Section



6(1) of the *Matrimonial Property Act*, proceedings seeking to enforce a claim relating to matrimonial property can be filed either at the High Court, where the value of such property exceeds the pecuniary jurisdiction of a Magistrate's Court, or in the alternative, before the Magistrate's Court if the value of such property is within that Court's pecuniary jurisdiction. The High Court and the Magistrate's Courts therefore have concurrent jurisdiction over such proceedings, and the only determinant is the pecuniary value of the property in contention. Subject to pecuniary jurisdiction therefore, an Applicant retains the choice to take his case to either of the two Courts.

31. In this case, the subject matter is definitely the property in contention alleged by the Applicant to be "matrimonial property" and listed at prayer 1 and 3 of the Originating Summons and also in prayer 2 of the Chamber Summons seeking injunctive relief. The Respondent has not adduced any evidence to demonstrate that the aggregate value of the property is within the pecuniary jurisdiction of the Magistrate's Court. In any event, invoking this Court's power to take judicial notice of apparent facts, it is obvious that the aggregate value far exceeds the pecuniary jurisdiction of the Magistrate's Court. The Magistrate's Court would therefore lack the pecuniary jurisdiction to handle the matter,. The Applicant is therefore before the proper forum – the High Court.
32. To bolster my findings above, I cite the Court of Appeal decision in the case of AKK vs PKW [2020] eKLR where the following was stated in respect to the choice of forum in relation to an application made under Section 17 of the *Matrimonial Property Act*, as opposed to one made under Section 7 of the same Act:

“A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a 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. In PNN vs. ZWN [2017] eKLR, Waki, JA stated that:

“An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding.

The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.”

33. For the above reasons, I am unable to embrace the Respondent's argument that there is no "existing suit" capable of sustaining an Application for a temporary order of injunction under Order 40 of the Civil Procedure Rules.



Final Orders

34. In premises, I order and rule as follows:

- i. The Respondent's Preliminary Objection dated 9/01/2015 is hereby dismissed.
- ii. The Applicant is awarded costs of the Preliminary Objection.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 20TH DAY OF JUNE 2025

.....

WANANDA J. R. ANURO

JUDGE

Delivered in the presence of:

Mr. Kesse for the Applicant

N/A for the Respondent

Court Assistant: Edwin Lotieng

