



REPUBLIC OF KENYA



KENYA LAW
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**Obiero v Odhiambo & 2 others (Civil Suit E074 of 2024)
[2025] KEHC 11814 (KLR) (Civ) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 11814 (KLR)

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

CIVIL

CIVIL SUIT E074 OF 2024

SN MUTUKU, J

JUNE 19, 2025

BETWEEN

ALLAN ONYANGO OBIERO PLAINTIFF

AND

BERYL NAOMI ODHIAMBO 1ST DEFENDANT

LINDA ODHIAMBO 2ND DEFENDANT

CAROLYNE AKINYI 3RD DEFENDANT

RULING

1. Allan Onyango Obiero (hereafter the Plaintiff) instituted the present matter by way of a Plaint dated 5th April 2024 seeking a vacating order, general damages, costs of the suit and interest thereon, against Beryl Naomi Odhiambo, Linda Odhiambo and Carolyne Akinyi (hereafter the 1st, 2nd and 3rd Defendants). The claim arises out of a claim for alleged trespass, damage to personal property and nuisance.
2. The plaint was accompanied by a Notice of Motion of the same date (the application) seeking, inter alia, an interim order restraining the Defendants from accessing the property titled South C Mugoya House No. 69 Five Star Road situated on LR No. 103/428 (the suit property) and an interlocutory injunctive order restraining the Defendants from damaging or otherwise interfering with the suit property pending hearing and determination of the suit, and a further order vacating the Defendants from the suit property while allowing entry therein by the Plaintiff, for purposes of assessing the extent of damage caused therein, until such time as the suit is heard and determined.
3. When the Application came up in court ex parte on 20th June 2024, the court allowed the same in terms of the interim and interlocutory injunctive orders sought.



The Preliminary Objection

4. The 1st Defendant filed a Notice of Preliminary Objection (PO) dated 26th August 2024 challenging the competency based on the grounds that:

That the suit filed herein as instituted by the Plaintiff is legally and fatally defective in as far as it seeks to bar and evict the 1st Defendant from the Matrimonial Home and the fixtures therein when the same is yet to be subjected to division under the Provisions of Section 7 as read with Section 6 (1) (a) and (b) of the *Matrimonial Property Act*, 2013.

Reply to the Preliminary Objection

5. The Plaintiff has challenged the PO through a Replying Affidavit dated 28th January 2025 wherein he has averred, inter alia, that the PO does not contain pure points of law but raises issues of fact which ought to be ascertained; that the suit property, being registered solely in his name, does not fall within the ambit of matrimonial property as purported; that he purchased the suit property by way of a mortgage facility obtained from Gulf African Bank, to the tune of Kshs. 13,000,000/- and that the present suit is not intended to evict the 1st Defendant
6. The Plaintiff claims that he has a fundamental constitutional right to safeguard his personal interests as well as his interest in the suit property and that the orders sought in the suit are therefore intended to restrain the 1st Defendant from committing further acts of arson and vandalism. Further, the Plaintiff has stated that the PO raised by the 1st Defendant does not meet the threshold for what constitutes a PO and hence the same ought to be dismissed with costs.

Submissions

7. On 30th April 2025, this court issued directions that parties address the court on the issue of jurisdiction through brief written submissions. However, at the time of writing this ruling, only the submissions by the Plaintiff had been availed. The Defendants did not attend court on the relevant dates and did not comply with the directions of the court to file written submissions.
8. The Plaintiff submitted on what constitutes a PO and relied on *Mukisa Biscuits Company v West End Distributors Limited* (1969) EA 696 and *Oraro v Mbaja* [2005] KEHC 3182 (KLR). He submitted that the 1st Defendant is essentially calling upon this court to ascertain whether the suit property is matrimonial in nature or otherwise, which constitutes a disputed factual issue that cannot be considered as a preliminary objection and that in the premises, the PO fails to meet the threshold laid out in the above-cited authorities.
9. The Plaintiff has separately submitted that the suit property is registered in his sole name and does not therefore fall within the ambit of matrimonial property, hence this court has jurisdiction to entertain the present suit. That in any event, the marriage between the Plaintiff and the 1st Defendant no longer subsists following its dissolution vide Nairobi Divorce Cause No. E143 of 2024 and thus, the question of matrimonial property cannot arise here and that the subject matter featuring in the present suit is not one of division of matrimonial property, but of eviction and vacating of the Defendants from the suit property.
10. The Plaintiff submitted that, on the basis of the above arguments, this court ought to render the PO unsustainable, and to declare that it has jurisdiction to hear and determine the present suit. The Plaintiff has also urged that the PO be dismissed with costs.



Analysis and Determination

11. The background of this matter was given above. When the matter was placed before me on 30th April 2025, I directed parties to address the court on the issue of jurisdiction. Apart from that direction, there was in the file a PO raised by the 1st Defendant raising the issue that the subject matter in this suit is Matrimonial Property. The Plaintiff has countered that PO by way of his Replying Affidavit to the effect that the PO raised herein does not meet the threshold of a PO and that the property in issue is not matrimonial property and therefore it is not subject to subdivision.
12. The 1st Defendant did not file submissions as directed by the court. The Plaintiff has filed. However, it is clear that the parties, through the PO, the Replying Affidavit to that PO and the Submissions filed, addressed the issue of the PO and did not address the court sufficiently on the issue of the jurisdiction of this court to determine this matter.
13. I have considered the PO, the Replying Affidavit, the Submissions on record and the authorities cited. Indeed, as pronounced in the cited authorities a PO consists of pure point of law that require no arguments for or against. This legal position is clear from Mukisa Biscuits case cited above and the Supreme Court in the decision of *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it was stated that:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
14. From a reading of the PO subject of this ruling, it is clear to me that the same rides on the sole ground that the present suit is incompetent and fatally defective for the reason that it concerns the suit property, which has not been subjected to division pursuant to the provisions of Section 7 as read with Section 6 (1)(a) and (b) of the *Matrimonial Property Act*, Cap. 152 Laws of Kenya. This claim has been challenged by the Plaintiff who has argued that it will require evidence to determine the issue raised.
15. Upon a consideration of the PO and the provisions of the law cited above, it is my considered view that the PO does not raise pure points of law. As stated in the authorities cited, a PO ought to ride on the assumption that the facts stated in the pleadings are undisputed, which is not the case here. The PO does not meet the threshold of a PO and must fail.
16. However, that is not to say that the matter is properly before this court. The issue of jurisdiction of the court to try this matter is still valid and ought to be determined to ensure that the parties are properly before this court.
17. The 1st Defendant has attached a marriage certificate to her Notice of Preliminary Objection. It is dated 27th March 2006. The Plaintiff has not addressed the issue of the marriage certificate in his Replying Affidavit to the PO. He has addressed that issue in his submissions at paragraphs 12 and 13 of the submissions. The Plaintiff does not deny that there was a marriage relationship between him and the 1st Defendant. In paragraph 12 of the submissions, he has stated that:

“The 1st Defendant has cunningly attached a marriage certificate to her preliminary objection as proof of a subsisting marriage yet that purported marriage was dissolved on or about the year 2024 and a Decree Nissi issued on the 18th of October, 2024 vide Nairobi Divorce Cause No. E143 OF 2024”



18. The Plaintiff goes on to submit under paragraph 13 that:

“.....It is clearly evident that there is no subsisting marriage between the plaintiff and the 1st defendant to warrant the suit property to be brought under the matrimonial property. The 1st defendant has also not attached any evidence of contribution towards the acquisition and maintenance of the plaintiff’s property in question.”

19. It is not the intention of this court to delve into the details of this dispute. What I am trying to do is to address the issue as to whether this court is seized with the requisite jurisdiction to determine this matter.

20. It is noteworthy that no party has addressed this court on this issue as I had directed. I find confidence in legal provisions and authorities that this court can raise the issue of jurisdiction *suo moto* even where parties have omitted to do so. This is aimed at ensuring that justice is served to both parties before the court.

21. In *Nasra Ibrahim Ibren v Independent Electoral and Boundaries Commission & 2 others* [2018] eKLR, Supreme Court of Kenya held the view that a court can raise the issue of jurisdiction *suo moto*. That Court, while citing Odunga J, as he then was, stated thus:

“A jurisdictional issue is fundamental and can even be raised by the court *suo moto*, as was persuasively and aptly stated by Odunga J in *Political Parties Dispute Tribunal & another v Musalia Mudavadi & 6 others Ex Parte Petronila Were* [2014] eKLR. The learned Judge drawing from the Court of Appeal precedent in *Owners and Masters of The Motor Vessel “Joey” vs. Owners and Masters of The Motor Tugs “Barbara” and “Steve B”* [2008] 1 EA 367 stated thus:

25. “What I understand the Court to have been saying is that it is not mandatory that an issue of jurisdiction must be raised by the parties. The Court on its own motion can take up the issue and make a determination thereon without the same being pleaded...”

Consequently, while the parties have not given the jurisdiction issue the much premium that it deserves, upon evaluation of the matter before us, it is our considered opinion that the issue of jurisdiction of this Court to hear and determine this appeal warrants settlement upfront.”

22. The decree nisi mentioned in the submissions of the Plaintiff has not been attached for consideration of this court. Besides, Section 7 of the *Matrimonial Property Act* (Cap. 152) is clear in its provisions 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 (emphasis added).

23. Even if the parties are no longer in a marital relationship, there is nothing to stop the 1st Defendant from pursuing her claim if she can prove to the court that she contributed towards the acquisition of that property. This claim does not accrue until the marriage between the two parties has been dissolved.

24. Therefore, my considered view is this, should the 1st Defendant have a claim over the property subject of this suit, it would be a miscarriage of justice if this court were to deny her the right forum to agitate that claim.



25. It is for the reasoning in this ruling that I hold the view, after careful consideration of the matter before me, that this matter were better argued before the Family Division where both parties will have the chance of demonstrating, through evidence, their claim, if any, of the subject matter. Consequently, this court is not the right forum to deal with this matter for lack of jurisdiction to determine the dispute. I will and do hereby allow the parties to move to the Family Division to argue this matter there.
26. This file shall be transferred to the Family Division to be placed before the Presiding Judge of that Division or any other judge of the Family Division for directions. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 19TH JUNE 2025.

S. N. MUTUKU

JUDGE

