



**JWK v EWG (Matrimonial Cause E066 of 2021)
[2025] KEHC 13018 (KLR) (Family) (19 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13018 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E066 OF 2021
PM NYAUNDI, J
SEPTEMBER 19, 2025**

BETWEEN

JWK APPLICANT

AND

EWG RESPONDENT

RULING

1. This ruling is in respect of the Respondent’s Notice of Preliminary Objection dated 5th September 2024 (hereinafter referred to as ‘the objection’). The objection was set out as follows: -
 1. That the entire suit is misconceived as the petitioner and the respondent are neither spouses nor former spouses hence offends the provisions of Section 17 of the Matrimonial Property Act Cap 152 of the Laws of Kenya on jurisdiction of this court.
 2. That this court lacks jurisdiction to hear and determine this cause.
2. The Applicant herein, filed Originating Summons dated 15th September 2021 seeks the following orders;
 1. That a determination be made as to each party’s contribution towards the acquisition and development of the matrimonial properties listed below and distribution be made.
 - a. Motor vehicle registration number KCJ XXX H.
 - b. Motor vehicle registration number KBP XXX Q.
 - c. Motor vehicle registration number KBL XXX E.
 - d. Motor vehicle registration number KBB XXX H.



- e. Motor vehicle registration number KAH XXX Y.
 - f. Nairobi/Block 151/X (at Kamuthi Estate in Maziwa Nairobi).
 - g. Thika Municipality Block 20/1XXX.
 - h. Chania/Ngorongo/3XXX.
 - i. Baobab Fractional Holiday Homes- Mwembe Resort Kilifi Home No. XX.
 - j. Ngata Resort Fractional Holiday Home House No. XX (Njoro).
2. That each party to bear their costs in the suit.
 3. Following directions of this court, the preliminary objection was canvassed by way of written submissions. At the time I retired to prepare the ruling only the Respondent had filed submissions.

Summary of the Respondent's Submissions.

4. It is submitted that the Preliminary Objection as framed meets the conditions laid out in *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696.
5. The Respondent cites the decisions in *The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Limited* [1989] eKLR and *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd & 2 Others* [2012] eKLR and urges that this Court should down its tools for want of jurisdiction.
6. It is submitted that the judgment of the Court in *JWK v EWG* MCC DIV No. E627 of 2021 found that there was no marriage between the two to be dissolved.

Analysis and Determination.

7. The key issue for determination is whether the Preliminary Objection succeeds. The circumstances in which a preliminary objection may be raised was explained by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, as follows:

“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.”
8. The effect of a preliminary objection if upheld, renders any further proceedings before the court impossible or unnecessary. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of *Oraro v Mbaja* (2005)1KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed. The Court of Appeal also stated in *Mukisa Biscuit Company v West End Distributors Ltd* that a preliminary objection cannot be raised if what is sought is the exercise of judicial discretion.



9. Further, the Supreme Court in *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* (Civil Application 36 of 2014) [2015] KESC 2 (KLR) (15 December 2015) (Ruling) stated as follows;

The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to preliminary objections. 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... In the instant matter, we consider the objector to have moved her motion, more as a sword than a shield. Such a course is not to be permitted, as it is apt to occasion an injustice to the applicant, and indeed, to the wider public interest.

10. Therefore, in order for a preliminary objection to succeed the following must be satisfied;
- i. The Preliminary Objection should raise a pure point of law.
 - ii. The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct and uncontested.
 - iii. The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - iv. A valid Preliminary Objection ought if successful dispose of the entire suit
11. The Respondent argues that the court lacks the jurisdiction to entertain the Originating summons dated 15th September 2021 as the parties were not married. Only parties who are married can invoke the Court under the *Matrimonial Property Act*. It is argued the issue of whether there was a marriage was determined in the divorce cause.
12. It is trite that jurisdiction is central to any matter before a court. In *Owners of the Motor Vessel Lillian's' v Caltex Oil (Kenya) Ltd* [1987] eKLR the court stated that:-
- “Jurisdiction is everything without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction” [own emphasis].
13. I have looked at the judgment which was attached by the applicant in her replying affidavit sworn in opposition.
14. Paragraph 21 of the said judgment states; “I find and hold that whereas the customary marriage between the Petitioner and the Respondent remained potentially polygamous, It was extinguished when the Respondent contracted a Christian Marriage in 2020.”
15. Paragraph 22 of the judgment states that; “I equally find that the said marriage having been extinguished, there is nothing before this court capable of dissolution. The upshot is that the Petitioner’s petition for dissolution of Kikuyu Customary Marriage between herself and the Respondent is without merit and the same.” (Emphasis Supplied)



16. Based on the submissions by the parties it is evident that they have taken diametric positions on the import of the Court's judgment on the existence or non-existence of a valid marriage. This therefore takes the preliminary objection out of the boundaries set in the Mukisa Case cited above.
17. The interpretation by the applicant is plausible on account of the Black's Law Dictionary 11th Edition definition of the term 'extinguish' thus-
 1. To bring to an end, to put an end to. 2. To terminate or cancel. 3. To put out or stifle'Extinguishment' is defined as-

The cessation or cancellation of some right or interest
18. The import of my finding is that I find that the Preliminary Objection is not merited and direct that the Originating Summons proceed to hearing, justice dictates that the Originating Summons be heard on its merits.
19. Therefore, the final orders I shall make are that
 - a. The Preliminary Objection is disallowed
 - b. The Respondent shall file and serve his reply within 14 days. The Petitioner granted leave to file further affidavit within 7 days of service
 - c. The Summons will proceed by way of viva voce evidence. The parties will file and exchange witness statements along with list and bundle of documents within 45 days.
 - d. Mention before the Deputy Registrar on 19th November 2025 to confirm compliance and take further directions.
 - e. This being a family matter there shall be no order as to costs
20. Parties granted leave to exercise right of appeal within 30 days.

It is so ordered.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19th DAY OF SEPTEMBER, 2025.

P. M NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

Mwinzi for Respondent

Tumu for Applicant

