



**BKM v MMB (Miscellaneous Cause E092 of 2022)
[2024] KEHC 1319 (KLR) (Family) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1319 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS CAUSE E092 OF 2022
HK CHEMITEI, J
FEBRUARY 15, 2024**

BETWEEN

BKM APPLICANT

AND

MMB RESPONDENT

RULING

1. This ruling relates to the notice of preliminary objection dated 14th July, 2022 and the originating summons/ application dated 5th May, 2022, 2022 filed by the parties.
2. The originating summons/ application dated 5th May, 2022 seeks for Orders That:
 - a. The Honourable Court recognizes and adopts the foreign final decree of divorce given to the Applicant and the Respondent in the District Court Tarrant County, Texas on 8th July, 2021.
 - b. The property Kajiado/ Kitengela/ 20XX be vested to BKM, the Applicant herein.
 - c. The property Ngong/ Ngong/ 11XX (sub – division of parcel number 50XX5) be vested to the Applicant upon payment of Kshs 15, 000, 000 being 50% of the Respondent’s share by depositing to the Court.
 - d. In the alternative to prayer 3 above this Honourable Court appoints a receiver to oversee the sale of the property titled Ngong/ Ngong/ 11XX4.
 - e. The Honourable Court grants any other order that the court deems just.
 - f. Costs of this suit be provided for.



3. The application is opposed by notice of preliminary objection dated 11th July, 2022 which challenges this court's jurisdiction to hear the originating summons dated 5th May, 2022. It is accompanied by replying affidavit sworn by MMB, the Respondent, on 13th July, 2022.
4. The Applicant has filed a further affidavit sworn on 31st July, 2023.
5. The Applicant has filed written submissions dated 10th July, 2022 in support of the application dated 5th May, 2022 and opposing the preliminary objection dated 14th July, 2022.
6. The Respondent has filed written submissions dated 7th August, 2023.

Background:

7. The genesis of this matter is the agreed final decree of divorce No. 322-660167-19 between the parties and the subsequent tussle over the properties viz land parcel numbers Kajiado/ Kitengela / 20XX, Ngong/ Ngong/ 11XX4 (sub – division of parcel number 50XX5) and property Near Nairobi Nazarene.
8. The dispute on land parcel number Kajiado/ Kitengela / 20XX is that the Respondent has refused to submit its original title deed so that its transfer can be effected to the Applicant. The Respondent avers that he handed it over to his advocates in Nairobi. The Applicant maintains that the original title deed is yet to be handed over to her.
9. The dispute on land parcel number Ngong/ Ngong/ 11XX4 (sub – division of parcel number 50XX5) is that:
 - a. The Applicant is willing to purchase half of it (being the Respondent's share) at Kshs 15, 000, 000 as per valuation report from Njihia Njoroge & Company Valuers, Surveyors, Estate & Managing Agents who inspected the property on 7th January, 2022. The whole property's open market value and forced sale values were indicated to be Kshs 30, 000, 000 and Kshs 22, 500, 000 respectively. As at 31st July, 2023 when she swore her further affidavit, she was willing to purchase the property within 3 weeks as opposed to the Respondent who was suggesting to purchase it within 3 months. She wishes to purchase the property to hold it in trust for their children and further that she is the one that purchased it.
 - b. The Respondent is willing to purchase the whole property at Kshs 42, 000, 000 which is a forced sale value as per certificate of valuation issued by Dantu & Co. Valuers dated 22nd June, 2022. They indicated the current value to be Kshs 60, 000, 000, mortgage value at Kshs 48, 000, 000 and forced sale value to be Kshs 42, 000, 000. He is willing to give the Applicant Kshs 21, 000, 000 being half of her share of the property.
10. The Respondent has not commented or made submissions on the property Near Nairobi Nazarene.

Analysis and Determination:

11. I have carefully considered the application before the court perused the affidavits as well as the submissions and the attendant cited authorities, and it is necessary as the practice is to begin interrogating whether this court is seized with jurisdiction to determine the matter as raised in the preliminary point of law.



12. In the case of *I.N. & 5 others v Board of Management St G. School Nairobi & another* (2017) eKLR the court defined, at paragraphs 7 & 8, a preliminary objection as follows: -

“Definition of a preliminary objection:

I find it necessary to define what constitutes a preliminary objection on a point of law. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. Secondly, if the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law.

It may be noted that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Understanding the nature and scope of preliminary objections is very important for practicing lawyers. Knowing how to raise a properly formulated preliminary objection, and when to raise it, can save a lot of time and costs.”

13. It is not disputed that the parties’ marriage was dissolved in the state of Texas in the United States of America and the decree issued is on record. The same being a foreign decree must of right be registered in Kenya.
14. The registration grants, or resealing for that matter gives it legitimacy and therefore it can be executed and without its registration here the same is superfluous and therefore unenforceable.
15. The regime under which a marriage decree is registered is provided under Section 61 of the *Marriage Act* 2014. The same states as hereunder;

“Registration of foreign annulments and divorces

- (1) Where a marriage celebrated in Kenya is annulled or dissolved by a decree of a foreign court, any party to the annulled or dissolved marriage may apply to the Registrar to register the decree.
- (2) Where the Registrar is satisfied that a decree under this section should be recognised in Kenya as if the decree was made by a Kenyan court, the Registrar shall register the decree in a register maintained for the purpose.
- (3) An application under this section shall include—
 - (a) a copy of the decree and where the decree is not in an official language, a certified translation of the decree in an official language and in the prescribed form; and
 - (b) a declaration under the law of the country in which the decree was obtained made to a legal practitioner authorised to witness such a declaration that states the decree is effective in that country as if the marriage had been celebrated in that country.”

16. As rightly submitted by the respondent the applicant has brought herself under the purview of the above section and not Section 67 of the same Act. It is clearly spelled out under its heading on the Originating Summons. She cannot run away from it. There is no evidence that the decree was duly registered as provided.



17. In the absence of the same and as rightly put by Musyoka J in *MNM v PNM* (2016) eKLR, this court has no ability to adjudicate over this matter to that extent and the preliminary objection is meritorious.
18. Nonetheless and taking into consideration the factors and circumstances herein, this court shall invoke its inherent powers under Article 159 of the *Constitution*. Dismissing and or striking out this matter will take the two parties some significant steps back. They have already from the averments in the affidavits taken steps to fulfill the terms of the decree despite the challenges explained by each party.
19. Consequently, I do direct the applicant to within 30 days from the date herein register the divorce decree with the registrar as provided under Section 61 above and in default the Originating Summons herein shall stand struck out with costs to the respondent.
20. Costs in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 15TH DAY OF FEBRUARY 2024.

H K CHEMITEI.

JUDGE

