



REPUBLIC OF KENYA



**Joseph v Adam (Civil Appeal E069 of 2022)
[2024] KEHC 8521 (KLR) (Civ) (12 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8521 (KLR)

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

CIVIL

CIVIL APPEAL E069 OF 2022

MA ODERO, J

JULY 12, 2024

BETWEEN

KABATENDE BIRORI JOSEPH APPELLANT

AND

JACQUELINE ADAM RESPONDENT

JUDGMENT

1. Before this Court is a Memorandum of appeal dated 25th August, 2022 filed by the Appellant Kabatende Birori Joseph seeking the following orders:-
 - “(a) The appeal be allowed.
 - (b) The Honourable Magistrate judgment be set aside and the same be substituted for the judgment of this Honourable Court.
 - (c) That in the alternative and without prejudice to the foregoing the ruling of 21st day of June 2022 in Divorce Cause MCDC No. E967 of 2021 be set aside and the appellant be given a chance to prosecute the matter in the Chief Magistrates Court as earlier filed.
 - (d) That costs of the appeal be borne by the Respondent.”
2. The Respondent Jacqueline Adam opposed the appeal. The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 7th March, 2023 whilst the Respondent relied upon her submissions dated 6th April, 2022.



Background

3. The Appellant and the Respondent celebrated their marriage in Kenya under Kenyan law on 15th January 1990. The couple resided in Mombasa until the year 1997 when they moved to Kigali, Rwanda where they reside to date.
4. The Appellant filed in the Chief Magistrates Court a Petition dated 13th September, 2021 seeking dissolution of his marriage to the Respondent.
5. The Respondent in turn filed a Notice of Preliminary Objection dated 19th October, 2021 claiming that the Kenya Courts had no jurisdiction over the matter as the couple were both domiciled in the Republic of Rwanda. The Respondent further claimed that the matter was ‘Res Judicata’ as she had also filed in the court in Kigali a Divorce Cause No. RC 00792/2021/TB/GSBO which was scheduled for a conciliation hearing.
6. The Preliminary Objection was heard and vide a Ruling delivered on 21st June 2022, the learned trial Magistrate Hon. G. M. Gitonga allowed the Preliminary Objection. The court declined to assume jurisdiction over the Divorce Cause and dismissed the same. Being aggrieved by that Ruling the Appellant filed this present appeal which appeal was premised upon the following grounds:-

- “ 1. . That the Learned Senior Principle Magistrate erred in law and fact by failing to exercise his lawful jurisdiction in the matter.
2. The learned Senior Principle Magistrate erred in law and fact by failing to acknowledge that he had a responsibility to determine the matter before him in its finality.
3. That the Learned Senior Principle Magistrate erred in law and fact by failing to appreciate the fact and law tabled in this matter.
3. That the Learned Senior Principle Magistrate erred in law and fact by applying a doctrine of common law when the written statutes and *the Constitution* provide for means of dealing with the matter before him.
3. That the learned Senior Principle magistrate erred in law and fact by failing to be guided by Article 159 (2) b (e) of *the Constitution* that justice shall not be delayed and that the principles of this constitution shall be protected and promoted.”

7. As stated earlier the appeal was opposed.

Analysis and Determination

8. I have carefully considered the appeal before this court as well as the written submissions filed by both parties. As a first appellate Court the duty of this court is to re-examine and review the arguments presented in the lower court and to draw its own conclusions on the same. [see *Selle & another -vs- Associated Motor Boat Co Ltd* [1968] E.A 123]
9. A Preliminary Objection it is said must raise a pure point of law [see *Mukhisa Biscuit Manufacturing Co Ltd -vs- Westend Distributors Ltd* [1969] E.A. A preliminary objection must be one which upon determination may dispose of the entire suit. I do find that the issues raised in the Respondents Notice of Preliminary Objection being issues of ‘Res Judicata’ and ‘jurisdiction’ are pure points of law which could when decided upon determine the entire suit.



10. On the question of ‘Resjudicata’ I do agree with the following finding by the learned trial magistrate.

“..... I am minded to observe that the doctrine of Res Judicata as argued by the Respondent does not apply in this case Section 7 of the *Civil Procedure Act* is very clear on its applicability of the doctrine. There has to be evidence that the issue has been heard and a finding decided [made] in a court of competent jurisdiction. No evidence has been placed before this court that Divorce Cause No. RC00 792/2021/1TB/GSBO [the Rwanda Case] has been heard and determined. The Preliminary Objection raised on this ground fails”

11. The remaining issue for determination is the question of jurisdiction.

It is trite that jurisdiction is everything and that without requisite jurisdiction a court must immediately down its tools [see Owners of Motor Vessel Lillian (“S”) -VS- Clatex Oil (k) Limtied (1989) IKLR]. The learned trial magistrate found that in view of the fact that the marriage was conducted in Kenya, the Kenyan courts did have jurisdiction over the matter.

12. However the trial court then proceeded to decline jurisdiction invoking the doctrine of ‘forum non-contention’. That since the couple had both been resident in Rwanda for the past twenty-five (25) years and given that there was a similar matter already filed by the Respondent in the Kigali Court, then it would be more convenient and would better serve the interest of justice to have the matter heard in Rwanda.

13. In personal matters, such as marriage, domicile is critical. Domicile is all about residency. Halsbury’s laws of England (3rd Edition 2017 P. 15 Paragraph 28 states domicile as follows

“Domicile of choice is acquired by the actual removal of an individual to another country accompanied by his “animus manendi” Any person not under disability may at any time change his existing domicile and acquire for himself a domicile of choice by the fact of residing in a country other than that of his domicile of origin with intention to continue reside there indefinitely. [own emphasis].

14. Similarly the Oxford Dictionary of Law defines ‘Domicile’ as follows;-

The country that a person treats as his permanent home and to which he has the closest legal attachment. A person cannot be without domicile and cannot have two domiciles at once A domicile of choice is acquired by making a home in a country with the intention that it should be permanent base” [own emphasis]

15. The law of domicile plays an important role in the determination of whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of marriage where the parties have been domiciled within the jurisdiction of that court for the period allowed by the relevant law.

16. The *Marriage Act*, No. 4 of 2014, does not have clear provisions of the domicile of parties seeking dissolution of marriages in Kenya. The only reference in the Act to domicile is to be found in section 67, which provides as follows:-

“Where a foreign court has granted a decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, the decree shall be recognized in Kenya if-
Either party is domiciled in the country where that court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of



institution of proceedings; Being a decree of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them.

17. The Matrimonial Causes Act, Cap 152, Laws of Kenya, which was repealed by the [Marriage Act](#), 2014, was more elaborate on domicile. In Sections 4 and 5. Section 4 provided that:-

‘Nothing in this Act contained shall authorize –

- a. The making of any decree of dissolution of marriage or of nullity of marriage unless the petitioner is domiciled in Kenya at the time when the petition is presented;
- b.’

18. Section 5 (1) provided that:-

(a) ‘Notwithstanding that the husband is not domiciled in Kenya, the court shall have jurisdiction in proceedings by a wife for divorce, if the wife is resident in Kenya and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.’

19. The jurisdiction of the Family Court to entertain a Divorce Cause largely revolves around the issue of ‘domicile’. In this case neither of the parties resides in Kenya. In fact the couple left this country way back in 1997 and have lived in Rwanda ever since. It is clear that both the Appellant and Respondent have selected The Republic of Rwanda as their country of domicile.

20. In the case of MNM -VS- PNM [2016] eKLR Hon. Justice Musyoka held as follows:-

“In personal matters, such as marriage, domicile is critical. Domicile is all about residency. The law of domicile plays an important role in the determination whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of marriage where the parties have been domiciled within the jurisdiction of that court for period allowed by the relevant law... the jurisdiction of a family court to entertain divorce cause is therefore guided by the law of domicile.....” [own emphasis]

21. The court went to state that “....

“Whether a court before which such matter has been placed competent to handle it will depend on whether the parties or either of them have been resident within the jurisdiction of that court for the period stipulated by the relevant law. In this case the parties had been resident in the USA for about ten years. No doubt the US court would have jurisdiction in a marital matter in the circumstances.”

22. It baffles me why a party who has lived in another country for over twenty (20) years would want to have matters of personal law settled by the Kenyan courts.

23. From the facts of this case is quite clear that the country of domicile for both parties is Rwanda. The two have by choice resided in Rwanda for over twenty (20) years.

24. Additionally none of the properties listed in the Appellants petition are located in Kenya which again mitigates against a court in Kenya handling the Divorce Cause. The courts in Kenya would be reluctant to assume jurisdiction over assets and properties located in a neighbouring country.



25. Based on the foregoing I find no merit in this appeal. The same is dismissed in its entirety. Cost will be met by the Appellant.

DATED IN NYERI THIS 12TH DAY OF JULY, 2024.

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MAUREEN A. ODERO

JUDGE

