



RWW v HW (Matrimonial Cause E11 of 2023) [2024] KEHC 9454 (KLR) (24 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9454 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAHURURU
MATRIMONIAL CAUSE E11 OF 2023
AK NDUNG'U, J
JULY 24, 2024**

BETWEEN

RWW PLAINTIFF

AND

HW DEFENDANT

RULING

1. *Vide* an Originating Summons dated 6th November, 2023 the Plaintiff instituted this cause the principal prayer sought being that a declaration be issued that the properties listed therein, and all improvements effected thereon are joint matrimonial properties of the Plaintiff and the Defendant in equal shares and should be shared equally between the Plaintiff and the Defendant.
2. The suit elicited a preliminary objection dated 13th November, 2023 filed by the defendant and fashioned as follows;

Prayer 2 of the Originating Summons is incompetent by dint of Section 17 of the Matrimonial Property Act which does not contemplate division/sharing of Matrimonial Property where the parties are still married, in that, there is no final order for dissolution of the marriage between the parties.
3. It is the defendant’s case that there is no final order for dissolution of the marriage between the parties.
4. The Plaintiff through a replying affidavit dated 16th April, 2024 opposed the preliminary objection stating that the notice of preliminary objection and grounds of opposition are misconceived, bad in law and an abuse of court process in that;
 - i. Section 17(1) of Matrimonial Property Act provides that a person may apply to court for a declaration of rights to any property that is contested between that person and a spouse or former spouse of the person.



- ii. The application for division of matrimonial property can therefore be made where the parties are still married and before the final order for dissolution of their marriage.
5. That the filing of the preliminary objection and notice to produce documents is only meant to delay or scuttle the hearing of the case on merit as there is no legal requirement to prove a civil case beyond any reasonable doubt.
6. That the notice of preliminary objection is on a matter of mixed law and facts and does not pass the test laid down in the celebrated case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* [1969] E.A. 696.
7. The Plaintiff through his counsel filed submissions dated 25th May, 2024. It is stated that the Defendant's notice of preliminary objection is misconceived, bad in law and an abuse of court process.
8. That the provisions of Section 17(1) of the *Matrimonial Property Act* is similar with Section 17 of the *Married Women's Properties Act, 1882 Laws of England* (previously applicable in Kenya before enactment of the current law) which has been the subject matter of various judicial pronouncements.
9. Reliance is placed on the following authorities; in *Nderitu v Nderitu* [1997] LLR 606 reported in the Family Digest-Matrimonial Property wherein it was held at page 81 holding No. 2(ii) as follows;
- “ (ii) For a wife to succeed in a section 17 application, all that she has to show is that (a) she is married to the husband; (b) the property in question was acquired during coverture; (c) she contributed directly or indirectly to the acquisition of the assets.”
10. [In Grace Wanjiku Wainaina v Benson Wainaina Kiburi](#) [2009] eKLR, Justice W. Ouko held as follows;

“ Finally, I wish to buttress the position I have taken in this matter by reiterating two things. First, the main consideration under Section 17 is that the parties must be husband and wife. Lord Pearce in [Strachan v Strachan](#) [1965] All ER 77 said that;

“ In any question between husband and wife”, it says. In my view, the parties must be husband and wife when summons is taken out”. (Emphasis supplied)

In *Fribance v Fribance* (supra) it is held that;

“ The court has jurisdiction to dispose of the matter if the parties were husband and wife when the summons were issued, notwithstanding the fact that at some time thereafter their relationship is ceased.” (Emphasis supplied)

HCCC.205/18

It does not, however, mean that once parties cease to be husband and wife by divorce they have no recourse to recover or claim their property. They can do so in the normal manner as was stated recently in [Peter Mburu Echaria v Priscilla Njeri Echaria](#) (supra). The court said;

“ After the dissolution of the marriage, the wife, as can be seen from the speech of Lord Diplock at page 783.....claimed one half undivided share in the house which was the matrimonial house for 10 years. The claim was made not under Section 17 of *1882 Act* but by an ordinary originating summons in the Chancery Division.”



The second point I am emphasizing is that Section 17 gives both the husband and the wife equal opportunity to move the court by summons to assert their rights even during the subsistence of the marriage.”

11. In *PNN v ZWN* [2017] eKLR, the Court of Appeal at paragraphs 34 – 35 had the following to say on the interpretation of Section 17;

“The correct position, in my view, was given in the English case of *Hichens v Hichens* [1945] 1 ALL ER 787 where a similar question arose. In that case, a pronouncement of decree nisi was made in a divorce suit filed by the wife against her husband. Before the decree was made absolute, the husband applied to the judge and invoked Section 17 of the Married Women’s Property Act for summary determination of questions concerning certain property. An order was accordingly made directing the registrar to hold an inquiry and to report back to the Judge. Before the registrar had made the report, the marriage between the parties was dissolved by a decree absolute. The registrar thereupon refused to continue the inquiry on the ground that, after the decree absolute he had no jurisdiction to proceed with the matter. The husband applied to the Judge who made an order that the inquiry should proceed. The wife appeal against the order, contending that the court had no jurisdiction to try questions under Section 17, since the marriage was dissolved; in other words, according to the wife, a dispute under Section 17 could only be contested between a married couple.

35. It was held by the English Court of Appeal, that since the court had the power, at the time when the marriage still subsisted, to direct an inquiry under the provisions of the Married Women’s Property Act, such an inquiry must proceed, notwithstanding the dissolution of the marriage by a decree absolute: but the court on receiving the report of the registrar, might take into account the fact that there had been a dissolution of the marriage by a decree absolute. See also *Fribance v Fribance* [1955] 3 ALL ER 789.” (emphasis added)

12. In the instant case, it is urged that there exists a decree nisi issued in Maralal SPMC Divorce Cause No. 2 of 2022 which is attached as annexure RWW-2(b) and that there is no decree absolute made in the said matter yet. That this court has the requisite jurisdiction to deal with the matter in line with the foregoing decisions under Section 17 of the *Matrimonial Property Act*, 2013, Laws of Kenya.
13. Counsel submits that the notice of preliminary objection is on a matter of mixed law and fact and does not pass the test laid down in the locus classicus case of *Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited* [1969] E.A. 696. The said case was cited with approval by Justice J.B. Ojwang (as he then was) in the case of *Oraro v Mbaja* [2003] eKLR as follows;

“Mr. Ougo buttressed his submission by drawing from the Court of Appeal decision in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A. 696. Of preliminary objections, Law, JA in that case said (p.700):

“I agree that the application for the suit to be dismissed for want of prosecution should have taken the form of a motion, and not that of a preliminary objection which it was not. So far as I am aware, 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.”



And to the same effect Newbold, P stated (p.701);

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. 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. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion, confuse the issues. The improper practise should stop.

I think the principle is abundantly clear. A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. 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.”
(emphasis added)

14. It is the plaintiff’s case that the preliminary objection cannot be used to determine all the reliefs sought by the Plaintiff in this case neither can it be decided without the court resorting into considering disputed matters of fact. The preliminary objection ought to fail and prays the same be dismissed with costs to the Plaintiff.
15. The Defendant through his counsel filed submissions dated 12th May, 2024 stating that if the preliminary objection is upheld, it will have the effect of disposing the entire suit.
16. That the issue for determination is Whether or not the suit is premature.
17. Counsel urges that the law is settled on the matter. He cites the decision in [MA v SAK](#) [2021] eKLR, where the court made the following pertinent observation;

“The basis for the distribution of matrimonial property is Section 7 of the [Matrimonial Property Act](#) which provide;

“Ownership of 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.”

Based on the above provisions, I am of the considered view that matrimonial property can only be divided upon the dissolution of marriage.

“In the premises, I’m of the view that the Petitioner herein is entitled to a share which may not be equal to that of the Respondent if at all the matrimonial property is to be distributed. The suit property herein cannot be subject to distribution without proof of divorce……”

18. That this court has no jurisdiction to entertain division of a matrimonial property in a case where there is no proof of dissolution of marriage.
19. I have had due regard to the preliminary objection and the opposition thereto. The objection targets only one prayer in the Originating Summons. Were it to succeed, the same would not dispose of the suit. To that extent, the objection fails the test in [Mukisa Biscuits Manufacturing Company Limited v West End Distributors Limited](#) (*supra*). This, for the simple reason that the failure of 1 prayer in a suit,



even assuming that the court would ultimately find prayer 2 herein untenable in law, does not mean that other prayers could not succeed.

20. Secondly, the determination of the status of the parties herein is one that calls for evidence and a preliminary objection therefore becomes inappropriate.
21. In this matter, the Plaintiff seeks both declaratory orders and distribution of matrimonial property. Declaration of matrimonial property rights is enshrined under Section 17 of the *Matrimonial Property Act* which provides that;
 - “ 1) a person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.
 - 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.”
22. From the reliefs sought, the suit is two pronged. The first one is declaration of the property rights and two, division of matrimonial property.
23. Section 7 of the *Matrimonial Property Act*, is explicit that this court has no jurisdiction to make determination on issues of division of matrimonial property before dissolution of a marriage. Nothing, however, impedes the court’s jurisdiction to make a determination on the prayer for declaratory rights under matrimonial property. This aspect of the law under Section 17 of the *Matrimonial Property Act* does not necessarily require parties to first dissolve their marriage.
24. In the case of *AKK v PKN* [2020] eKLR, the Court of Appeal stated as follows;
 - “ A plain reading of Section 17 enables a spouse, subsistence of marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in 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*”.
25. The matter is further elucidated in *PWN v ZWN* [2017] eKLR, where Waki J. stated that;
 - “An inquiry may thus be made under Section 17 and declarations may be issued, the subsistence of marriage notwithstanding...”
26. In light of the above, the preliminary objection herein must fail. The same is dismissed with costs to the plaintiff.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 24TH DAY OF JULY, 2024

.....

A.K. NDUNG’U

JUDGE

