



JKN v JNK; PK (Intended Interested Party) (Matrimonial Cause E030 of 2024) [2024] KEHC 9721 (KLR) (Family) (7 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E030 OF 2024
SN RIECHI, J
AUGUST 7, 2024**

BETWEEN

JKN APPLICANT

AND

JNK RESPONDENT

AND

PK INTENDED INTERESTED PARTY

RULING

1. This ruling is in respect of Preliminary Objection dated 26th June 2024, and Notice of Motion dated 10th June 2024.
2. The Applicant herein has filed a Divorce Cause in Milimani Commercial Divorce Cause No.554 of 2024 and the matter is pending hearing and determination. While the matter is pending before the commercial court, the applicant JKN courtmoved to this court and filed an application dated 10th June 2024 pursuant to order 40 of Civil Procedure Rules,2010 seeking orders that; -
 1. Spent
 2. Spent
 3. That the Court be pleased to grant an order of injunction restraining the Respondent either by herself or any other person acting on her behalf from denying the Applicant free access, use and quiet occupation of the parties' matrimonial home constructed on LR No. 7645/43 thereof pending the hearing and determination of this application.



4. That the Court be pleased to grant a temporary injunction restraining the Respondent either by herself or any other person acting on her behalf from selling, leasing, mortgaging, charging, transferring the following properties, LR No. 7645/43, Kiambaa/Ruaka/6329, Kiambaa/Ruaka/5310, Motor Vehicle Registration No. KDP 707 B Toyota Prado or any part thereof pending the hearing and determination of this cause.
 5. That the Court be pleased to grant an order of injunction restraining the respondent herself or any other person acting on her behalf from denying the Applicant free access, use and quiet occupation of the parties' matrimonial home constructed on LR No. 7645/43 thereof pending the hearing and determination of this cause.
 6. That this Honourable Court be pleased to direct that the rental proceeds derived from the property known as T & T Court located on the parcel of land known as Kiambaa/Ruaka/6329 less maintenance costs be deposited in a joint interest earning account opened in the names of the parties or their Advocates for the benefit of the parties herein pending the hearing and determination of this cause.
 7. That this Honourable Court be pleased to direct that a Standing Order do issue for a sum of Kenya Shillings One Hundred and Twenty Four Thousand, Nine Hundred and Fifty Eight (Kshs. 124,924/-) being monthly loan instalment from the rent proceeds payable to NCBA Bank pending the hearing and determination of this cause.
 8. The costs of this application be borne by the Respondent.
3. The application is premised on the grounds on face of it and the supporting affidavit sworn on even date.
 4. In response to the application the respondent JNK filed a Notice of Preliminary Objection dated 26th June 2024 setting on the following grounds;
 1. The suit and the application are fatally defective and the same ought to be struck out in the first instance.
 2. The entire application and the suit offends the provisions of Section 7 of the *Matrimonial Property Act*, CAP 152, Laws of Kenya, as revised in 2022. which anticipates that an applicant can only move the court for division of matrimonial property after a divorce or a dissolution of a marriage.
 3. The Applicant herein moved the family court for dissolution of marriage vide Milimani Divorce Cause No. E554 OF 2024 and the same is still pending determination by the said court.
 4. The existence of the said marriage between the Applicant and the Respondent is in itself contested and a declaration is yet to be made by the honorable court as to the nature of the relationship between the parties.
 5. That consequently, the application and the suit herein are not ripe for determination and its determination is premature and would only be reduced to an academic exercise.
 5. This application was canvassed by way of written submissions. The applicant filed written submission 2nd June 2024 and respondent filed written submissions dated 15th July 2024.
 6. The applicant submitted through Ms.Wanjiku who submitted on that this court has jurisdiction by virtue of section 17 of the *Matrimonial Property Act* to deal with issue of declaration of matrimonial



property rights. Ms. Wanjiku the purpose of the injunction order is to preserve the substratum of the suit from being put to waste or alienated during the pendency of a trial. She submitted that the application of applicant is merited and the P.O should be dismissed.

7. The respondent submitted through Mr. Nyongesa who submitted that the applicant has not demonstrated any threat of apprehension that is likely to result in irreparable injury. He submitted that the applicant has no right on the subject properties. He submitted that this court is devoid of jurisdiction to entertain the present matter.
8. This court has considered the Preliminary Objection raised by the Respondent and the response. The issue raised is whether the Preliminary Objection raised is proper and well founded in law. A Preliminary Objection is usually a weighty or serious matter to be raised at any stage of proceedings.
9. A preliminary objection is defined by *Black's Law Dictinionary* 10th Edition as:-

“an objection that, if upheld would render further proceedings before the tribunal impossible or unnecessary. An objection to the court’s jurisdiction is an example of a preliminary objection.”
10. Before I consider the nature of the objections raised, it is important to note that a preliminary objection must consist of purely a point of law pleaded which if well-founded will dispose of the entire suit. In the cited case of *Mukisa Biscuit Manufacturing co. Ltd v West End Distributors Ltd* (1969) EA the court held as follows:-

“So far as I am aware, a Preliminary Objection consists of a pure 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 on 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 on arbitration.”
11. In this matter, the Respondent has pleaded that this court lacks jurisdiction to entertain the Notice of Motion dated 10th June 2024 on the ground that Section 7 of the *Matrimonial Property Act* grants power to this court to divide property only after the dissolution of marriage. The provisions of Section 7 of the *Matrimonial Property Act* No. 49, 2013 provides as follows:-

“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.”
12. The import of Section 7 of *the Act* quite clearly shows that a court can only entertain division of matrimonial property between spouses or vesting of matrimonial property to either spouse upon dissolution of marriage or divorce.
13. It is noted from the proceedings herein that the Applicant has sought interlocutory reliefs through the Notice of Motion dated 10th June wherein she is seeking injunction orders on the listed properties pending hearing and determination of this application.
14. The Lodging of this application dated 10th June 2024 by the applicant in my view is significant because by doing so, the Applicant kicked started the operation of Section 17 of the *Matrimonial Property Act* which provides as follows on :-

“Action for declaration of rights to property



- (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
- (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.”

15. The above (Section 17(2) (C)) in my view, unclogs the jurisdiction of this court to deal with interlocutory matters touching on declaratory rights to matrimonial property notwithstanding the fact that the marriage between the parties have not been dissolved. The intention of the Law Makers in my view was deliberate and was aimed at preserving the subject matter of the suit or the interest of an estranged spouse, as she or he awaits the process of dissolution of marriage or divorce given the fact that such processes can at times be time consuming.
16. The orders sought in the said Notice of Motion, as observed above, shows that the Applicant is asking this court for injunctive reliefs to restrain the Respondent from selling, leasing, mortgaging, charging, transferring the following properties, LR No. 7645/43, Kiambaa/Ruaka/6329, Kiambaa/Ruaka/5310, Motor Vehicle Registration No. KDP 707 B Toyota Prado or any part thereof pending the hearing and determination of this cause.
17. At this stage this court is not being called upon to determine whether the listed properties constitute matrimonial property as per the law. It is also not being asked to divide the said property and to the extent that this court is being called upon to determine the interlocutory application by way of Notice of Motion dated 10th June 2024 and not the main suit that is yet to be filed , this court has the jurisdiction to entertain the application.
18. The Preliminary Objection filed is mainly hinged on the fact that the divorce proceedings are still pending .As I have observed, this court at this stage has not reached the stage of being called upon to entertain subdivision of the matrimonial properties as listed in the suit. In *AKK v PKW* [2020] eKLR the court of Appeal when faced with a similar situation made the following observation following useful and relevant observations;

“It is also correct that the orders concerning division of matrimonial property pursuant to Section 7 of the *Matrimonial Property Act* was unavailable to the appellant until the determination of Divorce case 867 of 2017 between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant’s prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court’s jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of *the Act* in order for the court to make the declaratory orders sought.....

An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in *Petit vs. Petit* [1970] AC 777:



One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court was whose is this? And not to whom shall it be given?

The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of *the Act*."

19. In light of the above decision and clear provisions of Section 17 of the Act, this court finds that the Preliminary Objection dated 26th June, 2024 is unsustainable.
20. Having set the above i will proceed to determine the application dated 10th June 2024. In the said application the applicant is seeking orders temporary injunction orders that the respondent be restrained from selling, leasing, mortgaging, charging, transferring the following properties, LR No. 7645/43, Kiambaa/Ruaka/6329, Kiambaa/Ruaka/5310, Motor Vehicle Registration No. KDP 707 B Toyota Prado or any part thereof pending the hearing and determination of this cause.
21. The law under order 40 (1) of the Civil Procedure Rules provides as follows on the issue of when temporary injunctions can be granted:

Where in any suit it is proved by affidavit or otherwise—

- (a) that any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or
 - (b) that the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further orders.
22. In this matter the Applicant has set out the grounds upon which he seeks for injunction in his application. He has stated that the he Applicant has filed for divorce in Milimani Divorce Cause No. E554 of 2024 and the same is pending hearing and determination at the Milimani Commercial Courts. He stated that during the pendency of the marriage, the Applicant and Respondent acquired by joint efforts and funds the matrimonial properties listed herein. That Applicant and Respondent agreed that the properties would be registered in the name of the Respondent and the same having been acquired



during the pendency of the marriage through the joint efforts of the parties, the Respondent holds the properties on her behalf and in trust for the Applicant.

23. The respondent averred that the Respondent has been collecting rent from a block of Apartments known as T & T Court located on the parcel of land known as Kiambaa/Ruaka/6329 to the exclusion of the Applicant. The applicant averred that that he is currently repaying a loan facility at NCBA Bank for a lorry that was acquired in the year 2021 for the purpose of facilitating transportation of construction materials for development of the block of apartments on the parcel of land known as Kiambaa/Ruaka/6329. The amount outstanding on the loan is Kenya Shilling One Million, Three Hundred and Thirty-Seven, Six Hundred and Ninety Nine (Kshs. 1.337,699/-).
24. The applicant contend that he currently pays a monthly amount of Kenya Shillings One Hundred and Twenty Four Thousand, Nine Hundred and Fifty Eight (Ksh. 124,924/-) which he strains to do as he is retired.
25. The applicant content further that he has now been left destitute having invested all his money including his pension in the family business and towards acquisition and development of the matrimonial properties. ‘
26. The applicant stated that he is apprehensive that unless the Respondent by herself or through his agents, employees and servants are restrained by an Order of this Honourable Court, she will alienate the matrimonial properties putting them out of reach of the Applicant. He stated that it is necessary to restrain the Respondent from transferring the properties to third parties with the aim of defeating the suit for division of matrimonial properties.
27. I am satisfied with his argument at this stage. It is my finding that the Applicant has established a prima facie case with a probability of success. I am persuaded by the court in *SJM v MK* [2020] eKLR where the court stated that:

“The Court’s first task is to determine if the Plaintiff has established a *prima facie* case with a probability of success once the full case is ventilated. I must be careful to reiterate that this first Giella factor does not suggest that the Applicant must establish with certainty that she will succeed on the merits; only that she raises an arguable case with a probability of success (see, for example, *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] KLR 125).”
28. It is my considered view that the Applicant, through his application, Affidavits and submissions, has demonstrated the first test in establishing whether the injunction should be granted.
29. In establishing the second test for granting an injunction this court should consider whether the Applicant will suffer irreparable injury, which would not be adequately compensated by an award of damages. The Applicant has argued that after he is now residing in an Air bnb and he is retired and currently servicing a loan towards some of the properties listed. I am satisfied that the Applicant may suffer irreparable injury, which would not be adequately compensated by an award of damages.
30. The Applicant deserves the orders he is seeking. I therefore allow the Notice of Motion dated 10th June 2024 and grant the following orders:
 1. That an interim order of injunction is hereby issued restraining the Respondent either by herself or any other person acting on her behalf from selling, leasing, mortgaging, charging, transferring the following properties, LR No. 7645/43, Kiambaa/Ruaka/6329, Kiambaa/Ruaka/5310, Motor Vehicle Registration No. KDP 707 B Toyota Prado or any part thereof pending the hearing and determination of this cause



2. This Court hereby direct that the rental proceeds derived from the property known as T & T Court located on the parcel of land known as Kiambaa/Ruaka/6329 less maintenance costs be deposited in a joint interest earning account opened in the names of the parties or their Advocates for the benefit of the parties herein pending the hearing and determination of this cause.

DATED AT NAIROBI THIS 7TH DAY OF AUGUST 2024.

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S. N. RIECHI

JUDGE

