



REPUBLIC OF KENYA



KENYA LAW
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**JMM v LKM (Matrimonial Cause E001 of 2021)
[2023] KEHC 2662 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2662 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NANYUKI
MATRIMONIAL CAUSE E001 OF 2021
HPG WAWERU, J
MARCH 23, 2023**

BETWEEN

JMM APPLICANT

AND

LKM RESPONDENT

RULING

1. The Applicant herein instituted this suit by way of originating summons dated 04/10/2021 seeking various reliefs in respect to claimed matrimonial properties. Together with the originating summons the Applicant also filed an application by notice of motion of the same date seeking a temporary injunction pending hearing and determination of the originating summons, to restrain the Respondent from selling, leasing, mortgaging, charging, transferring...or evicting and/or interfering with the Applicant's rights, occupation and/or interest over land parcels LR Ontulili/Ontulili/Katheri/xxxx, LR Ontulili/Ontulili Block 1 (Katheri) xxxx and LR Ontulili/Ontulili/Katheri/xxxx.
2. The Respondent filed a replying affidavit dated 10/11/2021 in response to the originating summons. On 12/11/2021 she filed notice of preliminary objection to the originating summons upon these grounds -
 - i. That the originating summons is misconceived, incompetent, bad in law and incurably defective for reason that it offends the provisions of section 7 of the *Matrimonial Property Act*, No 49 of 2013 (hereby referred as the 'Act').
 - ii. That this court therefor lacks jurisdiction to hear and determine the originating summons.

In response to the notice of preliminary objection the Applicant filed grounds of opposition dated 19/01/2022 asserting that the court has the requisite jurisdiction.



3. The parties agreed to cavass the preliminary objection by way of written submissions. The Applicant filed his submissions on 01/03/2022; the Respondent did not file any submissions, which essentially means that she did not prosecute her preliminary objection. However, as the issue raised is a challenge to this court's jurisdiction to hear and determine the originating summons, the court will deal with the preliminary objection.
4. I have considered the Applicant's submissions. I have also read through the pleadings. What can be gathered is that the parties herein are married under Meru customary law from the year 2006. In 2021 the Respondent filed for divorce vide Nanyuki CM Divorce Cause No 15 of 2021. The Applicant cross-petitioned for divorce. That cause is pending hearing and determination, and that was the situation when the Applicant instituted the present proceedings. The main pleadings in the divorce cause have been exhibited in the present proceedings, and I have perused them. The fact that there is a valid marriage between the parties that is subsisting is common ground.

4. The originating summons was lodged under section 17 of the Act which provides –

“17. 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.”

And section 7 of the Act provides -

“7. Ownership of matrimonial property 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.”

5. Under section 17 of the Act, there thus must be a marriage which either is still in existence or already dissolved. However, if division of the matrimonial property is sought under section 7 of the Act, there must be a decree of divorce or dissolution of the marriage. Section 17 provides for the procedure to institute proceedings, and also substantive jurisdiction for any other relief sought (apart from division of the matrimonial property), while section 7 provides for the substantive jurisdiction regarding division of the matrimonial property.
6. The first two reliefs sought in the originating summons are declarations that the mentioned properties constitute matrimonial properties. The court certainly has jurisdiction under section 17 of the Act to determine that issue. The relief sought in prayer 3 however is division of the matrimonial property under section 7 of the Act. For the court to exercise jurisdiction in that regard, the marriage between the Applicant and the Respondent must first be dissolved. Unless and until there is such decree of divorce, this court cannot proceed under section 7 of the Act.



7. To summarize, as already seen, there are aspects of the case that the court should be able to proceed with. It is only division of the matrimonial property that cannot be dealt until there is a decree of divorce. That prayer can be suspended until the divorce proceedings are concluded.
8. The upshot is that the preliminary objection is not well taken and is hereby dismissed. The Applicant shall have costs of the preliminary objection. It is so ordered.

DATED AND SIGNED AT NANYUKI THIS 7TH DAY OF MARCH 2023

H P G WAWERU

JUDGE

DELIVERED AT NANYUKI THIS 23RD DAY OF MARCH 2023

