



**RMG v SGU (Matrimonial Cause E026 of 2022)
[2023] KEHC 2153 (KLR) (15 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2153 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
MATRIMONIAL CAUSE E026 OF 2022
PM MULWA, J
MARCH 15, 2023**

BETWEEN

RMG APPLICANT

AND

SGU RESPONDENT

RULING

1. At the onset, the plaintiff/applicant (“the applicant”) in this instance brought the Notice of Motion dated July 13, 2022 supported by the grounds laid out on its face and the facts stated in the affidavit of the applicant, seeking various orders against the defendant/respondent (“the respondent”), key among them being an interlocutory injunction in respect to various properties pending the hearing and determination of the suit. She further sought part of the rent proceeds from the rental properties particularized in the Motion.
2. The respondent challenged the competency of the Motion by putting in the notice of preliminary objection dated September 25, 2022 containing the following grounds:
 - i. That the application is in itself a non-starter for the reasons that the *Marriage (Matrimonial Proceedings) Rules 2020* provides that the application to be made should be an Originating Summons in the relevant form provided at the schedule therein.
 - ii. That the application in itself is bad in law, an abuse of the court process, incompetent and frivolous therewith for the reasons that it also canvasses matters touching on commercial issues and criminal matters as a whole which cannot be dealt with by this court alone.
 - iii. That this honourable court lacks jurisdiction to hear this matter owing to the fact that the commercial issue intertwined herein, is composed of a loan owed to Family Bank worth Kshs 8,852,889.01 which amount is way below the minimum pecuniary jurisdiction statutorily provided for by law as established.



3. When the parties attended court on November 24, 2022 it was agreed by consent that the preliminary objection be heard and determined first. Consequently, the parties were directed to put in written submissions.
4. I have considered the notice of preliminary objection, and the contending submissions and authorities cited in support of and in opposition to the objection raised.
5. A brief background of the matter according to the record is that the applicant and the respondent were at all material times married and were blessed with five (5) children.
6. The record shows that sometime in the year 2020 the applicant filed a divorce petition pursuant to which a decree nisi was issued and subsequently made absolute on October 13, 2021, thereby resulting in the issuance of the decree absolute on November 29, 2021.
7. Consequently, the applicant instituted the present proceedings by way of an originating summons accompanied by the aforementioned notice of motion dated July 13, 2022.
8. Returning to the preliminary objection, it is apparent that the respondent is raising three (3) separate grounds of objection, which I will deal with in like order.
9. The first ground of objection touches on whether the motion was brought in the proper form.
10. In his submissions, the respondent argues that since the dispute concerns family companies and matrimonial properties, the provisions of the *Matrimonial Property Act* (“the Act”) and the *Matrimonial Proceedings Rules 2020* (“the Rules”) would become applicable.
11. The respondent further argues that Part II, Rule 4 of the *Rules* expresses that:
 - “(1) An application for leave to present a petition for separation of the parties or for the dissolution of a marriage contracted under Part IV of the Act before three years have elapsed since the celebration of the marriage shall be made by originating summons in Form MA15 set out in the First Schedule.”
12. It is therefore the contention by the respondent that the applicant ought to have sought leave in order to file a petition for separation of the parties, in view of the fact that the stipulated timelines mentioned in the above provision had lapsed.
13. In retort, the applicant submits that the provision of filing the Originating Summons relates purely to the suit and that no such provision has been made in respect to the filing of applications seeking interlocutory orders pending the hearing and determination of the suit.
14. Upon my consideration of the rival positions taken and a perusal of the legal and statutory provisions, I note that the proviso referenced by the respondent is inapplicable in this case since it relates to separation/divorce proceedings, which do not constitute the subject matter of the present dispute.
15. As earlier mentioned, the applicant had previously instituted divorce proceedings which were concluded. From the pleadings herein, it is evident that the matters in dispute touch on matrimonial property/properties relating to the parties.
16. The applicant has moved the Court in the main suit by way of Originating Summons. There exists no mandatory format for filing an interlocutory application in respect to matrimonial property. Section 17 of the *Act* stipulates thus:



- (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.”
17. In view of all the foregoing circumstances, I see no reason to find that the Motion is a non-starter for want of form. Ground (i) of the preliminary objection fails.
18. The second ground of objection raised was whether the Motion is an abuse of the court process on the grounds that it touches on matters criminal and commercial.
19. The respondent on the one part submits that the applicant has not come to court with clean hands and on the basis of non-disclosure of the details of some of the properties/assets in question. The respondent is therefore of the view that the applicant is not deserving of the interlocutory injunctive order sought by virtue of the fact that she has not satisfied the conditions set out by the court in the case of *SJM v MK* [2020] eKLR thus:
- “...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.”
20. The applicant on the other part submits that the instant Motion is not calling upon the court to decide on the other matters, whether commercial or criminal, and hence the argument being raised by the respondent cannot stand.
21. The law is well settled that preliminary objections apply only in instances where a pure point of law is raised and the facts are undisputed.
22. In the case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 cited in the submissions by the respondent, the court defined the term ‘preliminary objection’ in the following manner:
- “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 in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
23. The record is clear that the abovementioned issues being raised by the respondent would therefore require an investigation into the merits of the suit, which can only take place at the hearing and not at this stage.
24. Flowing therefrom, I am of the view that the issue on whether the material dispute touches on criminal and commercial matters cannot be regarded as a preliminary issue on a pure point of law. Ground (ii) of the preliminary objection therefore holds no water.



25. Concerning the third and final ground of objection as to whether this court has jurisdiction to entertain both the Motion and the suit, it is the contention by the respondent that one of the properties which forms the subject matter of the dispute, namely LR Ruiru West Block 1 has been charged to Family Bank and has an outstanding loan amount in the sum of Kshs 8,852,889.01 and which would therefore fall within the pecuniary jurisdiction of the magistrate's court.
26. The respondent further contended that the issues to be determined by the High Court under Sections 27, 28 and 29 of the *Matrimonial Causes Act*, Cap 152 Laws of Kenya can equally be determined by the subordinate courts.
27. The applicant on her part argues that the provisions of Article 165(3)(a) of *the Constitution of Kenya, 2010* grant the High Court unlimited original jurisdiction in handling both criminal and civil matters. And that the total value of the matrimonial property particularized hereinabove exceeds the pecuniary jurisdiction of the subordinate courts and hence the High Court has jurisdiction in the matter.
28. Upon my consideration of the rival positions taken on this subject, I find that the respondent has not tendered any credible evidence to show that this court lacks the pecuniary jurisdiction to entertain both the Motion and the suit. I concur with the reasoning advanced by the applicant that under Article 165(3)(a) of *the Constitution*, the High Court is clothed with unlimited original jurisdiction in criminal and civil cases.
29. Moreover, by virtue of Section 17 of the *Act* (supra), this court has jurisdiction to declare the rights of parties in relation to any property which is contested. This position was acknowledged by the respective courts in the case of *CK v AGM* [2018] eKLR and the case of *EWG v WMM* [2020] eKLR.
30. Nothing precludes a party from approaching the courts under either a civil or matrimonial cause for the enforcement of his or her rights to matrimonial property. Ground (iii) of the preliminary objection equally fails.
31. Final Orders
 - i. The preliminary objection lacks merit and is hereby dismissed.
 - ii. Costs to the plaintiff/applicant.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU

THIS 15TH DAY OF MARCH, 2023

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P.M. MULWA

JUDGE

In the presence of:

Mr. Kinyua – Court Assistant

For Appellant: No appearance

For Respondent: Mr. Waithanji

