



**PMK v MWK (Matrimonial Cause E075 of 2021)
[2023] KEHC 3233 (KLR) (Family) (20 April 2023) (Judgment)**

Neutral citation: [2023] KEHC 3233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E075 OF 2021
EKO OGOLA, J
APRIL 20, 2023**

BETWEEN

PMK APPLICANT

AND

MWK RESPONDENT

JUDGMENT

1. The respondent filed a preliminary objection dated July 29, 2022 against the originating summons application dated October 22, 2021, on the grounds that: -
 1. The application is fatally defective and the same ought to be struck out in the first instance
 2. The entire application offends the provisions of section 7 and 17 of the [Matrimonial Causes Act](#), cap 152 Laws of Kenya.
 3. The suit had been filed within the [Matrimonial Property Act](#) where the existence of a marriage relationship was fundamental
 4. The suit is incompetent and fatally defective
 5. The suit is an abuse of court process
 6. The suit is frivolous
2. The applicant filed grounds of opposition opposing the preliminary objection in the following grounds: -
 1. That the suit is competent and is properly before this court



2. That the suit as filed does not offend section 17 of the *Matrimonial Property Act* as which for declaratory orders pending dissolution of marriage
 3. That there does not exist pending divorce proceedings in the United Kingdom and in the Netherlands but the respondent has refused to co-operate to dissolve the marriage
3. The parties did not file submissions to the preliminary objection.

Determination

4. Having considered the preliminary objection and the grounds of opposition, the issue arising for determination is whether the preliminary objection has merit.
5. Preliminary objection is against an originating summons application where the applicant is seeking the division of matrimonial property.
6. The Leading decision in Preliminary objection is the Court of Appeal case *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, where it was held as follows: -

Law, JA:

“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 to arbitration.”

Newbold, P:

“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 increases costs and, on occasion, confuse the issues. This improper practice should stop.”

7. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR also captured the legal principle when it stated as follows:

“A preliminary objection 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.”

8. In *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR the Supreme Court stated that:

“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”



9. The respondent has stated that the application for division of matrimonial property offends section 7 and 17 of the Matrimonial Property Act. Section 7 of the Act provides: -

“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.”

Section 17 provides: -

- (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

10. The above provisions are to the effect that a person should only seek division of matrimonial property when a marriage has already been dissolved. Alternatively, one can seek for declaration of rights to property before the marriage is completely dissolved.

11. In the originating summons application, the applicant is seeking for division of matrimonial property yet she still states in the application that the marriage is yet to be dissolved.

12. In TMW v FMC, Matrimonial Cause 3 of 2018 [2018] eKLR the court held;

“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.”

13. In the instance case there is no proof of divorce, in fact the applicant in her application has stated that the marriage still subsists since the divorce proceedings are ongoing. The wording of the prayers in the application cannot be interpreted to mean that the applicant is seeking for declaration of rights. The upshot of the foregoing is that in the absence of proof of divorce the court’s hands are tied with regards to distribution of the property. On the strength of this limb alone, the preliminary objection is merited.

14. The originating summons dated October 22, 2021 is accordingly dismissed with no orders as to costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL 2023.

E.K. OGOLA

JUDGE

Judgment read and delivered online in the presence of:

M/s Waceke Thindigua for the Applicant

M/s Wangai Kuria for the Respondent

Ms. Eleanor Court Assistant

