



**DGG v GWN (Matrimonial Cause E068 of 2022)
[2023] KEHC 18130 (KLR) (Family) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18130 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

MATRIMONIAL CAUSE E068 OF 2022

MA ODERO, J

MAY 19, 2023

IN THE MATTER OF MATRIMONIAL PROPERTY ACT

BETWEEN

DGG APPLICANT

AND

GWN RESPONDENT

RULING

1. Before this court for determination is the Notice of Preliminary Objection dated November 18, 2022 filed by the Respondent GWN. The Applicant DGG opposed the Preliminary Objection.
2. The matter was canvassed by way of written submissions. The Respondents filed the written submissions dated December 15, 2022 whilst the Applicant relied upon her written submissions dated January 16, 2023.
3. The Applicant herein filed in the High Court the Originating Summons dated September 26, 2022 seeking the following orders:-

- “1. Spent.
2. That a declaration to issue that the following properties registered in the names of the Respondent and some through company shares as below are part of the matrimonial properties and both the Applicant and the Respondent have equal rights.- Shares in Mangwayas Investment.- Shares in Tenbeat general merchants.- Shares in ten bits caterers and event décor.- Shares in Giray general suppliers.- 1000 shares in Sothern Glades Limited.- Bank account in Equity Bank a/c No.xxxx- All of the parcel known as LR No. 15153/35 (IR No.xxxx)



in Kiambu.Southern Glades Apartment C2, second floor situated on LR No. 209/xxxx.- Matrimonial home in Kileleshwa.- Residential property in Greenfield.- A plot of land situated in Kenyatta Road.- Toyota Land Cruiser KCF xxxx.- Motor vehicle KDE xxxx.- Motor vehicle KCJ xxxx Toyota Noah.

3. That pending the hearing and determination of this application and Milimani divorce Petition E898 of 2022 in the lower court, an order of temporary injunction be issued restraining the Respondent either by herself, agents, representatives, servants and/or employees or any person claiming through them from interfering with, alienating, disposing, selling, encumbering, assigning, transferring or in any manner dealing with the said properties.
 4. That this Honourable Court be pleased to order the sale, division and/or apportionment of the properties between the parties equally.
 5. That further and in the alternative and in the event that title and ownership in any way of the suit properties has/have already been transferred in favour of any third party an order that the Respondent does account for the proceeds and the same be divided between the Applicant and Respondent equitably and equally.
 6. That an order that the Respondent does execute all documents where necessary to transfer the Applicant's portion in the properties or in default the same be executed by the Chief Registrar, Deputy Registrar, Lands Registrar of Registrar of Titles or in the alternative that the same properties be valued by a qualified and reputable valuer, sold and the proceeds be shared equally between the Applicant and the Respondent.
 7. That an order does issue declaring the Respondent accountable to the Applicant in respect of the income derived from the said properties.
 8. That the costs of this application be costs in the cause.”
4. In response to the Originating Summons the Respondent filed a Notice of Preliminary Objection which was premised upon the following grounds:-
- “ 1. The court's jurisdiction has been prematurely invoked and hence the court lacks the requisite jurisdiction to hear and determine the matter.
 2. The application is fatally defective as it offends the provisions of Section 7 of the *Matrimonial Property Act*, 2013 because the marriage has not been dissolved.
 3. The entire application is therefore ab initio incompetent, fatally defective and cannot stand in law before this honourable court.
 4. The application be dismissed with costs.”

Analysis and Determination

5. I have carefully considered the Preliminary Objection filed in the matter as well as the written submissions filed by both parties.



6. The definition of what constitutes a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Company Vs West End Distributors Ltd* [1969] EA where it was held that:-

“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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion. The improper practice of raising points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion confuse issues and this improper practice should stop.”

7. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.

- i. The Preliminary Objection should raise a pure point of law.
- ii. The Preliminary Objection must be argued on the assumption that all the fact pleaded are correct.
- iii. The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
- iv. A valid Preliminary Objection ought if successful dispose of the entire suit.

8. The same position was reiterated in *Hassan Ali Jobo & Another v Suleiman Said Shabal & 2 Others* [2014] eKLR where the Supreme Court observed; inter alia that:-

“...a Preliminary Objection consist 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 argued that the originating summons filed by the Plaintiff was fatally defective as the marriage between the parties has not been dissolved and is still subsisting. Section 17 of the *Matrimonial Properties Act*, provides as follows:-

- (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.
- (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.” (own emphasis)

10. The Kenyan Courts have severally interrogated the provisions of Section 17 In *PNN VS ZWN* [2017] KLR the Court of Appeal held as follows:-

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

“One of the main purposes of the Act of 1882 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 negatives 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 this be given?”

11. The court added:-

“The purpose of the Section [17 of the *Act*] is not to defeat rights but to provide a machinery for ascertaining rights and once ascertained, then the register would be changed to take account of them.” (Own emphasis)

12. Likewise in Nairobi Court Civil Suit 14 of 2013 (0.s) *CK v AGM* [2018] eKLR the Court of Appeal held as follows:-

“The above case demonstrates that a declaration under section 17 of the repealed Act is not pegged on the subsistence of a marriage. The effect of this section is such that the court can make a declaration with regard to the suit property in this case even though the parties are still married, it does not however provide for the sharing of such property. The Applicant cited the court’s lack of jurisdiction to distribute matrimonial property under section 7 of the *Matrimonial Property Act* during the subsistence of a marriage. The contested originating summons was however brought under the equivalent of section 17 of the Act, which is not dependent on the status of a marriage. In this case therefore, I find that this court is properly equipped with jurisdiction to resolve any questions about the parties’ beneficial entitlement to suit property without severing the property.” [Own emphasis]

13. A close look at the Originating Summons dated September 26, 2022 reveal that the prayers sought therein include prayers for declaratory orders. As such I find that this court is clothed with requisite jurisdiction to hear and determine that summons.

14. Based on the foregoing I find no merit in the Preliminary Objection dated November 18, 2022. The same is dismissed in its entirety. This being a family matter each side will meet their own costs.

DATED IN NAIROBI THIS 19TH DAY OF MAY, 2023.

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MAUREEN A. ODERO

JUDGE

