



**MJEDB v JBN (Matrimonial Cause E072 of 2021)  
[2023] KEHC 18702 (KLR) (Family) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 18702 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CAUSE E072 OF 2021  
PM NYAUNDI, J  
MAY 19, 2023  
IN THE MATTER OF THE MATRIMONIAL PROPERTY  
ACT NO. 49 OF 2013  
IN THE MATTER OF DIVISION OF MATRIMONIAL  
PROPERTY  
AND  
IN THE MATTER OF THE CONSTITUTION OF KENYA,  
2010**

**BETWEEN**

**MJEDB ..... APPLICANT**

**AND**

**JBN ..... RESPONDENT**

**RULING**

**Introduction**

1. The Respondent herein filed a notice of preliminary objection on a point of law dated October 19, 2021 based on the following grounds: -
  - i. That the Originating Summons is incompetent, an abuse of the court process, and bad in law as the Honourable courts lacks jurisdiction to hear and determine the same.
  - ii. That this honourable Court lacks jurisdiction to hear and determine the suit, it is res judicata.



- iii. That the entire Originating Summons is misconceived and bad in law as it fails to disclose a reasonable cause of action as against the Respondent.
2. The matter proceeded by way of written submissions. The Respondent filed submissions dated February 13, 2023 and the Applicant filed submissions dated March 27, 2023. In addition, the Respondent filed Supplementary written submissions dated April 10, 2023.

### **Respondent's Submissions**

3. The substratum of the Preliminary objection is that the suit dated October 19, 2021 is res judicata as the matters in issue were determined by the Rotterdam Court in Netherlands in Case Number C/ 10/ 606961/ FA RK 208429 on March 15, 2021 between the Applicant and the Respondent.
4. The Respondent identifies the issues for determination as
  - i. Whether this suit is Res Judicata
  - ii. Who should bear the costs of the suit
5. The Respondent relies on Section 7 of the *Civil Procedure Act* and relies on the Court of Appeal Decision in *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, that enumerated the five essential elements a party must satisfy to demonstrate that a matter is res judicata:
  - i. The suit or issue raised was directly and substantially in issue in the former suit.
  - ii. That the former suit was between the same party or parties under whom they or any of them claim.
  - iii. That those parties were litigating under the same title.
  - iv. That the issue in question was heard and finally determined in the former suit.
  - v. That the Court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
6. The Respondent also relied on the decisions in *Uburu Highway Development Ltd V Central Bank of Kenya* [ 1999] eKLR; *Njue Ngai v Ephantus Njiru Ngai & Anor* [2016] eKLR Civil Appeal 29 of 2015; *Kenya Commercial Bank Limited v Muiru Coffee Estate Limited & Anor* [2016] eKLR.
7. The Respondent then proceeded to evaluate each of the principles so as to demonstrate that the matter is res judicata.
8. The Respondent submits that in both cases it is the same parties litigating under the same title. Secondly it is submitted that the Rotterdam Court had jurisdiction. Thirdly the decision of the Rotterdam Court was final and fourthly the issues were directly and substantially the same.
9. On the fourth issue the Respondent expounds and submits that the following issues were determined by the Court in Rotterdam
  - i. The dissolution of the marriage
  - ii. Parental responsibility, custody and maintenance with regard to the child of the marriage
  - iii. Division of matrimonial property



10. It is submitted that allowing the Applicant to proceed with the Originating Summons would be tantamount to granting her a second bite at the cherry.
11. The Respondent contends that the judgments obtained in foreign countries are enforceable in Kenya, pursuant to the *Foreign Judgments (Reciprocal Enforcement) Act*. It is the position of the Respondent that the issue was determined by the Rotterdam Court and cannot therefore be re-opened in Kenya
12. On costs the Respondent avers that the Applicant should meet the costs of the suit.
13. Finally, it is submitted that the matter being res judicata it is a total abuse of the Court process and wastage of valuable and precious judicial time.
14. The Respondent's supplementary written submission reiterated the contention in the written submissions filed by the Respondent.

### **Applicant's Submissions**

15. The Applicants opposed the Preliminary Objection and relies on Section 7 of the *Civil Procedure Act*. It is submitted that the current matter is an Originating Summons on the division of matrimonial property and the issue to be determined is to establish whether the properties mentioned are matrimonial properties.
16. On the other hand, the matter in Rotterdam was a divorce cause suit and the Court went ahead to hear and determine the other related issues including parental responsibility, custody and maintenance.
17. It is submitted that the Rotterdam Court did not resolve the matrimonial property issue as the Applicant did not file a division and settlement form as she elected to proceed on that issue in the Kenyan Courts on the advice of her Counsel. It is contended that the issue of matrimonial property was therefore never substantially heard or determined.
18. The Applicant states that the Preliminary Objection as presented does not raise a pure point of law and the facts are disputed. It therefore fails the test laid down in *Aviation and Allied Workers Union Kenya vs Kenya Airways Ltd & 3 others*, Application No 50 OF 2014 [2015] eKLR. The Applicant further relies on the decisions in *CK Bett Traders Limited & 2 Others vs Kennedy Mwangi & Anor* [2021] eKLR and *Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR on the elements of a valid preliminary objection.
19. The Applicants further aver that the Rotterdam Court did not have jurisdiction to hear and determine the question of distribution of matrimonial property and relies on Section 3(b) of the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap 43 and the decision in *JRKN VS RGN* [2014] eKLR.
20. The Applicant concludes by asserting that they are rightly before the Court by dint of Section 17(1) of the *Matrimonial Property Act* No 49 of 2013.

### **Analysis and Determination**

21. The issue for determination is whether the matter is Res Judicata.
22. The basis for this assertion by the Respondent is that the issue of Division of matrimonial property was the subject of the matter in the Rotterdam Court Case Number/ Application number: C/10/606961/ FA RK 20-8429.
23. I will set out in detail the relevant portions of the decision: -
  - 2.



8. Division

2.8.1 The woman has requested that the division of the community property existing between the parties be determined in accordance with a division and settlement form that is yet to be submitted.

2.8.2 The Woman has not submitted such a form. The Court will therefore dismiss the request.

1. The Decision

The Court:

- 1.1 pronounces the divorce between the parties, married on July 24, 2019 in Rotterdam;
- 1.2 Determines that the parental authority of the minor child of the parties is vested in the woman alone;
- 1.3 Determines that the woman will be tenant of the dwelling at [particulars withheld] Rotterdam from the day on which the court order for the divorce is registered in the civil registry;
- 1.4 Orders the man to pay the woman a contribution towards the costs of care and upbringing of the minor to the amount of 512 Euros per month with effect from 26 November 2020 and of 487 Euros per month with effect from 26 May 2021 and with regard to the monthly payment due after today: every time in advance;
- 1.5 Declares the decision concerning parental authority, the right to rent the dwelling and the child contribution provisionally enforceable;
- 1.6 Orders each party to bear their own costs of these proceedings
- 1.7 Dismisses any further or different claim

24. The Court of Appeal in *Kundan Singh Construction Limited & another v Tanzania National Roads Agency* [2019] eKLR affirmed its decision in the *Uhuru Highway Development Ltd* case (supra) that identified the key elements that would give rise to res judicata and reiterated that;

“Essentially therefore, to reach a finding of res judicata, the court must ascertain; whether the identities of the parties to the suit and subject matter in dispute were similar, whether the judgment or order was final; whether or not the suit was heard on its merits, and whether the decision was rendered by a competent court with jurisdiction.” (Emphasis Supplied)”

25. Referring to its decision in *Kenya Commercial Bank Limited vs Benjob Amalgamated Limited* [2017] eKLR, the Court further clarified that those elements of res judicata are conjunctive rather than disjunctive and must all be present before a suit or an issue is deemed res judicata on account of the former suit.

26. The Court observing that a suit that has not been heard on merits cannot be rendered res judicata cited with approval Kuloba J, in *Judicial Hints to Civil Procedure* who states thus

“... a thing or matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgement. In that expression is found the rule that a final judgement rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving



the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties to action, and of quality in persons for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.”

27. The only record of what transpired in the Rotterdam case is the judgment. Which decision at paragraph 2.8 demonstrates that the matter was not heard on its merits. The Court dismissed the request on the basis that the division and settlement form was yet to be submitted.
28. In the case of *Tee Gee Electrics and Plastics Company Ltd vs Kenya Industrial Estates Limited* [2005] KLR 97 the Court stated:

“Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in *The Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd* [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits”.
29. In the instant case it is evident that the issue of division of matrimonial property was not heard and determined on its merits. There is nothing to show that the following questions were considered and a considered decision made:
  - i. Whether the parties during the subsistence of their marriage acquired the following properties namely
    1. Plot xx on Mavoko Town Block x/ xxxx Road Ville Syokimau
    2. [particulars withheld] on LR No [particulars withheld]
    3. Plot No xx on [particulars withheld]- Malili II
  - ii. Whether the Applicant contributed to the acquisition of the above- mentioned properties and if so to what extent?
  - iii. Whether the Applicant is entitled to equal share of all the matrimonial properties acquired jointly despite the Respondent having and/ or is in the process of having himself registered as the sole owner?
  - iv. Whether the Court should order that all the matrimonial properties acquired during the subsistence of the marriage be equally distributed equally now that the marriage is dissolved?
30. These are not trivial matters. They touch on constitutionally guaranteed rights under Article 40 (Protection of right to property); Article 48 (Access to Justice) and Article 50 (Right to a fair hearing).
31. In *Independent Electoral and Boundaries Commission v Jane Cheperenger and others* (2015) eKLR, the Supreme Court stated;



- [21] ...The true preliminary objection serves two purposes of merit: firstly it serves as a shield for the originator of the objection- against the profligate deployment of time and other resources. And secondly, it serves the public cause of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword for winning a case otherwise destined to be resolved judicially and on the merits.
32. I find that the preliminary objection as presented does not meet the legal threshold on what constitutes res judicata.
33. Having found that the issue on division of matrimonial property was not decided on merit it follows that there is no decision for enforcement pursuant to the *Foreign Judgments (Reciprocal Enforcement) Act.*
34. The upshot of the above is that the Respondents Preliminary Objection is dismissed.
35. Each party will bear its own costs  
It is so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 19<sup>TH</sup> DAY OF MAY, 2023.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

**In the presence of:**

Mrs Mwangi..... Advocate for Applicant

Mr. Muge.....Respondent

Karani Court Assistant

