



**AM v EMW (Civil Case E008 of 2022)
[2023] KEHC 23420 (KLR) (Family) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23420 (KLR)

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

**FAMILY
CIVIL CASE E008 OF 2022**

**MA ODERO, J
OCTOBER 6, 2023**

BETWEEN

AM PETITIONER

AND

EMW RESPONDENT

RULING

1. Before this court for determination is the notice of preliminary objection dated January 26, 2023 filed by the respondent Elizabeth Mutonyi Wekesa.
2. The petitioner Armstrong Malemo opposed the Preliminary objection through the grounds of objection dated January 27, 2023.
3. The matter was canvassed by way of written submissions. The respondent filed the written submissions dated March 3, 2023 whilst the petitioner relied upon his written submissions dated March 14, 2023.

Background

4. The petitioner herein filed in the High Court a Petition dated December 16, 2022 by which he sought the following orders:-
 - “ 1. The marriage between the petitioner and the respondent be dissolved and a decree nisi and decree absolute be issued.
 2. A declaration that the property known as 4470 Tucana Court, Unit 2104, Mississauga, L5R 3k8, Ontario, Canada and the developments thereon are held in trust by the Respondent for the benefit of the Petitioner and Respondent.



3. A declaration that the property known as 4470 Tucana Court, Unit 2104, Mississauga, L5R 3k8, Ontario, Canada registered in the name of the Respondent and in her possession in Ontario, Canada are matrimonial property.
4. The matrimonial property be divided as follows:
 - i) The property known as 4470 Tucana court, Unit 2104, Mississauga, L5R 3k8, Ontario, Canada registered in the name of the Respondent be retained by the Respondent.
 - ii) The car in Ontario, Canada registered in the name of the Respondent and currently in her possession be retained by the Respondent.
 - iii) The property known as LR No. Kiminini/Matunda Block3 (Baraton)44 in Trans Nzoia County, Kenya registered in the name of the Petitioner be retained by the Petitioner.
 - iv) Any property acquired by any spouse during the subsistence of the marriage in their sole name by their own money without any contribution by the other spouse and which do not form part of the matrimonial home or property under the Matrimonial Property Act, 2013 be retained by such a spouse.
5. The costs of this petition and the proceedings be borne by the Respondent.
6. Such further or other reliefs as this Honourable Court may deem fit and just to grant.”

5. In response the respondent filed the notice of preliminary objection dated January 26, 2023 which objection was premised upon the grounds that:

- “ 1. The Divorce Petition as instituted by the Petitioner is legally and fatally defective for want of jurisdiction pursuant to the provisions of section 2 of the Marriage Act 2014.
2. The Divorce Petition as instituted by the Petitioner is legally and totally defective in as far as it seeks to have division of Matrimonial Property contrary to provision of section 7 of the Matrimonial Property Act.”

6. In response to the preliminary objection the petitioner filed grounds of opposition dated January 27, 2023 as follows:-

- “ 1. The respondent’s preliminary objection herein is incompetent, misconceived and bad in law as this court has the requisite Constitutional and statutory jurisdiction to adjudicate the Petition herein and the issues raised therein.
2. Section 17(2) (b) of the Matrimonial Property Act, 2013 as read together with Rules 5 (1) (b), 6 (1) and 7 (1) of the Matrimonial Property Rules, 2022 inescapably grants this court jurisdiction to hear and determine the petition herein given that the value of the properties the subject of these



matrimonial proceedings exceeds the pecuniary jurisdiction of the Chief Magistrates' Court.

3. The Petition herein that seeks for divorce and division of matrimonial property is not in contravention of section 7 of the *Matrimonial Property, Act* 2013 which provides that Subject to section 6 (3), ownership 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 as alleged by the Respondent in her preliminary objection herein.
4. The preliminary objection is dead on arrival and does not meet the Judiciary delineated thresholds of what submissions of what constitutes a Preliminary Objection in law as restated by the Supreme Court in *Hassan Ali Jobo & another v Suleiman Said Shabal & 2 others* [2014] eKLR.
5. It is in the interests of justice and fairness that the respondent's preliminary objection herein be dismissed for want of merit.

Analysis and Determination

7. I have carefully considered the Notice of Preliminary Objection filed before this court, the Grounds of Opposition filed by the petitioner, as well as the submissions filed by both parties.
8. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA where the court stated as follows:-

“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 the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”.....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.”
9. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”
10. 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 facts 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.



11. Therefore, a genuine and proper preliminary objection can only raise points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
12. The respondent contends that this court has no jurisdiction to hear and determine the petition as filed by the Petitioner. It is trite that ‘jurisdiction is everything’ and that without requisite jurisdiction a court must immediately down its tools (see *Owners of The Motor Vessel “Lillian S v Caltex Oil* Civil Appeal No. 50 of 1989).
13. The respondent submits that the divorce petition filed by the Petitioner is fatally defective in so far as it includes prayers for division of matrimonial property.
14. The fact of the matter is that the High Court is clothed with jurisdiction to hear and determine both a divorce petition filed under the *Marriage Act* 2014 as well as proceedings for division of Matrimonial property brought under the provisions of section 7 of the *Matrimonial Property Act* 2013. Therefore, the question of jurisdiction would not arise.
15. However, although under article 165 of the *Constitution* of Kenya 2010 the High Court has unlimited original jurisdiction in Criminal and Civil matters, administratively divorce petitions are to be filed in the Magistrates Courts and proceedings for division of Matrimonial property are to be heard in the High Court.
16. In *ENN v SNK* [2021] eKLR the stated as follows:-
 - a) Unlimited original jurisdiction in criminal and civil matters. That is to say that this court has jurisdiction to hear all civil matters including divorce petitions. However, with the giving of jurisdiction to the subordinate court, this Court has only been left with jurisdiction to handle matrimonial property issues and act as an appellate court in cases like the one before this court. [own emphasis]
17. Therefore, the Petition filed by the petitioner is defective in so far as it seeks to combine the Divorce Petition together with prayers for division of Matrimonial property.
18. However, this defect is not fatal. The Petitioner needs to amend his Petition and file the Divorce Petition in the lower Court. The suit for division of Matrimonial property may be heard by the High Court. Accordingly, I find no merit in this notice of preliminary objection. The same is dismissed in its entirety. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

MAUREEN A. ODERO

JUDGE

