



**KW v Estate of KW & 4 others (Matrimonial Case 009 of 2022)
[2023] KEHC 23180 (KLR) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23180 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MATRIMONIAL CASE 009 OF 2022
JRA WANANDA, J
OCTOBER 6, 2023**

BETWEEN

KW PLAINTIFF

AND

ESTATE OF KW 1ST DEFENDANT

JKW 2ND DEFENDANT

PK 3RD DEFENDANT

KK 4TH DEFENDANT

MW 5TH DEFENDANT

RULING

1. Before the Court is a Preliminary Objection seeking that this suit be dismissed for, inter alia, offending the provisions of Order 37 Rule 1 and 2 of the *Civil Procedure Rules* and also on grounds of alleged absence of *locus standi* by the Plaintiff. Also raised is the allegation that the Plaintiff’s Advocate is conflicted because he is a relative of the parties.
2. All the parties herein are members of the family of the late Kiplagat Wendo (hereinafter referred to as “the deceased”) whose “estate” is the one stated to be sued herein as the 1st Defendant. The Plaintiff is the 1st wife of the deceased and the 2nd - 5th Defendants are sons of the deceased’s 2nd wife, the late Kimoi Wendot (hereinafter referred to as “the 2nd wife”). The 2nd - 5th Defendants are therefore the Plaintiff’s step-sons.
3. In the Plaint filed on 9/11/2022 through Messrs T. Cheruiyot & Co. Advocates as read with the Witness Statement accompanying it, the Plaintiff stated that she is 97 years old, a resident of Uasin Gishu, she got married to the deceased in 1942, they were blessed with several children, the first was born in 1947 and the last in 1965, in the early days of their marriage they lived in Kerio Valley the



deceased's ancestral home, in 1945 they moved to Kaptarakwa where they built their first house, started cultivating land and later opened a posho mill, they later purchased more parcels neighbouring theirs which they later merged into a block of about 10.6 acres and registered as Mosop/Kaptarakwa/6, they later purchased 5 more parcels in other places, when land adjudication process was effected after independence, all the 6 parcels were adjudicated in the name of the deceased, the deceased operated the business of transporting potatoes and they also carried out successful dairy and farming business, the Plaintiff toiled and managed both the farm and the businesses.

4. The Plaintiff stated further that in 1966 the deceased married the said 2nd wife, Kimoi Wendot, the deceased then turned hostile, he chased the Plaintiff from the shop and pushed her out of the posho mill business, after sometime the business collapsed due to mismanagement after which the deceased and the 2nd wife followed the Plaintiff to the village and became dependent on the Plaintiff, the deceased then requested the Plaintiff to allow him build a house for the 2nd wife on the parcel of land known as Mosop/Kaptarakwa/462, to avoid the continuous dependency on her the Plaintiff agreed, as soon as the 2nd wife settled on the said parcel of land family feuds escalated, as a result in 1974 the Plaintiff moved out of Mosop/Kaptarakwa/6 and migrated to Tembeleo/Elgeyo Border Block 4 (Kokwoput)/100, as soon as she moved out of Mosop/Kaptarakwa/6, the deceased and the 2nd wife moved into it.
5. The Plaintiff added that she had lived peacefully till recently when she received news that the sons of the 2nd wife were holding the deceased hostage and coercing him to transfer parcels of land into their names, as a result the deceased transferred Mosop/Kaptarakwa/462 to one Everlyne Jerotich Wendot, a daughter of the 2nd wife, they also wanted Tembeleo Elgeyo Border Block 4 (Kopwoturgut)/100 to be subdivided for their use and occupation, after the death of the deceased the Defendants went to the mortuary with mutation forms with the intention of affixing the deceased's thumbprints thereon but the same was thwarted by the mortuary attendants, when these efforts failed, the Defendants violently sprayed and damaged the Plaintiff's pasture and also started planting on land used by one of the Plaintiff's sons which act gave rise to actions that culminated into a report being made to the police accusing the Plaintiff's said son of alleged malicious damage to property.
6. Further, the Plaintiff averred that the 2nd wife was married 22 years after the Plaintiff's marriage and after the deceased and the Plaintiff had already acquired all the properties except Ngobeliani Farm Plot No. 79, it is unconscionable that the estate may be distributed to all the children without considering the level of the Plaintiff's contribution before the 2nd wife was brought in. The Plaintiff then made the following prayers:
 - i. A declaration against the estate of the 1st Defendant that it holds Mosop/Kaptarakwa/462, Tembeleo/Elgeyo Border Block 4 (Kokwopturgut)/100, Mosop/Kaptarakwa/12, Mosop/Kaptarakwa/18, Mosop/Kaptarakwa/6 and Mosop/Kaptarakwa/36 in trust for the Plaintiff in equal shares.
 - ii. A declaration that half shares of Mosop/Kaptarakwa/462, Tembeleo/Elgeyo Border Block 4 (Kokwopturgut)/100, Mosop/Kaptarakwa/12, Mosop/Kaptarakwa/18, Mosop/Kaptarakwa/6 and Mosop/Kaptarakwa/36 that vests in the estate of Kiplagat Wendo (deceased) be devolved according to the law of succession.
 - iii. A declaration that 10 acres shares of Tembeleo/Elgeyo Border Block 4 (Kokwopturgut)/100 is being held in trust for the estate of Peter Kipkosgei Wendot and the balance of 30 is equally shared by the Plaintiff and the estate of the 1st Defendant (Kiplagat Wendo).
 - iv. Costs.



7. Returning to the Preliminary Objection, the same was filed on 12/01/2023 through Messrs Koech Lelei & Co. Advocates and is framed as follows:
 - a. The suit offends the provisions of Order 37 Rule 1 and 2 of the *Civil Procedure Rules*.
 - b. The suit is untenable in law, frivolous, vexatious, unmeritorious and baseless and does not disclose reasonable cause against the Defendants and is otherwise an abuse of the Court process.
 - c. That the Plaintiff herein has no legal standard to sue since they are neither administrators nor Petitioners.
 - d. That the suit herein is frivolous, vexatious, defective and should be struck off as the Plaintiff has no locus standi.
 - e. That the Plaintiff's Advocate is conflicted in the suit as he is a relative of the Plaintiff and the Defendants.
8. Faced with the Preliminary Objection, on 24/02/2023, the Plaintiff swore a Replying Affidavit. In the Affidavit, she deponed that Order 37 Rule 1 and 2 of the *Civil Procedure Rules* does not apply herein because this suit is a declaratory cause for protection of interest in matrimonial property from wastage, the suit seeks protection of the Plaintiff's matrimonial interests and not administration of the estate which is yet to be filed, the 2nd – 5th Defendants are the children of the 2nd wife and are in direct threat to the Plaintiff's property rights in the matrimonial properties hence correctly sued, subject to Section 7 of the Matrimonial Properties Act, property acquired by a married couple in a polygamous marriage shall be retained equally by the husband and the 1st wife only if the property was acquired before the coming of the 2nd or subsequent wives, both the 2nd wife and the husband are deceased and thus the Plaintiff has a right to protect his property rights in properties which being registered in the name of the deceased are held subject to the Plaintiff's matrimonial property rights to the exclusion of the 2nd house.
9. The Plaintiff then deponed that regarding the form of Pleadings in approaching the Court, procedural technicalities have long been cured by dint of Article 159 of *the Constitution* of Kenya 2010. She added that a Preliminary Objection ought to be purely on points of law and not facts, as such a Preliminary Objection cannot be raised where there is a fact to be interrogated by admission of evidence, the issue whether the Plaintiff's Advocate is conflicted is a fact to be proved by evidence, not a point of law, to the best of her knowledge, her Counsel has no consanguinity or affinity to the Plaintiff or the Defendants, the Preliminary Objection is a non-starter, bad in law and the same should be dismissed.
10. Pursuant to directions given, the parties filed written Submissions over the Preliminary Objection. The Defendants filed theirs on 8/05/2023 while the Plaintiff filed on 2/06/2023.

Defendant's Submissions

11. Counsel for the Defendants cited the case of Alfred Njau vs City Council of Nairobi (1983) KLR 625 and submitted that the Plaintiff has filed the suit without taking out Letters of Administration, she has sued the 1st Defendant as the estate of the deceased. He posed the questions; who is the 1st Defendant in this suit? and; is the Plaintiff purporting to sue her dead husband in a matrimonial case? He then submitted that the Plaintiff has sued the 2nd – 5th Defendants who are her step-sons and posed the question; in what capacity are they being sued in a matrimonial Cause? and; are they the legal representatives of their late father's estate in the suit? He thus submitted that the 1st Defendant is not a party per se.



12. Counsel further cited the Black's Law Dictionary, 9th Edition and also the case of Drummond Jackson vs Britam Medical Association (1970) WLR 616 and submitted that the Plaintiff has sued the estate of the 1st Defendant and the purported Defendant is her late husband. He then posed the questions; what cause of action arises on the part of the 1st Defendant who is deceased? and; what has the dead person done to warrant filing of the suit? He then cited the case of *Melickzedek Shem Kamau vs Beatrice Waitibera Maina & 2 Others (2020)* eKLR and submitted that the 2nd – 5th Defendants have no Letters of Administration to be sued, they are just children of the deceased dragged in a matrimonial Cause, the suit is defective and should be dismissed.
13. Regarding Order 37 Rule 1 and 2 of the *Civil Procedure Rules*, Counsel submitted that the suit is termed as a matrimonial Cause but the prayers in the Plaint are about Trusts, the Plaintiff should therefore have filed an Originating Summons, the Plaintiff cannot sue for matrimonial Cause and ask the Court to declare that the deceased held property in trust for her, in the Plaintiff's reply she states that the suit is a declaratory Cause for protection of interest in matrimonial property in wastage and posed the questions; is this the right forum? and; Is this the procedure to be used to protect the interest in matrimonial property of a dead registered owner? According to Counsel, the answer is no.
14. In conclusion, Counsel submitted that the law is clear as to what documents and procedure should be adopted when seeking orders in a matrimonial suit and trusts, this is a point of law and not of fact hence the Preliminary Objection stands. According to Counsel, the Plaintiff has filed a frivolous and scandalous Cause and hence has wasted Court's precious time, she should instead use her energy to litigate in a Succession Cause in respect of her deceased husband.

Plaintiff's Submissions

15. On whether the Court has jurisdiction to issue declaratory orders in the estate of the deceased, Counsel for the Plaintiff submitted that this Cause arises from the right to property and specifically matrimonial property, the spouse who is the registered owner of the properties was polygamous hence the current Cause, where there is a threat of violation of the right to property, *the Constitution* guarantees the right to move to Court for protection, Article 40 of *the Constitution* of Kenya 2010 provides that every person has a right to own property which right shall be protected by the State, Section 7(1) of the *Matrimonial Property Act* gives a spouse, whether current or former, the right to move the Court for declaration of property as matrimonial, the marriage between the Plaintiff and the 1st Defendant was terminated by reason of death, the Plaintiff is now therefore a former spouse and whose entitlement to the properties jointly acquired by the two is at danger of being alienated hence the need for declaratory orders, this is the appropriate Court to determine the issue as to whether the properties are matrimonial, whereas it is true that the properties are in the name of the 1st Defendant who is now deceased, the Plaintiff is only seeking to prove her interest in the properties and a declaration that she has rights to be protected, this is particularly important because it will save the Court's time during Succession proceedings when it is finally filed, having obtained declaratory orders as to the subject parcels of land, certainty will have been achieved on whether they constitute free property for purposes of Succession, the orders sought will not result in the transfer of ownership to the name of the Plaintiff but rather to protect her rights to the parcels by contribution, there is no prejudice that will be suffered and therefore the Preliminary Objection is ill-advised.
16. On the issue of locus to sue, Counsel submitted that the properties were acquired by her and the deceased before the mother of the 2nd to 5th Defendants was married, the properties were however registered in the sole name of the deceased in accordance with Keiyo customary laws, women in African set up were not considered in owning property, her matrimonial interest has been alleged by facts, and it calls for the Court to interrogate the same. He cited the case of *Lilian Mosenik & Another v*



Management Committee of AGC Riverside Church [2022] eKLR, Section 14(a) of the *Matrimonial Properties Act* and *Esta Kuto & 2 Others v M. Oriental Bank & 2 Others [2018]* eKLR.

17. On whether the Defendants have been rightfully sued considering that they have not been appointed legal Administrators of the estate of the deceased, Counsel submitted that where there is threat to right to property the persons in breach or threatening to breach are the rightful people to be sued, it is not every matter concerning the estate of a deceased person that a grant has to be first obtained, every case must be treated on its merit, the probate Court lacks the jurisdiction to determine the issue of trust as was held in *Re Estate of Mbai Wainaina (Deceased) [2015]* eKLR.
18. Counsel submitted further that the 2nd – 5th Defendants have been active in agitating for the suit parcels of land, they are therefore estopped by conduct from claiming that they have no locus to be sued in the estate, additionally, the Probate Court will only distribute free property of the deceased among the beneficiaries, if in this Cause it is proved that indeed the properties are matrimonial then they will automatically be ousted from the distribution during succession, under Section 3 of the *Law of Succession Act* upon the death of a deceased person his estate means his free property when he was living, the property that the deceased was legally competent freely to dispose of and in respect of which his interest has not been terminated by his death, matrimonial property cannot be freely disposed of without the consent of the spouse and where a dispute arises the family Court is the one seized with jurisdiction.
19. On whether the Plaintiff's Advocate is conflicted, Counsel submitted that Preliminary Objections ought to be purely on points of law and where facts need to be interrogated the Preliminary Objection must fail, the Defendants have alleged that the Advocate is conflicted for reasons of being their relative, these are mere assertions with no proof, this does not constitute a point of law since they are facts that need to be proved.

Issues for Determination

20. I have considered the Preliminary Objection, the Application, Submissions presented and other Pleadings filed herein.
21. Regarding the Defendants' allegation that the Plaintiff's Counsel is conflicted for being a relative of both the Plaintiff and the Defendants, I note that although the same was raised in the Notice of Preliminary Objection the same was never touched on in the Defendants' Submissions. I therefore presume that the Defendant has abandoned the same and I will not therefore dwell on that issue.
22. In any case, I would not even have entertained canvassing of the issue since clearly, determination thereof would require the Court to take and analyze evidence on factual matters. This would have therefore obviously taken out the issue out of the realm of Preliminary Objections which should only be on a point of law as was stated in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd [1969] EA 696* where the Court of Appeal held 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 of the suit. Examples are an objection to 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.

.....

A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is usually 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

23. On a different matter, from the pleadings on record, it is clear that, like the deceased husband, the 2nd wife, the said Kimoi Wendot is also deceased. It has however not been disclosed when the two died.
24. Be that as it may, in my view, the issues that now remain for determination in respect to the Preliminary Objection are the following:
 - i. Whether this suit is fatally defective for being brought by way of a Plaint instead of Originating Summons.
 - ii. Whether properties registered in the name of the deceased husband herein should be the subject of a division of matrimonial properties Cause filed by his widow when no Letters of Administration have been issued by a probate/Succession Court in respect of the estate of the deceased husband
25. I now proceed to analyze and answer the said Issues.

i. Whether this suit is fatally defective for being brought by way of a Plaint instead of Originating Summons

26. The Plaintiff has not expressly disclosed the provision(s) of law under which the suit has been filed. On their part, the Defendants in assuming that the suit was brought under Order 37 of the Civil Procedures, swiftly raised the Objection that the suit having been initiated by way of Plaint, is fatally defective because it does not comply with the requirement that proceedings brought under Order 37 are to be brought through Originating Summons. Secondly, the Defendants argued that the suit is also incompetent insofar as Plaintiff is not an Administrator or a Petitioner.
27. In response, the Plaintiff, in his Replying Affidavit, was categorical that Order 37 does not apply in this matter because the suit is a declaratory suit seeking protection of interest in matrimonial property from wastage. The Plaintiff then cited Section 7 of the *Matrimonial Properties Act* and stated that the basis of her argument is that property acquired by a man and his 1st wife in a polygamous marriage is to be retained equally between the man and the 1st wife only, if the property was acquired before the coming of the 2nd or subsequent wives.
28. Section 7 provides as follows

“..... 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.”
29. Section 8(1) then provides as follows:

“property acquired by a man and his 1st wife in a polygamous marriage is to be retained equally”
30. The Plaintiff’s Counsel, in his Submission, then referred to Section 17(1) of the Act (wrongly referred to as Section 7(1)) which provides as follows:

“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.”



31. Since the Plaintiff has clarified that that the suit has been brought under Section 17(1) of the *Matrimonial Property Act* as read with Section 7 and 8 thereof, I have no reason to insist otherwise. I will therefore accept that contention and go by it.
32. The above scenario therefore puts to rest the Defendants’ contention that the Plaintiff lacks the locus standi to bring these proceedings. It also puts to rest the contention that suit is incompetent because under Order 37 Rule 1 and 2 of the *Civil Procedure Rules*, it ought to have been brought by way of Originating rather than by way of Plaintiff. In any case, even under Rule 17(1) of the Matrimonial Properties Act, I find that the procedure by which proceedings are brought under that provision, even if deemed to be wrong, would not necessarily render the proceedings fatally defective. On this point, I associate myself fully with the holding of Hon. Lady Justice Mulwa in *EWM v NMM [2020]* eKLR in which she held as follows:

“ 3. The procedure for application is provided under Section 17. It provides that:

Action for declaration of rights to property

- (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.

This signifies a petition is not the only mode of bringing a matrimonial action before the court.

4. In *EJT v JKL [2019]* eKLR the court was faced with a preliminary objection to strike out the plaint as the matrimonial property cause ought to have been instituted by way of an O.S application and not a plaint. The court gave reference to *Milcah Mucinah Munoko v Lawrence Ochokolo Oduma [2016]* eKLR that held

“The Court noted, and as also pointed out by both Parties, that the *Matrimonial Property Act* does not give the procedure or the mode of institution of any such proceedings under the Act and the same has thus been left to the parties and the Courts. It follows therefore that there is no explicitly outlined procedure to be followed in instituting proceedings under the Act and hence, this Court cannot dismiss a litigant on the basis that he or she ought to have instituted such proceedings using a particular mode as opposed to another.”

The court also gave reference to Article 159 and upheld substance over form or technicalities.



5. In *AKK v PKW* [2020] eKLR the Court of Appeal overturned a ruling on a preliminary objection where the respondent had challenged the Originating Summons application brought by the appellant for determination of matrimonial property on the grounds that a divorce had not been concluded thus the High Court lacked jurisdiction to determine the matrimonial property. The Court of Appeal held that relying on Section 17 of the Act the court is not limited in respect to the declaration of rights of a spouse's interest in matrimonial property. A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that an application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act.
6. In essence the Court dismissed the preliminary objection and held that a matrimonial action brought by way of an application can issue declaratory orders on the beneficial interest of each party to the matrimonial property.
7. By the above, it is evident that a party may bring an action for declarations under Section 17 by any format may it be by Plaint, Petition, Originating Summons (O.S) or even by an application- courtesy of Article 159 (2)(d) of *the Constitution*.
8. I am therefore persuaded that the Originating summons filed hereto is competently before the court.”

33. In the end therefore, since the Plaintiff has denied that this suit has been brought under Order 37 of the *Civil Procedure Rules* and insists that on the contrary, the same has been brought under Rule 17(1) of the *Matrimonial Properties Act*, I do not find the procedure adopted by the Plaintiff in bringing the suit to be fatally defective. Even if initiated through a wrong procedure, this Court still retains the power to convert a Plaint into an Originating Summons and vice versa. Accordingly, I overrule this portion of the Preliminary Objection.

ii. Whether properties registered in the name of the deceased husband herein should be the subject of a division of matrimonial properties Cause filed by his widow when no Letters of Administration have been issued by a probate/Succession Court in respect of the estate of the deceased husband

34. I now move to determining this major issue. The first notable hurdle arising from filing by a surviving spouse of a case seeking a declaration of property as being “matrimonial” and for division thereof when the other spouse is already deceased is that of the identity of the Defendant or Respondent to be sued.

35. In this instant case, in suing the purported estate of the deceased as the 1st Defendant, the Plaintiff finds herself faced with the above scenario since no person has been appointed to be the legal representative of the deceased. Indeed, the Defendants have raised this very objection. It is not disputed that the husband in whose sole name the properties are registered is now deceased and also that no Succession proceedings have been taken out so far in respect of his estate. In the absence of such Succession proceedings and in the absence of any Letters of Administration having been issued in respect of the estate of the deceased, who then is to stand in the deceased's position as the 1st Defendant? Who has



been served with Court process as the 1st Defendant? Who is supposed to file responses for and on behalf of the 1st Defendant?

36. As the surviving wife to the deceased, the Plaintiff would have been the very person expected to have taken out Letters of Administration or consented to somebody else in the family to do so. Indeed, the law gives her that priority. Strangely, the Plaintiff has now turned foe and is in fact now suing her late husband yet no one, including herself, has taken steps to initiate Succession proceedings.
37. Regarding this point, I cite the decision of Hon. A. Mbogholi-Msagha (as he then was) in the case of *Viktar Maina Ngunjiri & 4 others v Attorney General & 6 others [2018]* eKLR in which he held as follows:

“The estate of a deceased person may take over proceedings against him if that person were alive at the time the suit was filed. That notwithstanding, the estate must be made a party and authorized by the court through an executor or a personal representative. A formal application has to be filed to facilitate this. No grant of representation has been presented to court. In the instant case this cannot happen because the deceased died before the suit was filed and the representative of the estate has not been identified. Even if the representative were identified it is not possible to take over a nullity.

In the Indian case of *C. Muttu vs. Bharath Match Works* AIR 1964 Kant 293 the court observed,

“If he (defendant) dies before the suit and a suit is brought against him in the name in which he carried on business, the suit is against a dead man and it is a nullity from its inception. The suit being a nullity, the writ of summons issued in the suit by whomsoever accepted is also a nullity. Similarly, an order made in the suit allowing amendment of plaint by substituting the legal representative of the deceased as the defendant and allowing the suit to proceed against him is also a nullity. It is immaterial that the suit was brought bona fide and in ignorance of the death of such a person.”

38. It is therefore basic law that only a known legal entity can be sued in a case as a Defendant and a relief sought against him/her. From the foregoing, it is clear beyond peradventure that as sued, the purported 1st Defendant is a non-existent entity not capable of being sued in law at all. I am at a complete loss as to what legal understanding informed the decision to sue a clearly non-existent entity as a Defendant.
39. I ask myself the questions; why did the Defendant not file the matrimonial proceedings during the lifetime of the deceased and/or the 2nd wife so that they could respond to her claims? Why did she have to wait for the two to die before moving to Court for the declarations she is now seeking? Why now? Since no convincing explanation has been proffered by the Plaintiff for such inaction, I find the present suit to be wholly mischievous and a complete abuse of the Court process.
40. It is a well-known fact that generally, the moment a person dies, his property becomes the subject of a Succession Cause under which it is to be administered in line with the directions of the probate Court as governed under the *Law of Succession Act*, Cap. 160, Laws of Kenya. All matters relating thereto, including appointment of Administrator(s), identification and collection of properties of the deceased, identification of heirs and/or beneficiaries and all connected matters should then ideally be conducted in such Succession Cause. The remedy of division of property between a husband and a wife as provided under Section 17(1) of the *Matrimonial Properties Act* is, in my view, not the appropriate



forum in the circumstances of this case but the *Law of Succession Act*. Indeed, the preamble to the *Law of Succession Act* is as follows:

“An act of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased person and for the purpose connected therewith and incidental thereto.”

41. Contrary to the position advanced by the Plaintiff therefore and considering the circumstances of this case, my finding is that once the deceased died, identification and distribution of the properties owned by him ceased being matters within the province of the family Court determinable under the *Matrimonial Properties Act* and instead moved to the probate Court for determination under the *Law of Succession Act*.
42. I therefore do not agree that it was right for the Plaintiff to ignore the procedure stipulated under the *Law of Succession Act*, circumvent the same and purport to invoke the Matrimonial Properties Act long after the husband had already died and before an Administrator was appointed to manage the estate of the deceased husband. Issues on whether or not the properties registered in the name of the deceased were held by him in trust for the Plaintiff, whether or not the Plaintiff made contributions thereon, whether or not the properties are outside the realm of estate of the deceased or what proportion thereof the Plaintiff should inherit are now matters for the probate Court. That Court has the mandate to determine the said matters and is also sufficiently competent to conclusively determine and/or, in the alternative, give any appropriate directions on the forum to determine the same. I therefore refuse to accept that the said matters can be appropriately canvassed and determined under the Matrimonial Properties Act yet the Plaintiff's husband in whose name all the properties in question are registered is long dead.
43. In his Submissions, the Plaintiff's Counsel lets out the Plaintiff's intentions in the following manner:

“Additionally, the probate Court will only distribute free property of the deceased among the beneficiaries. If in this Cause it is proved that indeed the properties are matrimonial, then they will automatically be ousted from the distribution table during succession ...”
44. It is therefore clear that the Plaintiff's intention in filing this suit is to obtain an early and quick declaration from this Court removing the properties in question from the inventory of properties that shall be included in the estate of the deceased for distribution among the family members – the deceased's free property. She has stated that she is presently 97 years of age and it is most probably because of this advanced age that the Plaintiff prefers a “shortcut” to avoid a protracted and long-drawn Succession Court battle. This she cannot be allowed to do since the registered owner of the properties - the Plaintiff's husband - is now deceased and there is no Administrator as yet. Considering the circumstances of this case, this Court will not allow the Plaintiff to circumvent the law in the manner she is seeking to do. Since the suit properties are all registered in the sole name of the deceased, the Plaintiff is well advised to initiate or subject herself to the procedure stipulated under the *Law of Succession Act* and seek reliefs from the probate Court which is the one mandated in law to determine the fate of the properties and her contributions thereon, if any.
45. In arguing her case, the Plaintiff relied on the decision of Hon. Justice W. Musyoka made in the case of *In Re Estate of Mbai Wainaina (Deceased)* [2015] eKLR and argued that the case is authority that a probate Court has no jurisdiction to determine claims that properties registered in the name of a deceased were held by the deceased person in trust for others. I am fully aware of the cited decision. However, in my understanding, the holding made by Musyoka J, similar to many other cases before and after it, relates to claims made by third parties such as creditors, purchasers or alleged co-owners who



are not heirs or dependents of the deceased (spouses and/or children) but people outside the immediate family of the deceased. In the cited case for instance, the claimants were brothers of the deceased who alleged that they were joint co-owners of the properties with the deceased. They therefore claimed that although the properties were registered in the name of the deceased, the deceased held the properties in trust for them and the same were therefore not available for distribution as part of the deceased's free property. It will therefore be quickly noted that the said case does not and cannot apply in the instant suit since the Plaintiff herein is a spouse of the deceased and therefore an heir and/or dependent within the family, not a creditor, purchaser or an alleged co-owner outside the family of the deceased.

46. In the few matters that I know of in which the issue of division of matrimonial properties has been entertained by the Court despite the targeted spouse being deceased, the circumstances were different. For instance, *in Re Estate of Shahid Pervez Butt (Deceased) [2022]* eKLR (E. Ogola, P.J.O. Otieno and M. Njoki Mwangi, JJ), there was already an Administrator appointed by the probate Court and who is the one who was sued as the Respondent in place of the deceased. Secondly, the Succession Cause had been consolidated with the matrimonial properties case and therefore all arising issues were determined together and in one Ruling.
47. Regarding the joinder of the 2nd to 5th Defendants, I also agree with the Defendant's Counsel that proceedings under the Matrimonial Properties Act and specifically those under Section 17(1) thereof are basically and also logically meant to be between spouses. How then and in what capacity would the 2nd to 5th Defendants who are the Plaintiff's step-sons be justifiably roped into the proceedings? What cause of action under Section 17(1) of the Act has been disclosed against these Defendants yet they are not spouses of the deceased? In the absence of a proper explanation in regard thereto, I find that the joinder of the 2nd to 5th Defendants into the suit is without basis and discloses no known cause of action under the Matrimonial Properties Act.
48. I am of course aware of decisions where Courts have in appropriate circumstances upheld the joinder of third parties or persons who are not spouses to be included as Respondents in matters brought under the Matrimonial Properties Act. However, I again find that the circumstances in those cases were different. For instance, in the case of *Regine Butt v Haroon Butt & another [2015]* eKLR, Hon. Justice E. Mureithi relied on Section 12(4) of the Matrimonial Properties Act and allowed third parties to be retained as Respondents because there was a threat of eviction of the estranged wife from alleged matrimonial properties by such third parties. In those circumstances, the Judge was perfectly entitled to hold as he did and issue injunction orders against such third parties because Section 12(4) aforesaid expressly allows injunctions to be issued against "any person" from evicting the other spouse from a matrimonial home. In the instant case, there is no allegation of any threat of eviction.

Final Orders

49. In the premises, I rule as follows:
- i. The Preliminary Objection dated 9/01/2023 and filed by the Defendants on 12/01/2023 is hereby upheld in terms of grounds (b) and (d) thereof.
 - ii. This Cause is accordingly found to be untenable in law and defective and also does not disclose a known cause of action against the Defendants.
 - iii. The suit is in the circumstances struck out.
 - iv. This being a dispute among family members, to facilitate reconciliation and harmony, I make no order on costs which means that each party shall bear his/her own costs of the suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 6TH DAY OF OCTOBER 2023



.....

WANANDA J.R. ANURO

JUDGE

