



**LWK v JCW (Matrimonial Cause E078 of 2021)
[2023] KEHC 24352 (KLR) (Family) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24352 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E078 OF 2021
MA ODERO, J
OCTOBER 19, 2023**

BETWEEN

LWK APPLICANT

AND

JCW RESPONDENT

RULING

1. Before this court for determination is the notice of preliminary objection dated January 23, 2023 filed by the respondent James Wanjogu Comba.
2. The applicant Lilian Wairimu Kirimu opposed the preliminary objection through her replying affidavit dated February 9, 2023. The matter was canvassed by way of written submissions. The respondent filed the written submissions dated April 3, 2023 whilst the plaintiff relied upon her written submissions dated April 17, 2023.

Background

3. The parties herein got married to each other on September 2, 2000. Their marriage later fell into problems and the Plaintiff filed a Divorce Petition No. 266 of 2021 on March 10, 2021. The plaintiff alleges that during the subsistence of their Marriage the couple acquired several properties together. She is apprehensive that the respondent may move to sell transfer or otherwise dispose of said properties before her suit is heard and determined.



4. The plaintiff herein filed in the High Court the notice of Motion dated October 28, 2021 seeking inter alia orders that:-

“1. The company records and all the audited books of accounts and bank statements of the company known as Gichoya Development Company Limited since incorporation be produced to this Honourable court.”

5. In response to this application the respondent filed the notice of preliminary objection which was premised upon the grounds that:-

“1. The honourable court lacks jurisdiction to hear and determine matters touching on Gichoya Development Company Limited, a separate legal entity from the respondent and which is governed under the Companies Act.

2. In view of the foregoing, the claim against the company’s assets is incompetent, misconceived and bad in law and ought to be dismissed with costs.”

Analysis and Determination

6. 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.

7. The definition of a preliminary objection was given in the case of *Mukisa Biscuits Manufacturing Company Ltd – vs 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.”

8. 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.”

9. 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.



10. 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.
11. The respondent submits that his court has no jurisdiction to hear and determine matters touching on Gichoya Development Company Limited (hereinafter ‘the company’) as the company is a legal entity separate from the parties herein.
12. It is trite law that jurisdiction is everything and without requisite jurisdiction a court will immediately down its tools. [See *Motor Vessel “ss Lilian v Caltax Motor Oil (k) Limited* (1989) KLR]
13. The said which company was formed during the subsistence of the Marriage and is the ‘legal owner’ of some of the properties named by the Plaintiff. The Plaintiff and the Respondent both who are the parties to this marriage hold shares in the said company.
14. It is not correct to say that where property is registered in the name of a company then that property cannot be dealt with in proceedings for distribution of Matrimonial Property. In [AKK v PKW](#) [2020] eKLR the Court of Appeal held as follows:-

“The question that we must grapple with respecting that matrimonial home is whether it is available for distribution given that it is registered in the name of the company. We are aware of some decisions of this court that seem to suggest that property registered under the name of a company can only be dealt with in accordance with the dictates of company law and do not therefore fall for determination in a family property proceeding.

15. See for instance *SNK v MSK & 5 others* [2015] eKLR where the court (differently constituted) reversed a decision of the High Court ordering that certain properties owned by a limited liability company be transferred to the benefit of the wife and children of the marriage. The Court faulted the judge of the High Court for failing to give due regard to the settled principle of company law in [Salomon v Salomon](#) [1897] AC 22 as to the separate legal personality of a company distinct from its shareholders and directors. The court there took the view that this court has exhaustively dealt with this issue in *Muthembwa v Muthembwa* Civil Appeal No 74 of 2001 [2002] 1 EA 186 which was cited in *Mereka v Mereka* Civil Appeal No 236 of 2001 and held that a trial court has no jurisdiction under section 17 of the [Married Women Property Act](#) (1887, of England) to distribute properties registered in the name of the company in which the spouses are the shareholders.

With respect, we are not ourselves persuaded that *Muthembwa v Muthembwa* was to exactly that effect. Quite the opposite. The court there held, and we respectfully agree, that where the property of the company had been mixed with the matrimonial property, section 17 allowed the court to deal with the parties respective interests in the company as injustice might otherwise result, which, to our way of thinking, is repudiation, in appropriate cases, of the sometimes unhelpful distinction between the parties as spouses as opposed to shareholders for purposes of section 17 proceedings.

16. The court went on to state:-

“That practical approach to matrimonial property that is so closely linked to or mixed inextricably with property in the name of a company under the sole shareholding of a couple without outsiders in it, appears to us to be more conducive to the doing of real and substantive justice untrammelled and unfrustrated by the technicalities and esoteric niceties of company law that would defeat what ordinary citizens would see as rather straightforward issues of division of matrimonial property. *Muthembwa v Muthembwa* has been followed in other cases including *RFS v JDCS* [2010] eKLR where the Court appreciated



that when the matrimonial home is built on land belonging to a company where the husband is the major shareholder with his consent, the property becomes altered and he cannot be heard to raise the distinctions of company law in the hope of defeating the spouse's interest in its as matrimonial property.”

17. In the circumstances I find that since this dispute involves a dispute over matrimonial Property and given that the parties to the marriage are both shareholders of the company and given that the said properties in question were acquired during the subsistence of the Marriage, I am of the view that this court does have requisite jurisdiction to hear and determine the application dated October 28, 2021.
18. However, it is trite law that a company is a separate legal entity. In the case of *Salmon v Salmon & Co Ltd* [1897] AC 22 the court held that a company upon incorporation becomes a body corporate and is recognized by law to have a separate legal entity from its members. The company and the members are two separate bodies.
19. Given that the company is the legal owners of some of the properties cited in the suit, it would be necessary for the Plaintiff to file an application seeking to enjoin the company as a party to this suit.
20. Once this is done then this court would proceed to hear and determine this matter.
21. Finally, I find no merit in this Notice of Preliminary objection dated January 23, 2023. The same is dismissed in its entirety. Each party to pay its own costs.

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

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MAUREEN A. ODERO

JUDGE

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