



**RJL v KAL (Matrimonial Cause E001 of 2023)
[2024] KEHC 12575 (KLR) (16 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12575 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
MATRIMONIAL CAUSE E001 OF 2023**

**JR KARANJA, J
OCTOBER 16, 2024**

BETWEEN

RJL APPLICANT

AND

KAL RESPONDENT

JUDGMENT

1. The Originating Summons dated 12th October 2023 was filed along with the application vide the Notice of Motion dated the same day for a temporary injunction to be issued against the Respondent, KAL, restraining him from selling, leasing, transferring, encumbering, alienating, interfering with or in any manner dealing adversely with LR No [Particulars Withheld], all situated within Nandi County pending hearing and determination of this cause.
2. In the Originating Summons, the Applicant RJL, basically seeks declaratory orders to the effect that 50% or such other higher proportion of the aforementioned suit properties held jointly by the Applicant and the Respondent is for the beneficial interest of the Applicant in light of her contribution to the purchase of the suit properties and that the suit properties jointly bought but purchased in the name of the Respondent are partly held in trust for the Applicant.
3. The Applicant prays that the division to separate the interest in the suit properties be done within ninety (90) days from the date of judgment at the Respondent’s cost and that the Respondent be ordered to transfer the Applicants share in the suit properties to her within sixty (60) days from the date of division and in default, the Registrar of this Court be authorized to execute any transfer documents in place of the Respondent or any other person holding any title on behalf of the Applicant to effect all the orders of this court in favour of the Applicant.
4. Provisions of the *Civil Procedure Act*, the *Land Registration Act* and the *Matrimonial Property Act* have been invoked to bring both the originating summons and the Notice of Motion.



However, the Respondent filed a Preliminary Objection dated 8th November 2023 to both the Originating Summons and the Notice of Motion on ground that both offend the Provisions of Rule 5(1) (a) of the [Matrimonial Property Rules, 2022](#) as the purported marriage between the applicant and the respondent has not been dissolved thereby pondering the application, frivolous, vexatious, an abuse of the court process, bad and untenable in law and ought to be struck out with costs.

5. The objection proceeded by way of written submissions which were filed herein by the Applicant through Mukabani & Kagunza Advocates and by the Respondent through Bitok & Sambu Advocates.

This court having given due consideration to the objection in the light of the rival submissions was of the view that the issues emerging for determination are Firstly, whether the Objection is competent and proper before the court and Secondly, whether the application and indeed, the originating summons are tenable in law in as much as they are anchored on the provisions of the [Matrimonial Property Act](#).

6. On the first issue, the leading case law on preliminary objection is *Mukhisa Biscuits Manufacturing Company Limited v West End Distributions* (1969) EA 696 where it was stated that: -

“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 It raises a pure point of law which is argued 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.”

7. Herein, the objection is based on the provision of the [Matrimonial Property Act](#) and Rules, in particular Rule 5(1) (a) of the [Matrimonial Property Rules, 2022](#) which provides that: -

“a spouse or former spouse may apply to a court for the determination or declaration of any right or claim over matrimonial property in accordance with Rule 7: -

- a. At any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the [Marriage Act](#) (Cap 150).”

In the Applicant’s supporting affidavit at paragraph eleven (11) of the Notice of Motion it is averred that the marriage was broken down leading to divorce proceedings being instituted vide Kapsabet Chief Magistrate Divorce Cause No E022 of 2023. The divorce petition is annexed to both the application and the originating summons thereby implying that the process of having a dissolution of the marriage between the Applicant and the Respondent has commenced and is yet to be finalized with the issuance of a divorce decree.

8. This is a fact which is not disputed. It raises the question as to whether the originating summons and the application are improper and incompetent before court for being pre-mature in the absence of a formal dissolution of marriage and by dint of Rule 5(1) (a) of the [Matrimonial Property Rules](#). The Preliminary Objection is on a pure point of law, thus competent and proper before court.

9. On the Second issue for determination, it is without doubt that the marriage between the Applicant and the Respondent is yet to be dissolved in order to trigger distribution of the Matrimonial Property pursuant to the provisions of the [Matrimonial Property Act](#) under which the [Matrimonial Property Rules](#) are made.

During subsistence of a marriage the ownership of matrimonial property vests in the spouses i.e. the husband and his wife or wives. In this case the Applicant is one of the three spouses of the Respondent. She is by the Originating Summons seeking share of matrimonial property belonging to



the Respondent and all his spouses on account of an apparent disharmony in her spousal relationship with the Respondent for which she has sought a divorce by filing the divorce petition before the Chief Magistrate's Court at Kapsabet which petition is pending hearing and determination.

10. Under Rule 7 of the *Matrimonial Property Rules*, a spouse or former spouse may apply to a court for the determination or declaration of any right or claim over Matrimonial Property, but Rules 5(1) (a) presupposes that such application may only be made after the dissolution of the marriage by a court decree given in final determination of the proceedings in a divorce petition or matrimonial cause.

Matrimonial property under Section 6 of the *Matrimonial Property Act* means matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the substance of the marriage.

11. 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. This is provided under Section 7 of the *Matrimonial Property Act* which therefore means that the High Court cannot divide matrimonial property between spouses until divorce or the marriage is otherwise dissolved.

The Applicant herein is seeking a division or distribution of matrimonial property prior to the dissolution of her marriage to the Respondent. This is tantamount to putting "a cart before the horse" thereby running afoul to the provisions of the *Matrimonial Property Act* and the Rules made thereunder.

12. The objective of the *Matrimonial Property Act* is to provide for the rights and responsibilities of spouses in relation to matrimonial property and connected purposes and if it is invoked by any party in proceedings such as the present proceedings that party must adhere to its provisions and rules.

Section 7 of the Act is in mandatory terms with regard to division of matrimonial property which can only take effect after the dissolution of a marriage in any lawful manner. Therefore it is the humble opinion of this court that Section 17 of the Act would not be applicable in the circumstances of this case. The declaratory orders sought by the Applicant in relation to the ownership of the parcels of land aforementioned may be sought in the pending matrimonial cause or in an application for such orders before the Environment and Land Court.

13. For all reasons foregoing, this court must agree with the Respondent and hold that the originating summons and the notice of motion under which it is anchored are both pre-mature and untenable in law at this juncture.

The preliminary objection is therefore upheld with the result that both the Originating Summons and the present application are hereby struck out and dismissed with costs to the Respondent.

Ordered accordingly.

DELIVERED AND DATED THIS 16TH DAY OF OCTOBER, 2024

J. R. KARANJAH,

JUDGE

