





- Mombasa/Bububu(A)/ [...]
- Mombasa/Bububu (A)/ [...]
- Mombasa/ Bububu(A)/ [...]
- Mombasa/ Bububu(A)/ [...]
- Mombasa/Bububu(A)/ [...]
- Mombasa/Bububu(A)/ [...]

- Bank Account(s)

(  
i LR.NO. Gongoni Settlement Scheme/[...]-  
i RESPONDENT'S NAME  
i  
)

- Property in Kilifi County

(  
i  
i KCC [...] - RESPONDENT'S NAME  
i  
)

- Family Car

(  
i  
i KCR [...] - APPLICANT'S NAME  
v  
)

- Family Car

(  
v  
i PROWAY TRADING LTD- RESPONDENT'S  
i NAME  
)

- 50 shares

(  
v  
i WINTOUCH LTD- RESPONDENT'S NAME  
i  
)

- 200 shares

(  
v  
i BAZOOKA FAST FOODS LTD- RESPONDENT'S  
i NAME  
)

- 500 shares

(  
v  
i SHORELINE PROPERTIES LTD-RESPONDENT'S  
i NAME  
)

- 500 shares

(  
i  
i EDAFOS PROERTIES LTD- RESPONDENT'S  
i NAME  
)

SHARES

(  
v  
i EDUCATION INSURANCE POLICY NUMBER  
i 026/CEA/[...] - RESPONDENT'S NAME  
)

- ICEA LION assurance Company amounting to Kshs 302,686.00

(  
i  
i SHARES IN LEGAL FIRMS HELD BY THE  
i RESPONDENT  
)

- CJ LAW & ASSOCIATES LLP
- GM GAMMA ADVOCATES LTD

)

4. **THAT** a temporary injunction do issue restraining the Respondent his servants and/or agents from evicting the Applicant and the issues of marriage from the Suit Properties and/or selling, alienating, wasting, charging, damaging and/or otherwise interfering with the said properties pending hearing and determination of the originating summons herein.

5. **THAT** this Honourable Court be pleased to order the sale, division and/or apportionment of the properties between the parties equally.

6. **THAT** further and in the alternative and in the event that title and ownership in any way of the Suit Properties has/have already been transferred in favour of any third party an order that the Respondent does account for the proceeds and the same be divided between the Applicant and Respondent equitably and equally.

7. **THAT** an Order that the Respondent does execute all documents where necessary to transfer the Applicant’s portion in the properties or in default the same be executed by the Chief Registrar, Deputy Registrar, Lands Registrar or Registrar of Titles or in the alternative that the same properties be valued by a qualified and reputable valuer, sold and the proceeds be shared equally between the Applicant and the Respondent.

8. **THAT** the Respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in any and all banks accounts held with any of the following banks until the hearing and determination of these proceedings or until the Respondent secures the Applicant in terms of prayers (2), (3) and (4) above and such order be served upon the said banks:-

a. **Consolidated bank**            **JON.....personal savings account**

b. **Any other Bank where funds may have been transferred to from prior existing accounts.**

9. **THAT** the Respondent be compelled to render a full and frank disclosure to the Applicant on all bank statements and financial records and/or reports of the Family Businesses detailing all credit and debit entries in those accounts from the year 2014 to date pending the hearing and determination of these proceedings.

10. **THAT** any order made in terms of prayer 9 above relating to the Respondent’s personal bank accounts and Family Business Accounts be subject to such monthly amounts as may be certified by the Court as necessary to meet the Respondent’s own expenses so that he is not rendered destitute.

11. **THAT** any order made in terms of prayer 8 above relating to the Respondent’s personal bank accounts and Family Business Accounts be subject to such monthly amounts as may be certified by the Court as necessary to meet the Applicant’s own expenses so that she is not rendered destitute.

12. **THAT** this Honourable Court be pleased to dissolve and/or wind-up the following companies registered in the joint names of the Applicant and Respondent including all and any moveable and/or immovable assets held in the company names (Family Business) and the proceeds be shared equally and equitably between the parties:-

PROWAY TRADING LTD- RESPONDENT’S NAME	• 50 shares
WINTOUCH LTD- RESPONDENT’S NAME	• 200 shares
BAZOOKA FAST FOODS LTD- RESPONDENT’S NAME	• 500 shares
SHORELINE PROPERTIES LTD-RESPONDENT’S NAME	• 500 shares
EDAFOS PROERTIES LTD- RESPONDENT’S NAME	SHARES
NONICO LTD(700 shares)	700 SHARES
RESPONDENT’S NAME	

13. **THAT** the Respondent does render complete statements of account in respect of all the above companies and provides an account for all cash flows and profits obtained from the Family Businesses.

14. **THAT** it be declared that the law firm known as NDERE & COMPANY ADVOCATES (the Family Practice) registered in the name of the Respondent is owned jointly by the Applicant and the Respondent in partnership.

15. **THAT** this Honourable Court be pleased to dissolve and/or wind-up the Family Practice and the proceeds be shared between the parties equally.

**16. THAT** the Respondent be restrained from withdrawing, transferring, pledging or borrowing against any sums standing in the credit of NDERE & COMPANY ADVOCATES or JON in any and all banks accounts held with any of the following banks until the hearing and determination of these proceedings or until the Respondent secures the Applicant in terms of prayers (b), (c) and (d) above and such order be served upon the said banks:-

- (i) Family Bank Ndere & Company [...] main Office Account
- (ii) CFC Stanbic JON Sub Office Account
- (iii) ABSA Ltd; JON - Sub Office Account.
- (iv) and or any other Bank where funds may have been transferred to from prior existing accounts.

**17. THAT** the Respondent be compelled to render a full and frank disclosure to the Applicant on all bank statements and financial records and/or reports of the Family Practice detailing all credit and debit entries in those accounts from the year 2016 to date pending the hearing and determination of these proceedings.

**18. THAT** this Honourable Court be pleased to declare that the shares held by the Respondent in the following companies is matrimonial property and the proceeds of sale be shared equally between the Applicant and the Respondent;-

- (i) CJ LAW & ASSOCIATES LLP
- (ii) GM GAMMA ADVOCATES LTD

**19. THAT** the Respondent does render complete statements of account in respect of all the above companies and provides an account for all cash flows and profits obtained from them.

**20. THAT** the Respondent be compelled to make payments towards loan number [...] at the Law Society of Kenya Sacco.

**21. THAT** all the costs of the suit be awarded to the Applicant.

2. The application is premised upon grounds set out on the face of it and averments contained in the affidavit in support sworn on 30<sup>th</sup> July, 2020 by the applicant.

3. When the file was placed before the duty court, the Originating Summons was certified urgent. Directions to serve the application were then made and hearing date to be taken at the registry. Meanwhile, the respondent filed his replying affidavit on 28<sup>th</sup> October, 2020.

4. Subsequently, a hearing date for 26<sup>th</sup> November, 2020 was taken at the registry. On that day, there was no appearance on the respondent's side. M/s Osino appearing for the applicant sought to have the Originating Summons heard by way of viva voce evidence. She further sought leave to file a further affidavit in response to the relying affidavit and that prayer 4 of the originating summons being a temporary injunction preserving the properties be issued.

5. Consequently, the court granted prayer 4 of the Originating Summons pending hearing of the Originating summons and that hearing be conducted by way of viva voce evidence.

6. Aggrieved by the ex parte orders made in his absence and that of his counsel, the respondent filed an application dated 30<sup>th</sup> November, 2020 seeking to set aside the orders made on 26<sup>th</sup> October, 2020 on grounds that they were not notified of the hearing date. Contemporaneously filed with the application is a preliminary objection of even date stating that;

**a. The applicant has invoked this honorable court's jurisdiction prematurely contrary to provisions of Section 7 of the Matrimonial Property Act, No 49 of 2013.**

**b. There is no proper cause herein given that the Originating Summons creating this matter is fatally defective.**

**c. The entire suit should be struck out with costs.**

After canvassing the application, the court on 19<sup>th</sup> March, 2021 set aside the orders of 26<sup>th</sup> November 2020 and parties advised to set down the Originating Summons for hearing.

8. When the Originating Summons came up for hearing, parties agreed to have the afore stated Preliminary objection heard first. In his submission, M/s Onsare appearing for the respondent challenged the prayer for a temporary injunction within the originating Summons which is a substantive suit instead of filing a separate application for temporary orders. Secondly, counsel submitted that the prayer for division of matrimonial Property vide Section 7 of the matrimonial Property before dissolution of marriage is irregular hence a premature suit. According to Mr. Onsare, the suit is incompetent and bad in law.

9. In response, M/s Osino submitted that the suit has not only been filed under Section 7 but also Section 17 of the Matrimonial Property Act

which deals with declaration of rights on property ownership and contribution. Learned counsel urged that Article 45 (4) of the Constitution does recognize couples' equal rights at, during and after marriage.

10. Concerning the question on the applicant seeking temporary orders in the Originating Summons instead of a separate application, counsel submitted that rules governing matrimonial property proceedings are yet to be legislated hence seeking such order in the main suit is not prejudicial.

11. Touching on the question of instituting the suit before divorce, M/s Osino urged that Section 7 of the Matrimonial Property Act must be read in conjunction with Section 17 of the said Act. To support that proposition, counsel made reference to the court of appeal holding in the case of **HWN V WNM (2015) e KLR and PWK V JKG (2015) e KLR** where both courts issued declaratory orders in respect of matrimonial property dispute. Counsel urged the court to dismiss the preliminary objection and proceed with the hearing of the main suit.

12. In his rejoinder, Mr. Onsare opined that lack of matrimonial property rules is not aground to disregard otherwise clear rules of procedure. Counsel however admitted that a court can make declaratory orders under Section 17 of the Matrimonial Property Act but it cannot order for division of the same.

### **Analysis and determination.**

13. I have considered the Preliminary Objection herein and oral submissions by both counsel. Issues that crystalize for determination are;

**a. Whether temporary order/s can issue under a substantive suit in a matrimonial property dispute.**

**b. Whether the suit herein is bad in law in view of the fact that the parties herein have not divorced.**

14. It is trite that a preliminary objection must consist a pure point of law which when determined fully can lead to the final disposition of the matter. In the celebrated case of **Mukhisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd ( 1969) E.A 698** , the court described a preliminary objection 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...”**

15. Similar position was held in the case of **Hassan Nyanje Charo Vs Khatib Mwashetani & 3 Others Civil appeal No. 23 of 2014 (2014) e KLR and Aviation** and **Allied Workers union Kenya V Kenya Airways Ltd & Others Appl. No. 50 of 2014 ( 2015) e KLR** in which the court stated at paragraphs 15 as below;

**“Thus a Preliminary Objection may only be raised on pure question of law. To discern such a point of law; the court has to be satisfied there is no proper contest as to the facts. The facts, are deemed agreed, as they are presented in the pleadings on record”.**

16. Further, in the case of **Independent Electoral and Boundaries Commission Vs Jane Cheperenger & 2 Others ( 2015)eKLR** the court stated that;

**“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that it is to undisputed facts leads to but one conclusion’ that the facts are incompatible with that point of law”.**

17. It is evident from the above case law that a preliminary point of law is intended to save court's time from frivolous or undeserving litigation which if determined favorably will lead to final resolution of the issue in controversy.

18. The first issue vehemently argued is on the aspect that the prayer for a temporary injunction cannot be sought within a substantive application in this case the Originating Summons. There is no doubt that there is a clear provision and procedure provided under order 40 of the Civil Procedure rules which governs issuance of such orders. Unless its application is expressly precluded by any other written law, matrimonial property related proceedings seeking to invoke a prayer for temporary injunction must procedurally apply the Civil Procedure Rules in this case order 40. In the case of **Harmanus Phillipus Stegn Vs Giovanni Gnechi -Ruscone Supreme court application No 3 of 2012** the court held that;

**“It is trite law that a court of law has to be moved under the correct provisions of the law”**

19. Mr. Onsare urged that a temporary injunction should only issue in a separate application independent from the main suit. On the other hand, M/s Osino contended that there are no rules in place governing disputes under the matrimonial property Act. If we were to take M/s Osino's argument, then, under the Matrimonial Property Act, there is no mention of temporary injunction anywhere hence the prayer could as well be misplaced. I do not agree with M/s Osino that Civil Procure Rules do not apply in Matrimonial property related disputes.

20. It is trite that prayers for temporary orders in this case a temporary injunction can only be sought under a separate application and not in a substantive suit. To issue a temporary order in a substantive suit would be tantamount to issuing final orders when there is no prayer for a permanent injunction.

21. For the above reasons stated, I do agree with Mr. Onsare that the prayer for temporary injunction in a substantive suit is bad in law hence

cannot issue. The applicant ought to have filed a separate application seeking temporary prayers pending hearing and determination of the application inter partes and thereafter the main suit. I am therefore in agreement with Mr. Onsare that the temporary order being sought in the Originating Summons cannot apply until the suit is determined or in the alternative, a separate application would suffice.

22. Turning to the second ground which is the Elephant in the room, Mr. Onsare urged that the suit herein is incompetent hence bad in law as it was filed before the parties could dissolve their marriage (Divorce). In the case **of Peter Njenga Vs Sophia Ndungu Nairobi C.A Civil Appeal No 2 of 2000**, the court of appeal held that the high court has no jurisdiction to alienate lands between spouses during their lifetime or unbroken coverture and that a judge faced with a suit where division of matrimonial property is sought in such a case ought to dismiss it. This position was upheld **in MNW V WNM & 3 Others (2013) e KLR and TMW V FMC (2019) e KLR**.

23. It is now a generally accepted legal procedure that spouses who are intent of sharing matrimonial property acquired during coverture must first divorce before approaching the court. This position is further amplified by section 7 of the Matrimonial Property Act which provides that;

**“ownership of matrimonial property;**

**subject to Section 6 (3), 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 the divorce or their marriage is otherwise dissolved.”**

24. In the instant case, parties have not dissolved their marriage. To that extent, this court cannot divide or share out any of the subject matrimonial property. **See MNH v FHM ( 2018) e KLR** where the court held that;

**“In the absence of conclusive proof of the dissolution of the marriage between parties, the suit premises herein cannot be distributed.”**

25. In view of the fact that the marriage between the applicant and respondent is still intact, section 7 of the matrimonial Property is not applicable as no property will move from one party to the other under the platform of division of matrimonial property.

26. However, both parties are in agreement that under Section 17 of the matrimonial Property Act, a court can issue a declaration as to spousal rights in any matrimonial property but without passing title. Section 17 does provide as follows; Action for determination of rights to property.

**“(1) a person may apply to a court for a declaration of rights to any property that is contested between the person and a spouse or a former spouse of the person.**

**(2) an application under sub-section (1) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”**

27. The applicant herein filed a mixed grill kind of prayers in the Originating Summons. Principally, the Originating summons cuts across division of matrimonial property under section 7 and declaratory rights under Section 17. Having eliminated division of matrimonial property, I am left with the prayer under section 17 which seeks mere declaration of rights of ownership. In the case of **MNH V FHM (Supra)**, similar prayers were made for division of property and declaration. In **that case** the court merely made a declaration of rights but fell short of distributing the property. Equally, in **PWK V JKG ( Supra) and JWC V PBM (Supra )** the court recognized that a declaration can be made without sharing out property.

28. Considering the dictates of section 17 of the Matrimonial Property Act and the quoted case law, it is my finding that the Preliminary Objection partly succeeds in so far as the non -applicability of Section 7 of the Matrimonial Property Act is concern and the applicability of section 17 in these proceedings. To that extent, the preliminary objection herein cannot dispose the suit completely as there is part of the claim which cannot be ignored.

29. It is upon the applicant to risk by proceeding with mere declaration of rights without actual property vesting or changing hands to either party until the divorce proceedings are commenced and or concluded. Accordingly, the preliminary objection herein is upheld only to the extent that the court will not distribute matrimonial property and hearing shall proceed with the prayer for declaration of ownership rights. As to preservation of the property in question it is up to the aggrieved party to move the court appropriately. Regarding costs, the same shall abide by the suit.

**DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 18<sup>TH</sup> DAY OF JUNE, 2021**

**J. N. ONYIEGO**

**JUDGE**