



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MERU**  
**ORIGINATING SUMMONS NO. 35 OF 2018**  
**IN THE MATTER OF SHARING MATRIMONIAL PROPERTY**  
**AND**  
**IN THE MATTER OF MARRIED WOMEN PROPERTIES ACT**  
**BETWEEN**  
SRM.....PLAINTIFF  
**VERSUS**  
JMM.....DEFENDANT  
**RULING**

1. The Plaintiff and Defendant are a married couple, having gotten married on 21<sup>st</sup> November 2009. Their relationship is however estranged and the Plaintiff filed the instant proceedings to have the Court determine her interests in the suit property. By the Originating Summons dated 10<sup>th</sup> December 2018, she seeks the following orders: -

- i. The Plaintiff contributed in improvement of land parcel No. KIBIRIICHA/KIBIRICHIA/[Particulars Withheld] since 2009 when she got married to the Defendant.***
- ii. The Plaintiff is entitled to equal rights or more in land parcel No. KIBIRIICHA/KIBIRICHIA/[Particulars Withheld].***
- iii. The Court orders that the Plaintiff gets 50% or more share of land parcel No. KIBIRIICHA/KIBIRICHIA/[Particulars Withheld].***
- iv. What is the rightful share of the Plaintiff in land parcel No. KIBIRIICHA/KIBIRICHIA/[Particulars Withheld].***

***Respondent's Preliminary Objection***

2. In response to the application, the Respondent filed a Notice of Preliminary Objection dated 3<sup>rd</sup> February 2021 together with an affidavit to adduce facts in support of his objection. The preliminary objection is premised on two main points, being that the matter is *res judicata*, and that the Plaintiff is claiming a share of the matrimonial property but is yet to file a divorce cause.

3. In his supporting affidavit, he confirms that the Plaintiff is indeed his legally wedded wife whom he married in 2009 and it is not true that he chased her away as she alleges in her supporting affidavit; That the Plaintiff has previously filed ELC Suit No. 54 of 2018 wherein she raised similar issue as those raised in the instant suit for which the Court already determined; That the Plaintiff is yet to file a divorce cause and he is yet to be served with papers for a divorce cause (if any) by the Plaintiff and that it is only after the conclusion of a divorce cause and until the Court has issued a decree nisi that the Plaintiff may move the High Court to claim for matrimonial property.

***Applicant's Grounds of Opposition***

4. The Plaintiff/Applicant, being opposed to the Notice of Preliminary Objection filed Grounds of Opposition dated 2<sup>nd</sup> March 2021 stating that the suit herein is not *res judicata* as the case at the lower Court was only dismissed due to filing the matter in the wrong forum and as such, the issue has not been adjudicated upon and that the causes of action are different; She further states that the contention by the Defendant that she first needs to file a divorce cause before filing a matrimonial cause is far fetched as the prayers she seeks are with respect to declaratory rights as espoused under Section 17 of the Matrimonial Properties Act, 2013 Laws of Kenya.

### **Submissions by Parties**

5. The P.O was heard orally on 13<sup>th</sup> April 2021.

### **Issues for Determination**

6. The two main issue for determination, which both touch on the Jurisdiction of the Court are as follows: -

*i. Whether the matter is res judicata*

*ii. Whether the Court is barred from determining the matter in the absence of a finalized divorce cause.*

### **Whether the matter is res judicata**

7. The Defendant claims that the matter herein is *res judicata* having already been dealt with in ELC Suit No. 54 of 2018.

8. The Plaintiff on the other hand claims that the ELC case was dismissed for having been filed at the wrong forum and as such, the issue has not been adjudicated upon and that the causes of action are different;

9. The issue of *res judicata* is indeed a point of law which is successfully argued will determine the application in its entirety. **Section 7 of the Civil Procedure Act CAP 21 of the Laws of Kenya** prohibits courts from adjudicating upon matters which are *res judicata*. The said section provides as follows:-

***‘No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them can claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.’***

10. For the doctrine to apply, both matters i.e the one previously determined and the subsequent one must conjunctively bear all the three elements outlined in the provisions of Section 7 of the Civil Procedure Act. In this respect:-

i. Both matters must have been addressing similar issues directly and substantially.

ii. Both matters must have had similar parties whether such parties claim in their own rights or through others.

iii. The previous matter must have been determined by a Court of competent jurisdiction.

11. Concerning the parties, it is clear that both the Plaintiff and Defendant herein were parties to the ELC case alongside 2 others, for whom the ELC Court said were not necessary parties to the suit.

12. Concerning the issues being addressed, the present case, the Plaintiff seeks among others declarations over her interests and contributions in the suit property whereas in the former suit, she sought an injunction restraining interference with her quiet and peaceful enjoyment of the property. These issues, to this Court’s mind are not similar. One is founded upon the right to enjoy property and the other is founded upon the rights of a (former) spouse. Furthermore, the mere fact that the former matter was filed as an Environment and Land Case and yet the present one is a Matrimonial Property Cause reveals that the causes of actions between these two matters are different.

13. Concerning determination of the matter, from the contents of the Plaintiff’s affidavit, it is clear that the former ELC case was not determined to conclusion but was dismissed. The Plaintiff claims that it was dismissed owing to lack of jurisdiction for having been filed in the wrong forum. The Defendant also admits that the same was dismissed although he does not disclose the reasons for the dismissal and the Ruling annexed to his affidavit does not have all the pages. This notwithstanding, there is a clear indication that the said application was not determined on merits. It is one thing for a Court to dismiss a matter without having heard the same on merits and it is another thing to dismiss it after hearing it on merits and concluding that it should be dismissed.

14. The doctrine of *res judicata* will normally apply when the previous matter was heard and determined on merits. See for example the case of **Zephania Gichure Ndungu v Rwaikamba Rwathia Trading Co. Ltd & Another ELC No. 78 of 2009 (OS) [2014] eKLR** where L. W Gacheru J held as follows: -

**“However, before the Respondents can successful rely on the defence of res judicata, this court must be certain that the former suit was heard and determined on merit. The Respondents submitted that the former suit was dismissed with costs in 1999. However, none of the Respondents availed copies of proceedings and the Judgment in the said case to enable the Court to ascertain that the suit was indeed determined on merit. The 2<sup>nd</sup> Respondent in its submissions outlined an excerpt of a decision by Bosire J. in the former suit. On perusal of the Court file, I have taken note that the said decision was a ruling granting injunction orders pending the outcome of the suit. I therefore cannot determine that this suit is res judicata in the absence of proof that the same was heard and determined. I am guided by the pronouncement of the Court of Appeal in Caneland Ltd and Others v Delphis Bank Civil Appeal No 20 of 2000 that: “For res-judicata to arise the issue must have been heard and decided on merit otherwise the plea cannot be sustained.”**

15. This Court is therefore not satisfied that the instant matter is *res judicata*.

***Whether the Court is barred from determining the matter in the absence of a finalized divorce cause.***

16. To determine this issue, this Court has to be satisfied on a number of factual matters. First, is the question of whether or not the parties hereto were ever married, and secondly, whether or not there is any divorce proceeding pending. This Court will only entertain this issue as a point of law, if these factual matters are not disputed in line with the parameters set by the Court in questions of preliminary objections. See ***Mukisa Biscuit Company v Westend Distributor Limited (1969) EA 696*** and ***Meru Succession Cause No. 26 of 1988 In the matter of the Estate of Thoma Mbui Njenge***.

17. According to the Plaintiff, she has been married to the Defendant since 2009 and there is a marriage certificate annexed to her affidavit. This fact is also confirmed by the Defendant in his affidavit and he in fact claims that he is yet to be served with any divorce cause. It is therefore not in dispute that the parties hereto are a married couple and that there is no pending and/or finalized divorce cause. It is therefore safe to conclude there is in existence a valid marriage or an unbroken coverture between them. The question that follows is whether in the absence of such finalized divorce cause, the Court is divested of jurisdiction in determining the Plaintiff's matrimonial cause.

18. This matter has previously been dealt with by the Courts. It is a matter that is largely dependent on the nature of prayers sought in the Plaintiff's application and provisions of law under which the application has been brought.

19. Section 7 of the Matrimonial Property Act, 2013 provides as follows with respect to ownership: -

***7. 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 they divorce or their marriage is otherwise dissolved.***

20. It appears that it is the above provision of law which the Defendant had in mind when he urges that the Plaintiff must first file a divorce cause before bringing her claim in the instant matrimonial property cause.

21. However, Section 17 of the Matrimonial Property Act holds as follows: -

***17. 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.***

22. From the above provision of law, it is clear that even during subsistence of a marriage, an application pertaining a declaration of rights may be made. See the term '***Contested between that person and a spouse or a former spouse.***'

23. The Plaintiff in her application failed to indicate the provision of law under which she was bringing her application, as is the routine way of drafting applications. This Court however finds that in the spirit of Article 159 (2) of the Constitution of Kenya, this omission is not fatal let alone failure to cite the correct provision of law. See the case of ***Kenya Trypanosomiasis Research Institute v Anthony Kabimba Gusinjilu (Suing for and on behalf of 112 Plaintiffs) Civil Appeal No. 212 of 2015 [2019] eKLR***.

24. In the premises, this Court finds that to the extent that the Plaintiff's application seeks some declaratory orders with respect to her entitlements in the suit property, it is not a requirement that she proves that there is a divorce cause, either pending or finalized between her and the Defendant.

25. In the Court of Appeal case of ***AKK v PKW Civil Appela No. 61 of 2019, (2020) eKLR***, M. Warsame, P. O. Kiage and S. Gatembu Kairu JJA. held affirmed the above position as follows: -

***“32. Section 7 refers to division of matrimonial property whilst Section 17 refers to a declaration of rights in any property contested between a person and a spouse. It can be discerned from the appellant's pleadings in the High Court that she sought not only division but also orders from the court that the listed property was matrimonial property and a further finding that she had proprietary and pecuniary interests in the same. The trial court found that it had no jurisdiction under Section 7 to make orders as to the division of property. It is also correct that the orders concerning division of matrimonial property pursuant to Section 7 of the Matrimonial Property Act was unavailable to the appellant until the determination of Divorce case 867 of 2017 between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant's prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court's jurisdiction to the provisions in Section 7 of the Act. In failing to address itself to the***

*nature of reliefs sought by the appellant and the enabling provisions under Section 17 of the Act, the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make the declaratory orders sought...*

*34. 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 that 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.*

See also the case of *CK V AGM Civil Suit No. 14 of 2013 (O.S)*

26. This Court therefore finds that the absence of a finalized divorce cause does not bar the Plaintiff from bringing an application seeking declaratory rights as the instant one partly does. The Court must only make sure not to grant any orders that will sever the property, but it can indeed grant declaratory orders.

#### **ORDERS**

27. In the end, this Court makes the following orders: -

*i. The Defendant's Preliminary Objection dated 3<sup>rd</sup> February 2021 is hereby dismissed.*

*ii. Parties to fix hearing dates for the main suit at the registry.*

Order accordingly.

**DATED AND DELIVERED ON THIS 10<sup>TH</sup> DAY OF JUNE, 2021.**

**EDWARD M. MURIITHI**

**JUDGE**

**Appearances:**

**M/S Mwangi E G & Co. Advocates for the Plaintiff**

**M/S Wamache & Associates Advocates for the Defendant.**