

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. 50 OF 2015 (O.S.)

EAM.....APPLICANT

AND

POA.....RESPONDENT

RULING

1. The parties herein **Edla Atieno Muga** and **Peter Okoth Alin'go** were married on 6th June 2011. The marriage having broken down a divorce was decreed in March 2015.
2. Pursuant to the divorce the Applicant moved the court seeking for a declaration of ownership of 61% of the matrimonial home **L.R. No. Nairobi/Block [Particulars Withheld]** and sole ownership of several movable properties.
3. The Respondent filed a replying affidavit in opposition. It is his case that they jointly invested in the moveable and immovable properties of the family and even then, he claims 80% of the matrimonial home where he continues to reside pays all the outgoings including a mortgage to date.
4. The suit is yet to be heard, in the meantime the Respondent has raised a preliminary Objection which is the subject of this ruling, to the effect that the orders being sought relating to the matrimonial property and the entire proceedings are premature since the said property is under a mortgage with Kenya Commercial Bank and therefore, no determination can be made on the same until the mortgage is fully settled.
5. The Preliminary Objection was objected to on grounds that the court has powers to adjudicate on disputes relating to charged properties. It was urged further that the Preliminary objection was made so as to prevent the property being adjudicated upon. Thirdly, it was urged that the Preliminary Objection is based on disputed facts.
6. **Section 10** of the **Matrimonial Property Act 2013** speaks to spousal liabilities and provides that where reasonable liability has been incurred on a matrimonial property same becomes shared liability. Meaning that indeed the law is alive to the fact that a matrimonial property may be subject of a liability such as a charge and a mortgage.
7. Nothing in the Act stops the court from adjudicating over a matrimonial property that is subject of a cause and in declaring the shares of each of the spouses, in ordering that the same be disposed of and proceeds shared. In a scenario where there is a charge it is expected that first the charge will be settled and thereafter the balance of the proceeds shared between the ex-spouses.
8. In the notable case of **Muthembwa Versus Muthembwa (2002)1 E.A. Law Report** the court of Appeal had this to say about an encumbered matrimonial property:

“Where the property at issue was still the subject of outstanding loans, the loans remained a charge on the suit property and the parties could only share the remainder of the property after the joint borrowing was taken into account. In order to determine the respective

liabilities of the parties the date to be used by the court as a point of reference was the date on which cohabitation ceased. Any loan taken after such a date were not to be borne by the party not in possession of the property.”

9. The Preliminary Objection is therefore misplaced and the same dismissed with costs.

SIGNED DATED and DELIVERED in open court this 5TH day of **DECEMBER, 2019**.

.....

ALI-ARONI

JUDGE