



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**  
**H.C.C. NO.12 OF 2015**

**IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013**

**AND**

**IN THE MATTER OF THE LAND REGISTRATION ACT**

**R A A.....APPLICANT**

***VERSUS***

**T A M.....RESPONDENT**

**RULING**

**INTRODUCTION**

This is a ruling on a preliminary objection raised by the Respondent, Twalib Abdallah Mbarak following a suit filed by the Applicant, R A A in this court against him by way of Originating Summons filed on 17<sup>th</sup> March 2015.

**PLEADINGS**

The application was brought in terms of **Sections 2,6,7,9 & 17** of the **Matrimonial Property Act, 2013** and **Section 93 (3)** of the **Land Registration Act** seeking for the following substantive orders:-

- i) That the Honourable Court be pleased to declare and issue a declaration that under the listed property which is registered in the name of the Respondent is owned jointly by the Applicant and the Respondent and/or is held beneficially and in trust for the Applicant.
  - a) Apartment No. E16-65 situated on second floor of Block E16 erected on L.R No. [Particulars Withheld].
- ii) That an order do issue declaring that the Applicant is entitled to 50% of the said property or the proceeds of sale of the same or such other proportion as this Honourable Court may deem fit.
- iii) That alternatively, a declaration that the Applicant is entitled to the very least, an equal share either in kind or cash to the proceeds of the sale/transfer of the said property
- iv) That this Honourable Court be pleased to order that the property and the income aforesaid be

settled in proportions aforesaid or as the court may order.

v) That an injunction do issue restraining the Respondent from evicting the Applicant out of their matrimonial home namely Apartment No. E16-165 situate on second floor of Block E16, erected on L.R No. [Particulars Withheld].

vi) That a temporary injunction do issue restraining the Respondents, his servants and/or agents from alienating, wasting, damaging and/or otherwise interfering with the above mentioned property pending the hearing and determination of the Application.

vii) That a temporary injunction do issue restraining the Respondents, his servants and/or agents from alienating, wasting, damaging and/or otherwise interfering with the above mentioned property pending the hearing and determination of the Originating Summons.

viii) Such relief or order as this Honourable Court may deem fit and just to grant in the circumstances of the case.

ix) That cost of the summons be provided for.

Together with the filing of the application, the Applicant filed an application under certificate of urgency on 19<sup>th</sup> March 2015 seeking orders *inter alia* orders from this court;

i) That an injunction do issue restraining the Respondent from evicting her out of their matrimonial home namely Apartment No. E16-165 situate on second floor of Block E16, erected on L.R No. [Particulars Withheld].

ii) That a temporary injunction do issue restraining the Respondents, his servants and/or agents from alienating, wasting, damaging and/or otherwise interfering with the above mentioned property pending the hearing and determination of the Application.

iii) That a temporary injunction do issue restraining the Respondents, his servants and/or agents from alienating, wasting, damaging and/or otherwise interfering with the above mentioned property pending the hearing and determination of the Originating Summons.

iv) That this Honourable court be pleased to make such further orders as the interests of justice may require.

v) That the costs of this application be provided for.

The application is supported by the annexed affidavit of the Applicant. The Applicant deposes in her affidavit that she entered into a marriage with the Respondent which was solemnized on 16<sup>th</sup> April 2011 according to Muslim law. A copy of the marriage certificate is annexed thereto. She states further that the marriage ended in divorce on 20<sup>th</sup> September 2014, a final decree being issued by the Registrar of Mohammedan Marriages and Divorces on that day. A copy of the divorce certificate is also annexed thereto. The Applicant further deposes that during the marriage, the parties jointly acquired an immovable property described as Apartment No. E16-165 situate on the second floor of Block E16, erected on L.R No. [Particulars Withheld] and registered the same in the sole name of the Respondent. She avers that she jointly with the Respondent occupied and cohabited on the property as their matrimonial home where she has remained to date. She avers further that she has contributed both directly and indirectly towards the retention, maintenance and increase of the matrimonial property.

The Applicant states that the Respondent moved out of the matrimonial home sometime in July 2014 leaving herself and her daughter behind. According to the Applicant, her filing of the application was prompted by a letter dated 5<sup>th</sup> March 2015 which she received from the Respondent's advocates Messrs S. Musalia Mwenesi Advocates requiring her to give vacant possession of the matrimonial home. The

Applicant states that she is apprehensive that the Respondent intends to convert the matrimonial property thereby denying her enjoyment of the property. She has therefore moved this court to make declaratory orders in respect of the matrimonial property and a settlement of the same.

The application was placed before this court on 19<sup>th</sup> March 2015 under a certificate of urgency. This court duly certified the application as urgent and directed the Applicant to serve the Respondent with the application. The court further issued a temporary injunction restraining the Respondent from evicting the Applicant from the suit property until hearing and determination of the application.

In response, the Respondent filed a Notice of Preliminary Objection on 8th May, 2015 in respect to the suit filed by the Applicant. The grounds of objection read as follows:-

- i) The Honourable High Court does not have original jurisdiction in the matter.
- ii) The proceedings are under the **Matrimonial Property Act**, 2013 which is not “Islamic law” within the meaning of **Section 3** of the **Act**.
- iii) The parties to the suit profess Islam and are subject to Islamic law under **Article 170 (1) (3) and (5)** of the **Constitution** of Kenya, 2010.

These grounds of objection are the subject of consideration in this ruling. On 7<sup>th</sup> October 2015, the parties agreed to file written submissions to the Respondent’s preliminary objection. The parties filed their written submissions on 30<sup>th</sup> July 2015 by the Applicant while the Respondent filed his on 27<sup>th</sup> October 2015. The Applicant also filed supplementary submissions on 11<sup>th</sup> November 2015.

## **HEARING**

Parties further made oral submissions in court on 23<sup>rd</sup> June 2016 where they highlighted aspects of their written submissions. During the hearing of the oral submissions, the Respondent was represented by learned counsel Mr. Mwenesi whereas the Applicant was represented by learned counsel, Ms. Kitololo.

In his submissions on the preliminary objection raised by the Respondent, Learned counsel, Mr. Mwenesi, based on extensive submissions anchored his arguments on the following issues;

- a) Jurisdiction of the Court is a matter of law and is paramount consideration before conduct of proceedings, as it goes to the root of the matter. He relied on the following case;

**MACHARIA & ANOTHER vs. KENYA COMMERCIAL BANK LIMITED AND OTHERS [2014] E.A. 26 THE SUPREME COURT at pg 49 stated;**

***‘‘A court’s jurisdiction flows from the Constitution or legislation or both. Thus a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law....the issue as to whether a Court of law has jurisdiction to entertain a matter before it; is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.’’***

- b) **Section 3 of Matrimonial Property Act & Section 5 of the Kadhi’s Court Act** are subservient to and cannot override **Articles 24(4), 32, 40(2) (a) & (b) & 50 & 170 (5) of the Constitution 2010.**

- c) The above provisions should be read as a whole and the Court should apply purposive interpretation as espoused in **Article 259** of the Constitution so as to give effect to the parties rights. This position is in line with the Supreme Court decision of **IN RE THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2014]** which reads;

*“it is for these reasons that the Supreme Court while observing the importance of certainty of the law, has to nurture the development of the law in a manner that eschews formalism, in favour of the purposive approach. Interpreting the Constitution, is a task distinct from interpreting the ordinary law. The very style of the Constitution compels a broad and flexible approach to interpretation”.*

d) **Section 165(3) Constitution** does not grant the High Court unlimited jurisdiction in matters involving property as an incidence of divorce and also concerns marriages and divorce under Islamic law.

e) The Matrimonial Property Act does not define 'Court' and it cannot mean exclusively the High Court.

Learned Counsel informed this Court that Respondent’s right to freedom of religion is guaranteed under **Article 32** of the **Constitution of Kenya (2010)** that *a person shall not be compelled to act, or engage in any act, that is contrary to the person’s belief or religion*. He argued that the rationale for establishing and providing for the jurisdiction of Kadhis’ Courts under **Article 170 (1) (3) and (5)** and **Section 5** of the **Kadhis’ Courts Act** was to have the court determine questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings where all parties profess the Muslim faith. He further argued that **Article 24 (4)** was designed to allow the Respondent to exercise his constitutional rights and freedoms under **Article 32 Constitution 2010**.

Learned counsel for the Respondent submitted that the issues raised by the Applicant in the suit are governed by Muslim law as both parties profess the Muslim faith and that therefore, the Kadhi’s Court is the appropriate forum to determine the suit. He submitted that in interpreting whether this court has the capacity to determine the Applicant’s suit, the court should be guided by the object and purpose of **Article 170 (1) (3) and (5)** and **Section 5** of the **Kadhis’ Courts Act**. He urged the court to also bear in mind the provisions of **Article 259** with respect to the interpretation of the **Constitution** as was observed in the case of **IN RE THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2014] E.A.**

Learned counsel for the Respondent submitted that the interpretation of the unlimited original jurisdiction of the High Court under **Article 165 (3)** should not extend to matters subject of Muslim law. He expressed the view that compelling the Respondent to have the matter determined by this court would amount to a violation of his Muslim teachings and religious beliefs, a right recognizable under the Constitution. While relying on the ruling of Justice Meoli in **SHH –versus- MHY [2015] eKLR**, to further challenge the jurisdiction of this court to determine the Applicant’s suit, Mr. Mwenesi submitted that in any event, were this court to find that the Kadhi’s Court could not hear and determine the Applicant’s suit, then the suit ought to be transferred to the Resident Magistrate’s Court being the court of the first instance. It was his further submission that alternatively, the Applicant’s suit should be transferred to the Environment and Land Court established under **Article 162 (2) (b)** since it concerns the use and occupation of, and title to land. To this end, learned counsel for the Respondent relied on the Court of Appeal decision in the case of **KARISA CHENGO JEFFERSON KALAMA KENGHA AND KITSAO CHARO NGATI -VERSUS- REPUBLIC [2015] EKL.R.**

In her submissions on the preliminary objection raised by the Respondent, Ms. Kitololo submitted that this court is vested with unlimited original jurisdiction in civil matters under **Article 165 (3) (a)** of the **Constitution**. She submitted that although the Kadhis’ Courts have a constitutional mandate under **Article 170 (1) (3) and (5)** to apply Muslim law in proceeding where the parties profess the Muslim faith; the parties have to submit to the jurisdiction of the court, which the Applicant does not wish to. According to her, the Applicant is at liberty to seek remedy from this court on the subject matter of the suit. In support of her submission, Ms. Kitololo relied on the reasoning of this court in **R.B & ANOTHER –VERSUS- H.S.B & ANOTHER, SUCCESSION CAUSE NO. 301 OF 2014** and which reasoning was also repeated in the case of **SHH –VERSUS- MHY [2015] EKL.R.** She further submitted that the Applicant’s suit is filed under the provisions of the **Matrimonial Property Act** and does not raise questions on Muslim law hence this court has jurisdiction to entertain the same. As to whether the

Applicant's suit ought to be transferred to the Resident Magistrate's Court it was the Learned Counsel for the Applicant's submission that the subject matter in question exceeds the pecuniary jurisdiction of the said Court hence the suit cannot be determined by the said court. She further contended that the Respondent's preliminary objection was challenging the constitutionality of **Article 165 (3)** of the Constitution. Learned counsel for the Applicant submitted that the proposition that **Article 170 (1) (3)** and **(5)** of the **Constitution** purports to oust the jurisdiction of this court is misapprehended. She therefore urged the court to overrule the preliminary objection raised by the Respondent.

In a rejoinder, learned counsel for the Respondent reiterated that the Respondent's preliminary objection does not in any way challenge the constitutionality of **Article 165** of the **Constitution** but questions the jurisdiction of this court to hear the Applicant's suit in light of **Article 170 (1) (3)** and **(5)** of the **Constitution**.

### **DETERMINATION**

This court has given due consideration to the pleadings and the submissions made in court by the parties. The Respondent's preliminary objection on a point of law basically is that this court has no jurisdiction to hear and determine the suit filed by the Applicant. The essence of a preliminary objection was set out in the case of **MUKISA BISCUITS MANUFACTURING CO. LTD -VERSUS- WEST END DISTRIBUTERS LIMITED [1969] E.A 696**. In that case, it was held that a preliminary objection must raise pure points of law and not general grounds raised to oppose the application on its merits. A preliminary objection as per law J.A was stated to be thus:-

*“So far as I am aware, 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. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit or refer the dispute to arbitration.”*

Indeed, it is trite law that the issue of jurisdiction is fundamental to any trial process as without it any court process is a nullity and without any legal effect. In the classic case of **OWNERS OF THE MOTOR VESSEL “LILLIAN S” -VERSUS CALTEX OIL (KENYA) LTD [1989] KLR 1** Justice Nyarangi of the Court of Appeal held as follows:-

*“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

It is apparent therefore that before this court proceeds further, the question of jurisdiction must be settled first. The basis of the Respondent's objection to the proceedings in this court is basically that the parties to the suit both profess the Muslim faith and are therefore subject to Muslim law under **Article 170 (1) (3)** and **(5)** of the **Constitution**. For ease of reference I hereby reproduce the relevant provisions of law. **Article 170** of the **Constitution** establishes the Kadhi's Court and provides its jurisdiction as follows;

*“170. (1) There shall be a Chief Kadhi and such number, being not fewer than three, of other Kadhis as may be prescribed under an Act of Parliament.*

*(3) Parliament shall establish Kadhis' courts, each of which shall have the jurisdiction and powers conferred on it by legislation, subject to clause (5).*

*(5) The jurisdiction of a Kadhis' court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion (emphasis mine)*

**Article 170 (5)** clearly spells out the object for the establishment of the Kadhis' Courts, that is, to **determine of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion.** On the basis of the wording of **Article 170 (5)** a party has an option of opting out of the Kadhi's Court altogether. The Court of Appeal in the case of **GENEVIEVE BERTRAND -VERSUS- MOHAMED ATHMAN MAAWIYA AND ANOTHER [2014] EKLR** interpreted **Article 170 (5) of the Constitution** on the jurisdiction of Kadhi's Courts as follows;

***“In the case of the Kadhi's Court, it is a creature of the Constitution (section 66 of the retired Constitution and article 169 of the current Constitution). The jurisdiction of the Kadhi's Court is specifically defined under Article 170 (5) of the Constitution and section 5 of the Kadhi's [Court] Act, as “determination of questions of Muslim Law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court”. Thus the jurisdiction of the Kadhi's Court is determined by the existence of three factors. That is the subject matter of the claim or dispute, the party's Muslim faith, and the party's submission to the jurisdiction of the Kadhis Court.”(Emphasis mine)***

It is not in dispute that that the Applicant and the Respondent profess the Muslim faith. It is not also in dispute that they were married and divorced under Muslim law. The issue subject of these proceedings is a consequence out of the parties divorce. However, in this case, it has been submitted on behalf of the Applicant that she does not wish to submit to the jurisdiction of the Kadhi's Court. The Applicant's suit is brought under the purview of the **Matrimonial Property Act. Section 17 (1) of the Act** provides that a party can apply to a court for a declaration of rights to property. **Section 3 of the Act** does not compel a party who professes the Islamic faith to file his or her suit at the Kadhi's Court. The section provides as follows;

***“3. A person who professes the Islamic faith may be governed by Islamic Law relating to matrimonial property.***

Although the Act does not define “a court”, **Article 165 (3) of the Constitution** grants this court jurisdiction in the following terms;

***“165. (3) Subject to clause (5), the High Court shall have;***

***(a) unlimited original jurisdiction in criminal and civil matters;.....***

The Respondent to the suit urged this Court to rely on the case of **SHH vs MHY MATRIMONIAL CAUSE 1 OF 2015 (HIGH COURT -NAIVASHA)** which states as follows;

***“for the sake of good order in administration of justice, it may be prudent that a party seeking maintenance should approach the lowest Court of 1st instance, save where the circumstances otherwise dictate.....in respect to the application for maintenance.... it be filed before the Court of First instance under the Marriage Act, as the Applicant may elect, whether Kadhi's or Resident Magistrate's Court. “***

With respect, in the instant case, the **Matrimonial Property Act 2013** which the present suit is brought under, unlike the **Marriage Act 2014**, does not define 'Court'. Therefore, it maybe the Kadhi's Court, if both parties profess Muslim faith and submit to the jurisdiction of that court to determine the ownership use and occupation of the suit property, it may be the Magistrate's Court depending on its pecuniary jurisdiction over the subject-matter or the High Court with unlimited jurisdiction in both civil and criminal matters. In a nutshell there is a glaring lacuna of the law with regard to choice of forum where both Muslim parties do not submit to Kadhis Court.

There are as considered above, parallel legal provisions that clothe various Courts with concurrent jurisdiction. The Kadhis Court has original jurisdiction in **Muslim law relating to personal status**,

marriage, divorce or inheritance of those who profess the Muslim faith. The High Court has jurisdiction to determine matrimonial property disputes subject to pecuniary jurisdiction of Magistrates' Courts.

Considering all the submissions by Counsel for both parties, I find no legal provision to compel any of the parties to submit to any of the Courts. It is upon them to submit to either of these Courts for expedient resolution of their dispute.

This Court notes with concern that each party seeks to compel the other party to its choice of forum while in the same breath protecting its right to choose its own forum. Each party reserves the right to choose their forum without violating the other party's right to do so too. Article 27 (1) of Constitution 2010 prescribes;

*“every person is equal before the law and has the right to equal protection and equal benefit of the law”.*

This is a stalemate between the 2 parties and only the 2 parties can unlock the impasse by mutual agreement without compulsion on the choice of forum and choice of law. On the foregoing, this court is of the view that it has jurisdiction to entertain civil suits of which actions on matrimonial property are a part of. In the result, the Respondent's preliminary objection is hereby overruled. Each party to bear its own costs. It is so ordered.

**DELIVERED SIGNED DATED AT NAIROBI IN OPEN COURT THIS 5<sup>TH</sup> DAY OF SEPTEMBER, 2016**

**M.W. MUIGAI**

**JUDGE**

**In the presence of:**