

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC LAND CASE NO. E018 OF 2025

THOMAS MITCHELL DAVISON
PLAINTIFF

VERSUS

ESNAS NANDWA OMANYO
DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion application dated 1st February 2025 and the Defendant's Notice of Preliminary Objection dated 23rd March 2025.
2. For context, the Plaintiff commenced this suit vide a Plaint dated the 2nd December 2024, which he filed in the Civil Division of the High Court in Nairobi. Vide orders issued on 20th December 2024, Hon. Lady Justice C.W Meoli transferred the said file to this Court on the basis that

pleadings herein disclose a dispute falling within this Court's jurisdiction.

3. Subsequently, the Plaintiff filed his Notice of Motion application dated 1st February 2025 seeking the following Orders:

a) Spent.

b) That pending the hearing and determination of this suit, this Honourable court be pleased to determine/confirm the Plaintiff/Applicant's proprietary rights to the property known as Apartment 10A erected on Nairobi /Block /7/91 Marwa Heights (The Apartment).

c) That the Defendant/Respondent be ordered to vacate the apartment to pave the way for its sale or being leased out in line with the parties' original joint investment purpose.

d) That in the alternative to prayer 3, the Respondent be ordered to pay rent for her continued occupation of the property. In such event, the court be pleased to order that the rent be assessed by an independent valuer as

may be agreed upon by the parties or appointed by the court and the cost thereof be shared by the parties.

e) That the Sectional title to the apartment, once issued, be held in trust by the parties' joint conveyancing lawyer Mr. Patrick Mbugua or such other neutral party as the court may direct, pending the eventual sale of the property.

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

4. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit. He asserts that he resides in Australia and on or about December 2023, he met the Defendant on an online dating website and their relationship developed rapidly. He contends that the Defendant, presenting herself as a real estate agent advised him to invest in Nairobi's booming property market. He confirms that the Defendant identified a five (5) bedroom apartment No. 10 A erected on **Nairobi/Block /7/91** and highlighted its potential as a rental investment with projected monthly rents

of between USD 4,000 and 6,000. He claims that they then agreed that the apartment would be registered in their joint names with the understanding that he would pay the purchase price of Kshs. 32 million, while the Defendant would cover stamp duty and legal fees estimated at AUD 25,000. He asserts that the arrangement reflected their respective contributions of 92.3% (his share) and the Defendant's 7.7 % share.

5. He avers that at the initial stages of negotiations for the subject property, it became apparent that it was not feasible for him to obtain a KRA pin to facilitate joint registration with the Defendant due to his nationality. Therefore, the Defendant proposed that they sign a declaration of trust that they executed on 17th January 2024 and which was to be supplemental to the sale agreement. He insists that in the said document, the Defendant acknowledged that he had provided the full purchase price while she held the suit property as a trustee for his benefit and would not undertake

any action on the trust property without his prior written consent.

6. He asserts that on 22nd January 2024, they signed a Deed of Novation with the developer and further formalized the sale and purchase of the suit apartment, which had been re-negotiated to Kshs.29 million from Kshs.32 million, that he paid entirely. He states that total disbursements that he made to the Defendant is equivalent to Kshs. 43,176,424.55. He argues that while the Defendant claims to have contributed USD 100,000 towards the apartment, her claim remains unsubstantiated.
7. He alleges that during his visit to Kenya in February 2024, they underwent a marriage ceremony on 16th February 2024. Further, based on the alleged marriage, he obtained a KRA PIN and thereafter they instructed an advocate to write to their conveyancing advocate on 25th February 2024 revoking the declaration of trust to facilitate the registration of the property in both their names, thus the suit property became registered in their joint names.

8. He reiterates that he later searched the records at the Registry of Marriages in Kenya and discovered that the aforementioned marriage ceremony between the Defendant and himself, was not registered and it was null and void for failing to comply with Sections 12 (b), 12, 25 and 50 of the Marriage Act, 2014 as read with rule 5 of The Marriage (General) rules 2014. Further, he thus filed a **Nullity Cause No. E1013 OF 2024** seeking to nullify the marriage.
9. It is his case that the Defendant and her son Clinton have since moved into the suit property without prior disclosure or discussion with him and contrary to their agreement to use the property for rental purposes. Further, that given the invalidity of their alleged union, there was an urgent need on his part to have them begin the separation of the investment based on their proven financial contributions given that the property does not constitute matrimonial property under Section 6 of the Matrimonial Properties Act. He further explains that his lawyer wrote to the Defendant's advocates

but discussions have reached an impasse at the Defendant's instance.

10. The application is opposed by the Defendant who filed Grounds of Opposition and a replying affidavit. She asserts that the Plaintiff wished to start a family with her but she would later realize that he was using her in order to establish himself in Kenya. She points out that the Plaintiff was hasty to marry her only one week after their physical meeting and considered her children his. She disputes the notion that their marriage ceremony was fake and asserts that they were referred by a common friend to Reverend Mr. David Kereto who solemnized their marriage on 16th February 2024 at Covenant Church International Narok County and that he represented himself as a Minister with a license to minister marriages in Kenya, thus she is the Plaintiff's legal wife and currently lives at the suit property, which is their joint matrimonial house.

11. She claims that the Plaintiff has filed a Petition, in the Magistrate's Court Family Division at Milimani Law Courts and another **suit No. 1032 of 2024** at the Magistrate's court Milimani Commercial Division to repossess a Range Rover motor vehicle from her. She argues that while the Plaintiff claims that she intends to sell the suit property, he has been the one pressurizing her through texts and emails to volunteer to sell it and send the money to his account in Australia to service his alleged loans, which he took without her consent. She insists that she spent a sum of Kshs. Sixteen Million Two Hundred Thousand (16,200,000/=) plus other expenses like transport costs, furniture and other improvements and maintenance of the suit property.

12. In the Notice of Preliminary Objection dated 23rd May 2025, she contends that the suit violates Article 27, 40 and 45 of the Constitution. Further, that the Court lacks jurisdiction to determine the suit as the subject matter herein is matrimonial property thus its filing in this court offends Section 17 (1) (2) of the Matrimonial Property Act, No. 49 of

2013. She insists that the suit and application are premature as the petition to determine the validity of the marriage between the parties is pending in court thus she is still a wife.

13. The instant application and the Defendant's preliminary objection were canvassed by way of written submissions.

Submissions

14. The Plaintiff submits that the alleged marriage with the Defendant is invalid and reiterates that he purchased the suit property through his sole funds thus the property does not constitute matrimonial property within Section 6 of the Matrimonial Property Act 2013. He insists that the suit property should be treated as an investment. He further submits that he seeks a determination of his proprietary rights, which this court is well-clothed with jurisdiction to determine. He submits that he has met the threshold for grant of injunctions as stated in the case of **Giella v**

Cassman Brown and points out that he has established a prima facie case to that effect.

15. To buttress his averments, he relied on the following decisions: **Zipporah Njoki Kangara v Rock and Pure Limited & 3 Others [2021] eKLR, Echaria v Echaria [2007] eKLR and Asset & Cargo v Housing Finance Kenya Ltd & 2 Others, ELC 135 of 2018 (2021) eKLR.**

16. On her part, the Defendant reiterates the averments in her replying affidavit. She submits that the suit apartment is Matrimonial Property within the meaning of Section 6 of the Matrimonial Property Act and reiterates that she is married to the Plaintiff as the petition to declare their marriage a nullity is pending in **Nullity Cause No. E1013 of 2024.** Further, that the two parties have been staying together in the suit property as their matrimonial home and she has recognizable documented property ownership rights.

17. She further submits that she stands to suffer irreparable

psychological torture which cannot be compensated by way of damages as she and her entire family shall be rendered poor, homeless and insecure if the application is allowed while denying the orders sought will not prejudice the Plaintiff. To support her averments, she relied on the case of **Echaria v Echaria [2007] eKLR.**

Analysis and Determination

18. Upon consideration of the instant Notice of Motion application including the Notice of Preliminary Objection as well as the affidavits and submissions, the following are the issues for determination:

- a) Whether the Notice of Preliminary Objection is merited.**
- b) Whether the Court can confirm the Plaintiff's proprietary rights and evict the Defendant from the suit property at the interlocutory stage.**
- c) Whether the Defendant should be directed to pay rent over her continued occupation of the suit property.**

19. At the center of the dispute between the Plaintiff and the Defendant whose marriage is also the subject of a dispute pending in court in **Nullity Cause No. E1013 OF 2024**, to test its validity or lack thereof is the property known as **Apartment 10A erected on Nairobi/Block 7/91 (Marwa Heights)**.

20. The Property became registered in their joint names on the 24th February, 2024, after their "marriage" and after a declaration of trust executed on 17th January 2024, had been revoked. Each of the parties herein claim to have made huge contributions towards the acquisition of the suit property. The Defendant alleges that the suit property is matrimonial property hence this court has no jurisdiction to determine the issues raised.

21. On the first issue, the preliminary objection is raised on the basis that this Court has no jurisdiction to hear and determine the suit and application since the property in

dispute is matrimonial property thus the suit offends Section 17 of the Matrimonial Property Act.

22. A preliminary objection ought to raise a pure point of law. In **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] 1 EA** 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 the pleadings, and which if argued as a preliminary point may dispose of the suit.....”

23. In **Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR**, the Supreme Court observed as follows:

“... The true preliminary objection serves two purposes of merit: firstly, it serves as a shield for the originator of the objection— against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute

settlement. It is distinctly improper for a party to resort to the preliminary objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

24. Section 17 of the Matrimonial Properties Act provides;

“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.”

25. In this instance, this Court takes judicial notice of the fact that the Lower Court declared the marriage between the Plaintiff and Defendant a nullity in the aforementioned Nullity Cause on the 9th May, 2025. In the circumstance,

noting that matrimonial property is defined as property acquired by parties who were married, I find that the suit property herein cannot hence be deemed as matrimonial property. In the foregoing I find the instant Notice of Preliminary Objection unmerited and will disallow it.

As to whether the Court can confirm the Plaintiff's proprietary rights and evict the Defendant from the suit property at this interlocutory stage or if the Defendant should be directed to pay rent over her continued occupation thereon.

26. The Plaintiff has sought for the Court to determine his proprietary interest over the suit property and for the Defendant to be evicted therefrom or for Defendant to pay rent if she continues to occupy the said suit property. It is not in dispute that the suit property is now jointly registered in both the names of the Plaintiff and Defendant. Further, both the Plaintiff and Defendant claim to have contributed towards the acquisition of the said property. I note the prayers the

Plaintiff seeks at this interlocutory stage are mandatory in nature and will actually culminate in the determination of this suit.

27. On mandatory injunction in the case of **Kenya Breweries Limited & Another vs. Washington O. Okeyo Civil Appeal No. 332 of 2000 [2002] 1 EA 109**, the Court of Appeal held as follows:

“...A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction”.

28. Further, in **Kenya Consortium to Fight Aids, Tb & Malaria & Another V Brigitte Mukui Kitenge & 4 Others [2013] eKLR**, the Court held that:

“In fact the way the said prayers are crafted, they seem to be seeking perpetual injunctions. In The Headmaster Kiembeni Baptist Primary School & Another vs. The Pastor of Kiembeni Baptists Church Mombasa HCCA No. 103 of 2004, Maraga, J (as he then was) held that when dealing with applications for interlocutory injunctions it is wrong to grant a permanent injunction whose effect is to conclusively decide the suit as issues of fact should be decided after hearing evidence and that Courts should be wary of parties who make applications for interlocutory injunctive orders which if granted as prayed would have the effect of granting permanent or mandatory injunctions and sometimes even eviction orders as order 39 does not provide for grant of permanent injunctions at interlocutory stage.”

29. On perusal of the Complaint, I note the prayers the Plaintiff seeks

herein are the same final prayers sought in the Complaint. I note

the Plaintiff insists he solely paid for the suit property where the Defendant currently resides. Since I have already held that that the suit property is not matrimonial, it is hence deemed to be joint property as per the Land Registration Act. Further, for the Plaintiff to be entitled to the orders sought herein, the said joint ownership has to be severed and each person's share to be distinct.

30. As this juncture I opine that the orders being sought cannot issue unless viva voce evidence is adduced and the Court determines each parties' contribution and share of the property. I hence hold the Court cannot determine the Plaintiff's proprietary rights at this interlocutory stage. In that regard, I opine that the issue of eviction or valuation of suit property for purposes of determining the rent payable can only be determined if the issue of ownership has been dealt with, which cannot happen at this interlocutory stage. In the circumstances, while associating myself with the decisions cited, I find that there are no special circumstances

to warrant the granting of mandatory injunction at this interlocutory stage.

31. In the foregoing I find both the instant Notice of Motion application and Notice of Preliminary Objection unmerited and will disallow them.

32. Each party to bear their own costs.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 9TH
DAY OF OCTOBER, 2025**

CHRISTINE OCHIENG

JUDGE

In the presence of:

Ms Okullo for Plaintiff/ Applicant

Irumba for Defendant

Court Assistant: Joan