



MAN v NAO (Petition 4 of 2023) [2025] KEHC 15680 (KLR) (31 October 2025) (Ruling)

Neutral citation: [2025] KEHC 15680 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

PETITION 4 OF 2023

JRA WANANDA, J

OCTOBER 31, 2025

IN THE MATTER OF THE DIVISION OF MATRIMONIAL PROPERTY

IN THE MATTER OF MATRIMONIAL PROPERTY ACT (2014) LAWS OF KENYA

BETWEEN

MAN PLAINTIFF

AND

NAO RESPONDENT

RULING

1. The Applicant commenced this action by way of the Originating Summons dated 17/05/2023 filed through Messrs Chemweno & Co. Advocates. She basically sought a declaration that she is entitled to a share of the properties acquired by the Plaintiff prior to or during the subsistence of their marriage. However, the only property she identified is the parcel of land described as Langas Block 4/626. Together with the Summons, the Plaintiff also filed the Notice of Motion of the same date whereof she prayed for several interlocutory preservative or injunctive orders. The basis of the Plaintiff's claim is that she is a former wife of the Defendant blessed with 3 children, that their marriage was dissolved under the Decree Absolute dated 19/10/2021, and that she has, pursuant thereto, been served with a Notice to vacate the said property.
2. The Defendant, in response to the interlocutory Application, filed a Replying Affidavit, through Messrs Mose, Mose and Mose Advocates but failed to turn up in Court on 18/07/2023 when the Application came up for hearing. This Court then proceeded to allow the Application ex parte. The matter then came up for viva voce trial on several further occasions but was adjourned for various grounds. The Defendant then filed the Preliminary Objection dated 13/02/2025 in which the following was stated:
 - i. That this Honourable Court lacks jurisdiction to entertain the Originating Summons dated 17/05/2023 as the same is time barred.



- ii. The suit is bad in law and incurably defective as it offends the mandatory provisions of Rule 5(2) of Matrimonial Property Rules, 2022
3. In apparent reaction to the Preliminary Objection, the Plaintiff filed the Notice of Motion dated 1/04/2025 seeking orders as follows:
 - i. [...] spent
 - ii. That the Honourable Court be pleased to grant leave to the Applicant to file the intended suit against the Defendant out of time.
 - iii. That the Originating Summons dated 17th May 2023 herein annexed and all other subsequent pleadings where requisite fees has been paid be deemed as properly filed.
 - iv. That costs of the Application be provided for.
4. The grounds of the Application are, among others, that the delay was largely contributed by the Defendant's failure to serve the Plaintiff with copies of the Decree Absolute, and that the Plaintiff was also not aware that there were statutory time limits to be complied with. However, in her Affidavit in support of the Application, she simply deponed that the Defendant secretly filed the divorce proceedings.
5. The Application is opposed by the Defendant who swore the Replying Affidavit sworn on 26/10/2022. He deponed that the Application is an afterthought aimed at countering the defence he raised concerning the viability of the suit having been filed out of time. He thus contended that the Application violates the law and procedure as it seeks to legalize an illegality. He appreciated that Rule 18(1) and (2) of the Matrimonial Property Rules, 2022 grants the Court the discretion to extend time but urged that in the circumstances of this case, such discretion cannot be exercised because, inter alia, it is unprocedural for the Plaintiff to proceed to first file the suit and then subsequently purport to seek extension. Regarding the allegation that he did not serve the Decree Absolute, he termed the same a lie and pointed out that the Defendant actively participated in the Divorce proceedings, and was even represented by an Advocate.
6. It was then agreed that the Preliminary Objection and the Application for grant of leave to admit the suit out of time, being related, would be canvassed and determined together. I then gave the parties the liberty to file written Submissions. Mr. Kurgat, Counsel for the Defendant, filed the Submissions dated 6/03/2025, while Mr. Chemweno, for the Plaintiff, filed the Submissions dated 25/03/2025.

Defendant's Submissions

7. Counsel for the Respondent urged that the Preliminary Objection raises a pure point of law as guided in the case of *Sohanlaldurgadass Rajput & Another vs Divisional Integrated Development Programmes Co. Ltd* [2021] eKLR, and is thus a proper one as it meets the threshold set in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd* (1969) EA 696. He then submitted that the marriage was dissolved pursuant to the Decree Absolute made on 19/10/2021. He cited Rule 5(1) and (2) of the Matrimonial Property Rules, 2022, and pointed out that an action such as the instant one is required to be filed within 12 months "from the date on which the decree absolute is given". He also cited Rule 18 which prohibits the filing of pleadings "out of time except with leave of the Court on application for extension of time ...". He contended that the limitation period of 12 months lapsed on 19/10/2022 while the suit was filed on 17/05/2023, thus a delay of 7 months. He submitted further that the question of limitation of actions goes to the jurisdiction of the Court, and cited the case of *Bosire Ongera v Royal Media Services* [2015] eKLR.



Plaintiff's Submissions

8. Counsel for the Plaintiff refuted the submission that the Preliminary Objection meets the threshold set in the Mukisa Biscuit case (supra), and also Oraro v Mbaja [2005] 1 KLR 141. According to him, the Preliminary Objection fails the test because the issue as to whether a Court has jurisdiction is a pure question of fact. He cited the case of Owners of the Motor Vessel Lilian S v Caltex Oil (Kenya) Ltd (1989) KLR 1, and also the case of Peres Atieno Adeya v Anastasia Juma Oweya. To be honest however, I am unable to follow the gist of Counsel's submissions vis a vis the authorities he cited. Be that as it may, Counsel termed the Preliminary Objection as frivolous and scandalous and cited several authorities. He then submitted that the Defendant "must chose between whether to stop at the traffic red light of procedural technicalities, or walk down the path of substantive justice through the lenses of Article 159 of *the Constitution*". He also cited Rule 5(3) of the Matrimonial Property Rules, 2022, Order 51 Rule 10 (1) and (2) of the Civil Procedure Rules, and the case of Clerk, Nairobi City County Assembly v Speaker, Nairobi City County Assembly & Another; Orange Democratic Party & 4 Others (Interested Parties) [2019] eKLR.

Determination

9. The issues that arise for determination herein can be summarized as follows:
 - i. Whether the claim that the suit is barred by limitation of time is a proper Preliminary Objection
 - ii. Whether this suit should be struck out for having been filed outside the statutory limitation period, or whether, despite the limitation period having lapsed, the Court should, nonetheless, admit the suit out of time"
10. Before I interrogate the merits of the Preliminary Objection, I need to first address the question whether the challenge raised meets the threshold for what should constitute a "Preliminary Objection". In that respect, the Supreme Court, in the case of Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others, while following the oft-cited decision of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696, restated the following:

"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 to refer the dispute to arbitration ... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion". [Emphasis mine]
11. The challenge raised by the Defendant being one that raises the issue of limitation of time, there is no doubt that it, indeed, fits well within the circumstances contemplated as constituting a "Preliminary Objection" as it is clearly a pure point of law which has been pleaded, and which arises by clear implication out of pleadings, and also it does not require any contested fact to be ascertained.
12. In respect to the substantive issue, I may state that the right of a spouse or former spouse to apply for determination or declaration of her right, or claim, over matrimonial property is donated by Section



7 of the Matrimonial Property Act. In respect to this right and timelines for invoking it, Rule 5 of the Matrimonial Property Rules, 2022, then provides as follows:

- “5. When applications may be made
- (1). A spouse or former spouse may apply to a court for the determination or declaration of any right or claim over matrimonial property in accordance with Rule 7—
 - (a) at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the Marriage Act (Cap. 150);
 - (b) as part of the relief sought in a matrimonial cause under Section 17 of the Marriage Act (Cap. 150), where the applicant is seeking a declaration of rights to any property that is contested between the applicant and the applicant's spouse or former spouse; or
 - (c) with respect to the persons specified in rule 4(b) and (c), during the subsistence of a marriage.
 2. An application under paragraph (1)(a) shall be filed within twelve months from the date on which the decree absolute is given.
 3. Without prejudice to the generality of paragraph (ii), a court may, for good cause, extend the time for making an application under paragraph (i)(a) after hearing —
 - (a) the applicant; and
 - (b) any other person interested in the property who is likely to be affected by the order sought and who the Court considers as having a right to be heard.”

13. In this instant case, the Decree Absolute which formally dissolved the marriage between the parties herein was issued on 19/10/2021 in Kisumu Chief Magistrate Divorce Cause No. 51 of 2019. There is therefore no doubt that the limitation period of 12 months lapsed on or about 19/10/2022. The Originating Summons was however filed on 17/05/2023, thus about 7 months outside the limitation period. The Applicant now asks this Court to grant extension of time, and deem the suit as properly filed out of time. The 12-month limitation evidently was introduced in appreciation of the reality that divorce-related disputes should be timeously resolved, as delays more often keeps the parties in continuous agony and anguish.

14. In dealing with an Application similar to the instant one, C.J. Kendagor J, in the case of MNN v JN (Matrimonial Cause E087 of 2024) [2025] KEHC 3077 (KLR) (Family) (26 February 2025) (Ruling), held and directed as follows:

- “12. The wording in Rule 5 (2) is mandatory. Rule 18 (1) also expressly states in mandatory terms that no party may file any pleading or other process out of time, except with the leave of the Court upon application for an extension of



time for that purpose, and on such terms as the court may deem just. This Rule implies that leave must be sought before the pleadings are filed, not vice versa.

13. The Applicant's argument in the submissions can be seen as contending that under Rule 18 (2) of the Matrimonial Property Rules, a party may file pleadings and then seek leave for their admission thereafter. However, this is a flawed interpretation of the procedural framework established by the rules.
14. My interpretation of sub-rule (2) is that it establishes a framework for how a party can formally approach the Court to seek leave. The provision for applications in ongoing court proceedings is intended for situations where pleadings or any other necessary processes are to be filed beyond the specific timeframes in existing court proceedings. In that instance, the proceedings are presumed to have been properly initiated within the timelines specified in the Matrimonial Property Rules.
15. The Originating Summons was filed outside of the 12-month time frame as outlined in Rule 5 (2) of the Matrimonial Property Rules and without the leave of the Court. The Applicant seeks a remedy for a wrong that cannot be addressed retroactively. Leave ought to have been sought before filing the matrimonial property cause. The Originating Summons Application is improperly before the Court, and I proceed to strike it out."
15. On my part, though obviously well-considered, I beg to depart from the reasoning above since in my view, Rule 18 only applies in properly filed ongoing proceedings, that is, where there is already a valid suit before the Court. Where, as herein, the suit is itself admittedly invalid, or is yet to be filed on the ground of limitation of time, and the Applicant is still seeking leave to file the same, or to be admitted out of time, the correct provision, in my view, would be Rule 5(3). In my view therefore, in a case such as the instant one, invoking of Rule 18 at this stage would appear to be premature. I take the view that since Rule 5(3) does not expressly stipulate that leave to file a matrimonial cause suit out of time must only be sought prior to filing the suit, the preferred interpretation should be one that takes into account the spirit and intention of the law, which should be one that does not limit the Court's discretion.
16. My take is that the overriding objective in civil litigation is a policy issue which the Court invokes to obviate hardship, expense, delay and to focus on substantive justice. Apart from the Court's inherent powers recognized under various provisions of the law, for instance, Section 3A of the *Civil Procedure Act*, the introduction of Sections 1A and 1B of the *Civil Procedure Act*, as read with Article 159(2) (d) of *the Constitution*, changed the way in which Courts operate. I believe that by introducing of the overriding objective principle in litigation, the Court is now mandated to consider aspects like the delay likely to be occasioned and the cost, and also prejudice to the parties when called upon to summarily reject actions. In short, the Court has to weigh one situation against another for the benefit of the wider interests of justice before coming to a decision. Article 159(2)(d) also makes it clear that Courts ought to render justice without undue regard to technicalities of procedure. Of course, this does not mean that procedural lapses should be ignored. What it means is that the Court has to weigh the prejudice that is likely to be suffered by the innocent party and weigh it against the prejudice to be suffered by the offending party before sending away a litigant from the seat of justice without hearing him on merits. This is how I prefer to exercise my judicial discretion. I therefore take the view that the Court is empowered to grant leave to file a matrimonial cause action under Rule 5(3) of the Matrimonial Property Rules, 2022, both prior to, and/or even after filing of the suit. There is nothing barring the Court from granting leave retrospectively.



17. I believe the spirit of Rule 5(3) is the same as in other similar provisions of law, such as Section 95 of the *Civil Procedure Act*, which provides that:

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.”

18. There is also Order 50 of the Civil Procedure Rules which provides that:

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed”

19. I therefore find that the Applicant’s act of seeking leave after she had already filed the suit is not fatal.

20. Moving to the issue whether leave to admit the suit out of time should now be granted, the Supreme Court, in the case of Andrew Kiplagat Chemaringo vs. Paul Kipkorir Kibet [2018] eKLR, guided as follows:

“the law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”

21. On its part, the Court of Appeal (Odek JJA), in the case of Edith Gichungu Koine Vs Stephen Njagi Thoithi [2014] eKLR, stated as follows:

“Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others.”

22. It is therefore the position that where the delay by a litigant is well explained and the matter sought to be litigated upon raises triable issues or arguable points, the Court will be reluctant to punish such litigant by declining to grant him enlargement of time. On this point, the Court of Appeal, in the case of Kamlesh Mansukhalal Damki Patni Vs Director of Public Prosecution & 3 Others [2015] eKLR, in declining to strike out a Notice of Appeal filed one day out of time, stated as follows:

“40. It must be realized that courts exist for the purpose of dispensing justice. Judicial officers derive their judicial power from the people, or as we are wont to say in Kenya, from Wanjiku, by dint of Article 159 (1) of *the Constitution* which succinctly states that “judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under this Constitution.” Judicial officers are also state officers, and consequently, are enjoined by Article 10 of *the Constitution* to adhere to national values and principles of governance which require them whenever applying or interpreting *the Constitution* or interpreting the law to ensure, inter alia, that the rule of law, human dignity and human rights and equity,



are upheld. For these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. Such decisions may involve only parties inter se (and hence only parties' interests) and while others may transcend the interest of the litigants and encompass public interest. In all these decisions, it is incumbent upon the court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice."

23. Similarly, in the case of Charles Karanja Kiiru – versus- Charles Githinji Muigwa [2017] eKLR, the Court of Appeal upheld the following statements made by the trial Judge (P.J. Otieno J) in the suit giving rise to the Appeal before it:

"It suffices to comment that a court of law should be hesitant at closing the door to the corridors of justice prior to a litigant being heard on his complaint"

24. It is therefore clear that grant of leave to file an action out of time is a discretionary power and not a matter of course. The Applicant is therefore under an obligation to satisfactorily demonstrate that there was good cause why the action was not filed in time. Such good cause must be demonstrated and established by the Applicant himself and it is not the Court's initiative to try to infer or imply the same. It is entirely the Applicant's duty to satisfy the Court. The question now is whether the delay herein has been well explained by the Applicant.

25. In this case, as aforesaid, the suit has been filed 7 months outside the limitation period. As aforesaid, the grounds of the Application are basically that the delay was contributed to by the Defendant's failure to serve the Plaintiff with copies of the Decree Absolute, although this has been vehemently denied. The second reason is that the Plaintiff was not aware that there were statutory time limits. However, in her Affidavit in support of the Application, the Plaintiff simply deponed that the Defendant secretly filed the divorce proceedings. The grounds are evidently not so well explained and the Affidavit is also too casually done.

26. I however consider the nature of the cause of action, and also the position that the Plaintiff says she has been pushed to, that is, being served with a notice to vacate from what she considers to be a home she has a claim to. Declining to grant her leave to file the suit will thus mean her immediate eviction without her alleged interests being considered. I also note that it took the Defendant about 2 years to file the Preliminary Objection after all along litigating without any protest. It is also not lost on me that Counsel for the Plaintiff may himself have not been aware of the 12 months statutory limitation period. Had he been aware, he would definitely have sought the extension much earlier. The fact that he only sought the extension of time after the Preliminary Objection was filed suggests that he was himself in the dark. For this reason, although ignorance of the law is no defence, as the mistake seems to have been the Advocates', I will be reluctant to punish the client for the mistakes of her Advocate.

27. I am persuaded by the holding in the case of Belinda Murai & 9 Others -Vs- Amos Wainaina [1982] KLR 38, in which the indefatigable C.B. Madan, JA (as he then was) pronounced himself in the following manner:

"A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel. Though in the case of junior counsel the court may feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to have known better. The court may not forgive or condone it but it ought



to certainly do whatever is necessary to rectify it if the interests of justice so dictate. The courts of justice themselves make mistakes which is politely referred to as erring in their interpretation of laws and adoption of a legal point of view which courts of appeal sometime overrule.”

28. Applying the above principles, while I cannot excuse the Plaintiff’s delay in filing the suit or in timeously seeking extension of time, the nature of the cause of action and the broad equity approach, justifies admitting the suit. This is thus one case where I find it apt to apply the principle that a litigant should not always be made to suffer for the mistakes of her Advocate. I believe the default committed can be put right by payment of costs.

Final Orders

29. In the end, I order as follows:
- i. The Preliminary Objection dated 13/02/2025, although accepted and recognized as valid, is nonetheless, overruled insofar as it seeks the striking out of the suit. Consequently, the Objectors’ Notice of Motion dated 1/04/2025 is hereby allowed.
 - ii. In the circumstances, the Originating Summons dated 17/05/2023, and by extension this suit, together with all consequential pleadings filed and proceedings taken in connection thereto is deemed as properly filed and on record. Leave to file, or to admit the suit out of time is accordingly hereby granted, and/or deemed to have been granted.
 - iii. I award thrown away costs to the Defendant, which I assess at a sum of Kshs 50,000/-, to be paid by the Plaintiff within a period of 4 months. In the event of failure to comply, the Defendant shall be at liberty to move the Court to strike out the suit.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 31ST DAY OF OCTOBER 2025

WANANDA JOHN R. ANURO

JUDGE

Delivered in the presence of:

Mr. Chemweno for the Plaintiff

Kurgat for the Respondent

Court Assistant: Brian Kimathi

