



**Wesonga v Fitzgerald (Originating Summons E085 of 2025)  
[2025] KEHC 14964 (KLR) (Family) (15 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14964 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
ORIGINATING SUMMONS E085 OF 2025  
CJ KENDAGOR, J  
OCTOBER 15, 2025**

**BETWEEN**

**AMIDAH RIZIKI WESONGA ..... APPLICANT**

**AND**

**CAMERON FITZGERALD ..... RESPONDENT**

**RULING**

1. The Applicant filed an Originating Summons dated 18<sup>th</sup> November, 2025 against the Respondent seeking the following orders;
  - i. A declaration that there is a presumption of marriage between Claimant and the Respondent, and that consequently, the Claimant is entitled to all the rights reserved for a spouse/or former spouse in regard to matrimonial property;
  - ii. A declaration that the Applicant owns and is entitled to half share in all the property and monies acquired by the Applicant and Respondent during the subsistence of the Applicant's marriage to the Respondent;
  - iii. A declaration the Applicant owns and is entitled to half share of the household goods and electronics consisting of general utensils, furniture including seats, tables, beds and electronics;
  - iv. Any other orders the Court deems just and expedient.
2. The Respondent filed Grounds of Opposition dated 8<sup>th</sup> February, 2025, as a response, and alongside that, filed a Notice of Preliminary Objection of the same date.
3. The Preliminary Objection raised the following grounds;
  - a. The application is fatally defective and the same ought to be struck out in the first instance;



- b. The entire application offends the provisions of section 7 and 17 of *Matrimonial Property Act*, Cap.152 Laws of Kenya where the existence of a marriage and/or dissolution of the same are fundamental to invoke the powers of the court;
  - c. The application lacks specificity and is incapable of being properly responded to. In an adversarial system like ours, pleadings have to be clear to prepare the other party on what they should expect;
  - d. The suit is frivolous, abuse of court process and should be dismissed with costs to the respondent in the first instance.
4. The Preliminary Objection was canvassed by way of written submissions.

#### **Respondent's Case in support of the preliminary objection**

5. The Respondent submitted that the O.S. Application is not supported by a valid supporting affidavit, as the one on record showed that it was commissioned in Nairobi, yet the stamp shows Nanyuki. Further the respondent took issue with the undated supporting affidavit and asked the court to find that the same did not meet the standards of requirement under the *Oaths and Statutory Declarations Act*.
6. The Respondent further argued that the particulars of the claim in the application are vague and lack clarity, making them difficult for the Respondent to understand and thus defend himself.
7. Finally, the Respondent argued that the suit offends Section 7 of the *Matrimonial Property Act* as the Applicant seeks to share the matrimonial property without proof of the existence or dissolution of marriage.
8. The Respondent asked the court to find that the suit is frivolous, an abuse of the court process, and to dismiss it with costs.

#### **Applicant's Case against the preliminary objection**

9. The Applicant argued that the matter is properly before the Court and argued that the Preliminary Objection raised factual matters that cannot be determined at this stage.
10. Further, that the errors pointed out in Clause e (i) and e (iii) of the Originating Summons are curable by amendment or the filing of a Supplementary Affidavit.
11. The Applicant asked the court to dismiss the preliminary objection and direct that the matter proceed to a hearing.

#### **Analysis and determination**

12. Having considered the Preliminary Objection and the written submissions by the parties, I find the issue for determination to be whether the Preliminary Objection should be upheld or not.
13. In *AW v KMK* [2025] KEHC 5120 (KLR), the Court in determining a preliminary objection stated as follows;

“For a Preliminary Objection to succeed it must satisfy the following tests in that it should only raise a pure point of law, it is argued on the assumption that all the facts pleaded by the other side are correct and lastly, it cannot be raised if any fact that has to be ascertained



by evidence or if what is sought is the exercise of judicial discretion. A valid preliminary objection should dispose of the suit if successful.”

14. On the ground of whether a marriage exists or not, this is a factual question that requires examination of evidence and thus does not qualify as a Preliminary Objection.
15. I further reject the ground on the Form of the Affidavit. Whereas it is a point of law, Order 19 Rule 7 of the Civil Procedure Rules empowers the Court to receive any affidavit sworn for the purpose of being used in any suit, notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.
16. Turning to the ground of specificity, I agree that it is a point of law, and in making the determination, I have examined the pleadings lodged by the applicant.
17. Pleadings shape the trial process and also play a crucial role in defining the issues for the court’s determination at the trial. They act as an indicator of whether a reasonable cause of action or defence has been presented. Pleadings reveal the burden of proof and serve as a standard for comparing a party’s evidence with the case that has been pleaded.
18. The claim is made under the *Matrimonial Property Act*, a legislation intended to outline the rights and responsibilities of spouses regarding matrimonial property and connected purposes.
19. The Applicant has asked the Court, in the prayers, for an order regarding the presumption of marriage and for declarations that the applicant owns and is entitled to a half-share in the property and monies acquired by both the Applicant and the Respondent during the marriage.
20. The Applicant asserts that the Respondent owns a range of movable and immovable properties, as well as funds in a bank account; however, she has not supplied any details concerning these properties, which are fundamental to a claim under the *Matrimonial Property Act*.
21. Apart from the household items, the information provided in prayers e (i) and e (iii) lacks clarity and specificity. There are no names of the properties mentioned, no descriptions of the properties or assets, and no enumeration of their quantities, if any. As it stands, the claim on the property is very vague.
22. Order 2, Rule 3 of the Civil Procedure Rules provides as follows;
  - “(1) Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits.”
23. The words ‘material facts’ have not been defined in the *Civil Procedure Act* or Rules; they essentially refer to all facts crucial for either the plaintiff’s cause of action or the defendant’s defence. These include the facts necessary to substantiate one’s case.
24. Based on the foregoing, the fundamental principles dictate that pleadings must be clear, devoid of ambiguity, and include sufficient details where necessary, enabling the opposing party to fully comprehend the nature of the claim and understand the case they are required to respond to.



25. In Kenya Commercial Bank Ltd v. Sheikh Osman Mohammed, CA No. 179 of 2010 the Court expressed itself thus:

“It is not the function of a court in civil litigation to speculate or surmise as to the nature of the plaintiff’s claim. Pleadings must be deployed to serve their function, namely to inform the other party, and the court, with sufficient clarity what their case is so that the other party may have a fair opportunity to meet that case and more importantly, so that the issues for determination by the court are clear.”

26. The Court has evaluated whether an amendment could address the issues mentioned above. However, the Court determines not to salvage the current pleadings, as they are fundamentally defective. Instead, the Court exercises its discretion to strike out the offending pleadings, allowing the Applicant the opportunity to present new, proper pleadings.

27. I find that the Originating Summons Application lacks the necessary particulars and is ambiguous and bad in law. The preliminary objection is therefore upheld. The suit is struck out with costs awarded to the Respondent.

28. It is so ordered.

**DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 15<sup>TH</sup> DAY OF OCTOBER, 2025.**

.....

**C. KENDAGOR**

**JUDGE**

In the presence of:

Court Assistant: Beryl

Mr. Shem Karani, Advocate for the Respondent

No attendance for the Applicant

