



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**CIVIL CASE NO. 8 OF 2014 (OS)**

**GALPHINE KALEJI MUCHINYI .....**  
**APPLICANT**

**VERSES**

**PETER SHIKUKU MUCHINYI (*Legal representative of***  
***The estate of the late SYLVESTER NJOYI MUCHINYI*) ....**  
**RESPONDENT**

**BEATRICE MUKHWANA LUTTA .....** INTERESTED  
**PARTY**

**RULING**

1. Before this court is a preliminary objection by the Respondent dated 18<sup>th</sup> July 2016 that:-

**(a) Upon death the estate of a deceased person can only be dealt with the provision of the Law of Succession Act Cap 160 laws of Kenya.**

**(b) That an application for declaration of rights to any property under section 17(1) of the Matrimonial Act No 49 of 2013 cannot be made against a legal representative of the estate of a deceased person.**

2. The court directed the parties to file written submissions which they complied.
3. The Respondent submitted that the properties which were acquired by the Applicant and her late divorced husband were matrimonial to that extent, but since his demise the same were only to be dealt with under the Succession Act. That the province of the Matrimonial Property Act was extinguished once the deceased passed on.
4. The Respondent identified two issues for determination, namely whether the estate of the deceased can be subject of matrimonial proceedings pursuant to section 17(1) of the Matrimonial Properties Act where a matrimonial cause has been filed after the deceased lifetime.
5. He argued that the same was untenable for the basic reason that the court would be condemning a person unheard if it proceeds. In other words, the fact that the spouse was no longer alive the remaining spouse will literally have a field day.
6. He relied among others on **K.W V ESTATE OF KW & 4 OTHERS (2023) KEHC (23180) (KLR)** as well as **re ESTATE OF STEPHEN MURATHI MUIRURI (2024(KEHC) 10666(KLR))**.
7. The other issue identified by the Respondent is whether summons for declaration of right to matrimonial property can lawfully be made against the legal representative of the estate of a deceased person.

8. The Respondent argued that the same was not feasible seeing that the Matrimonial Act clearly delineated it so that it only dealt with properties of a spouse. That it was only a wife and a husband who were privy to how they acquired the matrimonial property.
9. It was also his case that the Act did not specify who was to be sued. The Respondent prayed for the objection to be allowed.
10. The Applicant on the other hand submitted and relied on Section 17 of the Matrimonial Act 2013 and Rule 4(c) of the Matrimonial Property Rules. She argued that the court had capacity to determine the matrimonial properties question post the death of one of the spouses.
11. The Applicant relied on the case of **MM (Deceased) 2020 eKLR** where the court opined that there was need for the court to consider the two Acts namely the Succession Act as well as the Matrimonial Property Act and that the contributions of a spouse in the estate must be protected.
12. That the claim squarely fell within the armpits of the Matrimonial Act as she seeks a declaration to have the properties declared matrimonial against the legal representatives of a deceased person and the same was in line with section 17 of the Act.

### **ANALYSIS AND DETERMINATION**

13. Having read the submissions on record as well as the cited authorities what is not in dispute is the fact that the

Applicant and her deceased husband were granted divorce on 15<sup>th</sup> July 2014 and this suit filed three years thereafter.

14. The issues as grafted by the parties is whether in light of the death of the Applicant's husband this suit ought to stand or the estate ought to be determined by way of succession proceedings.
15. The preliminary objection is premised on that. The Applicant on the other hand thinks otherwise, namely that the issue falls squarely within the Matrimonial Causes Act.
16. It is of course in the ordinary course of events that an estate is usually governed by Cap 160 and not Cap 152. The latter governs issues of property between divorced parties and the court makes declarations on each of the parties' entitlement.
17. In that vein is the Applicant right in arguing that the suit ought to stand despite the death of her former husband?
18. I have perused section 17 of the matrimonial Cause Act and the same states as hereunder;

***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.**

19. On the other hand the preamble to the said Act states as follows;

**“An Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.**

20. My understanding of the above preamble has to do with matrimonial property between spouses and not estates of deceased spouses. If the drafters were to have meant estates, then it ought to have clearly stated so.

21. There was a strong argument by the Applicant while relying on rule 4 of the Matrimonial causes rules that the Respondent had capacity to file the suit. The said rule states as follows:

**Persons by whom proceedings may be instituted**

**Any person, including the following persons, may institute civil proceedings claiming any right or relief in relation to matrimonial property—**

**(a) a spouse;**

**(b) any person against whom a spouse has made a conflicting claim in respect of property; and**

**(c) a trustee in bankruptcy, an executor under a will or other testamentary grant, an**

***administrator or a personal representative, of the estate of a spouse for an order or declaration relating to the status, ownership, vesting, or possession of any specific property by, or for the beneficial interest of, a spouse or former spouse.***

22. I have perused the Act and I do not find any evidence to support this rule. In my view whereas the rule suggests that a trustee or executor can be sued none of this strong rule is found under the Act. The rules are the handmaiden of the Act. To that extent I find that the same is not anchored anywhere in the Act. In my view this was very material as it encroached on the boundary of the Succession Act and it behooved the drafters to have included in the Act.
23. Similarly, reading wholesomely the Matrimonial Act *viz* a *viz* the Succession Act it is imperative that any issue dealing with an estate of a deceased person as a matter of course must be determined under the Succession Act.
24. Even for argument's sake, were the court to proceed with the matter, it is clear that the deceased would not be here to answer on how they acquired the properties and at what period extent and the costs. An administrator cannot be cross examined for instance on how the purchase was done, the development of the property if it is real estate and such minute details.

25. All that the administrator or the executor will do will be simply relying on available records and nothing more. He may not even be aware of any witnesses to call and it therefore becomes problematic.
26. On the other hand under the Succession Act there is sufficient latitude for the spouse or former spouse to prove her claim. If she contributed much in the estate then I do not think the courts will wish it away. In the case at hand for instance the Applicant claims that she contributed so much yet the impugned Will does not provide for her.
27. Now that the Applicant has filed objection proceedings in the succession cause, it gives her the platform to challenge the Will and if anything, reasonable provisions can always apply if the objection is unmerited.
28. All that the court is pointing out is that this court does not have jurisdiction to entertain the claim herein.
29. This accords well with the Succession Act whose preamble states that;  
***An ACT of Parliament to amend, define and consolidate the law relating to intestate and testamentary succession and the administration of estates of deceased persons; and for purposes connected therewith and incidental thereto***
30. I think it is also fair to state that the Applicant ought to have filed the suit within the lifetime of the deceased. To wait for the expiry of three years thereafter was not efficacious.

31. In view of the above observations I find that the proper court to determine the issues herein ought to be the succession cause and not this court. The right to sue under the Matrimonial Act was extinguished by the death of her former husband. As stated earlier all is not lost for the Applicant.
32. **In the premises I do find the preliminary objection merited and allow the same with no order as to costs.**
33. **The suit is otherwise dismissed.**

**Dated signed and delivered at Nairobi via video link  
this 22<sup>nd</sup> day of January 2026.**

**H K CHEMITEI  
JUDGE**