



**In re CKN & ENM (Deceased) (Family Originating Summons E005 of 2024) [2026] KEHC 332 (KLR) (21 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 332 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT EMBU**

**FAMILY ORIGINATING SUMMONS E005 OF 2024**

**RM MWONGO, J**

**JANUARY 21, 2026**

**IN THE MATTER OF THE MATRIMONIAL PROPERTY OF CKN AND ENM (DCD)**

**BETWEEN**

**CKM ..... CLAIMANT**

**AND**

**THE ESTATE OF NM (DECEASED) ..... 1<sup>ST</sup> RESPONDENT**

**MOSES MUTHEE NJIRU ..... 2<sup>ND</sup> RESPONDENT**

**PATRICK MUGENDI NJIRU ..... 3<sup>RD</sup> RESPONDENT**

**JANE KARIMI NJIRU ..... 4<sup>TH</sup> RESPONDENT**

**LYDIA WAWIRA NJIRU ..... 5<sup>TH</sup> RESPONDENT**

**FAITH WAMBURA NJIRU ..... 6<sup>TH</sup> RESPONDENT**

**IRENE NJERU NJIRU ..... 7<sup>TH</sup> RESPONDENT**

**CHRISTINE MWENDE NJIRU ..... 8<sup>TH</sup> RESPONDENT**

**PURITY MUTHANJE NJIRU ..... 9<sup>TH</sup> RESPONDENT**

**DAINA WANJA NJIRU ..... 10<sup>TH</sup> RESPONDENT**

**RULING**

1. The claimant and the 1<sup>st</sup> respondent ENM (now deceased) were married on 20<sup>th</sup> December 1989 under the African Christian Marriage and Divorce Act. Their marriage ended through a decree absolute issued on 02<sup>nd</sup> October 2024. The claimant filed originating summons (OS) dated 04<sup>th</sup> October 2024 seeking determination and distribution of matrimonial property. The OS was filed on 11<sup>th</sup> October 2024. The 1<sup>st</sup> respondent died on 10<sup>th</sup> October 2024



2. The 1<sup>st</sup> respondent died following the dissolution of the marriage. As a result, when administration of his estate commenced, the issue of matrimonial property came up, hence the present application.

### **Application**

3. The applicant filed a notice of motion dated 22<sup>nd</sup> November 2024 seeking the following orders:
  1. Spent;
  2. An interim order of inhibition be granted to restrain and prohibit the administrators of the estate of ENM (deceased) or any other person from disposing of or dealing with title deed number Kyeni/Mufu/9713 and all the immovable and movable property thereon in any way or manner pending hearing and determination of this application.
  3. An interim order of inhibition be granted to restrain and prohibit the 2<sup>nd</sup> Respondent, his heirs, agents or servants from disposing of or dealing with title deed number Kyeni/Mufu/9710 and all the immovable and movable property thereon in any way or manner pending hearing and determination of this application;
  4. An interim order of inhibition be granted to restrain and prohibit the 3<sup>rd</sup> Respondent, his heirs, agents or servants from disposing of or dealing with title deed number Kyeni/Mufu/9711 and all the immovable and movable property thereon in any way or manner pending hearing and determination of this application;
  5. An interim order of inhibition be granted to restrain the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup> 8<sup>th</sup> 9<sup>th</sup> and 10<sup>th</sup> Respondents, their heirs, agents or servants from disposing of or dealing with title deed number Kyeni/Mufu/9712 and all the immovable and movable property thereon in any way or manner pending hearing and determination of this application;
  6. An order of inhibition be granted to restrain and prohibit the administrators of the estate of ENM (deceased) or any other person from disposing of or dealing with title deed number Kyeni/Mufu/9713 and all the immovable and movable property thereon in any way or manner pending hearing and determination of the OS;
  7. An order of inhibition be granted to restrain and prohibit the 2<sup>nd</sup> Respondent or his heirs or agents or servants from disposing of or dealing with title deed number Kyeni/Mufu/9710 and all the immovable and movable property thereon in any way or manner pending hearing and determination of the OS;
  8. An order of inhibition be granted to restrain and prohibit the 3<sup>rd</sup> Respondent or his heirs or agents or servants from disposing of or dealing with title deed number Kyeni/Mufu/9711 and all the immovable and movable property thereon in any way or manner pending hearing and determination of the OS;
  9. An order of inhibition be granted to restrain and prohibit the 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup> 9<sup>th</sup> 10<sup>th</sup> Respondents or their heirs or agents or servants from disposing of or dealing with title deed number Kyeni/Mufu/9712 and all the immovable and movable property thereon in any way or manner pending hearing and determination of the OS; and
  10. Costs of this application be in the cause.
4. The application was supported by the grounds set out on its face and in the supporting affidavit thereof. The applicant claimed that Parcel No. Kyeni/Mufu/2543 was their matrimonial home and, though it was registered in the name of the deceased, it should be declared to be matrimonial property.



That the named property was subdivided into Kyeni/Mufu/9710, 9711, 9712 and 9713 without her knowledge and consent. After this subdivision, the 1<sup>st</sup> respondent proceeded to transfer Kyeni/Mufu/9710 to the 2<sup>nd</sup> respondent, Kyeni/Mufu/9711 to the 3<sup>rd</sup> respondent, and Kyeni/Mufu/9712 to the 4<sup>th</sup>-10<sup>th</sup> respondents. These transfers were done without her knowledge. Finally, that the 1<sup>st</sup> respondent transferred Kyeni/Mufu/9713 to himself without her consent and knowledge.

5. She stated that the respondents ought to have known that parcel number Kyeni/Mufu/2543 was matrimonial property since it was acquired during the subsistence of her marriage to the 1<sup>st</sup> respondent, and it should not have been transferred without her knowledge and consent.

### **The Preliminary Objection**

6. The respondents/objectors filed a preliminary objection dated 28<sup>th</sup> April 2025 on grounds that the court lacks Jurisdiction to hear the suit. They urged that the suit violates Section 7 of the *Matrimonial Property Act*. The 1<sup>st</sup> Respondent, the estate of EMN (deceased) the former spouse of the claimant, was sued by the claimant whilst deceased. No suit can be sustained against a dead person. Thus, the estate has no capacity to be sued without a legal representative. That the suit violates Article 162 (2)(b) of *the Constitution* of Kenya in that the claimant's claim against the 2<sup>nd</sup> to 10<sup>th</sup> respondents is the preserve of the Environment and Land Court and not a matrimonial property suit.

### **Parties' Submissions**

7. The preliminary objection was canvassed by way of written submissions.
8. The respondents/objectors submitted that without an administrator in the estate of the 1<sup>st</sup> respondent taking his place in the suit, the suit is improper and the court lacks jurisdiction to determine it. That the claimant has sued a deceased person in a matrimonial cause which was filed after his death. They argued that a suit against a dead man is a nullity from its inception. They relied on the case of *Martha Wangui Muriithi v Limuru Hills Limited & 7 others* [2020] KEELC 1769 (KLR).
9. They argued that no rights can accrue to a dead man, neither can responsibilities be imposed on him, as was stated in the cases of *FEO v ACO (Sued as Co-Administratrix of the Estate of the Late BPO)* (Matrimonial Cause E006 of 2023) [2024] KEHC 14889 (KLR) and *Esther Wanjiru Githatu v Mary Wanjiru Githatu* [2019] KECA 811 (KLR).
10. The claimant relied on the cases of *Joho & another v Shahbal & 2 others* [2014] KESC 34 (KLR), *George Waweru Njuguna v Pauline Chesang Gitau Kamuyu* [2017] KEELC 1861 (KLR), *Unilever Tea Kenya Limited v Andrew Cheruiyot Rotich & 3 others* [2020] eKLR, *Stephen Onyango Achola & another v Edward Sule Hongo & 2 others* [2016] KECA 642 (KLR), *Sapani v Bank of Africa Kenya Limited (Civil Appeal E1013 of 2022)* [2025] KEHC 1664 (KLR), *Sita Steel Rolling Mills Ltd v Jubilee Insurance Co. Limited* [2007] eKLR, *Serah Njeri Mwobi v John Kimani Njoroge* [2013] KECA 501 (KLR), *Mulinge & 2 others v Mponda & 5 others* [2022] KEELC 3125 (KLR), *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] EA 696, *Independent Electoral & Boundaries Commission v Cheperenger & 2 others* [2015] KESC 2 (KLR) and *Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] KESC 8 (KLR).
11. She argued that the named properties should be declared matrimonial property and the orders sought through the application should be issued to preserve the property. She further relied on sections 7 and 17 of the *Matrimonial Property Act*, Rule 4 and 6(1)(a) of the *Matrimonial Property Rules* and section 93 of the *Land Registration Act*. She urged that the preliminary objection lacks merit and it should be dismissed.



## Issue for Determination

12. The only issue for determination is whether the preliminary objection has merit.

## Analysis and Determination

13. It is trite that a preliminary objection is raised based purely on issues of law. Additionally, the determination of those legal issues should potentially have the overall effect of determining the primary suit if the preliminary objection succeeds. This was the position taken by the Court of Appeal in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* (supra) where the Court held thus:

“...So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises out of clear implication out of the pleadings, and which if argued as a preliminary point may dispose of the suit....A preliminary objection is in the nature of 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.”

14. The claimant filed the OS on 11<sup>th</sup> October 2024 according to the filing time stamp on the document. The 1<sup>st</sup> respondent died on 10<sup>th</sup> October 2024, one day before the OS was filed. The fact of death of the 1<sup>st</sup> respondent was in fact pleaded in the application by the claimant. These dates are important because they call the court to examine the effect of the death of the deceased to the whole matrimonial cause.
15. Matrimonial property rights have been held to be only available when both spouses are alive. The court in the case of *FEO v ACO* (supra) discussed the place of matrimonial property claims when a spouse dies. Musyoka, J held:

“Matrimonial property rights are only available during the lifetime of the spouses. They become extinct upon the death of either spouse, and, therefore, unavailable to be litigated over, or enforced, whether in proceedings under the *Matrimonial Property Act* or the *Law of Succession Act*. Upon being extinguished in death, those rights resurrect as the right of the surviving spouse to life interest over the net intestate estate of the dead spouse in succession. So, there would be no gap, to require plugging, in the manner proposed in *Esther Wanjiru Kiarie vs. Mary Wanjiru Githatu* [2016] eKLR (Kimondo, J), *In re Estate of the Late George Cheriro Chepkosiom (Deceased)* [2017] eKLR (M. Ngugi, J), *In re Estate of Kipkemboi Chepkwony Meto alias Kipkemoi arap Kimeto (Deceased)* [2017] eKLR (M. Ngugi, J) and *Esther Wanjiru Githatu vs. Mary Wanjiru Githatu* [2019] eKLR (Githinji, Okwengu & J. Mohammed, JJA). Even if that were to be considered to be a gap in the law, which I state it is not, it would still not be open to the court to legislate that position into succession law and practice, as was done in those cases, and it should be left to Parliament, should it find it necessary, in its wisdom, to amend either the *Law of Succession Act* or the *Matrimonial Property Act*, to provide for it.” [Emphasis added]

16. According to Order 24 Rule 1 of the Civil Procedure Rules, the death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues. Order 24 Rule 4 of the same Rules provides:

“(1) Where one of two or more defendants dies and the cause of action does not survive or continue against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the cause of action survives



or continues, the court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.

- (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.
  - (3) Where within one year no application is made under subrule (1), the suit shall abate as against the deceased defendant.” [Emphasis added]
17. In the case of CKM v ENM & another [2024] KECA 293 (KLR), the matrimonial cause began on 01<sup>st</sup> May 2015 and the respondent died in 2016. In that case, the respondent had sold a part of the matrimonial property without the knowledge and consent of the applicant. The court held that the part of the hearing which was done after 1 year had lapsed following the death of the respondent was done without jurisdiction. In that case, the respondent died after the matrimonial cause had been instituted.
  18. In the present case, the 1<sup>st</sup> respondent died after divorce but before the claimant filed the matrimonial cause, going by the time stamp on the OS and the date of death of the 1<sup>st</sup> respondent.
  19. Whilst ENM, the deceased spouse of the applicant was alive up to the time immediately prior to his death, the deceased had property rights in his name which could be adjudicated under the Matrimonial Property Act. In this case, the property in issue is alleged to have been acquired during Marriage and held in the name of the deceased. As such, under Section 14 (MPA), there would be a rebuttable presumption that it was held in trust for her. However, when the 1<sup>st</sup> respondent died, as at that date, any rights he had over the properties which were in his name fall to his estate, and can only be enforced through his estate under the Law of Succession Act. Section 2 of the Law of Succession Act defines “estate” to mean “the free Property of a deceased person”. Further, “spouse” is defined to mean “a husband or wife or wives recognized under the Marriage Act. In fact, in this case, Order 24 Rule 4 of the Civil Procedure Rules cannot apply because as at the time of filing the matrimonial cause, the 1<sup>st</sup> respondent was already dead, therefore, could not be made a party in the cause in his own name.

### Conclusions and Disposition

20. In light of the foregoing circumstances, the claimant’s rights over matrimonial property are oblique given that the 1<sup>st</sup> respondent died before the suit was instituted. The claimant can no longer claim under a matrimonial cause but only through succession as a former spouse of the deceased husband. The only other option would have been for her to claim rights of ownership under the land laws before the Environment and Land Court, challenging acquisition of the properties by the 2<sup>nd</sup>-10<sup>th</sup> respondents.
21. Accordingly, I find that the preliminary objection has merit and it is hereby allowed. The notice of motion dated 22<sup>nd</sup> November 2024 and the OS dated 04<sup>th</sup> October 2024 are therefore hereby dismissed on grounds that the court lacks jurisdiction to entertain both applications.
22. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 21<sup>ST</sup> DAY OF JANUARY, 2026.**

**R. MWONGO**

**JUDGE**

Delivered in the presence of:



1. Gachuba for Claimant
2. Muriithi for 2<sup>nd</sup> Respondent
3. No Representation – Estate
4. Francis Munyao - Court Assistant

