



**MMA v MAH (Family Originating Summons E011 of 2025)
[2026] KEHC 437 (KLR) (23 January 2026) (Ruling)**

Neutral citation: [2026] KEHC 437 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY ORIGINATING SUMMONS E011 OF 2025**

**G MUTAI, J
JANUARY 23, 2026**

BETWEEN

MMA CLAIMANT

AND

MAH RESPONDENT

RULING

1. The originating summons before the court was filed on 5th November 2025. The said summons seeks 16 orders, including injunctive relief and declaratory orders. The declaratory orders are in respect of properties that the claimant contends in her originating summons are the parties' matrimonial properties, and whose division she seeks.
2. The claimant further contends that the respondent issued a "talak" vide a letter dated 6th October 2025, in which he backdated the pronouncement of the Islamic divorce to 17th September 2025. In the said letter, he demanded that the claimant vacate the alleged matrimonial home upon the expiry of the eddat period on 17th December 2025.
3. This court considered the matter exparte on 6th November 2025. The court certified the matter as urgent, fixed a hearing date for the summons for 20th November 2025, and issued a temporary injunction preventing the eviction of the claimant from the alleged matrimonial house, namely, Plot No. Mombasa/XXVI/766, Kizingo, Mombasa, or the selling, charging, alienating, wasting, or damaging the same. The court issued similar orders in respect of properties listed in prayer 5 of the originating summons.
4. Upon being served with the originating summons and the orders of this court, the respondent raised a preliminary objection to the jurisdiction of this court on the grounds that there was no valid divorce since the eddat period had not been completed, nor was there proof of 3 talaks, which would have made



the divorce effective immediately the third talak was pronounced. The respondent contended that the parties' marriage was still subsisting at the time the preliminary objection was raised.

5. The preliminary objection was canvassed by way of written and oral submissions. The oral submissions were made on 26th November 2025. The submissions of the respondent are 25th November 2025. The respondent averred that the claimant hadn't completed the mandatory 3 months or three menstrual cycle eddat period and that the marriage was thus still subsisting. Counsel relied on, inter alia, the following cases: *AKK v PKW* [2020] KECA 335 (KLR), *PNN v ZWN* [2017] KECA 753 (KLR), and *TMW v FMC* [2018] KEHC 2482 (KLR).
6. On the other hand, the claimant averred in her submissions dated 20th November 2025 that this court has the necessary jurisdiction under section 17 of the *Matrimonial Property Act*, even where the marriage was still subsisting. Ms Osino, learned counsel for the respondent, relied on the case of *AKK v PKW* [2020] KECA 335 (KLR) and that of *RMM v BAM* [2015] KECA 1013 (KLR), in support of her contention.
7. Ms Osino submitted that since the respondent had filed a response, he had submitted to the jurisdiction of this court.
8. Regarding the pronouncement of "talak" and whether the marriage was still subsisting, counsel submitted that it takes effect upon pronouncement. Reliance was placed on the persuasive decision of the Kadhi's court in *SS v HA* [2015] KEKC 10 (KLR), where it was held as follows.

"Looking at the evidence in totality, this call for this court to shed light on the validity of unilateral divorce under Islamic law in Mulla on Principles of Mahomedan Law (Nineteenth Edition, 1990) states vide para 310:-

"310. Talak may be oral or in writing. A talak may be effected (1) orally (by spoken words) or (2) by a written document called a talaknama.

(1) Oral talak. No particular form of words is prescribed for effecting a talak. If the words are express (saheeh) or well understood as implying divorce, no proof of intention is required. If the words are ambiguous (kinayat), the intention must be proved (e). It is not necessary that the talak should be pronounced in the presence of the wife or even addressed to her.

In *Wajid Ali v. Jafar Husain* (1932) 7 Luck, 430, 136 I.C. 209, ('32) A.O.34], the court stated that "the intention must be proved".

In Dr. Tahir Mahmood's 'The Muslim Law of India' (Second Edition, at pp.113119), the basic rule stated is that a Muslim husband under all schools of Muslim Law can divorce his wife by his unilateral action and without the intervention of the Court. This power is known as the power to pronounce a talak.

Although my judicial conscience is disturbed by a Muslim husband who abuses unilateral power to inflict instant divorce, which doesn't accord with Islamic injunctions.

It's a popular fallacy that a Muslim male enjoys under Sharia unbridled authority to liquidate the marriage without a reasonable cause.

Islamic law forbids a man from seeking pretexts to divorce his wife, so long as she remains faithful and obedient to him. "..... if they (namely women) obey you, do not seek a means against them". Q: Chap. IV:34



The Islamic law gives the man primarily the faculty of dissolving the marriage, if the wife, by her indocility or her bad character, renders the married life unhappy; but in the absence of serious reasons, no man can justify a divorce, either in the eyes of religion or the law. If he abandons his wife or puts her away in simple caprice, he draws upon himself the divine anger.”

9. I have considered the matter carefully. What is before at this moment are the prayers for interim relief pending the hearing and determination of the originating summons on the merits. As of the date of this ruling, more than 3 months have elapsed since the talak was pronounced.

10. It is necessary that I look at sections 7 and 17 of the *Matrimonial Property Act*.

11. Section 7 of the *Matrimonial Property Act* states that: -

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

12. On the other hand, section 17 of the *Matrimonial Property Act* states that: -

“(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.”

13. I am persuaded by the decision of the Kadhi’s court in SS v HA [2015] KEKC 10 (KLR) that divorce is effective upon pronouncement.

14. The decision in the SS case was buttressed by the holding in the case of In re FAO (Applicant) [2024] KEKC 5 (KLR), where the Hon Abdulhalim H Athman, then the Chief Kadhi of Kenya, held as follows:-

“5. Under Islamic law, the husband has the original jurisdiction to effect divorce. He does not need leave of court or any organization to exercise this inherent legal right. Upon pronouncement by the husband, divorce is effective. It should be written, dated, and witnessed to authenticate it. Part IX, Section 57 [1] of the *Marriage Act* No. 4 of 2014 requires it be registered within a reasonable time. Narrated Abu Huraira [R.A.] that the Prophet [PBUH] said: Three issues are considered effective upon pronouncement, whether one is serious or in jest: marriage, divorce, and raj’at [returning wife to marriage contract after divorce before expiry of edda period in a revocable divorce]. Reported by the five Imams of Hadith except Al-Nasa’i.

6. Section 372 of the KCBB states: “Once uttered by the husband through the express pronouncement, divorce becomes effective. However, in using symbolic words, the husband must have intended the divorce for it to become effective.”



7. S.C. Sircar in ‘Marriage, dowry, divorce, Al Sharia Sunni and Imamiyah’ at page 389 states: ‘The divorce of every husband is effective if he be of sound understanding and mature age, but that of a boy or a lunatic or one talking in his sleep is not effective.’
15. The foregoing decisions were made by preeminent jurists of Islamic law. That being the case, I am of the view that the matter is rightly before this court, as, at the time it was filed, the talak had been pronounced in writing by the respondent. The parties were therefore divorced.
16. Even if I was wrong, the 3-month eddat period has now lapsed. Due to the passage of time, the marriage has now been dissolved under the more stringent interpretation of Islamic law favored by the respondent.
17. In any case, what is now before the court is the consideration of injunctive orders to preserve the contested properties and declaratory relief. Such prayers can be considered by the court before the marriage is dissolved. In finding as foregoing, I am guided by the decision of the court in *AW v KMK* [2025] KEHC 5120 (KLR). In the said case, A Mshila, J, stated as follows in paragraph 20 of her ruling:

“The view as provided for under Section 17 of the *Matrimonial Property Act* demonstrates that this court has jurisdiction to make determinations on a prayers for declaratory rights under matrimonial property in instances where parties have not necessarily first dissolved their marriage. Refer to the case of *AKK v PKN* [2020] eKLR where the Court of Appeal stated as follows:-

“A plain reading of Section 17 enables a spouse, subsistence of marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in Matrimonial Cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under Section 17 of the Act.”

18. The upshot of the foregoing is that the preliminary objection has no merit; the same is overruled.
19. Regarding costs, each party shall bear his/her own costs.
20. It is so ordered.

DATED AND SIGNED IN MOMBASA ON THIS 23RD DAY OF JANUARY, 2026. RULING DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Osino, for the Claimant;

Ms Amina, holding brief for Mr Sadik, for the Respondent; and

Bancy - Court Assistant.

