



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAKURU
MATRIMONIAL CAUSE NO. E014 OF 2023

DKM APPLICANT

VERSUS

MWN.....RESPONDENT

RULING

1. By way of Originating Summons dated 20th December 2023 the Applicant commenced this suit seeking a declaration that property known as Share No. 14, 15, 16 excised from parcel Nakuru Municipality block 29/623 is matrimonial property owned by the Respondent and Applicant in equal shares or in the alternative equal sharing of proceeds from the sale of the subject property.

2. The Respondent filed a Preliminary Objection dated 30th April 2025, questioning competency of the Suit on the following grounds;-
 - a) **THAT the pleadings filed by the Petitioner dated 20th December 2023 are misconceived and misguided, since there still exist a marriage between the parties.**
 - b) **THAT the entire suit is grossly incompetent, fundamentally defective, bad in law, and the same ought to be struck out with Costs to the Respondent.**

3. The Applicant filed a Replying Affidavit sworn on 17th September, 2025 argued that this Court has jurisdiction to determine by way of declaration as to the rights a marriage under **Section 17** of the **Matrimonial Property Act**.

Submissions

4. The Respondent submitted that the suit was incompetent as there have been no divorce proceedings between the parties, it follows that the marital relationship between them remains legally subsisting and binding, and cannot be deemed otherwise in the absence of a decree of dissolution.
5. ***FJK vs PKY [2024] eKLR*** and ***CMN v JMF [2024] eKLR*** to submit that determination of rights in matrimonial property can only arise after dissolution of marriage between the parties, through lawful decree to that effect.
6. The Respondent submitted that, matrimonial jurisdiction cannot be limited to **Section 7** of the **Matrimonial Property Act** while ignoring the provisions of **Section 17** of the Act which refers to declaration of right in any property contested between spouses.

Analysis and determination

7. I have considered the Preliminary Objection and the rival submissions tendered by both parties. The singular question for determination is whether this Court is possessed of jurisdiction to entertain this suit.
8. It is common ground that the marriage between the parties is subsisting.
9. The Respondent contended that, the suit was defective as it offended **Section 7** of the **Matrimonial Property Act**, arguing that division of matrimonial property can only be ordered upon divorce or dissolution of marriage.
10. In contrast, the Applicant relied on **Section 17** of the same Act, maintaining that the Court retains jurisdiction to declare a spouse's rights in matrimonial property even during the subsistence of marriage.
11. **Section 7** provides that:
...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. **Section 17**, however, states that
*"(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.
(2) An application under subsection (1) –*

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

13. There is a distinction between distribution of property under **Section 7** and declaration of rights under **Section 17**. From the Applicant’s pleadings, it is clear that he sought not only division but also recognition that the listed property constituted matrimonial property.
14. It follows that the absence of divorce proceedings or a filed petition for dissolution does not bar a party from seeking a declaration of rights to property in the High Court under **Section 17** of the **Matrimonial Property Act**. This position was affirmed in **AKK v PKW [2020] KECA 335 (KLR)**, where the Court recognized that declaratory relief may be sought even during the subsistence of marriage.
15. The Respondent relied on **FJK v PKY [2025] KEHC 1256 (KLR)** to argue otherwise. In that case, the Court held:

“In view of the foregoing, it is my considered view that this court has jurisdiction to make declarations only as to interest in property during the pendency of a marriage. The issues of distribution of the property can only be determined upon dissolution of a marriage. From the foregoing, this court can only make declaration in respect to interest of properties of parties herein but as at now, no

evidence has been adduced to establish contribution of each party in acquisition of the properties herein.

In view of the above, Preliminary Objection partly succeed.

This court cannot therefore make declaration on interests of parties at this stage but will give orders to preserve the properties awaiting dissolution of marriage and filing of Matrimonial Cause thereafter. In view of the above, Preliminary Objection partly succeed.”

16. **FJK v PKY (supra)** underscores that the Court may preserve property but does not negate the Applicant’s right to seek declaratory relief under **Section 17**.
17. Accordingly, this Court is possessed of jurisdiction to entertain the suit insofar as it relates to declarations of rights in matrimonial property.
18. The preliminary objection of 30th April 2025, is hereby overruled and is accordingly dismissed.

It is so ordered.

Dated, Signed and Delivered at Nakuru

On this 18th day of March, 2026.

MOHOCHI S.M.

JUDGE