



**FJK v PKY (Matrimonial Cause E004 of 2024)
[2025] KEHC 1256 (KLR) (27 February 2025) (Judgment)**

Neutral citation: [2025] KEHC 1256 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KABARNET
MATRIMONIAL CAUSE E004 OF 2024**

RB NGETICH, J

FEBRUARY 27, 2025

**IN THE MATTER OF SECTION 6, 7 AND 17 OF
THE MATRIMONIAL PROPERTY ACT 2013**

BETWEEN

FJK PLAINTIFF

AND

PKY DEFENDANT

JUDGMENT

1. The plaintiff has moved this court vide an application (Originating Summons) dated 24th October, 2024 seeking for the following orders: -
 - i. A declaration that all household goods and effects in the matrimonial home situated at Kabimoi area along Nakuru-Ravine Road within Baringo County were acquired solely through the efforts of the Plaintiff.
 - ii. A declaration that all household goods and effects in the matrimonial home situated at Rongai within Nakuru County are owned jointly and in equal shares by the plaintiff and the Defendant.
 - iii. A declaration that all household goods and effects in the matrimonial home situated at Mumberes, Mlango Moja area within Baringo County are owned jointly and in equal shares by the Plaintiff and the Defendant.
 - iv. A declaration that the properties and investments enumerated herein below were acquired through the efforts of both the Plaintiff and the Defendant during coverture and under the control of the Defendant are owned by the Plaintiff and the Defendant in the ratio of 50:50 or in such proportions as this honourable court may deem fit:



- a. Solian Tuiyobei farm (Kwa Wakori) measuring approximately 0.5 acres.
 - b. Tractor KTCBXXXX, Massey Ferguson fitted with trailer, jembe, water tank.
 - c. Motor vehicle registration no. KCTXXXX Toyota Hillux,
 - d. Motor vehicle registration number KCXXXXX, Toyota Fielder.
 - e. Plot of land measuring 50 x 100 at Kabimoi Parkview to be excised from Lembus/ Kabimoi 165.
 - f. Plot of land measuring 50 x 100 fts to be excised from Lembus/Kabimoi 166 developed with 4 single room houses and 3 one bedroomed houses ranging in estimated Kshs.20,000.00/= per month.
 - g. Parcel of land located at Kabimoi area along Nakuru-Ravine Road measuring approximately 0.25 acres to be excised from Lembus/Kabimoi 165 and developed with 3 bedroomed matrimonial home.
 - h. Fully furnished 3 bedroomed matrimonial home, store and 3 water tanks (two 3000 litres and one 2000 litres) located at Mumberes, Mlango Moja area.
 - i. Fully furnished 1 bedroomed matrimonial home located at Rongai.
 - j. Plot number. 258 measuring 0.5 acres to be excised from parcel No.6207/2 (Kabarak Westgate).
 - k. Ten (10) bulls and fifteen (15) sheep at Mumberes Mlango Moja matrimonial home.
 - l. Approximately 400 mature Cypress trees at Mumberes Mlango Moja matrimonial home.
 - m. Fifteen (15) sheep at Rongai matrimonial home.
- v. A declaration that the Defendant is accountable to the Plaintiff in respect of all income derived from plot of land measuring 50 x 100 fts developed with 4 single room houses and 3 one bedroomed houses and tractor KTCBXXXX, messy ferguson fitted with trailer, jembe, 5000 litre water boozzer.
 - vi. A declaration that the Plaintiff is the sole and exclusive owner of parcel of land known as Temporary Plot No.33 To Be Excised From IR 4275.
 - vii. An Order of injunction restraining the Defendant by himself, his agents, servants and/ or employees from interfering with the Plaintiff's ownership of parcel of land known as temporary plot no. 33 to be excised from IR 4275.
 - viii. An Order of permanent injunction restraining the Defendant by himself, his agents, servants and/or employees from collecting further rent from the matrimonial properties listed above.
 - ix. An Order that all rent collected from the matrimonial properties in control of the Defendant be deposited in a joint interest earning account between the Plaintiff and the Defendant.
 - x. That upon declaration of ownership and ratio of contribution, the Honourable Court be pleased to order that the properties in paragraph hereinabove be valued and upon valuation, be divided equally together with the income proceeds realized therefrom between the Plaintiff



and the Defendant herein or in such a manner and proportions as this Honorable court deems fit and just.

- xi. That the cost of this summons be borne by the Defendant.

Supporting Affidavit

2. The application is supported by the annexed affidavit sworn by Florence Jerop Kibor. She averred that the Plaintiff and the Defendant herein got married on 16th April, 2004 and solemnized their union at AIC RONGAI in Nakuru County and that they lived together as husband and wife until 29th September, 2023 when the Defendant kicked the Plaintiff out of their matrimonial home unceremoniously.
3. That during coverture, the Plaintiff and the 1st Defendant acquired several properties which are under the control of the Defendant but were acquired during coverture through the joint efforts of the Plaintiff and the Defendant herein and the legal inference is that the Defendant holds the said parcels of land in trust for himself and the Plaintiff.
4. That parcel of land known as temporary plot No.33 to be excised from IR 4275 was acquired through sole efforts of the Plaintiff.
5. That the Defendant is in physical possession of all of the moveable and immovable assets as well as the ownership documents thereof and is enjoying exclusive control of all the income generated therefrom and there is real threat of adverse dealing unless this court intervenes, owing to the circumstances, the Plaintiff is apprehensive that the Defendant by himself will adversely deal with the properties acquired during the subsistence of their marriage and therefore seeks preservatory orders as well as division of the matrimonial properties herein above.
6. That the Plaintiff contributed directly and indirectly to the purchase, improvement and development of the matrimonial properties but plaintiff has been denied access, control, and management of the said properties.
7. The plaintiff further avers that their marriage was blessed with three (3) issues born on 5th January 2007, 29th April, 2011 and November, 2014 and at the time of their marriage, both herself and the Defendant were working as a Clinical Officers with the County Government of Baringo.
8. She avers that when she met the defendant, he had no properties and they put their resources together and acquired properties being:-
 1. Solian Tuiyobei farm (kwa wakori) measuring approximately 0.5 Acres,
 2. Tractor KTCBXXXX, Massey Ferguson fitted with trailer, jembe,
 3. Water tank,
 4. 1 motor vehicle registration No. KCTXXXX Toyota Hillux,
 5. motor vehicle registration number KCXXXXXX, Toyota Fielder,
 6. Plot of land measuring 50 x 100 at Kabimoi Parkview,
 7. Plot of land measuring 50 x 100 fts developed with 4 single room houses and
 8. 3 one bedroomed houses ranking in estimated Kshs. 20,000.00/= per month,



9. Parcel of land located at Kabimoi area along Nakuru-Ravine Road developed with 3 bedroomed matrimonial home,
 10. Fully furnished 3 bedroomed matrimonial home, store and 3 water tanks (two 3000 litres and one 2000 litres) located at Mumberes - Mlango moja area,
 11. Fully furnished 1 bedroomed matrimonial home located at Rongai,
 12. Plot number. 258 measuring 0.5 Acres to be excised from parcel No. 6207/2 (Kabarak Westgate),
 13. Ten (10) bulls and fifteen (15) sheep at Mumberes Mlango moja matrimonial home,
 14. Approximately 400 mature Cypress trees at Mumberes Mlango Moja matrimonial home,
 15. Fifteen (15) sheep at Rongai matrimonial home.
9. That there is real threat of adverse dealing unless this court intervenes and owing to the circumstances, she is apprehensive that the Defendant by himself will adversely deal with the properties acquired during the subsistence of their marriage and therefore seeks preservatory orders as well as division of the matrimonial properties listed herein above.
 10. She avers that she contributed directly and indirectly to the purchase, improvement and development of the matrimonial properties. She equally raised their children and contributed to their education and also took care of the Defendant as a good wife would do for the last 19 years until when he unceremoniously kicked her out of their matrimonial home and is deserving of the orders sought.
 11. She avers that she supported the defendant directly and indirectly in the acquisition and establishment of the family assets and other investments which he either registered in his sole name or under his control; further that she singlehandedly purchased furniture, electronics, cookeries and other household items in all their matrimonial homes.
 12. The petitioner stated that she has since filed Divorce Cause being Eldama Ravine MCDC No. E006 of 2024 between herself and the Defendant which is pending hearing and determination. That the Defendant is constantly looking for ways to dispose of all properties acquired during the subsistence of the marriage despite her substantial contribution to their acquisition and that she should be allowed to enjoy the fruits of her hard work acquired during her youthful and energetic life.

Defendant's Response

13. In response to Originating Summons, the defendant filed Preliminary Objection on the following grounds;
 - i. This Honorable Court lacks jurisdiction to entertain this matter.
 - ii. The matter is premature as it seeks division of matrimonial property in contravention of Section 7 of the *Matrimonial Property Act* the parties have not yet divorced.
14. The defendant argued that in view of the above grounds, this suit is incompetent, misconceived and bad in law and ought to be dismissed with costs.



Defendant's Submissions:

15. The Defendant in compliance with the directions issued by the court filed written submissions and states that the Plaintiff herein instituted the instant Originating Summons dated 24th October, 2024 seeking among others orders,
 - “10. That upon declaration of ownership and ratio of contribution, the honourable court be pleased to order that the properties in paragraph hereinabove be valued and upon valuation, be divided equally together with income proceeds realized therefrom between the Plaintiff and the Defendant herein or in such a manner and proportion as this court deems fit and just.
16. They submit that a Preliminary Objection was described in the case of Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696 and the preliminary objection raised in this suit challenges jurisdiction of this court to hear and determine this suit.
17. The defendant submits that the Preliminary Objection raised is in respect to jurisdiction and argue that the plaintiff seeks an order for distribution of matrimonial properties between him and the plaintiff among other declaratory orders and submit that for this court to make such orders as prayed by the Plaintiff, it must address itself on the following issues;
 - a. Whether there existed a marriage between the Plaintiff and the Defendant.
 - b. Whether the marriage has been dissolved or not.
 - c. Whether the suit properties are matrimonial properties
 - d. Finally, the contribution of the acquisition of the said properties by the parties and the entitlement and/or share of each party.
18. The defendant submits that there is no doubt in this case that the Plaintiff and the Defendant were married under the Marriage Act Cap 151 and that the said marriage has never been dissolved by any competent court and submit that Section 7 of the Matrimonial Property Act, 2013 under which the instant application is grounded provides that;
 - “...ownership of matrimonial property vests in the spouses according to the contribution of either spouses towards the acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved”.
19. And on the other hand, Section 17 of the Act states;
 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 a procedure as may be prescribed;
 - b. May be made notwithstanding that a petition has not been filed under any law relating to matrimonial cases.”
20. The defendant submit that this court has no jurisdiction under Section 7 of the Act to divide matrimonial properties between spouses until their divorce or their marriage is otherwise dissolved and for one to bring an application under section 17 of the Act on declaratory orders of ownership of the



matrimonial properties, he or she must prove an existence of a contest between him/her and the other spouse and in this case, the Plaintiff has not adduced any evidence in that respect.

21. The defendant submits that the main prayer that the Plaintiff seeks before this court is an order for distribution of matrimonial properties acquired during subsistence of the marriage between her and Defendant during the subsistence of the marriage, we urge this court to find merit in the Defendant's Preliminary Objection and strike out the suit herein with costs.

Plaintiff's Submissions:

22. The plaintiff on their part filed written submissions. They submit that the principles that the Court is enjoined to apply in determining the merits or otherwise of the Preliminary Objection were set out by the Court of Appeal in the case of Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd [1969] EA 696. At page 700.
23. That a Preliminary Objection will only succeed where if argued as a preliminary point, may dispose of the suit in its entirety.
24. They argue that whereas Section 7 of *Matrimonial Property Act* does not permit the division of matrimonial property during the subsistence of the marriage, Section 17 of the Act does permit the court to make declaration on matrimonial property even during the subsistence of marriage. Section 17 provides:-

- “(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 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.”

25. That the Court of Appeal had an occasion to discuss the ramifications of Sections 7 and 17 of MPA in the case AKK –V- PKW (2020) eKLR and held as follows:-

- “ 34. A plain reading of Section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a 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.”

26. That the above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. They argue that the effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce.
27. It is their considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. That by virtue of Section 7, the High court



cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. They argued that this court is clothed with the requisite jurisdiction to entertain those aspects of the applicant's prayers that did not involve the division of matrimonial property should not limit its jurisdiction on the basis of the provisions of Section 7 of the Act, they rely in the case of N. C.K. -vs- G. V.K [2015] eKLR.

28. That it is evident that the law does not bar a party from bringing a claim for declaration of matrimonial property rights during subsistence of a marriage and the Preliminary Objection will therefore not determine the suit in its entirety and must therefore fail and urged this court to dismiss the Preliminary Objection with costs to the Plaintiff.

Determination

29. I have perused the application by the Plaintiff brought by way of originating summons, the preliminary objection raised by the Defendant and the rival submissions by the parties and what I consider to be in issue is whether this court has jurisdiction to issue the orders sought in the originating summons.

30. From averments herein, there is no dispute that the plaintiff and defendant solemnized their marriage on 16th April, 2004 at AIC Rongai in Nakuru County. It is not disputed that the marriage has not been dissolved or annulled in any court of law. However, the parties indicated that there are pending divorce proceedings.

31. The question that follows then is whether this court has the jurisdiction to make a determination on matrimonial property during the existence of a marriage. Matrimonial property is defined under section 6 of the *Matrimonial Property Act* to mean:

- a) The matrimonial home or homes;
- b) Household goods and effects in the matrimonial home or homes; or
- c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

The matrimonial home is defined under Section 2 of the Act as any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.

32. Section 17 of *Matrimonial Property Act* provides for as follows:

- “(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 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.”

33. By virtue of Section 17 of the *Matrimonial Property Act*, the court has jurisdiction to declare the rights of parties in relation to any property which is contested. The Respondent however sought more than a



declaration of rights. She went further to seek that the court distribution of properties acquired during subsistence of marriage.

34. In the court the Court of Appeal case of P. N. N –vs- Z. W. N. [2017] eKLR Waki JA, stated that:-

“An inquiry may thus be made under Section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in Petit –vs- Petit [1970] AC 777:” One of the main purposes of the Act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property, the question for the court was whose is this "And not to whom shall it be given."

35. The above case demonstrates that a declaration under section 17 of the repealed Act is not pegged on the subsistence of a marriage. The effect of this section is such that the court can make a declaration with regard to the suit property in this case even though the parties are still married, it does not however provide for the sharing of such property.

36. In the persuasive case of N.C.K –vs- G.V.K [2015] eKLR, Muchelule J, observed thus:

“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the court will resolve any questions about the beneficial entitlement to their property without using the divorce court’s adjustive power. The Family Law Act 1966 at section 33(4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of Arif vs Anwar [2015] EWHC 124 (FAM) the parties filed divorce proceedings but the same was yet to be determined. The court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same...

It would appear to me that a spouse can, under section 17 of the *Matrimonial Property Act* 2013, either where there is a divorce matter pending, or where, for whatever reason, he can no longer live together with the other spouse but is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same.”

37. 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.

Final Orders:-

38.



- 1) The Preliminary Objection partly succeeds.
2. In respect to distribution of matrimonial properties, the marriage between the parties herein has not been dissolved. This court will not therefore distribute matrimonial property.
3. In respect to declaration on parties' entitlement/contribution to matrimonial properties, no evidence has been adduced to assist the court in determining each spouse's contribution.
2. The parties herein are restrained from disposing any of the properties herein.
2. Proceeds from the properties herein to be deposited in a joint interest earning account pending distribution.
3. Parties may file matrimonial cause after dissolution of marriage.

JUDGMENT DELIVERED, DATED AND SIGNED VIRTUALLY AT KABARNET THIS 27TH DAY OF FEBRUARY 2025.

.....

RACHEL NGETICH

JUDGE

In the presence of:

No appearance for Plaintiff.

Mr. Opar for Defendant/Applicant.

Court assistants – Elvis/Momanyi.

