**SM v MNM (Family Miscellaneous Application E001 of 2025)**
**[2025] KEHC 12052 (KLR) (30 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12052 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT GARSEN**

**FAMILY MISCELLANEOUS APPLICATION E001 OF 2025**

**JN NJAGI, J**

**JULY 30, 2025**

**BETWEEN**

**SM ..... APPLICANT**

**AND**

**MNM ..... RESPONDENT**

**RULING**

1. The Applicant and the Respondent were previously married but their marriage was dissolved by a decree of divorce issued by the High Court of South Africa, Kwa Zulu- Natal, Durban on 7th October 2024. Following the dissolution, the parties executed a Matrimonial Property Settlement Agreement dated 9th January 2025 which outlined the distribution of the South African and Kenyan matrimonial properties.

2. The Applicant herein, SM, has now filed a Notice of Motion application dated 4th April 2025 seeking for orders that:

    1. Spent

    2. That this Honourable court be pleased to grant permanent orders mandating the settlement agreement dated 9th January, 2025 as agreed in the matrimonial property settlement regarding the properties in Kenya, namely: M, [name withheld] Villa No. XX, and [particulars withheld] Cottage be entirely adopted and effected.

    3. That the Applicant be allowed to access [particulars withheld] Cottage as he is still a shareholder of [particulars withheld] Limited [the company], which owns the [particulars withheld] Property, and therefore ought to have access to all his properties, pending the final transfer of the properties to his name.

4. That the applicant and his agents be allowed to access [particulars withheld] to allow the agents to be able to take photographs in order to value the property and complete the sale at market value as specified in the settlement agreement.

5. That all the rental income earned in [particulars withheld] Cottage and [particulars withheld] Villa be held in an escrow account pending the completion of the transfer of these properties.

6. That the Officer Commanding Station [OCS] of Muthaiga police station to assist in the access of the [name withheld] Villa in Ridgeways to complete the transaction without further delay or interference in any way and further give mandate to OCS Muthaiga Police Station to take the responsibility of signing all documents on behalf of the Respondents as stated in clause 5.9 of the settlement agreement.

7. That the Officer Commanding Station [OCS] of Lamu Police Station - Lamu assist in the access and the completion of the transfer of the [particulars withheld] Beach Cottage and further be authorized to take the responsibility of signing all documents on behalf of the Respondent as stated in clause 5.27 of the settlement agreement.

8. That each party to bear their own cost of this application.

9. That this Honorable Court be pleased to make such orders or further orders as it may deem expedient in the interest of justice.

3. The application is based on grounds stated on the face of the application and supported by the affidavit of the Applicant sworn on even date. The grounds are that the Applicant and Respondent were previously married, but are now divorced. That as part of the divorce settlement, they executed a Matrimonial Property Settlement, dated 9th January 2025 in which the parties agreed that one of the properties, [particulars withheld] Villa No.XX situate at Ridgeways will be placed for sale on the open Market within thirty days from the date of the agreement, where both the partied will share proceeds. That the Applicant has sourced for agencies such as Pam Goldings to conduct sale at market value in accordance to the agreement. However, the respondent has denied/refused access to the agents and further completely denied and delayed the process towards the valuation and sale of the property because she continues to collect rental profit solely pending the sale of the property.

4. It was agreed that the Respondent would transfer [particulars withheld] Beach cottage in Lamu to the applicant. That the property is owned by Manda Investments limited, where the Applicant and Respondent are joint shareholders. The parties agreed to pass the required resolution for Manda to authorize the transfer of the property to the Applicant within thirty days of signing of the agreement. That the Respondent has refused to sign the resolution to allow the transfer of the property as agreed upon. That the Respondent`s advocates stated that they required to conduct due diligence but it is evident that the delay is because the Respondent continues to collect rental income on the property pending the transfer.

5. It was further agreed the Applicant would pay all the costs of passing the resolutions and the transfer of these properties in Kenya. However, that with the hold up, the Applicant is put in a position where he is spending more to retain counsel and agents thus causing him to suffer tremendous economic loss. Therefore, that unless this Court issues a permanent order mandating the settlement agreement to be adopted and effected as soon as possible, the Applicant shall be heavily and irreparably prejudiced. That it is in the interest of justice that the prayers sought be granted.

6. The application was opposed by the Respondent on the grounds that the foreign divorce decree and settlement agreement have not been recognized in Kenya thereby rendering them unenforceable

under the *Marriage Act*, cap. 150, particularly sections 61 and 67; that the application is procedurally defective as it sees final reliefs through a Notice of Motion unanchored on either a plaint, Originating Summons, Petition or any other mode of commencing a suit and that the Applicant has come to court with unclean hands, having breached several clauses of the agreement but any delays on her part were based on legal due diligence and not on bad faith.

7. The Respondent in her replying affidavit sworn on the 19th May 2025 averred that the divorce decree issued by the High Court of South Africa [Kwazulu-Natal] on October 2004 has not been recognized and registered in Kenya for it to be enforced in Kenya. That the matrimonial property settlement agreement dated 9th January 2025 is ancillary to the foreign divorce decree and similarly lacks enforceability in Kenya until properly domesticated through recognition and enforcement. That the Applicant's failure to follows due process renders his application premature and legally untenable and this Court lacks jurisdiction to determine the application as filed.

8. The Respondent averred that in respect of [particulars withheld] Beach Cottage, her advocates in Kenya under merely requested due diligence on the property's title and a proper valuation to be conducted before executing any transfer documents. That this is a standard legal precaution but the Applicant has failed to provide the necessary documents despite repeated requests.

9. It was averred that the applicant was never barred from accessing [name withheld] but it is the Applicant who in a concerted effort to avoid paying the actual assessed stamp duty on the property has sought estate agents to value the property contrary to the legal valuation provided by the Respondent.

10. It was further averred that [name withheld] Beach Cottage is not generating any income as it is merely land with a rustic cottage which has never been booked hence the allegations that the Respondent is collecting rental income from the said property are false.

11. That concerning [name withheld] Villa, the Respondent has not refused access to valuation agents but that she requested proper identification and security clearance for the agents, given that the property is occupied by United Nations Staff Member who enjoys diplomatic immunity hence the need for adherence to strict protocols. That she has provided the name of the Kenya Company legally mandated to conduct a valuation of the property but the applicant has to date not provided any licensed property valuers That Pam Goldings are merely estate agents and not licensed valuers.

12. The Respondent averred that the Applicant's claim of financial prejudice is self-inflicted as he has failed to cooperate in making the agreed payments in respect of the South African Assets and has instead avoided the High Court of South Africa which has jurisdiction over this matter [especially the matters related to tax issues with the South African Revenue Services on the running of EWP in South Africa] and rushed to procedurally invoke this Honourable Court's jurisdiction.

13. The Respondent contends that the Applicant has misrepresented facts to this Court by alleging that she is deliberately delaying the property transfers to collect rental income yet the matrimonial property agreement explicitly at clause 5.30 allows her to continue collecting rent until conclusion of the transfer of [name withheld] property to the Applicant and finalization of the sale of [name withheld] Villa.

14. That the applicant has failed to comply with his obligations in respect of the South African Properties under the agreement, including paying the incurred accountant fees for East West Petroleum [EWP], writing off the loan and sorting tax matters, transferring his share in 22 Hoylake Drive to their daughter E [which was only done recently after consistent reminders [and paying expenses towards the matrimonial home as per the agreement. That the Applicant's conduct demonstrates bad faith, as he seeks court intervention while at the same time violating the very same agreement he seeks to be enforced.

15. That pursuant to clause 8.3 of the matrimonial property agreement, the Applicant was to secure the waiver of EWP interest free loan in the sum of Kshs.R2,700,000/= within seven [7] days of execution of the agreement. That to date, despite several demands from the Respondent`s attorney's in South Africa, the Applicant has remained adamant on breaching those terms of the agreement and consistently frustrated the Respondent`s efforts to ensure compliance.

16. Further that pending the transfer of the Applicant's share in the matrimonial home, the Applicant undertook in the agreement to meet the maintenance expenses of the said home. That following numerous follow-ups he has recently paid R.639,000/= leaving a shortfall of R.18,000/= out of the agreed amount of R.757,000/=. Therefore, that the Applicant is being economical with the truth and has approached this court with unclean hands yet he is seeking equitable remedies in the form of permanent mandatory injunctions. That the same ought to be dismissed.

17. The application was canvassed by way of written submissions.

**Applicant's Submissions**

18. The Applicant identified 3 issues for determination, namely:

    [1] Whether the Matrimonial Property Settlement Agreement dated 9th January 2025 should be enforced by this Honourable court;

    [2] Whether the Applicant is entitled to access and participate in the disposal and management of the matrimonial properties as agreed, and

    [3] Whether the conduct of the Respondent warrants intervention through coercive enforcement orders and police assistance.

19. On the first issue, the Applicant submitted that the agreement between the parties herein is a valid and binding contract in law which was voluntarily executed by the parties with clear terms on asset distribution and timelines for implementation. That courts have consistently upheld agreements of this nature unless fraud, coercion or illegality is proven. Reliance in this respect was placed in Civil Appeal No. 124 of 2018, M.I v N.M.W [2019] eKLR where the Court of Appeal held that:

    Where parties to a matrimonial dispute mutually agree on the division of their property, the court will generally give effect to such agreement unless it is unconscionable or procured through fraud or undue influence.

20. Further reliance was placed in QMAO V DAW, Matrimonial cause No. EXXX of 2021 [2024] KEHC 4952 [KLR] [Family] [13 May 2024 [Judgment] where Odero J. while dealing with distribution of Matrimonial property under the *Matrimonial Property Act*, 2013 held that:

> "While the Act does not expressly recognize Postnuptial Agreements, it is my view that this does not mean that such agreements are not enforceable. Being contractual in nature, the general law of contract applies and they are enforceable just like any other contract. Therefore, they are subject to the court's scrutiny if allegations of fraud, coercion or is manifestly unjust are pleaded by a party to the agreement. The Court will however not interfere merely because the terms of the agreement are favourable to one party and not the other. :..... Therefore I find that the Settlement Agreement dated 27th August, 2019 is a post-nuptial agreement and is enforceable by the court. ... A copy of the said Settlement Agreement dated 27th August, 2019 appears as Annexture '[1] M 4' to the Applicant's

Affidavit dated 26th October, 2021. The Agreement is duly signed by both parties and is witnessed by their respective Advocates."

21. It was submitted that there are no such allegations being made in this matter. That the respondent signed the agreement voluntarily and is now estopped from frustrating its performance under the doctrine of pacta sunt servanda [agreements must be kept]. That the applicant has made attempts to fulfil his obligations under the agreement by engaging agents for sale and covering all legal expenses but the respondent continues to frustrate the process.

22. The Applicant submitted that the actions of the Respondent constitute material breach of the settlement agreement and stands to suffer irreparable harm from continued rental revenue loss, legal expenses, and prolonged economic injustice. The Applicant cited the case of Republic v District Land Registrar Nandi & another Ex Parte Owuor [2016] eKLR where the court stated that:

Equity aids the vigilant, not those who sleep on their rights. Where rights are being violated under the guise of legal or procedural delay, courts must act to protect the aggrieved.

23. Consequently, the Applicant urged this court to enforce the agreement and issue the ancillary orders sought so as to facilitate the implementation of the agreement.

**Respondent's submissions**

24. The Respondent submitted on 3 issues:

[1] Whether this court has jurisdiction to entertain and enforce the foreign divorce decree and the settlement agreement;

[2] Whether the application is fatally defective; and

[3] Whether the court should grant the injunction sought.

25. On the first issue, the Respondent submitted that the Applicant has failed to comply with section 67 of the *Marriage Act* which provides the statutory framework for recognition of foreign marriages where the marriage was dissolved outside Kenya. That the applicant is attempting to enforce a decree and an agreement that exist in a foreign jurisdiction without first establishing their domestic validity under Kenyan law through recognition. It was submitted that lack of recognition under section 67 of the *Marriage Act* renders the claim untenable and unregistered decree. Reliance was placed in the case of IWN v HJC [2021] [KEHC] 13131 [KLR] where it was held that:

[9] From its wording Section 67 envisages the recognition of all foreign judgments relating to matrimonial proceedings without there being the need to demonstrate reciprocity. All that is required is that there be evidence to show that either party was domiciled in the country where the Decree was made and that the Court which issued the Decree had jurisdiction to do so. Secondly it must be shown that the Decree of annulment, divorce or separation was effective in the country of domicile.

26. It was submitted that the attempt to anchor the enforceability of the agreement on general contract law overlooks the fact that the agreement derived its enforceability from the divorce decree issued in South Africa which decree has not been registered or recognized under sections 61 and 67 of the *Marriage Act*. Consequently that the agreement cannot be enforced as a free-standing postnuptial contract outside the statutory framework governing matrimonial property and recognition of foreign judgments. Therefore, that this court lacks the jurisdiction to enforce the foreign decree and its associated agreement in the absence of compliance with sections 61 and 67 of the *Marriage Act* as a

result of which the application is premature, incompetent and fatally defective and should be dismissed with costs.

27. On the second issue, the Respondent submitted that the application is fatally defective in substance and in form as it seeks permanent injunctive relief without being anchored on a plaint or any substantive suit. That the application is brought by way of a Notice of Motion contrary to the established legal principles governing the grant of final reliefs, yet a Notice of Motion is a procedural device to seek interlocutory or incidental reliefs within a properly instituted suit and not to seek substantive or final remedies such as permanent injunctions or declarations of proprietary rights.

28. The respondent made reference to Order 3 Rule 1 and 2 of the Civil Procedure Rules which provides that a suit is instituted by way of a plaint, originating summons or Petition depending on the nature of the claim. Reliance in this respect was placed in the case of Chacha & another v Orbit Chemicals Industries Limited [Environment and Land Misc. Case E003 of 2023 [2020] KEELC 3278 [KLR] [7March 2024] [Ruling] where it was held that:

> " ...It behooves the Applicants to file a suit whereby the same is seeking substantive orders against the Respondents. Only then can the Applicants file an application for temporary injunction pending the determination of the suit. The orders of temporary injunction or even a permanent injunction can only be anchored on some foundation. For clarity, the foundation would be a substantive suit filed by the Applicants and in respect of which the same has inter-alia sought for orders of permanent injunction or appropriate declaratory reliefs."

29. The court continued to say that:

> " For coherence, in the absence of a suit, to anchor the application for temporary/permanent injunction, the application for temporary/permanent injunction herein has certainly been made and mounted in vacuum....In this matter the Applicants did not anchor their Notice of Motion in a suit. They do not have a competent suit before the court. The application is not anchored in any pleading to give it validity. Not every procedural blunder can be excused as a 'mere technicality'. The filing of a suit is a mandatory statutory provision which the court cannot simply wish away. In the case of Dishon Ochieng v Sda Church [2012] eKLR the court held that an application must be anchored in a plaint and that failure to comply renders the said application fatally defective. The failure/omission of the Applicants to file substantive suit cannot be overlooked as a "mere technicality."

30. It was submitted that a motion cannot stand on its own and must be supported by a substantive pleading. In this respect the respondent relied on the case of Mbugua & another v Mbugua & 4 others [2024] KEHC 2405 [KLR] where the court held:-

> " It is also trite law that an application for injunction can only be issued where there is a substantive suit in place otherwise the injunction will be in vain and it cannot stand in law."

31. The court in that case cited the case of Cresta Investments Limited v Gulf African Bank Limited & Another [2020] eKLR which held:-

> " Moreover, an application for injunction under Order 40 of the Civil Procedure Rules is predicated on a suit filed by the party seeking the injunction. An injunction without a substantive claim is a plea in vain and cannot lie in law or at all."

32. Also cited was the case of Geofrey Ndungu Theuri v Law Society of Kenya [1988] KECA 81 [KLR] where the court held that:

> " .....the order specifically refers to a suit which is defined under section 2 of the *Civil Procedure Act* in these terms: 'suit' means all civil proceedings commenced in any manner prescribed under the Civil Procedure Rules and an applicant is not entitled under Order 30 of the Civil Procedure Rules to seek or obtain an order for injunctive relief against another party without filing a suit. The grossly abused Section 3A of the *Civil Procedure Act* does not give the court the power to act without jurisdiction."

33. It was submitted that the application is incompetent and should be struck out for procedural impropriety.

34. On the third issue, the respondent submitted that the application does not satisfy the conditions for the grant of an injunction as set out in the case of Giella v Cassman Brown [1975] EA 358 of there being a prima facie case with a probability of success, proof that the applicant will suffer irreparable injury unless the prayer for injunction is granted and thirdly if the court is in doubt on the first 2 tests to decide the case on a balance of convenience. It was submitted that these were not met in the application.

35. It was further submitted that a party who seeks equitable relief must be prepared to demonstrate that their own conduct is free from blame in relation to the matters before the court. That in this case, the Applicant has approached the court with unclean hands in that he has breached his duty under the very agreement he seeks to enforce in that he has failed to facilitate the waiver of the R2.7 million EWP interest free loan within the stipulated 7-day period under clause 8.3 of the agreement; failing to pay accountant and legal fees relating to the South African estate; delaying the transfer of his interest in the matrimonial home at 22 Hoylake Drive to their daughter Elizabeth and neglecting his duty to pay maintenance expenses as agreed. Therefore that the Applicant having breached his obligations under the agreement is not deserving of the equitable remedies he seeks.

36. The respondent urged the court to dismiss the application with costs.

**Analysis and determination**

37. I have considered the pleadings filed herein, the submissions and the relevant law. The issues that fall for determination are:

    [1] Whether this court has jurisdiction to entertain the matter

    [2] Whether injunctive orders should issue.

38. On the first issue, the Applicant seeks to enforce a Matrimonial Property Settlement Agreement executed after a decree of divorce issued by a South African Court. The respondent opposed the application on the ground that the applicant has not in the first place sought to have the decree of the South African Court being recognized in Kenya as provided by section 67 of the *Marriage Act*. The Applicant on the other hand argued that the settlement agreement is a contract enforceable in a court of law without reference to section 67 of the *marriage Act*.

39. Section 67 of the *Marriage Act* 2014 provides for the recognition of divorce decrees issued by foreign courts as follows:-

> " Where a foreign court has granted a Decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, that decree shall be recognized in Kenya if;

[a] Either party is domiciled in the country where that Court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings.

[b] Being a Divorce of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them."

40. Compliance with the said section can only be by way of an application in a court of law in Kenya seeking for recognition of the divorce decree issued by a foreign court. The Applicant in this matter has not sought for the same before filing the present application. I do not agree with the position taken by the Applicant that the settlement agreement is a contractual agreement that has no relation with the decree of a foreign court. It is clear that some of the issues that form part of the arguments in the matter touch on the parties` South African estate and therefore the settlement agreement cannot be divorced from the decree made by the South African Court. I agree with the submission by the Respondent that the settlement agreement cannot stand on its own without recognition and domestication of the decree of divorce made by the South African Court. The Applicant should therefore have first sought for the recognition of the decree made by the South African Court before seeking to enforce the Settlement agreement. He did not do so. It is therefore my finding that this court lacks jurisdiction to enforce the foreign decree in absence of compliance with section 67 of the *Marriage Act*. The application is thus incompetent and should fail on this ground.

41. On the second issue, the Application argues that the application is brought by way of a notice of motion and seeks for injunctive reliefs without the application being anchored on any plaint or other methods of commencing a suit, The applicant made no response on this argument.

42. Order 3 Rule 1 of the Civil Procedure Rules provides as follows:

Every suit shall be instituted by presenting a plaint to the Court, or in such other manner as may be prescribed.

43. Similarly, Section 19 of the *Civil Procedure Act* further provides that every suit shall be instituted in such manner as may be prescribed by the rules.

44. The prescribed manner of instituting suits in court include by way of a plaint, originating summons or Petition. The Applicant herein brought the claim by way of a Notice of Motion. A notice of Motion is not a prescribed manner of instituting suits. In the case of Board of Governors Nairobi School v Jackson Ireri Geta [1999] KLR, cited with approval in Fidelity Bank Ltd v John Joel Kanyali Misc.Appl.8/2014, the court opined how a suit can be commenced and said that:

" 2. Pleading is defined in Section 2 of the *Civil Procedure Act* to:

Include a petition or summons and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant; this definition, is couched in such a way as to accord with Order IV Rule 1 [now Order 3 Rule 1] which prescribes the manner of commencing suits, which rule provides that every suit shall be instituted by presenting a plaint to the court, or in such other manner as may be prescribed.

3. The use of the term "summons" in the definition of the term "pleading" must be read to mean "originating summons" as that is a manner prescribed for instituting suits.

4. Chamber Summons is not a manner prescribed for instituting suits and cannot therefore be a pleading within the meaning of that term as used the *Civil Procedure Act* and Rules and made thereunder."

45. In Kalyonge v Karanja [Miscellaneous Application E070 of 2021] [2022] KEHC 16174 [KLR] [Commercial and Tax] [9 December 2022] [Ruling] where the applicant instituted the claim by way of a Notice of Motion, the court stated that:

The suit before the court is not competent. The applicant came by way of notice of motion which is not prescribed by any law or rule as an originating process.

46. The Applicant herein is seeking for permanent injunction against the Respondent and instituted the claim by way of a Notice of Motion, which is not a prescribed manner of instituting suits. He thus did not file a substantive suit upon which the orders sought of injunction can be anchored on.

47. There is ample case law that an injunction cannot issue in a vacuum when there is no suit before the court – see the authorities cited above - Mbugua & another v Mbugua & 4 others, Chacha & another v Orbit Chemicals Industries Limited and Geofrey Ndungu Theuri v Law Society of Kenya [1988] KECA 81 [KLR]. They all point to the fact that an application for injunction filed without a substantive suit is incompetent. The same position was taken in the case of Swanya Limited & 2 others v Homebay Property Limited [2021] eKLR where an application for injunction was filed without a substantive suit and the court stated that:

.....in the absence of a Substantive suit, the subject Application, was mounted in vacuum. Same was therefore legally untenable and incapable of attracting Orders of Temporary Injunction.

48. Consequently, the orders sought herein cannot issue in the absence of a substantive suit. The application is thus incompetent.

49. In view of the foregoing, it is my finding that the application is bereft of merit and is consequently dismissed with costs to the Respondent.

**DELIVERED, DATED AND SIGNED AT GARSEN THIS 30TH DAY OF JULY 2025.**

**J. N. NJAGI**

**JUDGE**

In the presence of

Mr. Komora for Respondent

Applicant – absent

Court Assistant: J. Kambi