



**CKM v EKM (Civil Cause E002 of 2022)
[2024] KEHC 520 (KLR) (Family) (24 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 520 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL CAUSE E002 OF 2022
SN RIECHI, J
JANUARY 24, 2024**

BETWEEN

CKM APPLICANT

AND

EKM RESPONDENT

RULING

1. CMM the Defendant/Applicant was married to EKM the Plaintiff/Respondent. The parents had one child of the marriage. They divorced in H.C. No..... and decree Nisi issued. They then had an issue in respect to property acquired during subsistence of the marriage which dispute has had a long history in this Court since 1994 when Eunice Kyalo filed High Court Commercial and Administrative Division Cause No. 2562 of 1994. The matter has had the pleasure of being handled by 17 judges of the Court. These include: Aluoch J, Hayange J, Ole Kuyiwa J, Ringera J, Bosire J, Aganyanya J, Juma J, Mbogholi J, Mbito J, Kuloba J. Koome J, Mugo J, Mabeya J, Gikonyo J, Ochieng J and Okwany J.
2. The applicant CMM filed this suit Matrimonial Cause No. 2 of 2022 (OS). By application dated 4.5.2022 he seeks the following orders:
 - a. That this Application be certified as urgent and heard ex-parte in the first instance,
 - b. That this Honourable Court be pleased to declare the proceedings or orders issued by the Commercial & Tax Division after the judgment by the Court of Appeal in Civil Appeal No.74 of 2001 as null and void for lack of jurisdiction and set them aside in their entirety.
 - c. That this Honourable Court do proceed distribute the matrimonial property in line with the directions/orders issued by the Court of Appeal in Civil Appeal No. 74 of 2001.
 - d. That the costs Of this application be in the cause.



3. The grounds for the application are:
 1. That the Plaintiff and the Defendant herein were Husband and Wife.
 2. That the dispute herein concerns the control and share of properties acquired by the Plaintiff and the Defendant while living as Husband and Wife.
 3. That the dispute herein is not a commercial dispute, but concerns the distribution of matrimonial property.
 4. That the issues emanating from the suit falls squarely within the *Matrimonial Property Act*.
 5. That the matter has been handled on several occasions by the Commercial & Tax Division as though the dispute is commercial in nature.
 6. That the treatment of the suit as an ordinary commercial dispute has occasioned injustice among the parties involved.
 7. That in the circumstances and for the just determination of the issues herein it is prudent that all the proceedings before the Commercial & Tax Division be set aside in their entirety and declared null and void.
 8. That it is for the determination of all issues on merit and in the interest of justice that the sought should be granted.
4. The application is supported by the Affidavit of CMM K. Muthembwa the applicant sworn on 4.5.2023 where he reiterates the grounds of the application. Riunga Raiji and Company Advocates for the Respondent EKM filed grounds of opposition to the application stating;
 1. The said application is misconceived and an abuse of the court process.
 2. The divisions of the High Court are administrative rather than jurisdictional and no proceedings orders or judgment can be invalidated, voided or set aside on the basis of which division of the High Court the proceedings were taken or the orders or judgement given.
 3. There is currently pending Court of Appeal Civil Appeal No. E441 of 2021 challenging orders given on 27th May 2021. The Defendant can only raise the issue of jurisdiction in that forum.
 4. This Honorable Court lacks jurisdiction to entertain or grant orders sought in the application herein.
5. The applicant CMM Muthembwa filed a further affidavit sworn on 9.11.2022 where in paragraph 6 he depones:

that it is true there is an appeal at the Court of Appeal being Civil Appeal E441 of 2021 challenging the orders issued on 27th May 2021. Attached hereto and marked CKM 2 is the Memorandum of Appeal filed in the matter dated 6th August 2021”.
6. Directions were issued that the application be canvassed by way of Written Submissions. Mungai Kalande and Co. Advocates filed submissions which Mr. Raiji elected to rely his grounds of opposition. Counsel for the Applicant submitted that the dispute is over property acquired during marriage and therefore subject to the jurisdiction of the *Matrimonial Property Act*. He referred this court to the persuasive decision of Kemei J. in ELC E 035/2021 EMW Vs RMK to fortify his submissions.



7. I have carefully considered the application response and submission by the applicant. From a perusal of the application and documents annexed and the proceedings in HC Commercial Suit No. 262 of 1994 (OS), it is clear to me that the applicant and respondent have actually been prosecuting their dispute in that Court. No where in their proceedings was the issue of that Court not having jurisdiction been raised by the applicant.
8. The orders made in that court have been appealed to the Court of appeal and even there is no issue of jurisdiction was raised. Indeed, the applicant in paragraph 6 of his further defence concedes that there is a pending appeal in court of appeal Civil Appeal No. E 441/2021 between the parties.
9. I note that the application is seeking order to set aside proceedings of another High Court Judge on the issue of jurisdiction. This is a matter which should be raised in that court and where as in this case there is a pending appeal in the court of appeal same be raised in that court.
10. I therefore find the application without merit and same is hereby dismissed with costs.

DATED AT NAIROBI THIS 24TH DAY OF JANUARY 2024

.....

S. N. RIECHI

JUDGE

