



CMN v JMF (Civil Suit E041 of 2021) [2024] KEHC 7610 (KLR) (Family) (27 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7610 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT E041 OF 2021
HK CHEMITEI, J
JUNE 27, 2024**

BETWEEN

CMN APPLICANT

AND

JMF RESPONDENT

RULING

1. This ruling relates to the notice of preliminary objection dated 22nd September, 2023 filed by the Respondent, JMF based on the Grounds That:
 - a) The suit herein is premature as the marriage between the parties has not been dissolved.
 - b) The honourable court lacks jurisdiction to dissolve the marriage between the parties.
 - c) The entire suit is fatally defective, incompetent, bad in law and an abuse of the court process.
2. The Applicant filed written submissions dated 5th December, 2023 placing reliance on the following:
 - a. *Mukisa Biscuit Manufacturers Limited v West End Distributors Limited [1969] E. A. 696* where the court stated as follows:

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side



are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

- b. [Independent Electoral & Boundaries Commission v Jane Chepkiner & 2 Others](#) [2015] eKLR where the court stated as follows:

“The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit; firstly, it serves as a shield for the originator of the objection – against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits.”

- c. [Hassan Ali Jobo & Another v Suleiman Said Shabal & 2 Others](#) SCK Petition No. 10 of 2013 [2014] eKLR where the court stated as follows:

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.”

- d. [Deepak Chamanlal Kamani & Another v Kenya Anti – Corruption Commission & 2 Others](#) (Civil Appeal (Application) No. 152 of 2009) where the court stated as follows:

“The initial approach of the courts must now not be to automatically strike out a pleading but to first examine whether the striking out will be in conformity with the overriding objectives set out in the legislation. If a way or ways alternative to striking out are available, the courts must consider those alternatives and see if they are more consonant with the overriding objective than a striking out. But the new approach is not to say that the new thinking totally uproots all well – established principles or precedent in the exercise of the discretion of the court which is a judicial process devoid of whim and caprice.”

- e. Section 17 of the [Matrimonial Property Act](#) which provides as follows:

- “(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 (1) –
- (a) shall be made in accordance with such procedures 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.”



f. *Halsbury's Laws of England* (4th Ed.) (at p. 552) also provides as follows:

“Costs follow the event. Although in general the court has discretion as to costs, no party is entitled to recover any costs of or incidental to any proceedings from any other party to the proceedings except under an order of the court. If in the exercise of its discretion the court sees fit to make any orders as to cost, then the subject to the rules relating to costs, the court must order the costs to follow the event except where it appears to the court that in circumstances of the case some other order should be made as to the whole or any part of the costs.”

3. The Respondent filed submissions dated 3rd November, 2023 placing reliance on the following:

a. Section 7 of the Matrimonial Properties Act which provides, “Ownership of matrimonial property 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.”

b. DLG v LVG Nairobi Misc Cause No. 138 of 2019 where the court held as follows:

“...neither the trial court nor this court has jurisdiction to hear and determine a dispute between spouses seeking the division of matrimonial property before the divorce or dissolution of the marriage between them.

Under section 2 of the *Marriage Act*, 2014 a party seeking the dissolution of a marriage has to file a petition before a Resident Magistrate's Courts Act, 2015.”

Background

4. The notice of preliminary objection arises from the application dated 14th July, 2021 filed by the Applicant, Celestine Munini Nzioka, seeking for Orders That:

i. The movable and immovable properties itemized herein were acquired with the funds and efforts of the Petitioner/ Applicant during their marriage, and which were registered in the name of the Respondent, and in joint names are jointly owned by the Petitioner/ Applicant and the Respondent or in the proportion that this Honourable Court deems just and fit.

a. LR. 100078/ 42 (L.R. 10426/ 194).

b. Nairobi/ Block 93/ 1215.

c. Kajiado/ Kaputei – Central 161.

d. Umoja Innercore Section 1 Plot No. B78.

e. Mavoko Town Block 2/ 8385.

f. A business known as Salico Pharmaceuticals that is located at L. R. No. 209/ 233/ 2.

g. All household goods, furniture and fittings in the matrimonial and residential house located at South B Executive Estate, House Number 53.

ii. Equal division, by contribution or as the Honourable Court may deem just of the properties enlisted in paragraph 1 above be made between the Petitioner/ Applicant and the Respondent.



- iii. The Respondent does execute all the relevant documents to transfer the Petitioner's/ Applicants share of immovable properties enlisted in paragraph 1 above to the Petitioner/ Applicant.
 - iv. In the alternative and without prejudice to the contents of paragraph iii above, the immovable properties enlisted in paragraph 1 above valued and sold at the current market price so that the Honourable Court may deem just and fit, between the Petitioner/ Applicant and the Respondent.
 - v. The Petitioner/ Applicant is entitled to her share of contribution or a share as this Honourable Court may deem just and fit to grant.
 - vi. The Respondent discloses the relevant documents in his possession on the properties enumerated in paragraph 1 herein above and that the Respondent discloses the status of the said properties.
 - vii. The marriage between the applicant and the Respondent be dissolved.
5. This Honourable Court be pleased to grant such further of other relief (s) as may be just in the circumstances of this case.

Analysis and Determination

- 6. I have carefully considered the notice of preliminary objection and the rival submissions filed by the parties.
- 7. The issue for determination are clear and straight forward namely, Whether the grounds in the notice of preliminary objection are points of law.
- 8. It is evident that the marriage between the applicant and the respondent is still subsisting although it is a subject of divorce. The plethora of authorities cited by the parties clearly demonstrate that the issue of division of matrimonial property can only be dealt with once the parties have parted ways, possibly through a divorce proceeding and when a decree absolute has been issued.
- 9. In this case I find merit in the preliminary objection and take solace under Section 7 and 17 of the *Matrimonial Properties Act* which states inter alia;

“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.”

Section 17 of the *Matrimonial Property Act* on the other hand provides as follows;

“(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”.



10. Based on the above I think it is premature for the applicant to seek the orders in the Originating summons herein without first exhausting the divorce proceedings. It is perhaps different if the orders sought was for the preservation of the properties but as it is the entire suit is premature.
11. For the foregoing reasons the preliminary objection is upheld, the entire suit herein is hereby struck out.
12. Costs shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 27TH DAY OF JUNE 2024.

H K CHEMITEI

JUDGE

