



**NAP v RS (Matrimonial Cause E040 of 2022)
[2023] KEHC 17399 (KLR) (Family) (28 April 2023) (Ruling)**

Neutral citation: [2023] KEHC 17399 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E040 OF 2022
MA ODERO, J
APRIL 28, 2023
IN THE MATTER OF MATRIMONIAL PROPERTY ACT, 2013
AND
THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
THE CONSTITUTION OF KENYA, 2010**

BETWEEN

NAP APPLICANT

AND

RS RESPONDENT

RULING

1. Before this court is the Notice of Preliminary Objection dated July 8, 2022 filed by the Respondent RS. The Preliminary Objection was opposed.

Background

2. The Applicant NAP herein filed in court the originating summons dated June 13, 2022 seeking various orders in respect of matrimonial property.
3. In response to the originating summons the Respondent filed the Notice of Preliminary Objection which was premised upon the following grounds:-
 - a) Despite this Honourable Court having the requisite jurisdiction under section 17 of the [Matrimonial Property Act](#), No 49 of 2013, to make declarations in regard to beneficial interests



in matrimonial property, this Honourable Court however lacks the jurisdiction to entertain/ grant any claim for the division on an equal or 50/50 basis of the alleged matrimonial property during the pendency and current subsistence of the marriage between the privy parties herein.

- b) That it reasonably follows that this Honourable Court lacks the jurisdiction to grant both prayers 8 and 9 of the Originating Summons dated June 13, 2022 in so far as the same seek division of the alleged matrimonial property on a 50/50 or equal basis as the privy parties herein are still married and the said prayers not only offend section 7 of the Matrimonial Property Act No 49 of 2013 but are incompetent and premature at this state.
 - c) That this Honourable Court similarly lacks the jurisdiction to either distribute, divide or make any declaration(s) of beneficial interest in the properties registered in the names of limited liability companies and third parties namely:
 - 1) All that property known as LR No x/xxx (IR No xxxx) registered in the name of Northwood Developers Limited;
 - 2) Vehicle registration number KBZ xxxA (Porsche) registered in the names of Underwriting Services & Insurance Agencies Limited/ICK Insurance Brokers Limited; and
 - 3) Motor vehicle registration number KBY xxxB (Porsche) registered in the names of one Anish Maheshkumar Doshi who is not only a stranger but is not privy to the instant suit.
4. The matter was canvassed by way of written submissions. The Applicant filed the written submissions dated November 15, 2022 whilst the Respondent filed the submissions dated October 18, 2022.

Analysis and determination

5. I have carefully considered the Preliminary Objection raised by the Respondent as well as the written submissions filed by both parties. The Preliminary Objection raises two issues:
- (i) Jurisdiction of this court to hear and determine the Originating summons.
 - (ii) Whether the court may make orders in respect of properties registered to third parties.
6. The definition of a Preliminary Objection was given in the case of *Mukisa Biscuits Manufacturing Company LTD v West End Distributors Ltd* [1969] EA 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 the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submissions 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 facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”



7. In *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 others* [2015] eKLR, the Supreme Court of Kenya stated as follows:-

“a preliminary objection may only be raised on a “pure question of law”. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”

8. Therefore in order for a preliminary objection to succeed the following tests must be satisfied.
- (i) The Preliminary Objection should raise a pure point of law.
 - (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
 - (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.
9. The issue being raised in this Preliminary Objection being that of Jurisdiction is one which if allowed will dispose of the entire suit. I am therefore satisfied that this is a proper Preliminary Objection.

(i) Jurisdiction

10. The Respondent argues that the court lacks the jurisdiction to entertain the Originating summons dated June 13, 2022.
11. It is trite that jurisdiction is central to any matter before a court. In *Owners of the Motor Vessel Lillian's v Caltex Oil (kenya) Ltd* [1987] eKLR the court stated that:-
- “Jurisdiction is everything without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction” [own emphasis].
12. The Respondent submits that Section 7 of the *Matrimonial Property Act* only grants the High Court power to distribute Matrimonial Property after a marriage has been dissolved.
13. Section 7 of the *Matrimonial Property Act, 2013* provides as follows:-
- “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.”
14. The import of Section 7 of the *Act* quite clearly shows that a court can only entertain division of matrimonial property between spouses or vesting of matrimonial property to either spouse upon dissolution of marriage or divorce.
15. I have carefully perused the Originating summons dated June 13, 2022 I note that the prayers sought therein include prayers for interlocutory reliefs as well as prayers for ‘declaratory orders’. None of the prayers in the summons seeks for the division of matrimonial property.



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

“Action for declaration of rights to property

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 a 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.” [own emphasis]

17. Therefore by virtue of Section 17 (2) (c) of the [Act](#) this court has the jurisdiction to entertain an application seeking declaratory rights notwithstanding the fact that the marital union is yet to be dissolved.

18. In the case of [NCK v GVK](#) [2015] eKLR, Muchelule, J as he was then) 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 it is not seeking to divorce, come to court to resolve any questions about beneficial interest in the matrimonial property without severing the same.” [own emphasis]

19. Likewise in [AKK v PKW](#) [2020] eKLR, the Court of Appeal when faced with a similar situation made the following observation following useful and relevant observations:-

“It is also correct that the orders concerning division of matrimonial property pursuant to Section 7 of the [Matrimonial Property Act](#) was unavailable to the appellant until the determination of Divorce case 867 of 2017 between the parties hereto. However, in view of the order sought by the appellant extensively detailed above, it cannot categorically be said that the appellant’s prayers fell solely within the ambit of Section 7 of the Act. It is our opinion that the learned Judge erred in limiting the court’s jurisdiction to the provisions in Section 7 of the [Act](#). In failing to address itself to the nature of reliefs sought. “by the appellant and the enabling provisions under Section 17 of the [Act](#), the trial court did not proceed to determine whether the appellant satisfied the provisions under Section 17 of the Act in order for the court to make the declaratory orders sought.....”



20. The Court of Appeal went on to state that:-

”An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding..... The above case demonstrates that a declaration under Section 17 of the Act is not necessarily pegged on the subsistence of a marriage. 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. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with requisite jurisdiction to entertain those aspects of the appellant’s prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of Section 7 of the Act.” [own emphasis]

21. On the basis of the forgoing I find that this court is clothed with requisite jurisdiction to hear and determine the originating summons.

(ii) Whether the court can make orders in respect to property belonging to third parties.

22. The Respondent contends that some of the assets listed in the summons do not constitute matrimonial property but rather are assets which belonging to third parties.

23. The question of whether or not the said assets belong to third parties is a question of fact and not of law. This will require proof by way of evidence. This cannot be deemed to be a matter to be disposed of by way of a Preliminary Objection.

24. For the above reasons I find no merit in the Preliminary Objection dated July 18, 2022. The same is hereby dismissed in its entirety. Costs will be met by the Respondent.

DATED IN NAIROBI THIS 28TH DAY OF APRIL 2023.

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MAUREEN A. ODERO

JUDGE

