



**ZAS v MKO (Family Originating Summons E005 of 2023)
[2023] KEHC 24530 (KLR) (1 November 2023) (Ruling)**

Neutral citation: [2023] KEHC 24530 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
FAMILY ORIGINATING SUMMONS E005 OF 2023
RE ABURILI, J
NOVEMBER 1, 2023**

BETWEEN

ZAS APPLICANT

AND

MKO RESPONDENT

RULING

Introduction

1. By Originating Summons dated 2nd October 2023 the applicant sought the following orders:
 - a. A declaration that the applicant has an overriding interest in the property at issue; Land Parcel Kisumu/Kasule/3655
 - b. An order do issue prohibiting on a permanent basis, the defendant, his agents, proxies, and or anyone acting on his behalf from evicting the plaintiff, harassing her in any way, and or taking any action that may dispose of, encumber, and or interfering with occupation and status of Land Parcel Kisumu/Kasule/3655.
 - c. That a permanent injunction be issued prohibiting the defendant from accessing Venmar School, transferring teachers, dismissing them, becoming involved in its management in any capacity, operating or accessing the school account number held in all banks in any capacity, taking loans, withdrawing cash, and/or becoming involved in any capacity in matters pertaining to Venmar School.
2. The Applicant also filed a Notice of motion dated the same day seeking for conservatory orders against the Respondent, for status quo prevailing in respect of Kisumu/Kasule/3655 to be maintained, that the respondent be prohibited from evicting the plaintiff/ applicant, harassing her in any way or disposing of, encumbering or tampering with her occupation of the said property until the suit herein



is heard and determined; that the respondent be deterred from accessing Venmar School, transferring teachers, dismissing them, getting the school account numbers held by various banks in any way, taking loans or withdrawing cash and getting involved in the issues concerning Venmar School in any way. She also prayed for costs of the application.

3. The application was predicated on the Supporting Affidavit dated 2nd October 2023, sworn by the applicant, Zuhura Anubii Saleh. It was the applicant's case that she and the respondent had been married and living together since 2010 but the respondent left the matrimonial home, abandoned her and threw her out of her own business and further he was in the process of selling the matrimonial home without her consent.
4. The applicant further averred that the respondent had unlawfully appropriated Venmar School and was negotiating economic loans with banks under the school's name and was also mistreating and expelling teachers without justification thus causing her harm as the rightful proprietor of the aforementioned school.
5. It was the applicant's case that the respondent had dispatched thugs who had threatened to beat her and evict her from the marital residence, which residence was purchased and constructed by both of them.
6. Opposing the application for conservatory orders and the entire Originating Summons, the respondent filed a Notice of Preliminary Objection dated 11th October 2023 in which he raised the following grounds:
 - i. The applicant's cause of action as set out in the body of Originating Summons relates to division of matrimonial property under the *Matrimonial Property Act*, 2013.
 - ii. The nature of the foregoing dispute falls squarely within the meaning of the disputes set out at Section 7 of the *Matrimonial Property Act* 2013 which provides that the properties of the marriage shall be divided between the spouses if they divorce or if their marriage is otherwise dissolved.
 - iii. That this court lacks jurisdiction to handle this matter since the status of the marriage is fundamental and its dissolution has never been filed in any court of the law of the competent jurisdiction therefore the suit herein offends Section 7 of the *Matrimonial Properties Act* 2013.
 - iv. That the plaintiff herein lacks the capacity to institute this claim, and the same ought to be struck out with costs to the respondent.
7. The respondent also filed a replying affidavit sworn on the 11th October 2023 denying the allegations made by the applicant and contending that the instant application was incompetent, frivolous and misconceived hence it did not meet the criteria for grant of the orders sought.
8. The respondent denied ever being in a marriage with the applicant but admitted that they were in a relationship in which they had two children.
9. It was the respondent's case that he was the legal proprietor of land parcel number Kisumu/Kasule/3655 which land he purchased solely and developed using his own finances and resources and at no time did the applicant make any contribution to the same.
10. The respondent further deposed that during the subsistence of their relationship, he caused the applicant and their children to reside on the suit property land parcel number Kisumu/Kasule/3655 where she remained to date.



11. It was the respondent's case that the applicant had not provided any documents regarding the impending sale and alleged appropriation of the said properties and thus there was no way the court could rely on her allegations.
12. The respondent reiterated that the suit property land parcel number Kisumu/Kasule/3655 was not matrimonial property as they had not been married and neither had they conducted any divorce to enable them distribute the properties and thus the instant application was premature and undeserving of the court's time.
13. The parties made oral submissions to canvass the Preliminary objection. `

The Applicant's Oral Submissions

14. It was submitted on behalf of the applicant that they opposed the preliminary objection on two grounds namely that the status of marriage being talked about was in conflict. The applicant relied on the case of Mombasa High Court MP OS 3/2011 *BWM v RM* where it was stated that a declaration can still be filed even when the marriage was still subsisting.
15. Mr. Otieno for the applicant submitted that the respondent's preliminary objection was premature, that the marriage was still an issue to be determined.
16. The applicant further submitted that matters of injunction cannot be subject of preliminary objection as was held in the Mukisa Biscuit case and as such the Preliminary objection ought to be dismissed with costs.

The Respondent's Oral Submissions

17. Ms. Otieno for the respondent submitted that the suit offended Section 7 of the [Matrimonial Properties Act](#), 2013 that provides for division of Matrimonial Property between spouses upon divorce.
18. It was submitted that the applicant sought division of the matrimonial property acquired during the marriage yet no decree *nisi* or decree absolute had been filed. The respondent submitted that there was no divorce filed as alleged hence the court lacked jurisdiction to handle the instant matter.
19. The respondent submitted that he prayed for striking out of the suit with costs to the respondent. It was submitted that injunctions could not be given pending nothing. The respondent submitted that the existence of a marriage has to be determined before a Divorce Court first, not this court.

Analysis & Determination

20. I have carefully considered the Preliminary objection raised and as argued., the pleadings, the rival submissions and authorities relied on.
21. I therefore discern two issues for determination. They are: -
 - i. Whether the objection is properly before the Court.
 - ii. If (i) above is answered in the affirmative, whether this Court has jurisdiction to deal with the O.S. and the application.
22. I will first deal with the propriety of the objection.



23. A preliminary objection was defined and discussed in the *Mukisa Biscuits Manufacturing Company Limited v West End Distributors* (1969) EA 696 where Law, J stated as follows:

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration....”

24. In *John Musakali v Speaker County of Bungoma & 4 others* [2015] eKLR the Court stated that:

“The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.”

25. Ojwang J.B. J (as he then was) in *Oraro v Mbaja* (2005) KLR 141 citing the statement of Law, JA. in the Mukisa Biscuits case (*supra*) went on to state that:

“A 'Preliminary Objection' correctly understood is now well defined as and declared to be a point of law which must not be blurred by factual details liable to be contested and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point....

Anything that purports to be a Preliminary Objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence....”

26. Thus, the above position is the now settled law on preliminary objections. I will now subject the preliminary objection as raised in this case to the law as set out above.

27. In my view, the objection by the respondent is double-pronged. The first limb is that the marriage between the parties was yet to be proved.

28. Drawing from the above cited decisions, it is clear that the preliminary objection herein is premised on a disputed fact of whether or not there was or is a valid marriage between the two parties hereto. As was well put by Ojwang J.B. J (as he then was) in the above case *Oraro v Mbaja*, ‘..... anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence’.

29. Accordingly, I find and hold that the preliminary objection on the first limb cannot succeed and is hereby dismissed.

30. The second limb was that the O.S. was prematurely filed before the marriage between the parties, if any, was dissolved. This limb was predicated on Section 7 of the *Matrimonial Properties Act*. This limb passes the bar of a proper preliminary objection on a point of law and therefore I proceed to determine it on its merits.



31. The significance of a Court's jurisdiction always remains at the very fore in every dispute. The Court's jurisdiction must be ascertained at the earliest stage. A court of law must always examine the pleadings and decide at the earliest opportunity even without being prompted by any party, as to whether it has jurisdiction to hear and determine the suit before it. This is because jurisdiction is everything without which a court of law acts in vain and therefore where it finds that it is devoid of jurisdiction, it must down its tools and do no more.
32. Speaking on the jurisdiction of a Court, the Supreme Court of Kenya Civil Application No. 11 of 2016 *Hon. (Lady) Justice Kalpana H. Rawal v Judicial Service Commission & Others* in demystifying jurisdiction quoted from the decision in Supreme Court of Nigeria Supreme Case No. 11 of 2012 *Obeja Emmanuel Dangana v Hon. Atai Aidoko Aliusman & 4 Others* where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows: -
- “...It is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity - dead - and of no legal effect whatsoever, That is why an issue of jurisdiction is crucial and fundamental in adjudication and has to be dealt with first and foremost...”
33. The Court of Appeal in the case of *Kakuta Maimai Hamisi v Peris Pesi Tobiko & 2 Others* (2013) eKLR had the following to say on the centrality of the issue of jurisdiction: -
- “So central and determinative is the jurisdiction that it is at once fundamental and overarching as far as any judicial proceedings in concerned. It is a threshold question and best taken at inception. It is definitive and determinative and prompt pronouncement on it once it appears to be in issue in a consideration imposed on courts out of decent respect for economy and efficiency and necessary eschewing of a polite but ultimate futile undertaking of proceedings that will end in barren cui-de-sac. Courts, like nature, must not sit in vain.”
34. In the *Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) Limited* [1989] KLR 1, it was stated that:
- “By jurisdiction is meant the authority which a court has to decide matters that are before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where the court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given...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 a continuation of proceedings pending other evidence. A Court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”



35. On the sources of a Court's jurisdiction, the Supreme Court of Kenya in *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & others* (2012) eKLR stated as follows:

“A court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsels for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality, it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings ... where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”/

36. As earlier stated, the second limb of the preliminary objection was based on Section 7 of the *Matrimonial Properties Act*. The section provides that:

7. 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.

37. In this case it is clear this this suit which is commenced by way of originating summons is premised on section 17 of the *Matrimonial Property Act*, 2013. I have reproduced the prayers sought in the O.S.

38. Section 17 of the *Matrimonial Property Act* provides as follows: -

“17. 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 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.”

(emphasis added).

39. Section 17 of the Act settles the second limb of the objection. However, the Courts have also interrogated the said provision in the following decisions.



40. Addressing the nature of Section 17 of the Act in Nairobi Civil Appeal No. 128 of 2014 *PNN v ZWN* [2017] eKLR the Court of Appeal stated as follows:

“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 v 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?”

41. The same Court added that:

“The purpose of the Section [17 of the Act] is not to defeat rights but to provide a machinery for ascertaining rights and once ascertained, then the register would be changed to take account of them.”

42. The High Court in *NCK v GVK* [2015 eKLR while distinguishing proceedings under Section 7 of the Act from those under Section 17 of the Act expressed itself as follows: -

“12. 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 1996 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 v 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. Further in *L (Children), RE* [2012] EWCA CIV 721 where a married couple were having considerable differences to the point of not being able to cohabit together, the judge issued an occupation order pursuant to section 33 of the Family Law Act 1996 requiring the husband to vacate the matrimonial home forthwith and to remain from it until a certain period, and gave a shared residence order.

13. 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 that is 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 the beneficial entitlement to their property. He can seek declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. The court will declare each party’s beneficial interest in the matrimonial property without severing the same. Such a declaration is not, in my view, inconsistent with Article 45(3) of *the Constitution* of Kenya 2010. In other words, both sections 7 and 17 of the *Matrimonial Property Act* 2013 are consistent with, and seek to reinforce, Article 45(3). One deals with the



distribution of matrimonial property upon divorce and the other protects the rights of spouses in relation to matrimonial property where the marriage is still in existence. Once again, the court is not dealing with an application under section 17 of the *Matrimonial Property Act* 2013.”

43. And, in Nairobi High Court Civil Suit 14 of 2013 (O.S) *CK v AGM* [2018] eKLR the Court held as follows: -

“23. 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.

24. The Applicant cited the court’s lack of jurisdiction to distribute matrimonial property under section 7 of the *Matrimonial Property Act* during the subsistence of a marriage. The contested originating summons was however brought under the equivalent of section 17 of the Act, which is not dependent on the status of a marriage. In this case therefore, I find that this court is properly equipped with jurisdiction to resolve any questions about the parties’ beneficial entitlement to suit property without severing the property.”

44. I am in total agreement with the above interpretation of Sections 7 and 17 of the Act. For clarity, proceedings under Section 17 of the Act are not only pegged on instances where the marriage is challenged. Such proceedings may be instituted even in the happiest of all marriages where a spouse can freely approach the Court under Section 17 of the Act for appropriate declarations.

45. The above discussion certainly brings to the fore that the preliminary objection which was predicated on Section 7 of the Act whereas the O.S. though not strictly provided was brought in line with Section 17 of the Act. Accordingly, I find the preliminary objection on the second limb not well founded and the same is hereby declined and dismissed.

46. I therefore find and hold that this Court is seized of the requisite jurisdiction to deal with the Originating Summons on its merit.

47. Having dismissed the preliminary objection, I direct that the parties now address the court on the merits of the application for conservatory orders dated 2/10/2023 as they prepare for the hearing of the Originating Summons. The applicant to file and serve written submissions within 10 days of today upon which the Respondent shall file and serve his within 10 days of service.

48. In the intervening period, there shall be *status quo* of the applicant’s occupation of and usage of Kisumu/Kasule/3655 and Venmar School in order to preserve the subject matter of the application before me until Mention on 21/11/2023 to fix a ruling date.

49. Costs in the cause.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 1ST DAY OF NOVEMBER, 2023

R. E. ABURILI

JUDGE

