



REPUBLIC OF KENYA



KENYA LAW
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**ROM v BNU (Environment and Land Appeal 15 of 2018)
[2023] KEELC 16441 (KLR) (20 March 2023) (Judgment)**

Neutral citation: [2023] KEELC 16441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 15 OF 2018**

**EO OBAGA, J
MARCH 20, 2023**

BETWEEN

ROM APPELLANT

AND

BNU RESPONDENT

*(An appeal from the Judgement of Hon. O. Barasa Principal Magistrate dated
16th October, 2018 in Eldoret Chief Magistrate E & L case No. 11 of 2018)*

JUDGMENT

1. This appeal arises from the judgement of Hon. H. O Barasa delivered on October 16, 2018 in Eldoret Chief Magistrate E & L Case No 32 of 2019. The appellant was the husband of the Respondent the two having been married in 2009 under Luhya Customary Law which was later solemnized under the marriage Act cap 150 (Now repealed) in 2011. The appellant and the Respondent have since divorced.
2. During the subsistence of the marriage, the Appellant and the Respondent owned one property at Annex within Eldoret town being LR. No (particulars withheld) and another at Soy being LR No (Particulars withheld).
3. On November 10, 2018, the respondent filed a suit against the Appellant in which she sought the following reliefs: -
 - a. A declaration that the intended registration/transfer, sale and/ or alienation and any intended transfers of the land parcels known as LR No. (particulars withheld) and LR. No. (particulars withheld) measuring 1.60 Ha without her consent are a nullity and of no legal effect and the same be cancelled forthwith coupled with an injunction restraining any dealing in the said parcels.



- b. A declaration by way of settlement that they jointly own the land parcels known as LR No. (particulars withheld) and LR No. (particulars withheld) and/or a settlement of the respective shares of the parties to the marriage be made equally.
 - c. The land's officers/Registrars be ordered to register any court's declaration and/or settlement of the respective shares of the parties in the register of the land parcels known as LR No. (particulars withheld) and LR No. (particulars withheld) measuring 1.60 Ha and the defendant be compelled to execute such instruments to give effect to the decree/order in default the Honorable court does designate such officer to execute the same in accordance with section 98 of the Civil Procedure Act, cap 21.
 - d. Costs and interest of the suit.
 - e. Any other relief that this Honourable court may deem just and expedient.
4. During the hearing of the case before the trial magistrate, the issue of jurisdiction was raised but in the impugned judgement, the trial magistrate held that he had jurisdiction to hear the matter and proceeded to grant prayers (b) and (c) of the plaint.
 5. It is the judgement of the trial court which triggered this appeal in which the following grounds of appeal have been raised.
 1. The learned Trial magistrate erred in fact and in law by arriving at the finding that resulted to the division of matrimonial property in Environment and land case despite the fact that the learned magistrate could not arrogate himself jurisdiction to distribute matrimonial property since the jurisdiction of land court is limited to the jurisdiction spelt out in section 13 of the Land and Environment Court Act of 2011
 2. The learned trial magistrate erred in law and fact by failing to appreciate that while sitting as an environment and land court case we could only exercise the special jurisdiction conferred under article 162 (2)(b) and by extension section 13 of the Environment Court Act of 2011.
 3. The learned trial magistrate erred in law and fact by ignoring the important purport of the evidence on record of whether the respondent had proved her case within required standard.
 4. The decision of the learned trial magistrate allowing the respondents suit was against the weight of the evidence on record, Judicial decisions of more superior court to the subordinate court be virtue of doctrine of stare desis against the weight of submissions before the court.
 6. The parties to this appeal were directed to file written submissions. The appellant filed his submissions on November 10, 2022. The respondent filed her submissions on March 24, 2022.
 7. I have gone through the grounds of appeal, the proceedings in the record of appeal as well as the submissions of the parties. The duty of this court as a first appellate court was stated in the case of *Selle & another -vs- Associated Motor Boat Co. Ltd* (1968) EA 123 where it was held that a first appeal is by way of a retrial and the first appellate court is not bound to follow the findings of fact if it appears that



trial court failed to take into account of particular circumstances or probabilities or if the impression of the demeanor of a witness is inconsistent with the evidence generally. All that the appellate court of first instance needs to remember is that it had no opportunity of seeing and hearing witnesses who testified during the trial court below.

8. In re-evaluating and re-considering the evidence before the trial court, I find that there are two issues which are to be determined in this appeal. The first is whether the trial magistrate had jurisdiction to entertain the suit. The second is whether the magistrate ignored the submission and authorities which were cited to him.

Whether the trial magistrate had jurisdiction to hear the suit before him;

9. In the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others*, the Supreme Court of Kenya stated as follows:-

“...court can only exercise jurisdiction that has been donated to it by either the *Constitution* or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

10. In the instant case, the trial court was sitting pursuant to the jurisdiction granted to it under section 9(a) of the *Magistrate's Courts Act* 2015 which provides as follows: -

- (a) in the exercise of the jurisdiction conferred upon it by section 26 of the Environment and Land Act (cap. 12A) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to —
 - (i) environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (ii) compulsory acquisition of land;
 - (iii) land administration and management;
 - (iv) public, private and community land and contracts, chores in action or other instruments granting any enforceable interests in land; and
 - (v) environment and land generally.

11. The jurisdiction under section 9(a) of the *Magistrates' Courts Act* arose after the amendment to section 26 of the *Environment and Land Court Act* which inserted subsection (3) which provides as follows: -

“The Chief Justice may by notice in the Gazette, appoint certain magistrates to preside over cases involving environment and land matters of any area of the country.”

12. The respondent's claim before the lower court particularly in prayer (b), the Respondent wanted the suit properties to be shared equally. During the hearing, the Respondent proceeded to adduce evidence showing what her contribution towards acquisition of the suit properties was.



13. In granting prayer (b) and (c), the trial magistrate effectively decreed that the two properties were owned in equal proportion. The question which then arises is whether the trial magistrate had jurisdiction to share the matrimonial properties.
14. Section 2 of the *Matrimonial Property Act* defines matrimonial property as follows: -

“ means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses and their family home and include any other attached property”.
15. Until July 22, 2022, there was no definition of court under the *Matrimonial Property Act*. The rules under the *matrimonial property Act* were promulgated in 2022 and were published vide legal notice No. 137 of July 22, 2022. These rules gave jurisdiction for applications under *Matrimonial Property Act* where the value of the subject matter did not exceed Kshs. 20,000,000/= to the Chief Magistrate’s Court and for applications where the property exceeds 20,000,000/= to the High Court.
16. In making a finding that he had jurisdiction to hear the matter, the trial magistrate rendered himself as follows: -

“In his submissions, the defendant stated that this court lacked the requisite jurisdiction to hear and determine this case and cited the case of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* (2012) eKLR. It is however significant to note that the subject matter of this suit is land and the court of Appeal has pronounced itself on the issue of whether the lower court have jurisdiction to hear and determine land matters. The defendant took issue with the fact that when the matter herein came up for hearing, the plaintiff raised matrimonial issues. It is not in dispute that the parties are no longer married. The two divorced vide Divorce Case No. and the dispute between them is with regard to the parcels of land that were allegedly acquired during subsistence of their marriage. In my view, this is a matter which falls within the jurisdiction of this court. The matter was transferred to this court from the Environment and Land Court and since its transfer the pleadings have never been amended and as such, I hold that this court has the requisite jurisdiction to determine the same as stipulated under section 7 of the Magistrates Court Act.”
17. The trial magistrate appears to have been under mistaken believe that as the case had been transferred to the court from the Environment and Land Court, he had jurisdiction to handle it under section 7 of the *Magistrates Courts Act*. The trial magistrate failed to address himself to section 9(a) of the *Magistrates’ Courts Act* which gave jurisdiction on what could be heard by a magistrates’ court.
18. The trial magistrate appears to have been mistaken that this was a land matter. There was no contention on ownership. What the Respondent wanted was division of matrimonial property which could not be entertained by a court sitting as an Environment and Land Court. This issue was clarified later in 2022 when the court was defined as High Court and courts which exercise Civil jurisdiction in the Chef magistrate’s court where the subject matter does not exceed 20,000,000/= It is therefore clear that the trial magistrate had no jurisdiction to entertain division of matrimonial property.

Whether the trial magistrate ignored the submissions and authorities which were cited to him;

19. It is clear from the judgement that the trial magistrate ignored the submissions made before him by the Appellant. Authorities on jurisdiction were cited to him. Despite these authorities, the trial magistrate ignored them holding wrongly that what was before him was a land matter and that he had jurisdiction to entertain the suit. The prayers in the plaint were clear that the Respondent was after division of



matrimonial property equally. Had the trial magistrate addressed his mind to the provisions of section 9(a) of the *Magistrates Courts' Act*, he would not have fallen into this error.

20. I find that this appeal has merits. I allow the same with the result that the judgement of the trial magistrate is hereby set aside and in place thereof I make an order dismissing the Respondent's suit in the lower court with no order as to costs. Each party shall bear their own costs for the appeal.

DATED, SIGNED and DELIVERED at ELDORET on this 20th day of MARCH, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Ms. Raburu for Omondi for Appellant.

Mr. Omusundi for Respondent.

Court Assistant –Laban

E. O. OBAGA

JUDGE

20th MARCH, 2023

