



REPUBLIC OF KENYA



**Kazungu v Ngaro & 5 others (Environment & Land Case
115 of 2015) [2023] KEELC 17556 (KLR) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 115 OF 2015**

EK MAKORI, J

MAY 25, 2023

BETWEEN

JUMWA KALUME KAZUNGU PLAINTIFF

AND

MSENA FUNDI NGARO 1ST DEFENDANT

NDERITO MICHURI 2ND DEFENDANT

SAAD ABOUD MOHAMED 3RD DEFENDANT

MOHAMED ABOUD MUHAMED 4TH DEFENDANT

ABDULRAHAMAN KIMANI MOHAMED 5TH DEFENDANT

BARAKA NGUMAO MKARE 6TH DEFENDANT

RULING

1. A preliminary objection dated October 31, 2022 has been raised that:
 - a) That the plaintiff does not have locus standi to sustain this suit insofar as it is a claim based on share of matrimonial property pursuant to section 3 of the [Marriage Act](#) No 4 of 2014.
 - b) The claim is based on presumption of marriage, determination and division of matrimonial property that is the preserve of the High Court (family division) and not the ELC as established.
 - c) The claim falls short of the threshold set in section 17 of the [Matrimonial Property Act](#) to warrant granting the orders sought.
2. Parties were directed to file written submissions on the preliminary objection. They did comply.



3. The 5th defendant/ applicant contended that the current suit was brought by one Jumwa Kalume who later passed away on February 26, 2020 against her husband Msena Fundi Ngaro who also passed away on March 17, 2020 and alleged purchasers of part of the suit property Kilifi/Mtondia/192. The children of the plaintiff took out letters of administration ad litem dated October 1, 2021 to propagate their mother's claim over the suit property - that it was matrimonial property and that sale to 3rd parties herein was without consent null and void and that a declaration be made that the property was matrimonial property and was not available for sale.
4. The applicant submitted that matrimonial property could only subsist during the pendency of the marriage. When parties die as in this case, their assets become subject to the purview of the probate and administration proceedings, which is the province of the High Court and not the ELC.
5. By death, the marriage of the duo was extinguished and in the same breath, a claim for declaration matrimonial property is extinguished.
6. The 5th defendant argued that once the two spouses passed on, the process under the Succession Act crept in. A Probate and Administration Court can only distribute the estate of the duo, which is the High Court.
7. The plaintiffs on the other hand contended that the claim which is before this court rest squarely in this court for prayers of injunction against trespass by the defendants and declaration that the property was matrimonial property and was not available for sale. The issue at hand can only be handled and disposed of during a full trial.
8. I have considered the submissions and materials placed before me. What springs for determination is whether this court has jurisdiction to entertain the matter in the form it is or it falls within the purview of the family division of the High Court.
9. Once a preliminary objection is raised, it has to be dealt with at the earliest as it has the potential of disposing of the entire suit as held by Law JA. in the leading decision of *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors Ltd* [1969] thus:

“...so far as I'm aware, 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.”
10. The thrust of the preliminary objection herein rest directly on the jurisdiction of this court, as held by Nyarangi JA. in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR:

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
11. The main actors in this suit are now no more. The patriarch and matriarch were wrangling over a property known as Kilifi/Mtondia/192. Part of it had been sold by the patriarch to some of the defendants herein including the 5th defendants. He was the sole titleholder of the property during his



lifetime. The matriarch sought to reverse that position in her days contending that the suit property was matrimonial property sold without her consent. She passed on too. The children have taken over the matter on her behalf on the same course that the suit property was matrimonial and not available for sale. The question, which now begs an answer is can the claim, be sustainable. Does the ELC have jurisdiction? Was the claim extinguished by virtue of the demise of the two parents?

12. Matrimonial property is defined in section 6(1),(3) and (4) of the [Matrimonial Property Act, 2013](#) provides that:-

“Meaning of matrimonial property

(1) For the purposes of this Act, matrimonial property means—

(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determined that the agreement was influenced by fraud, coercion or is manifestly unjust.

13. There has been a discourse on the jurisdiction of the courts of coordinate to handle matrimonial property and the distribution of the same the case of [Zipporah Njoki Kanagara v Rock and Pure Ltd and 3 others](#) [2021 eKLR has been quoted by the plaintiffs affirming that the ELC can handle a claim of this nature as stated by Nakuni J. citing other ELC decisions on this topic:

“Suit property, in relation to matrimonial property is defined by section 6 (1) (c) of the [Matrimonial Property Act, 2015](#) as any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. The determination as to whether or not the suit property is matrimonial does not oust the jurisdiction of this court. In the case of *BWM v JMC* (2018) eKLR it was held: For avoidance of doubt, the court notes that the [Matrimonial Property Act](#) does not define the court that disputes relating to the matrimonial property disputes should be referred for determination. It is this the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court. The only limitation applicable to this court is that it can only hear such disputes if they involve or relate to occupation, use, and title to land. I find nothing to oust the jurisdiction of this court and I proceed to determine the preliminary objection.”

14. The ELC has opined that the jurisdiction on the issue matrimonial property is concurrent depending on the powers as allowed by the [Constitution](#). The substratum of the suit is what triggers the ELC to come in if the issues revolve around ownership of the matrimonial property as held in the decision I have quoted. However, where the issues raised are in the nature of declarations that the property is matrimonial, then the matter ought to be filed in the High Court (see *MMMM v CGM& 2 others* ELC appeal No 427 of 20170. ELC has declined to hear disputes related to the division of matrimonial



property or requirement of contribution to the same (see [Nyaribari v Ann Afandi & Anor.](#) [2018] eKLR

15. Current suit was filed seeking first to have the property determined as matrimonial property as defined by law after such determination, the court to proceed to declare that any sale thereafter was illegal null and void. There will obviously a discussion around contribution and shares by the parties and the subsequent sale.
16. The next complication is that both the patriarch and the matriarch have died. The children have entered the arena on the side of the matriarch it makes matters more convoluted since we are now talking of the estates of the two, and the question as to whether any suit real stands worthy litigating. My humble view is that the ELC has nothing left to litigate already sale had taken place during the lifetime of the patriarch, how the land was acquired and the extent of contribution is unknown. This court tried to fathom the same Olola J. in a ruling for injunction but failed.
17. On jurisdiction, I conclude I do not have any reserve left for the ELC, and down tools. On whether there is a balance of issues for trial, I doubt but leave it to the parties to approach the High Court family division the two initial actors having passed on.
18. The upshot is that the preliminary objection succeeds with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 25TH DAY OF MAY 2023.

E. K. MAKORI

Judge

In the Presence of: -

Mr. Musyimi for 5th Defendant

Court Clerk: Happy

In the Absence of: -

Mr. Mwadilo for the Plaintiff

