



REPUBLIC OF KENYA



KENYA LAW
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**JWWG v RWK & 2 others (Matrimonial Cause E006 of 2021)
[2022] KEHC 15688 (KLR) (25 November 2022) (Ruling)**

Neutral citation: [2022] KEHC 15688 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E006 OF 2021
TM MATHEKA, J
NOVEMBER 25, 2022**

BETWEEN

JWWG PLAINTIFF

AND

RWK 1ST DEFENDANT

SKM 2ND DEFENDANT

LAND REGISTRAR, NAKURU 3RD DEFENDANT

RULING

1. By an originating summons dated May 25, 2021, brought under section 8(1) (a),6,12,14 and 17 of the *Matrimonial Property Act*, 49 of 2013 and order 51 of the *Civil Procedure Rules*, 2010 ,the plaintiff sought for orders :-
 1. That the honourable court be pleased to declare and do issue a declaration that the property being Land Parcel No Bahati/kabatini Block 1/115XX measuring zero decimal zero four three five (0.0435), Ha, currently registered in the name of the 2nd defendant is matrimonial property.
 2. That the honourable court be pleased to declare and do issue a declaration that the transfer and registration of the suit property, Land Parcel No. Bahati/kabatini Block 1/115XX, by the 1st defendant to the 2nd defendant was fraudulent and therefore null and void.
 3. That the honourable court be pleased to issue an order compelling the 3rd defendant to cancel and transfer the title of the suit Property, Land Parcel No Bahati/kabatini Block 1/115XX registered in the name of the 2nd defendant and for the same to be registered in the name of the plaintiff in trust for the children, or in the joint names of the plaintiff and the 1st defendant.



4. That the honourable court be pleased to issue an order for permanent injunction restraining the 1st, 2nd and 3rd defendants, their agents or servants from interfering with the suit property, Land Parcel No Bahati/kabatini Block 1/115XX.
5. That the costs of this suit be borne by the 1st and 2nd defendants who have occasioned this action.
2. The application is premised on grounds on its face and supported by an affidavit of Rachel Wairimu Kabutu sworn on the even date.
3. On April 8, 2022, the 2nd defendant/applicant filed a notice of preliminary objection to the said originating summons on the following grounds:-
 1. The orders sought cannot be granted against the defendants as requested in the originating summons because this honourable court lacks jurisdiction to hear and determine matters in respect of title and interest in land which is vested in Environment and Land Court.
 2. The instant suit offends the provisions of order 37 rule 8 which prohibits the court from entertaining a claim for cancellation of title by way of originating summons.
 3. Consequently, the suit currently instituted is in contra-statute which cannot be saved by oxygen principle or provisions of article 159 of the Constitution of Kenya, 2010.
 4. In the premises, the instant suit amounts to and/or constitutes an abuse of court processes and therefore should be struck out from the court's records.
4. When the parties appeared before this court on May 26, 2022, it was agreed that the same be canvassed by way of written submissions.

1st Defendant's/Respondent's Written Submissions

5. The respondents herein submitted on two issues: -
 - I. Whether this honourable court has jurisdiction to hear and determine the originating summons dated May 25, 2021.
 - II. Who bears the costs.
6. On the first issue, the respondent submitted that jurisdiction is everything and it is what gives a court or a tribunal the power, authority and legitimacy to entertain any matter before it. To support this position, he relied on the case of Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd [1989].
7. He submitted that the suit arose from ownership of title No Bahati Kabatini Block 1/115XX which is no longer a matrimonial property since it is now legally registered under the name of the 2nd defendant.
8. He argued that order 37 rule 8 of the Civil Procedure Rules, 2010 prohibits this honourable court from cancellation of a title registered under the Registered Land Act by way of originating summons.
9. On the second issue, he submitted that it is a settled legal principle that's costs follow event and that a successful party in litigation is entitled to fruits of litigation being costs. He thus prayed for costs of this application.
10. The 2nd & 3rd defendants' submissions are not on record.



Plaintiff's/Respondent's Written Submissions

11. The plaintiff distilled three issues for determination namely;
 - i. Whether this honourable court has jurisdiction to hear and determine this matter
 - ii. Whether the plaintiff moved the court appropriately
 - iii. Whether the objection is properly before the court.
12. On the first issue, the plaintiff cited the entire section 17 of the *Matrimonial Property Act* No 49 of 2013 on Action for declaration of rights to property and the Court of Appeal decision of *PNN VS ZWN* [2007] eKLR in which the court held that the purpose of section 17 of the Act was not to defeat rights but to provide a machinery to ascertain rights and once ascertained, then the register would be changed to take account of them.
13. The plaintiff further cited the provision of section 12 of the *Matrimonial Act* 2013 which requires spousal consent to be obtained before dealing in any way with the matrimonial property.
14. The plaintiff argued that section 17(1) and (2) of the *Matrimonial Property Act* does not limit the court on the kind of declaration to make on the rights of a spouse's interest in matrimonial property.
15. She also cited section 14 of the same Act and Kisumu High Court Civil Case No 14 of 2017 *MO vs AOW* where the court acknowledged that even if the property is registered in the name of one person, but another person contributed towards the acquisition of the property then both persons have proprietary interests in the property and if legal ownership is registered in the name of only one of them then that one is decreed to hold the land on trust and beneficially not just for himself but also for the other person.
16. The plaintiff argued that upon this honourable court finding and declaring that the suit property forms part of the matrimonial property then it should proceed to issue a declaration for that right to be protected and to declare the illegal and fraudulent transfer/registration of the matrimonial property null and void.
17. That sections 3A, 1 A & 1B of the *Civil Procedure Act* and article 159 of the *Constitution* 2010 vest this honourable court with inherent power to make any orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.
18. The plaintiff referred this court to *Halsbury's Laws of England* ,4 edition vol 37 paragraph 14 that defined inherent powers as follows:

“..... In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”



19. That situations like the one before this honourable court call for the exercise of the inherent powers of the court. Reliance was further placed on *MMK vs JJM & Another* [2022] eKLR where the court stated that:-

“28...I think this is incorrect. The *Constitution* did not envisage that in a case such as the present one where the Court has determined the question of ownership of property and where such determination has consequences on the registration of the title, the parties should have to bring an entirely different suit in the Environmental and Land Court to effectuate the findings and determinations of the High Court. Such a mechanically talismanic reading of the jurisdiction of the Court would be the very kind of technical (in) justice that article 159 of the *Constitution* abhors. The High Court has incidental jurisdiction to make orders related to ownership of land where it has made findings and determinations respecting matrimonial property.

29 In the present case, the appropriate finding and order that recommends itself is the one proposed by the plaintiff: a finding that the transfer of the Suit Property to the 2nd respondent was unlawful and an order cancelling the title issued in respect of that transfer...”

20. The plaintiff submitted that this court is properly equipped with jurisdiction to determine this matter.
21. In respect of the second issue, the plaintiff submitted that summons is properly before court and that there is no other procedure known in law that she would use to move the court for the reliefs sought.
22. With respect to the third issue, the plaintiff argued that the 2nd defendant is jumping the gun as the summons is yet to be heard. She referred this court to the case of *Oraro vs Mbaja* (2005) KLR 141 where after quoting the statement of Law, JA. in the *Mukisa Biscuits Manufacturing Co Ltd vs West End Distributors Limited* (1969) EA went on to stay 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.

23. She therefore argued that the preliminary objection before court is a non-starter, misconceived and should be dismissed with costs.

Issues for Determination

24. The only issue for determination is whether this court has jurisdiction to hear and determine the originating summons dated May 25, 2021.

Analysis

25. A suit is only effective if the court has jurisdiction to adjudicate the issues raised in the suit. Jurisdiction may be defined as the power of the court to hear and determine a cause, to adjudicate and exercise any judicial power in relation to it. Jurisdiction means the power conferred by law upon the court to try and hear the cases and give appropriate judgements. (see the case of *Republic vs Magistrates Court, Mombasa; Absin Synergy Limited (Interested Party)* (Judicial Review E033 of 2021) [2022] KEHC 10 (KLR) (24 January 2022).



26. It is trite law that jurisdiction flows from the Constitution or statute. It is not a creature of any individual, nor can one arrogate to themselves authority to hear and or adjudicate over a dispute. See Samuel Kamau Macharia and another vs Kenya Commercial Bank and 2 others SC Civil appeal No 2 of 2011
27. The quintessential words of the court in Owners of Motor vessel "S" vs Caltex oil (K) Ltd (1989)KLR1 hold true;
- “Jurisdiction is everything. Without it, a court has no power to make one more step. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
28. What the applicant seeks in the originating summons are reliefs, declarations with respect to matrimonial rights. This is provided for in the Matrimonial Property Act at section 17 that:
- “(1) A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.
- (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.”
29. The 2nd defendant’s argument is that this matter falls under the jurisdiction of the Environment and Land Court. Article 162(2)(b) states that Environment and Land Court has the mandate to hear and determine disputes relating to use and occupation and title to land. The question at the outset is whether the reliefs sought herein are within the purview of the Environment and Land Court.
30. Clearly this is not just an Environment and Land Court matter. It is a claim based on matrimonial property. There is a whole statute the Matrimonial Property Act that deals with issues of property within the confines of marriage. The claim herein arises from the alleged contribution made by the plaintiff by virtue of marriage. On this I agree with the holding of Joel Ngugi J as he then was in MMK vs JIM & Another [2022] eKLR above.
31. In addition the statute speaks for itself. The plaintiff has stated that she was married to the 1st defendant and the property in question was acquired during the subsistence of the marriage and though registered in the sole name of the 1st defendant’s name, he was holding it in trust for her and their children. It is her position that the suit property is a matrimonial property.
32. The 1st defendant respondent does not deny that the property was purchased during the marriage and sold while the marriage was subsisting, except the argument that the plaintiff applicant has not proved the existence of the said marriage or any contribution on her part. Those are issues to be dealt with at the hearing of the originating summons. He admits that he sold the property to support their children.



33. Looking at the pleadings I am persuaded that this was a property acquired while the two lived as husband and wife. On the face of it and by virtue of section 12 of the [Matrimonial Property Act](#) which states:

“Special provisions relating to matrimonial property

- (1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.
- (2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man’s wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.
- (3) A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.
- (4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—
 - (a) on the sale of any estate or interest in the matrimonial home in execution of a decree;
 - (b) by a trustee in bankruptcy; or
 - (c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.
- (5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.”

This is property that ought to be protected pending the hearing and determination of the originating summons.

34. In addition, there is the presumption that property purchased during the subsistence of a marriage, as provided for by section 14

Presumptions as to property acquired during marriage;

“Where matrimonial property is acquired during marriage—

- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
- (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

35. It is in the backdrop of these statutory provisions standing with section 17 of the [Matrimonial Property Act](#), that I say that this court has jurisdiction to determine whether a property that is in contest is a matrimonial property and to declare the rights of parties in relation to that property.

36. It is on the aforesaid grounds that I find that at the preliminary objection by the 2nd defendant is bereft of merit and it is dismissed with costs to the plaintiff.



37. The parties are at liberty by virtue of article 159(2) (c) to pursue alternative dispute resolution mechanisms. In Nakuru we have Alternative Justice System (AJS) and mediation. Parties can fix a date before the Deputy Registrar for this purpose.

38. Orders Accordingly.

DATED, SIGNED AND DELIVERED VIA EMAIL THIS 25TH NOVEMBER 2022.

MUMBUA T MATHEKA,

JUDGE.

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