REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 26 OF 2017 (OS)

JNK..... PETITIONER

VERSUS

EMN.....RESPONDENT

RULING

1. When on 8th January 2013 the applicant JNK filed his plaint in the Environment and Land Court he pleaded that he and the respondent EMN begun cohabiting as husband and wife about 2002 and lived together until 9th June 2009 when the respondent forced him

> **"out of the matrimonial home……."**

In paragraphs 3, 4, 5 and 6 of the plaint he pleaded as follows:

> **"3. In or about January 2002 or thereabouts, the parties herein started cohabiting with each other as husband and wife. The parties herein lived together until 9th June 2009 when the defendant without any lawful cause or justification forced the plaintiff to move out of the matrimonial home and since then parties have lived totally separate lives.**
>
> **4. Prior to the said marriage, each of us had contracted previous marriage which had been dissolved and each of us had adult children from our respective previous marriages.**
>
> **5. During the subsistence of the said marriage and on numerous occasions, the defendant without any lawful cause or justification subjected me to extreme torture and cruelty all aimed at coercing me to move out of the matrimonial home.**
>
> **6. During the subsistence of the said marriage, we jointly acquired two adjacent parcels of land at Runda in Nairobi namely; title numbers Nairobi/Block [….] and Nairobi/Block [….] and on the said parcels of land stands our matrimonial home comprising of a four bed-roomed residential house and the usual conveniences. The current market value of the said property is in excess of Kshs.50,000,000/=**"

2. In the prayers, he sought a declaration that the parcels of land which were registered in their joint names constituted matrimonial property jointly acquired during the subsistence of the marriage.

3. He sought that it be found that each party had an equal share in the property, and that the same be valued and sold and the proceeds be shared equally.

4. The respondent's case was that in 1985 she got married to another man with whom she got four children before the man died in 2009. She stated that from 2002 she had an intermittent affair with the applicant, but that they never lived together as husband and wife; that the applicant was married to another woman and had no capacity to marry her; that although the two parcels were jointly registered between them, she was the one who had solely bought them; and that therefore the property was not matrimonial property.

5. The parties were represented. On 19th April 2017 their counsel appeared before the Environment and Land Court and agreed that this was a matter for the Family Court and got it transferred to this Division. The respondent had in her defence questioned the jurisdiction of the Environment and Land Court to hear and determine the dispute. By her conduct on 19th April 2017, I find, she abandoned the question of

jurisdiction. On 3rd May 2017 counsel for the parties appeared before this court and agreed on the issues for determination. Parties agreed to prepare for the hearing of the dispute.

6. On 1st November 2018 the applicant applied to amend the plaint to say that the parties were not legally married and that the property was not matrimonial property. The proposed amended plaint pleaded that the dispute belonged to the Environment and Land Court. The respondent opposed the application. She raised a preliminary objection to the application whose ground was that the court lacked the jurisdiction to transfer the dispute back to the Environment and Land Court, given the applicant's previous pleading which had caused the transfer of the dispute to the Family Division.

7. This court heard the application. It dismissed it with costs in a ruling dated 22nd May 2019 and delivered on 29th May 2019. The court found that the application had not been made in good faith, and was an abuse of the process of the court. The court upheld the respondent's preliminary objection.

8. On 26th July 2019 the applicant filed the present application. The application substantially sought that the court reviews and/or varies and sets aside its ruling of 29th May 2019, and transfers the matter back to the Environment and Land Court. The applicant was complaining that the court had failed to address the issue of jurisdiction, which was a mistake he wanted corrected. He complained that the court had failed to consider the entire record of the proceedings; had wrongly found that he had caused delay in the case; had wrongly found that he had caused the movement of the case between the Environment and Land Court and this court; and had wrongly found that there had been agreement by counsel of the parties to move the matter to this court. The application was brought under **Order 45** of the **Civil Procedure Rules** and **section 80** of the **Civil Procedure Act.**

9. The respondent opposed the application through a notice of preliminary objection whose grounds were that the court in its ruling had considered the preliminary objection dated 27th November 2018 and upheld it and that, the applicant having stated that the court lacked jurisdiction to hear and determine the dispute, the court had no jurisdiction to transfer the dispute from itself to the Environment and Land Court.

10. Under **Order 45 rule 1** of **Civil Procedure Rules**, an applicant who considers himself aggrieved by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or by a decree or order from which no appeal is allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of the judgement to the court which passed the decree or made the order without unreasonable delay.

11. A look at the grounds on which the applicant's application is based, and the matters deponed to in the supporting affidavit, clearly shows that he was completely dissatisfied with the ruling that this court delivered on 29th May 2019. He considered that this court wrongly failed to address the issue of jurisdiction, the court failed to consider all the evidence on record, wrongly found that the parties' counsel had consented to the transfer of the case from the Environment and Land Court to this court, and so on. The applicant is not saying that there was some new matter or evidence that he has come by. He is saying that the court reached an erroneous conclusion on the evidence that was put forth, and that it failed to address issues that had been placed before it. He is saying that the ruling was wrong, given the facts of the case between the parties. He is of the view that the court was wrong to dismiss his application to amend the plaint. Quite unfortunately, what was open to the applicant was to appeal against the ruling of the court **(Muyodi –v- Industrial and Commercial Development Corporation and Another [2006] IEA 243 (CAK).** As a general rule, no review can lie where the ground put forth is that an erroneous conclusion was reached in a given case, or that there was an incorrect exposition of the law **(Godfrey Ajuang Okumu –v- Nicholas Odera Opinya, HCCC No. 337 of 1996 at Kisumu).**

12. Secondly, the applicant was bound by his own pleadings. He is the one who had pleaded that he and the respondent were married and that together they bought the property which he considered to be matrimonial property. In a civil case, each party is allowed to formulate his own case. This is because he is the one who knows his case. He will be called upon to call evidence to support the case he has pleaded. He will not be allowed to call evidence contrary to what he has pleaded **(IEBC and Another –v- Stephen Mutinda & 3 Others [2014]eKLR).** The court itself will be bound by the pleadings of the parties, and will only adjudicate upon the specific matters that they have set forth in the pleadings.

13. Thirdly, if the applicant is saying that this court has no jurisdiction to hear and determine this dispute because he and the respondent were not married, and that the property jointly registered in their names was not matrimonial property, he cannot succeed in his quest to have the dispute transferred to the Environment and Land Court. This is because, it is trite that a court that has no jurisdiction in a matter filed before it cannot have the jurisdiction to transfer it to a court that has the jurisdiction to hear and determine it **(Phoenix of E.A. Assurance Company Limited –v- S.M. Thiga t/a Newspaper Service [2019]eKLR).**

14. Where a suit has been filed in a court without jurisdiction it is a nullity. It is void *ab initio*. If that is the case, this court would have no case to transfer to the Environment and Land Court. Infact, this is the reason why the preliminary objection taken by the respondent is sustainable.

15. In conclusion, I find that the present application is not only mischievous but is also without merit. I dismiss it with costs. I find that the objection by the respondent is merited, and allow it with costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 24TH DAY OF MAY 2021.

A.O. MUCHELULE

JUDGE