



REPUBLIC OF KENYA



KENYA LAW
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**Mwachala v Msafari & 3 others (Environment and Land Appeal
E030 of 2023) [2023] KEELC 20972 (KLR) (24 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20972 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL E030 OF 2023
NA MATHEKA, J
OCTOBER 24, 2023**

BETWEEN

MILLICENT ZIGHE MWACHALA APPELLANT

AND

JEREMIAH MGANGA MSAFARI 1ST RESPONDENT

CRISPUS MWACHALA PAKA 2ND RESPONDENT

LAND REGISTRAR (WUNDANYI) 3RD RESPONDENT

**TRUSTEES OF THE ASSOCIATION OF JEHOVA'S WITNESS 4TH
RESPONDENT**

RULING

1. The first application is dated July 3, 2023 and is brought under section and 3A of the [Civil Procedure Act](#), Order 42 Rule 6(1) & (2) and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders that;
 1. This matter be certified urgent and service be dispensed with in the first instance.
 2. Taveta MELC No 10 Millicent Zighe Mwachala v Crispus Mwachala Paka & Others.
 3. Pending the Hearing and determination of Mombasa ELCA No E030 of 2023 Millicent Zighe Mwachala & others v Jeremiah Mwachala Msafari & Others, this Honourable Court be pleased to stay the proceedings in Taveta MELC No. 10 of 2019 Millicent Zighe Mwachala v Crispus Mwachala Paka & others.
 4. That costs of this Application be awarded to the appellant/applicant.
2. It is based on the grounds that the Appellant having been aggrieved by the Ruling and Order of the learned trial magistrate Hon D.M. Ndungi delivered on the 13th April 2023 has since moved to



this court via Mombasa ELCA No E030 of 2023 Millicent Zighe Mwachala & others v Jeremiah Mghanga Msafari & others. The Appeal seeks to challenge the findings of the learned trial magistrate in permitting the 1st Respondent who is an interested party in the proceedings before the trial court, to file a defense and counter claim to the Appellants suit. That the trial magistrate has now set the suit before him i.e Taveta MELC No. 10 of 2019 Millicent Zighe Mwachala v Crispus Mwachala Paka & others for hearing on the July 13, 2023. In the event that this court does not grant the Orders sought, the entire appeal would be rendered nugatory since the hearing is scheduled to take place on July 13, 2023.

3. The Memorandum & Record of Appeal has already been filed and served. The Appeal raises very many triable issues. It seeks amongst other grounds to challenge the courts finding that an interested party can by law file a defense and counter claim. In the circumstances, the appellant/applicant has established an arguable appeal that is not frivolous, with probability of success, to warrant the grant of the interim reliefs sought herein. On the other hand, the respondents risks no damages should the orders sought herein be granted and, in any case, the respondents stand to suffer no prejudice. The appellant/applicant is therefore apprehensive that unless retrained in the manner sought herein, the appellant shall suffer irreparable loss of the suit property, with the appeal being rendered moot. In view of the foregoing, it is in the interest of justice that this Application be heard expeditiously and the orders sought herein granted.
4. The 1st respondent opposed the appellant/applicants motion dated July 3, 2023 on grounds that stay of proceedings pending an interlocutory appeal seriously impedes the trial court proceedings the applicant has failed to show exceptional circumstances warranting such stay as opposed to having the case concluded and all arising grievances taken. There has been material non-disclosure by the appellant/applicant that, in case, the High Court is the appellate court seized of the appellate jurisdiction of the instant subordinate trial court proceedings vide Mombasa Family Division Appeal Number E017 of 2021 Jeremiah Mghanga Millicent Zighe & others, whose appellate decree the 1st respondent trial court's proceedings and granted leave to file pleadings.
5. As a court of concurrent jurisdiction with the High Court by dint of article 162(2) of the Constitution of Kenya, 2010, this Honourable Court lacks jurisdiction, *mutatis mutandis*, under supersede or otherwise interfere with the judgment and said appellate decree of Hon. Justice Onyiego in Mombasa Family Division____ Appeal Number E077 of v Millicent Zighe & others as it is being called upon to do by the Appellant/Applicant. That the Family Division of court is the right forum to litigate on issues touching on matrimonial disputes. This honourable court lacks the benefit of jurisdiction to sit as an appellate court where parties are divorce, matrimonial property. The Honourable court lacks jurisdiction to transfer the instant appeal to the High Court where it finds out that it has no jurisdiction. It matters not how strongly impassioned a court may feel to correct a perceived wrong without jurisdiction, the court would be embarking on a hopeless adventure to nowhere.
6. The second application is dated July 11, 2023 and is brought under article 162 (2). 162 (5) (b) & 165(3) of the Constitution of Kenya, 2010. Section 17 of the Matrimonial Property, of 2013 section 13 of the Environment & Land Court Act, 2011 & Order 51 Rule 2 of the Civil Procedures Rules seeking the following orders;
 - a. The appellant/applicant's motion dated July 3, 2023 together with the Memorandum of Appeal dated May 3, 2023 be dismissed with costs; and
 - b. Costs of this application as well as the appeal be provided to the 1st respondent.
7. It is based on the affidavit of Jeremiah Mghanga Msafari and grounds that the instant interlocutory appeal originates from the matrimonial dispute proceedings at the subordinate trial court where the



appellant seeks declaratory and injunctive reliefs against the 2nd respondent over assorted matrimonial properties. hence, even if the matrimonial dispute solely includes land, the appellant's claim falls under section 17 of the Matrimonial Properties Act, 2013 which is under the jurisdiction of the High Court, Family Division.

8. The 1st respondent is the registered owner of one of the properties that the appellant/applicant seeks to be declared matrimonial property having bought the same from the 1st respondent at a valuable consideration of Kshs. 6,500,000. Accordingly, the 1st respondent was joined as a party to the trial court proceedings and granted leave to file pleadings *vide* Hon. Justice Onyiego's appellate decree issued on December 23, 2021 in Mombasa Family Division Appeal Number E011 of 2021 Jeremiah Mghanga v Millicent Zighe & others. Guided by the aforementioned appellate decree, the subordinate trial court, vide a Ruling delivered on April 14, 2023, dismissed the appellant/applicant's motion seeking to strike out the 1st respondent's pleadings. It is the said Ruling of the trial subordinate court that the instant interlocutory appeal has been preferred. Hence, in essence, the appellant/applicant is inviting this honourable court, through the back door, to sit as an appellate court against the appellate decree of Hon. Justice Onyiego's. Jurisdiction is such a fundamental matter that it can be raised at any stage, at any time, in any manner and even for the first time on appeal. In case, the appellant/applicant has at all material times known that the High Court is the forum convenient seized of appellate jurisdiction over the proceedings at the subordinate trial court by dint proceedings in Mombasa Family Division Appeal Number E011 of 2021 Jeremiah Mghanga vs Millicent Zighe & others.
9. This court has considered both applications and the submissions therein. By the application dated July 3, 2023 the 1st respondent has raised a preliminary issue on jurisdiction which this court will have to consider first. Jurisdiction is fundamental and can be raised at any stage of the proceedings, and when raised, the court has to decide on it before tackling any other issue at hand. The appellant seeks to appeal against the ruling of Hon. D.M Ndungi (PM) in Taveta PMELC No. 19 of 2019 Millicent Zighe Mwachala vs Chispus Mwachala Paka and others delivered on April 13, 2023, which allowed the 1st respondent to file pleadings in the suit as an interested party. The appellant's application dated July 3, 2023 seeks to stay the proceedings in Taveta PMELC No. 19 of 2019 until this appeal is heard and determined. This court is now faced with the question of whether it has jurisdiction to determine the dispute before it, as the 1st Respondent argues that the dispute is entirely on matrimonial property dispute which is a reserve of the High Court.
10. The suit the appellant seeks to appeal against, Taveta PMELC 10 of 2019 was instituted by the appellant vide a plaint dated September 3, 2019 and amended on August 10, 2020 against the 2nd, 3rd and 4th respondents. The appellant alleged that the 2nd respondent was in the process of disposing of family properties among them Taita Taveta/Kimala Mata/459 and 21937, Kimorigo/Mboghoni/137 and Starehe Kamili/Mwanza Ngombe Allotment No.75 without the consent of the family. She prayed for the court to declare the parcels of land as matrimonial property and issue a permanent injunction against the respondents herein. The trial court delivered its judgement on November 12, 2020 and allowed the prayers sought and found that the suit properties constituted matrimonial property and that the appellant had an equitable beneficial interest in them.
11. The 1st respondent, approached the court *vide* an application dated December 10, 2020 with a claim over Kimorigo/Mboghoni/137 which he claimed to have bought from the 2nd respondent. He sought inter alia leave to file pleadings in the suit as an Interested Party and set aside the said judgment on the ground that he was a bonafide purchaser for value after carrying out all necessary due diligence including doing a search before acquisition and registration. The said application was dismissed by the learned magistrate, hence the 1st respondent moving to the high court vide High Court Family Appeal No. E011 of 2021 Jeremiah Mghanga Msafari v Millicent Zighe Mwachala and 4 others. The High



Court found the appeal merited and directed for a fresh hearing and determination of the lower court matter which at the time was Taveta PMCC No. 10 of 2019, and had been heard and determined on November 12, 2020.

12. The orders sought by the appellant in the trial court were for declaratory orders that Taita Taveta/Kimala Mata/459 and 21937, Kimorigo/Mboghoni/137 and Starehe Kamili/Mwanza Ngombe Allotment No.75 be found to be forming part of matrimonial property and for an injunction prohibiting any of their disposal or dealings. The Appellant's prayers fell solely on the ambit of section 17 of the Matrimonial Property Act which provides that:

- 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.

13. The appellant was inviting court to decide on her rights in the suit properties within her spousal relationship with the 2nd respondent, which is still in existence. The Court of Appeal in AKK v PKW [2020] eKLR held that,

“A declaration under section 17 of the Act is not necessarily pegged on the substance of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the high court cannot divide matrimonial property between spouses until their divorce or marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the Appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of section 7 of the Act.”

14. I find that the High Court has the requisite jurisdiction to consider the Appellant's prayers under section 17 of the Matrimonial Property Act, which is to determine the rights of spouses. The High Court is clothed with original and unlimited jurisdiction in civil matters by article 165 (3)(a) of the Constitution. This court's jurisdiction on the other hand is limited by article 162 (2) (b) of the Constitution; is to hear and determine disputes relating to the environment and the use and occupation of, and title to, land. This appeal ought to have been filed before the High Court as this court has no jurisdiction to hear and determine it. I find the application dated July 11, 2023 is merited. Having made these findings, this court has to down its tools and I dismiss this appeal with costs to the 1st Respondent.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF OCTOBER 2023.

N.A. MATHEKA

JUDGE

