



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

E.L.C CASE NO. 51 OF 2019

NWN.....PLAINTIFF

VERSUS

LNM.....DEFENDANT

JUDGMENT

1. This Honourable Court has been invited to determine a Preliminary Objection raised by the Defendant at Paragraph 8 of Statement of Defence dated 7th November, 2020 and filed on 11th November, 2020.

2. The said Preliminary objection reads as follows; -

“The Defendant avers that the Honourable Court lacks jurisdiction to hear and determine claims based on matrimonial property and shall raise a preliminary objection on the said ground.”

3. The said Preliminary Objection was agreed by consent to be disposed of by way of written submissions when the matter came up for hearing on 10th May, 2021.

4. The Defendant filed his on 20th September, 2021 while the Plaintiff filed hers on 4th October, 2021.

DEFENDANT’S SUBMISSIONS: -

5. The defendant submitted that the plaintiff at Prayer 2 of the suit prayed for a declaration that the suit land is matrimonial property and that indeed all the paragraphs in the plaint alluded to a marriage between the parties herein.

6. They submitted that amongst the land matters that this Honourable Court does not have jurisdiction to determine includes Succession Matters and Matrimonial Properties’ disputes.

7. They submitted that the Courts that have jurisdiction to hear and determine matrimonial property disputes under **Section 17 of the Matrimonial Property Act, 2013** is only the High Court and Subordinate Courts.

8. They further submitted that the Court of Appeal has held that it is only the High Court which has jurisdiction to determine issues of division of matrimonial property. They relied in the case of **AKK V PKW (2020) e KLR**.

9. In conclusion, they submitted that the Preliminary Objection has merit and prayed that the suit be struck of with costs.

PLAINTIFF’S SUBMISSIONS: -

10. The Plaintiff contends that this Honourable Court is clothed with the jurisdiction to hear and determine matrimonial property and family land under **Article 162 (2) (b) of the Constitution and Section 13 of the Environment and Land Court Act**.

11. She submitted that no particular court is identified by the **Matrimonial Property Act, 2013** and can therefore be any Court that has

been given jurisdiction to hear matrimonial disputes.

12. She submitted that the current legal position is that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court, the only limitation being that this Court can only hear such disputes if they involve and relate to land.

13. She relied on the cases of **Rose Wanjiru Ngare v Julius Ngare Macharia (2019) e KLR**, **Jane Wambui Ngeru versus Timothy Mwangi Ngeru (2016) e KLR**, **Susan Kwamboka Nyakundi v Fredrick Mathenge Macharia (2019) e KLR**, and **Victorina Nanjala Wekesa v Cleophas W Waswa & Another (2021) e KLR**.

14. She urged this Honourable Court to adopt similar positions in the above-mentioned authorities and to dismiss the Preliminary Objection with costs.

ANALYSIS: -

15. I have considered the Defendant's Preliminary objection which is contained at Paragraph 8 of the Statement of defence, the parties' submissions and the authorities cited and annexed thereto.

16. *The definition of a **Preliminary Objection** is set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd –vs- West End Distributors Ltd (1969) EA 696**, where it was held that:*

“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... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

17. Prior to determining a question raised as a Preliminary point, the Court is required to first satisfy itself that the issue raises a pure point of law.

18. The Defendant has stated that this Honourable Court lack jurisdiction to hear and determine the dispute. I find that the issue raises a pure point of law which if successful, may determine the suit. It has been said that jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of **The Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd (1989) KLR 1**. Where **Nyarangi J.A.** held as follows:

'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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.'

19. In determining the issue of jurisdiction, the Supreme Court in the case of **Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 others** held as follows:

“..... a 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.”

20. This Honourable Court's jurisdiction is given under **Section 13 of the Environment and Land Court Act No.19 of 2011** which provides that:

“(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.

(2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes? (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources; (b) relating to compulsory acquisition of land; (c) relating to land administration and management; (d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and (e) any other dispute relating to environment and land.”

21. It is therefore clear that this Honourable Court is clothed with jurisdiction to determine all disputes pertaining to environment and land.

22. The dispute herein involves a parcel of land Registration Number Inoi/Mbeti/xxx which has been claimed to be matrimonial property.

23. Jurisdiction to determine matrimonial property disputes is enshrined under **Section 17 of the Matrimonial Property Act, 2013** 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.”

24. This Court in determining the jurisdiction to determine Matrimonial Property Disputes held as follows: -

“18. In interpreting the above section the Hon. Justice Nyamweya in Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] e KLR noted in this respect that –

“No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction.

It is thus 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 land.”

19. This Court therefore adopts a similar position and finds that it has the Jurisdiction to adjudicate this matter as the same relates or involves land, and therefore the defendants submissions in this regard has no basis.”

25. From the above authority, it can be said that land disputes are cross cutting issue especially in High court and the sister courts of equal status.

26. However, there is a clear distinction that can be made from the pleadings and the prayers sought. The plaintiff and the defendant in this case are described as husband and wife. The plaintiff and the defendants are blessed with six children named in paragraph 4 of the plaint. From the plaint dated 25/11/2019, the plaintiff who is the defendant's wife is seeking inter-alia a declaration that the defendant holds land parcel number INOI/MBETI/xxx in trust for the plaintiff and their children. In order to appreciate the issue in controversy, it is important to understand the concept of trust and the beneficiaries thereof. In the case of **ISACK M'INANGA KIEBA V ISAAAYA THEURI M'LINTARI & ISACK NTONGAI, (SCOK) Petition 10 of 2015**, the Supreme Court held;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High court in Kiarie v Kinuthia, that what is essential is the nature of the land intention of the parties---. Some of the elements that would qualify a claimant as a trustee are; the land in question was before registration family, clan, or group land; the relationship of the claimant to such family, clan, or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances, the claim is directed against the registered proprietor who is a member of the family, clan, or group”.(Emphasis mine)

From the above Decision by the superior court, it is clear that the plaintiff who is the wife of the defendant do not come from the same family, clan or group to be entitled to a clan land under customary law. The Plaintiff's claim falls under **Section 17 of the Matrimonial Properties Act, 2013** which is under the jurisdiction of the High Court. I therefore find that this Honourable Court lacks the jurisdiction to hear and determine this suit.

27. In the final analysis, I find the notice of preliminary objection as pleaded at paragraph 8 of the Defendant's statement of Defense dated 07/11/2020 merited and the same is hereby upheld. Consequently, this suit is stuck out with costs to the defendant.

Judgment READ, DELIVERED and SIGNED in open Court at Kerugoya this 21st day of January, 2022.

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HON. E. C. CHERONO

ELC JUDGE

In the presence of:-

1. Ms Wambui holding brief for Mr. Mwaura for the Plaintiff
2. Ms Kimata holding brief for Mr. Magee for the Defendant.
3. Kabuta – Court Assistant.