



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MOMBASA**

**ELC CASE NO. 79 OF 2019**

**HAMISI KAZUNGU KALUME.....PLAINTIFF**

**VERSUS**

**RITA HELLEN LESIAMITO.....DEFENDANT**

**RULING**

By a notice dated 21<sup>st</sup> May 2021 the defendant raises a preliminary objection that the honourable court lacks the requisite jurisdiction to hear and determine the matter. The defendant submits that by seeking the foregoing relief the plaintiff invites this honourable court to the realm of family law where this honourable court will be forced to invoke the provisions of the Marriage Act 2014 and the Matrimonial Property Act 2013. The relief sought by the plaintiff raises issues for determination by this honourable court in considering whether to allow or deny the plaintiff's claim seeking to declare the suit property as their matrimonial home.

The plaintiff's submit that this court has jurisdiction as the same relates to the use, occupation and title to land. The plaintiff also seeks and order for the defendant to be restrained from leasing, evicting and interfering with the plaintiff's quiet use, occupation and possession of the suit property and an order for permanent injunction. They relied on the case of Gladys Muthoni Kibui vs Geofry Ngatia (2021) eKLR, BWN vs JMC (2018) eKLR and Jane Wambui Ngeru vs Timothy Mwangi Ngeru (2015) eKLR.

This court has considered the preliminary objection and the submissions herein. A Preliminary Objection, as stated in the case of Mukisa Biscuit Manufacturing Company Ltd vs West End Distributors Ltd (1969) E.A 696,

*“..... 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”*

In the same case, Sir Charles Newbold said:

*“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”.*

J.B. Ojwang, J (as he then was) in the case of Oraro vs. Mbajja (2005) e KLR had the following to state regarding a 'Preliminary Objection'.

*“I think the principle is abundantly clear. A “preliminary objection”, correctly understood is now well identified as, and declared to be the point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be preliminary objection, and 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. I am in agreement ..... that, “where a court needs to investigate facts, a matter cannot be raised as a preliminary point.”.*

On perusal of the pleadings in this case the plaintiff seeks among other reliefs that the suit property be declared matrimonial property. The plaintiff stated that they were married on the 5<sup>th</sup> August 2011 at the Registrar of Marriages in Mombasa and acquired the suit property jointly as their matrimonial home. From the documentary evidence on record the marriage between the plaintiff and defendant was dissolved way back in March 2019 and the defendant maintains that the suit property was not matrimonial property. The jurisdiction of the Environment and Land Court is set out in written law; the starting point is Article 162(2) of the Constitution of Kenya 2012, which provides as follows; -

*“(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).*

*(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—*

(a) .....; and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)".

The Environment and Land Court Act Section 13 provides as follows;

“(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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate Courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) .....

(6) .....

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any Order and grant any relief as the Court deems fit and just, including—

(a) interim or permanent preservation Orders including injunctions;

(b) prerogative Orders; (c) award of damages; (d) compensation;

(e) specific performance; (g) restitution; (h) declaration; or (i) costs.”

It is generally accepted that this Court has very wide original and appellate powers to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution relating inter alia to use, occupation and title to land. Similarly, the Court can grant wide reliefs as stated above. The instant suit seeks declaratory orders that the suit property is matrimonial property. Much as the Plaintiff purports to seek a declaration in his final prayers that the suit land be declared a matrimonial property, the major issue in the dispute at hand is ownership of the suit land. Having found that the suit land has a certificate of title registered in the joint names of the parties, the Plaintiff claims ownership of the suit land on account of the alleged acquisition and developments, that places the case squarely in the jurisdiction of the ELC Act and consequently the ELC Court. I find that the objection is not merited and I overrule the same. Costs in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 18<sup>TH</sup> JANUARY 2022.**

**N.A. MATHEKA**

**JUDGE**