



**Maina v Macharia (Environment & Land Case E064 of 2022)  
[2025] KEELC 3981 (KLR) (23 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3981 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE E064 OF 2022**

**A OMBWAYO, J  
MAY 23, 2025**

**BETWEEN**

**BETH WAMBOI MAINA ..... PLAINTIFF**

**AND**

**JAMES MAINA MACHARIA ..... DEFENDANT**

**RULING**

1. Beth Wamboi Maina, (hereinafter referred to as the Plaintiff) seeks a declaration that land title no. Bahati / Kabatini Block 1 / 9238 registered in the name of James Maina Macharia (hereinafter as the Defendant) and held in trust by the Defendant for both the Plaintiff and the Defendant is matrimonial property and does not belong solely to the Defendant. The plaintiff prays for a declaration that the Plaintiff has matrimonial/spousal, overriding and/or beneficial interest in the matrimonial property as wife and co-owner, and a permanent injunction.
2. Moreover, the plaintiff seeks an order that the monthly rental income generated from the rental property constructed on Bahati / Kabatini Block 1 / 9238 be shared equally between the Plaintiff and the Defendant.
3. The Defendant has vide notice dated 10/03/2025 raised a preliminary objection on jurisdiction. That the Environment and Land Court is not seized of jurisdiction to hear and determine this matter. On 10/03/25, the court directed that the preliminary objection be heard and determined first.
4. The defendant submits that it is trite law that jurisdiction cannot be conferred to a court by any party or by consent of parties. The issue of jurisdiction is paramount and has to be dealt with once it has come to the fore irrespective of time taken before it is raised. Most importantly, this matter has not kicked



off for hearing hence it is appropriate to deal with the same now. On the question of jurisdiction, the defendant refers to the case of R v. Karisa Chengo [2017] eKLR, the Supreme Court determined that;

“The limits of this authority are imposed by the statute, charter or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a Court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing.

Jurisdiction must be acquired before judgment is given. Jurisdiction was a court’s power to entertain, hear and determine a dispute before it.”

5. The defendant further refers to the case of Samuel Kamau Macharia & another v. Kenya Commercial Bank Limited & 2 others (2012) Eklr, the Supreme Court held;

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the Constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

6. The defendant submits further that this court is not clothed with appropriate jurisdiction to hear and determine this matter. This matter falls within the jurisdiction of the High Court.

7. She refers to Section 17(1) & (2) of the *Matrimonial Property Act*, Cap. 152, states;-

17. Action for declaration of rights to property

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.

8. While section 17(1) makes reference to a court, section (2) subsection (a) makes reference to procedures as have been prescribed. The rules have been prescribed for under the Matrimonial Property Rules which were published vide *Legal Notice 137 of 2022*. Rule 6 thereof provides;-

6. Court to which application may be made

1. An application to enforce a claim relating to matrimonial property may be made in any proceedings under the Act—
  - a. to the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate’s court; or
  - b. to a magistrate’s court having civil jurisdiction to adjudicate matters within the court’s pecuniary jurisdiction.



2. Where the spouses profess the Muslim faith, the court to which an application is made may, on the request of the parties, be guided by Muslim law.
9. According to the defendant, Rule 6(1) (a) is express as to the place of lodging a claim of the nature such as the one herein. The same ought to be made to the High Court. He revisits R v. Karisa Chengo (supra), the Supreme Court stated:-

“*The Constitution*, the *Environment and Land Court Act* and the *Employment and Labour Relations Court Act* revealed that a special cadre of courts with sui generis jurisdiction were provided for.

Such parity of hierarchical stature did not imply that either Environment and Land Court or the Employment and Labour Relations Court was the High Court or vice versa. The three were different and autonomous courts and exercised different and distinct jurisdictions. As article 165(5) of *the Constitution* precluded the High Court from entertaining matters reserved for the Environment and Land Court or the Employment or the Labour Relations Court, it was to be inferred, by the same token, that the Environment and Land Court and Employment and Labour Relations Court too could not hear matters reserved to the jurisdiction of the High Court”.

10. Flowing from the foregoing, it is therefore the defendant’s submission that the Environment and Land Court has no jurisdiction over matters touching on matrimonial property.
11. In PNE v PME [2007] eKLR, the court held that since the cause related to matrimonial property, the same was to be placed before the family court division while in JOO v GKN [2021] eKLR, the court concluded that the Environment and Land Court was not the proper court vested with jurisdiction to adjudicate the dispute in that suit.
12. The gravamen of the plaintiff’s submissions is that the court has the requisite jurisdiction to hear and determine this dispute. She refers to the Supreme Court of Kenya in the case of Samwel Macharia Kamau v Kenya Commercial Bank & 2 others, Civil Application No. 2 of 2011 that had the following to say about the primordial issue of jurisdiction:-

‘The jurisdiction of the Court flows from either *the Constitution*, legislation or both and a Court cannot arrogate itself jurisdiction exceeding that which is conferred upon it by law.’

13. The plaintiff submits that the Environment and Land Court is established under *the Constitution* of Kenya, 2010 and *Environment and Land Court Act*, 2011. The establishment of the Court by Article 162(2)(b) of *the Constitution* of Kenya, 2010 was brought to life by the enactment of the *Environment and Land Court Act* which delineated, under Section 13 (2), the jurisdiction of the Court to hear and determine disputes relating to environment and the use and occupation of and title to land. These constitutional, as well as statutory provisions envisaged that the jurisdiction of this Court extends to every matter related to land disputes including matrimonial property since matrimonial property is tied to ownership and use of land. The plaintiff argues that section 13 (5) of the ELC Act empowers the Court, in exercise of its jurisdiction, to make any order and grant any relief as it deems fit and just. This implies that the Court, within the exercise of its jurisdiction, has the power to entertain matters of any kind related to land disputes including matrimonial land disputes, and proceed to issue such orders as it deems fit, upon hearing and determination of such matters.
14. According to the plaintiff, Section 101 of the *Land Registration Act*, 2012, as well as Section 150 of the *Land Act*, 2012 bestow the Environment and Land Court with the jurisdiction to hear and determine



disputes, actions, as well as proceedings concerning land. On the contention by the defendant that the claim is founded on allegations of matrimonial property rights and therefore that the same falls under the exclusive jurisdiction of the High Court, Family Division relying on Sections 17 and 18 of the *Matrimonial Property Act*, 2013, the plaintiff submits that specific contention is that Section 17 of the Act does not bestow jurisdiction to a particular Court. Moreover, the statute in its definition section does not define the court to be any particular court, much less the High Court.

15. From the foregoing therefore, there is an implication that this Honourable Court and the High Court possess simultaneous jurisdiction over matrimonial property only that this Honourable Court has the exclusive subject matter jurisdiction where the matter in issue is matrimonial property of landed nature.
16. The plaintiff refers to the case of Muumbo & another (C/o Mitgai Kemei & Associates Advocates) v Mwingi View Point Lodge Limited & 8 others (Environment & Land Case 10 of 2023) [2024] KEELC 6921 (KLR) (22 October 2024) (Ruling), while dismissing such Preliminary Objection, the Court stated the predominant purpose test shall apply in determining whether a particular case is a dispute about land and is properly before the Environment and Land Court or not as follows:-

... The court shall apply the pre-dominant purpose test as persuasively stated in the case of Suzanne Butler & 4 Others vs Redhill Investments & Another (2017) eKLR, where the court held that:

“... When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Predominant Purpose Test:

... Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.”

17. The plaintiff submits that from the Plaint, the predominant purpose in the instant suit is prevention of disposal of the suit property. He refers to the case of RW v JMN [2022] KEELC 1843 (KLR), while dealing with a matter before the Environmental and Land Court, Njoroge J stated as follows: -

“On the other hand, the *Matrimonial Property Act* No. 49 of 2013 does not specifically define “court” but it is trite that division of matrimonial property is determined by the High Court under its jurisdiction as provided under Section 3A of the *Civil Procedure Act* and Article 165(3) (a) of *the Constitution* of Kenya 2010. It is my opinion that in one part of this claim what this court is being called upon to do in terms of division of matrimonial property can only be done in the High court.

However, that part of the claim is severable and its inclusion does not invalidate any other claim that may be properly before this court and of which this court may possess jurisdiction to deal.”

18. In the Preliminary Objection challenging the jurisdiction of the Environment and Land Court to hear and determine the suit as the cause of action was a claim of matrimonial property, Koross, J. Stated as



follows in Muinde v Mwanja & 2 others (Environment and Land Case Civil Suit E052 of 2024)[2025] KEELC 984 (KLR) (4 March 2025) (Ruling): -

.....it emerges inter alia, that (a) this court has concurrent jurisdiction with the high court over matrimonial property, (b) this court will assume jurisdiction if the dispute is on the use, occupation and title to land, (c) the predominant test has to be applied on the claim and lastly, (d) this court will not exercise jurisdiction over matrimonial property if the parties are undergoing a divorce or their divorce has been concluded

19. The plaintiff submits that there is no question before any court or this court for that matter for division of matrimonial property between the parties. It is also abundantly clear that there is neither pending nor ongoing divorce cause between the Applicant/Defendant and the Respondent/Plaintiff.
20. Further, the Respondent/Plaintiff, in her Complaint, pleads that she is apprehensive that the Applicant/Defendant intends to sell all that parcel of land title number Bahati/kabatini Block 1/9238, which is a matrimonial property and seeks among other orders, a permanent injunction restraining the Applicant by himself, his officers, servants, agents, family members and or relatives or anyone acting on the Applicant's behalf and or authority from interfering with the Respondent's exclusive and quiet possession of land title number Bahati/Kabatini Block 1/9238. The sought prayer relates to the use, occupation and title to land, and hence it is crystal clear that this Honourable Court has jurisdiction to handle the matter. In his Statement of Defence dated 16TH February 2023, the Applicant/Defendant asserted that he had disposed of the said suit property, which is a clear confirmation that the dispute before this Honourable Court arises from dispute over land, specifically use, occupation and title to the suit land, and hence the matter is properly before the Court. The plaintiff argues that a similar situation was expounded, in Muinde v Mwanja & 2 others (Environment and Land Case Civil Suit E052 of 2024) [2025] KEELC 984 (KLR) (4 March 2025) (Ruling) where the learned Judge stated that: -
  31. From the complaint, it appears the plaintiff and 1[st] defendant are husband and wife albeit separated. It states the 2ND and 3RD defendants, at the 1ST defendant's instructions, entered the suit property and started erecting beacons and billboards therein and even carried measurements in it. It seems she is contending there was a trespass.
  32. She alleges the suit property is matrimonial property and registered in the 1ST defendant's name. Accordingly, he cannot subdivide or dispose of it without her spousal consent. It is noteworthy that this court has observed the title deed of the suit property shows it is not registered in any of the defendants' names.

And held that:

31. Be that as it may, this dispute touches on the use, occupation, and title to land, and therefore, this matter falls within the jurisdiction of this court.

### **Analysis and Determination.**

21. The court has discerned the issue for determination being whether the Environment and Land Court has jurisdiction to hear and determine this matter touching on matrimonial property and to be specific, land. Matrimonial property is described in section 6(1) of the *Matrimonial Property Act* Cap 152 Laws of Kenya which provides that for the purposes of the Act, matrimonial property means:- (a) the matrimonial home or homes;
  - b. household goods and effects in the matrimonial home or homes; or



- c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
22. In *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR the Supreme Court of Kenya was categorical that without jurisdiction, a court cannot entertain any proceedings. It pronounced that:-
- "A Court's jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."
23. In the Matter of Interim Independent Electoral Commissions, Constitutional Application No. 2 of 2011 [2011] eKLR, the Supreme Court had similarly expressed that where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits; it cannot expand its jurisdiction through judicial craft or innovation; nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. In *Republic v Karisa Chengo & 2 others* SC Petition No. 5 of 2015 [2017] eKLR the Supreme Court was clear that the High Court, the ELC and ELRC are different and autonomous courts with "different and distinct jurisdictions" and that:-
- "As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court."
24. With the foregoing in mind, the court must first determine the nature of the dispute before the ELC so as to establish whether that court has jurisdiction.
25. The Environment and Land Court is underpinned on the provision of Article 162(2) b of *the Constitution* of Kenya 2010. Section 13(2) of the *Environment and Land Court Act* provides for the jurisdiction of the Environment and Land Court to hear and determine disputes relating to environment and the use and occupation of, and title to land. This court finds that where the dispute revolves on use, occupation and title to immovable matrimonial property, then the same is envisaged under Article 162(2) b of *the constitution* of Kenya 2010 and section 13(2) of the *environment and land court act* and therefore the Environment and Land Court has jurisdiction. I do find that this court has the prerequisite jurisdiction to hear this matter and therefore the preliminary jurisdiction is dismissed with costs.

**SIGNED BY: HON. JUSTICE ANTONY O. OMBWAYO**

**JUDICIARY OF KENYA. NAKURU ENVIRONMENT AND LAND COURT ENVIRONMENT AND LAND COURT**

**DATE: 2025-05-23 10:19:52**

