



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

Neutral citation: [2025] KEELC 984 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE CIVIL SUIT E052 OF 2024**

AY KOROSS, J

MARCH 4, 2025

BETWEEN

PASCHALIA MUMBI MUINDE PLAINTIFF

AND

RONALD NGALA MWANIA 1ST DEFENDANT

AMIN HUSSEIN 2ND DEFENDANT

NEXT LEVEL PROPERTIES LTD 3RD DEFENDANT

RULING

Preliminary Objection (PO)

1. The subject matter for this court's determination is the defendants' PO dated 15/07/2024, which is against the main suit and raises the following grounds: -
 - a. By Article 165 (3) and (5) of *the Constitution*, this court lacks jurisdiction to hear and determine the suit as the cause of action is a claim of matrimonial property whose preserve lies with the Magistrate's court on divorce proceeding and High Court's family division on division of matrimonial property.
 - b. By Section 17 (b) of the *Matrimonial Property Act*, the court has to interrogate the matrimonial status of the parties, and thus, it is not the appropriate forum to deal with the dispute.
 - c. The suit contravenes the provisions of Section 7 (5) and (6) of the *Matrimonial Property Act*.
 - d. The suit contravenes the provisions of Section 6 (2) (5) and (6) of the *Matrimonial Property Act*.



- e. The title deed of the suit property annexed to the notice of motion shows the suit property is registered in the name of Joseph Mwanja Kilukumi who is not a party to these proceedings.
 - f. The plaintiff is not entitled to the suit property and has no legal standing to claim property that belongs to her father-in-law.
 - g. There exists a conflict of interest as counsel for the plaintiff Mr. Mutua Mboya had represented the 1st defendant in HC Succession Cause no. 857 of 1998 on the estate of Joseph Mwanja Kilukumi where land parcel no. LR Mavoko Town Block 2/44 formed part of the estate of the deceased which is in contravention of the Law Society of Kenya Code of Standards of Professional Practice and Ethical Conduct and more particularly Rule 6 paragraphs 95 and 99.
2. Thus, the defendants urged this court to strike out the suit with costs to him. The plaintiff did not file any documents in opposition to the PO and as directed by the court, it was canvassed by written submissions.

Parties' submissions

3. The defendants' law firm on record M/s. A.M. Mbindyo & Co. Advocates filed their written submissions dated 25/07/2024. In them, counsel argued grounds (a), (b), (c) and (d) as a singular ground whilst grounds (e), (f), and (g) were argued together.
4. The plaintiff's law firm on record Ms. Mutua Mboya & Nzisi Advocates filed their written submissions dated 8/10/2024. They only argued grounds (a), (b), (c), and (d) as a singular ground but did not bother to deal with the other grounds.
5. Upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider each of the counsels' arguments on the particular issue and also bear in mind the provisions of the law and judicial precedents that they have both relied upon to buttress their respective arguments.

Issues for determination

6. Accordingly, having carefully considered the grounds of the PO, the plaintiff's and 1st defendant's rival submissions together with authorities relied upon, it is the considered view of this court that the following issues which shall be dealt with consecutively commend themselves for determination: -
 - a. Whether the PO has met the legal threshold.
 - b. What grounds of the PO have met the legal threshold and are they merited?
 - c. What orders should this court issue including an order as to costs?
7. As rightfully submitted by both counsels, the decision of Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd. (1969) EA 696 has long settled the tests that a PO has to meet and, in this decision, the court held thus: -

“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 has to be ascertained or if what is sought is the exercise of judicial discretion.”

8. From this decision, it is deduced that for a PO to succeed, it must meet 3 tests which are, it raises a pure point of law, on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In addition, the PO should be capable of disposing of a suit.
9. Despite both counsels arguing on the PO, neither of them addressed me on whether the grounds had met the legal threshold. It is therefore incumbent upon this court to deal with this issue first, and once it is established that the grounds have met the scrutiny of Mukisa Biscuit (Supra), only then can it consider the 2nd issue.
10. On consideration of the grounds, only grounds (a), (b), (c) and (d), which touch on the jurisdiction of this court, meet the standard of a preliminary objection.
11. This is so because of *the Constitution* of Kenya under Article 162 (2) (b) and Section 13 of the *Environment and Land Court Act* (ELC Act) which give this court the jurisdiction to adjudicate disputes over the environment and the use and occupation of, and title to, land.
12. As has been held in several court decisions, including the Court of Appeal decision of Owners of the Motor Vessel ‘Lilian S’ v Caltex Oil (Kenya) Limited [1989] KLR, which the defendants have relied upon, jurisdiction is everything, and without it, the court cannot move one step further.
13. A question of court jurisdiction is a pure point of law. Thus, it is my finding that some of the grounds of the PO have raised some pure points of law, which, if argued, may dispose of the suit. I find grounds (a), (b), (c) and (d) have met the test of Mukisa (Supra).
14. Nevertheless, that cannot be said of the other grounds. These grounds point to matters of facts that are liable to be contested and call for the adduction of evidence to prove it and for this court has to ascertain them.
15. Thus, I find grounds (e), (f) and (g) do not meet the threshold of Mukisa (Supra). Having failed to meet the threshold, the court will not proceed further on these grounds and they are hereby dismissed.

b. What grounds of the PO have met the legal threshold and are they merited?

16. As held in the Supreme Court of Kenya decision of Samwel Kamau Macharia v Kenya Commercial Bank & 2 Others, Civil Application No. 2 of 2011, the jurisdiction of the court flows from either *the constitution* or legislation or both and a court cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.
17. As earlier stated, the jurisdiction of the ELC is derived from Article 162(2) of *the Constitution* and Section 13 of the ELC Act. We will start with Article 162(2) of *the Constitution* but to contextualize it, it is prudent to look at the entire Article 162 of *the Constitution*. This provision of the law provides as follows; -

- “(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).
- (2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—



- (a) employment and labour relations; 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).
- (4) The subordinate courts are the courts established under Article 169, or by Parliament in accordance with that Article.”

18. Bringing life into Article 162(2) of *the Constitution*, Parliament enacted the ELC Act and delineated the jurisdiction of the ELC court. Section 13 thereof states 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) 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;
 - (f) restitution;
 - (g) declaration; or



(h) costs.”

19. Both counsels agree that these provisions of the law confer this court with jurisdiction. Nonetheless, as regards its applicability to the plaintiff’s case, they hold a contrarian view.
20. The plaintiff’s counsel argues this court has the necessary jurisdiction, whilst the defendants’ counsel contends that some provisions of the Matrimonial Property Act, particularly Sections 6 (2) and 17 and Rules 5 and 6 confer jurisdiction to the High Court.
21. Accordingly, it suffices to say it is necessary to interrogate the provisions of this Matrimonial Property Act.
22. On examination thereof, the relevant provisions that set out the jurisdiction of the court that can deal with disputes under this particular Act and what amounts to matrimonial property and its ownership are Sections 2, 6(1), 7 and 17 and Rule 6 of the Matrimonial Property Rules. Section 17 states: -

- “(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.”

Whereas Rule 6 of the Matrimonial Property Rules provides as follows: -

- “(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.”

23. These provisions of law have been the subject of interpretation in several court decisions. There is a consensus by this court that Section 17 does not confer jurisdiction to a particular court, and this court and the High Court have concurrent jurisdiction over matrimonial property. It would be provident to outline a few of these decisions.

24. In arguing this court lacks jurisdiction, the defendants have relied on the decision of *EMW v RMK* [2022] KEELC 1497 (KLR), where the parties had ongoing divorce proceedings, and one of them had approached the ELC on the claim of the division of matrimonial property. In this case, Kemei J stated: -

“In this case the Plaintiffs claim revolves around division of property that she claims to be matrimonial property. For the Court to determine the case it must inquire as to the marital status of the parties. In this case the parties are still married but separated. The other issue is to determine which of the properties listed are matrimonial or not. Distribution of matrimonial property in an undissolved marriage is best left to the family Court.”

25. In the decision of *Jane Wambui Ngeru v Timothy Mwangi Ngeru* [2015] KEELC 657 (KLR), Nyamweya J (as she then was) when dealing with an ELC dispute over a matrimonial property where a party was seeking declaratory reliefs and permanent injunction held the view the case was properly before her by stating:-

“These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court. In addition the *Land Registration Act* which provides for certain matrimonial property rights and co-ownership of the matrimonial home as between spouses specifically provides under section 101 thereof that this Court has jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act...

No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes...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.”

26. In *RW v JMN* [2022] KEELC 1843 (KLR), Njoroge J stated thus when dealing with a matter that was before the ELC: -

“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.”



27. When faced with an ELC dispute where parties had divorced, Naikuni J declined to exercise jurisdiction and stated as follows: -

“Equally this Court enjoys jurisdiction over matrimonial properties except where it involves matrimonial causes which is in the province of the High Court and the Magistrates’ Court in line with their respective jurisdictions.”

28. In applying the predominant test principle between an unmarried couple who had entered into a prenuptial agreement and a dispute arose over it, Asati J stated: -

“It is indeed true that Court have concurrent jurisdictions in matrimonial property matters as submitted by the applicant. The claim in this matter is predominantly land hence this court has jurisdiction under article 162(2) of *the Constitution* and Section 13 of the *Environment and Land Court Act*. The applicant is suing for recovery of a share of the land due to her pursuant to the pre-nuptial agreement.”

29. From these decisions, 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.

30. I have looked at the Court of Appeal decision of Peter Ndungu Njenga Vs Sophia Watiri Ndungu [2000] Keca 202 (Klr) that has been relied upon by the defendants and I note it was rendered long before the enactment of the *Matrimonial Property Act* and thus, inconsequential to the circumstances of this case.

31. From the plaint, it appears the plaintiff and 1st 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.

33. 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.

34. This court is aware that the plaintiff has filed a notice of motion dated 8/07/2024 seeking temporary injunctive relief. But before I deal with this motion, in my humble view, this is an appropriate matter that should be referred to court-annexed mediation. In the meantime, there is a need to preserve the suit property.

35. In the end, I hereby issue the following disposal orders: -

- a. Grounds (e), (f) and (g) of the PO dated 15/07/2024 are hereby dismissed.
- b. This matter is hereby referred to court-annexed mediation.
- c. Pending hearing and determination of the notice of motion dated 8/07/2024 and/or settlement of the dispute, an order of status quo that is currently prevailing on the registration



status of land reference no. Mavoko Town Block 2/44 or the registration status of subdivisions thereof (if any) be maintained.

- d. Pending hearing and determination of the notice of motion dated 8/07/2024 or settlement of the dispute, an order of status quo that is currently prevailing on the occupation and or usage of land reference no. Mavoko Town Block 2/44 or the subdivisions thereof (if any) be maintained.
- e. Matter to be mentioned before this court on 3rd June, 2025.

Orders accordingly.

DATED AT MACHAKOS THIS 4TH DAY OF MARCH, 2025

HON A. Y. KOROSS

JUDGE

04.03.2025

DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

In the presence of;

Mr. Mbindyo for defendant

Mr. Muriithi holding brief for Mr. Nzavu for plaintiff/applicant

Ms Kanja- Court Assistant

