



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 110 of 2019 (OS)**

**GLADYS MUTHONI KIBUI.....PLAINTIFF**

**VERSUS**

**GEOFFREY NGATIA.....DEFENDANT/OBJECTOR**

**RULING**

The matter for determination is the **Notice of Preliminary Objection** dated **20<sup>th</sup> September 2019**, filed by the Defendant/Objector on the grounds that;

- 1) This Honorable Court lacks jurisdiction to entertain this matter.**
- 2) The matter is premature as it seeks division of matrimonial property in contravention of Section 7 of the Matrimonial Property Act the parties have not yet divorced.**
- 3) This honorable Court lacks geographical jurisdiction to determine this suit.**
- 4) In the view of the foregoing, the application is incompetent, misconceived and bad in law and ought to be dismissed with costs.**

The Court directed the parties to file written submissions and in compliance with the said directives, the Defendant/Objector through the **Law Firm of SALUNY ADVOCATES LLP**, filed the written submissions on **14<sup>th</sup> October 2020**, while the Plaintiff filed her written submissions on **1<sup>st</sup> December 2020**, through the Law Firm of **SB OTIENO & CO ADVOCATES** and relied on various decided cases and provisions of law to which the Court has now carefully read and considered.

A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

***“So far as I am aware, 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”.***

Further Sir **Charles Nebbold, JA** stated that:-

***“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. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.***

This Court having made a finding on the description of a **Preliminary Objection**, it is not in doubt that a **Preliminary Objection** raises pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct. However it cannot be raised if any facts has to be ascertained from elsewhere or the Court is called upon to exercise judicial discretion.

In the case of **Quick Enterprises Ltd..Vs..Kenya Railways Corporation, Kisumu HCCC No. 22 of 1999**, the Court held that:-

***“When preliminary points are raised, they should be capable of disposing the matter preliminarily without the Court having to result to ascertaining the facts from elsewhere apart from looking at the pleadings.”***

Further a **Preliminary Objection** must stem from the pleadings and raises pure point of law. See the case of *Avtar Singh Bhamra & Another...Vs....Oriental Commercial Bank, Kisumu HCCC No.53 of 2004*, where the Court held that:-

***“A Preliminary Objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”***

Before the Court embarks on determining the merit of this **Notice of Preliminary Objection**, it has to first determine whether what has been raised herein satisfy the ingredients of a **Preliminary Objection**. As the Court determines whether what the Defendant/Objector has filed amounts to a Preliminary Objection or not, it will be persuaded by the findings in the case of *Oraro...Vs...Mbaja (2005) 1KLR 141*, where the Court held that:-

***“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.***

**Whether the Court has jurisdiction to determine the dispute:**

The Plaintiff’s case as framed is for the severance of a joint ownership in respect to **KIKUYU/KIKUYU BLOCK 1/70**. Under **Article 162(2)(b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act, 2011**, this Court has jurisdiction to determine all disputes relating to the environment and the use and occupation of, and title to land. **Section 13(1)** and **(2)** of the **Environment and Land Act** provides as follows:

***“13. Jurisdiction of the Court***

***(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, chose in action or other instruments granting any enforceable interests in land; and***

***(e) any other dispute relating to environment and land.”***

There is no doubt from the foregoing that this Court has jurisdiction to determine the dispute before it which revolves around title to land. On whether the Court can determine a dispute over matrimonial property, so long as the dispute is over the use, occupation or title to land, this Court has jurisdiction to determine it whether such land is classified as matrimonial property or not.

In *Jane Wambui Ngeru v Timothy Mwangi Ngeru (2015)eKLR* the Court stated as follows:

***“In addition if rights to matrimonial property are in dispute, Section 17 of the Matrimonial Property Act of 2013 provides as follows:***

***(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.***

***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.”*

In *B W M VS J M C, Murang'a*

The Court notes that the above case demonstrates that a declaration under Section 17 of the repealed Act is not pegged on the subsistence of a marriage. The effect of this Section is such that the Court can make a declaration with regard to the suit property known as **KIKUYU/KIKUYU BLOCK 1/70**, in this case even though the parties are still married. It does not however provide for the sharing of such property.

The upshot of the foregoing is that since the marriage of the Plaintiff and Defendant has broken down, the Court has powers to issue declaration under **Section 17** of the **Matrimonial Property Act** but **CANNOT SEVERE** the same as prayed by the Plaintiff on **prayer item 1 and 3** of the O.S which states;

**1. Joint ownership in respect of KIKUYU/KIKUYU BLOCK 1/70 be severed to a tenancy in common.**

**3. An order do issue declaring that the Plaintiff is entitled to 90% of the 0.0788HA of the suit property.**

From the above analysis the Court finds and holds that these proceedings were instituted prematurely with a view to distribute the matrimonial property as prayed. The Court holds that the only remedy is that the Plaintiff may seek an appropriate relief in the Family Division Court. Division of Matrimonial Property can only be done after dissolution of marriage. This Court has no Jurisdiction to deal with dissolution of marriages.

For the above reasons, the Court finds that the **Notice of Preliminary Objection** dated **20<sup>th</sup> September 2019**, by the Defendant is merited and the same is upheld.

The Plaintiff should file this suit in the relevant Court with requisite Jurisdiction.

Since the Preliminary objection is upheld, the Court strikes out the suit herein entirely and directs the Plaintiff to file the suit in the right Court.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 22<sup>ND</sup> DAY OF APRIL 2021.**

**L. GACHERU**

**JUDGE**

**22/4/2021**

**Court Assistant - Phyllis**

**ORDER**

In view of the declaration of measures restricting Court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Otieno for the Plaintiff**

**M/s Cuna for the Defendant/Objector**

**L. GACHERU**

**JUDGE**

**22/4/2021**