



REPUBLIC OF KENYA



**EVK v SK (Environment and Land Case Civil Suit E030B of 2022)
[2023] KEELC 17302 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17302 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND CASE CIVIL SUIT E030B OF 2022**

TW MURIGI, J

MAY 3, 2023

BETWEEN

EVK PLAINTIFF

AND

SK DEFENDANT

RULING

1. The Plaintiff instituted this suit vide an Originating Summons dated 20th September, 2022 and sought the following orders:-
 1. A declaration be issued that properties known as Title No. Makueni/Nguu Ranch xxxx, Makueni/Nguu Ranch/xxxx, Plot No. xxxx Emali Township and Plot No. xxxx Emali Township were acquired by joint funds and efforts of the Plaintiff and the Defendant during their marriage and registered in the sole names of the Defendant or otherwise so not registered but held are owned jointly by the Plaintiff and the Defendant as matrimonial property.
 2. All monies, rent, revenue or proceeds realized and/or collected from Plot No. xxxx Emali Township and Plot No. xxxx Emali Township and proceeds of sales of farm produce from Title No xxxx. Nguu Ranch Settlement Scheme constitute matrimonial property between the Plaintiff and the Defendant.
 3. The Defendant be directed to provide a true account of the rental income solely collected from the suit premises to the exclusion of the Plaintiff.
2. The Originating Summons is supported by the affidavit of the Applicant sworn on even date. Alongside the Originating Summons, the Applicant filed a Notice of Motion of even date seeking the following orders:-
 1. Spent.



2. That pending the inter parties hearing of this application, a temporary injunction be issued restraining the Respondent either by himself, his servants/and/or agents from selling, disposing off, or in any manner whatsoever evicting or denying entry to the Plaintiff to the suit premises, to wit Title No. Makueni/Nguu Ranch/xxxx, Makueni/Nguu Ranch/xxxx, Plot No. xxxx Emali Township and Plot No. xxxx Emali Township.
 3. That a temporary injunction be issued restraining the Respondent either by himself, his servants and/or agents from selling, disposing off, or in any manner whatsoever evicting or denying entry to the Plaintiff to the suit premises, to wit Title No. Makueni/Nguu Ranch/xxxx, Makueni/Nguu Ranch/xxxx, Plot No. xxxx Emali Township and Plot No. xxxx Emali Township pending the hearing and determination of the Originating Summons.
 4. That pending the hearing and determination of the Originating Summons, an interim order be issued permitting the Plaintiff to exclusively take effective possession, control and use Title No. Makueni/Nguu Ranch xxxx and Title No. xxxx Emali Township and the Defendant to take effective possession, control and use Title No. Makueni/Nguu Ranch/xxxx and Title No. xxxx Emali Township.
 5. That the Officer Commanding Emali Police Station be ordered to implement the order restraining the Defendant and his agents, assigns or servants from threatening with eviction, harassing, or in any manner whatsoever evicting the Plaintiff from the suit premises pending the determination of the Originating Summons.
 6. That cost of this application be in the cause.
3. In response to the Originating Summons and the application, the Defendant filed a Notice of Preliminary Objection dated 1st November, 2022 on the following grounds:-
1. The Honourable Court lacks jurisdiction to entertain the suit and the application dated 26th September, 2022 since the dispute revolves around alleged matrimonial property and the jurisdiction to deal with such is a reserve of the High Court.
 2. That the jurisdiction of this Court is limited to the provisions of Article 162(2) of the Constitution and Section 13(2) of the ELC Act No. 19 of 2021 and does not extend to the provisions of the Matrimonial Property Act No. 49 of 2013.
 3. The main suit and the application should be dismissed with costs.
 4. The parties were directed to canvass the Preliminary Objection by way of written submissions.

The Respondent's Submissions

5. The Respondent's submissions were filed on 11th November, 2022.
6. Counsel for the Respondent submitted that jurisdiction is everything and the Court must therefore establish whether it has jurisdiction to determine the Applicant's claim.
7. Counsel further submitted that the jurisdiction of the Environment and Land Court is limited by Article 162(2) and (3) of the Constitution and Section 13(2) of the Environment and Land Court Act No 19 of 2021. Counsel contended that by filing the present suit, the Applicant is inviting the Court to proceed in a jurisdiction which is a reserve of the family Court. Counsel urged the Court to down its tools as it has no jurisdiction to determine a claim involving division of matrimonial property.



The Applicant's Submissions

8. The Applicant's submissions were filed on 8th December, 2022.
9. Counsel for the Applicant raised the following issues for the Court's determination:-
 - i. Whether the purported Notice of Preliminary Objection raises a pure point of law as espoused in the locus classicus of *Mukisa Biscuits Manufacturing Co. Ltd vs West End Distributors Ltd 1969 EA 696*.
 - ii. Whether the Environment and Land Court sitting at Makueni has jurisdiction to determine this dispute on marriage and distribution of matrimonial home and immovable property.
10. On whether the preliminary objection raises a pure point of law, Counsel submitted that the Plaintiff contributed towards the development of the matrimonial property registered in the name of the Defendant which the Defendant has denied.
11. Counsel argued that the preliminary objection raises contentious matters of fact which can only be determined by hearing the suit on merit.
12. On jurisdiction, Counsel submitted that the Court has jurisdiction to hear and determine the suit as the Plaintiff's interest in the matrimonial property is a claim of ownership of the suit properties which falls under the jurisdiction of this Court. Counsel submitted that whereas the Court has no jurisdiction to determine a dispute involving division of matrimonial property, it has jurisdiction to protect immovable property that constitutes matrimonial property from wastage by a selfish spouse.
13. It was further submitted that the dispute herein does not revolve around division of the matrimonial property as the marriage between the parties has not been dissolved. Counsel contended that the Plaintiff is seeking a declaration that she is entitled to the property registered in the name of the Defendant. To buttress his submissions, Counsel placed reliance on Section 13(7) of the [*Environment and Land Court Act*](#).

Analysis and Determination

14. The law on Preliminary Objection is well settled. A Preliminary Objection must be on a pure point of law.
15. In *Mukisa Biscuits Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated;

“So far as I'm aware, a preliminary objection consists of point of law which have 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 submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
16. Further on Sir Charles Newbold JA stated;

“The first matter relates to the increasing practice of raising points which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a 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 nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop.”

17. In *Oraro v Mbaja* [2005] eKLR Ojwang J (as he then was) described it as follows;

“I think the principle is abundantly clear. “A Preliminary Objection” correctly understood is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the process of evidence. An assertion which claims to be a Preliminary Objection and yet it hears 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.”

18. The Court of Appeal in *Nitin Properties Ltd v Singh Kalsi & Another* [1995] eKLR also captured the legal principle when it stated as follows;

“A preliminary objection 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.”

19. The preliminary objection if allowed may dispose off the entire suit without giving the parties an opportunity to be heard. Having considered the objection raised by the Respondent, the Court finds that the issue of jurisdiction can dispose of the matter preliminarily without having to ascertain the facts. The preliminary objection raised by the Respondent fits the description of a preliminary objection stated in the *Mukisa Biscuits* case supra.

20. Having considered the preliminary objection and the rival submissions, the issue that arises for determination is whether this Court has jurisdiction to hear and determine this suit.

21. The question of jurisdiction was discussed in the celebrated case of *Owners of the Motor Vessel “Lillian S” Vs Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Justice Nyarangi of the Court of Appeal 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.”

22. Similarly, the Supreme Court in *Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Ltd & 2 Others* (2012) eKLR held that:-

“...the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the court cannot entertain any proceedings.”

23. The jurisdiction of this Court is conferred by Article 162(2) of *the Constitution* and Section 13(2) of the *Environment and Land Court Act*.



24. Article 162(2) of *the Constitution* provides as follows:-

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.

25. Section 13(2) of the *Environment and Land Court Act* provides as follows:-

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, valuation, minning, 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 interest in land and;
- e. Any other dispute relating to environment and land.

26. It is trite law that the Court must determine whether it has jurisdiction to hear and determine the matter before it. The Applicant averred that the suit properties are registered in the name of the Defendant. In this regard she annexed a copy of the title deed for land parcel No. Makueni/Nguu/xxxx to her supporting affidavit. The Applicant further averred that she had contributed towards the acquisition and development of the suit properties.

27. The Defendant on the other hand argued that the instant suit falls under the realm of the *Matrimonial Property Act* as it relates to the division of matrimonial property. Matrimonial property is defined in the *Matrimonial Property Act* as follows:-

28. For the purpose of this Act matrimonial property means;

- a. The matrimonial home or homes;
- b. Household goods and effects in the matrimonial home or homes;
- c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

29. The Plaintiff is challenging the Defendant's title to the suit properties. The Defendant did not admit the Plaintiff's allegations. The substratum of the suit is the ownership of the suit properties which the Plaintiff alleges to have contributed towards the acquisition thereof. The document of title clearly indicates that the Defendant is the registered owner of the suit property. This Court finds and holds that the dispute between the parties herein relates to the ownership of the suit properties.

30. Concurrent jurisdiction is given to the Court to hear disputes relating to matrimonial property rights as the Matrimonial Act does not define the Court that disputes relating to matrimonial property should be referred for determination. This Court finds and holds that the issue of ownership goes into the issue of title.



31. Having found that the dispute in the present suit relates to the ownership of the suit properties, this Court finds and holds that it has the jurisdiction to hear and determine the suit. In light of the foregoing, I find that the preliminary objection is devoid of merit and the same is hereby dismissed with costs to the Applicant.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 3RD DAY OF MAY, 2023.

In the presence of: -

Court Assistant – Mr. Kwemboi

Loki for the Respondent.

