



REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT

AT KITALE

LAND CASE NO. 110 OF 2018

SUSAN TAPEN KENYA.....PLAINTIFF

VERSUS

CLEMENT ACHACHL.....DEFENDANT

RULING

1. The application dated 22/2/2021 and filed in court on 23/2/2021 has been bought under **Section 13 of the Environment and Land Act (Act No. 19 of 2011)** as read together with **Article 162 of the Constitution, Section 6 & 17 of the Matrimonial Property Act (Act No. 49 of 2013)** and **Order 40 Rule 6 of the Civil Procedure Rules**. The applicant/defendant seeks the following orders:-

a. ...spent

b. That the interlocutory injunction issued by this honourable court on 14/12/2018 and subsequently confirmed on 28/3/2019 be discharged and the orders granting it vacated.

c. That this honourable court do find that it lacks jurisdiction to entertain this suit as the suit property herein is matrimonial property and the plaintiff's claim is based on the Matrimonial Property Act.

d. That this suit be struck out for having willfully and knowingly been filed in the Environment and Land Court when the plaintiff's claim is governed by the Matrimonial Property Act.

e. That upon the suit being struck out, the plaintiff be condemned to pay the costs of this application as well as those of the suit itself.

2. The application is supported by the affidavit sworn on 24/2/2021 by counsel for the applicants.

3. The applicant further filed a notice of preliminary objection raising the same issues brought out in paragraphs (c) and (d) of the application dated 22/2/2021.

4. The Respondent filed a replying affidavit dated 17/3/2021 on 19/3/2021.

5. The court ordered that the application shall be disposed of by way of written submissions. The applicant filed his submissions on 23/3/2021 and the respondent filed hers on 19/3/2021.

6. I have perused the application the preliminary objection and the replying affidavit as well as the submissions of both parties. The main issue that arises for determination in the present application is whether this court has jurisdiction to hear and determine the instant suit.

7. The applicant is of the view that it does not possess such jurisdiction for the reason that the suit is matrimonial property and the plaintiff's claim is based on the **Matrimonial Property Act**. He states that prayer (a) of the plaint seeks a declaration that the suit land and all the developments thereon are matrimonial property vesting in both the plaintiff and the defendant.

8. No authority was cited by the applicant's counsel but he curiously attached the entire **Matrimonial Property Act No 49 of 2013** to the supporting affidavit but owing to what I will state hereinafter this court wistfully thinks the proper Act to exhibit should have been the **Environment and Land Court Act**.

9. The jurisdiction of the environment and land court is granted by **article 162(2)(b)** of the **Constitution Of Kenya 2010** which states as follows:

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

**(a) .....**

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

10. **Article 162(3)** provides as follows:

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

11. Further the statute enacted to bring flesh to **article 162(2) (b)** and partly to **Article 162(3)** set out above is the **Environment And Land Court Act no**

12. **Section 13** of that Act states as follows:

**13.(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) (Deleted by 12 of 2012, Sch.).**

**(6) (Deleted by 12 of 2012, Sch.).**

**(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;**

**(f) compensation;**

**(g) specific performance;**

**(g) restitution;**

**(h) declaration; or**

**(i) costs.**

13. The plaintiff's counsel urged that the subject property was bought jointly and that the defendant holds it in trust; he cited **section 28(b)** of the **Land Registration Act** and averred that it recognizes trust for the wife and the children. He stated that from the pleadings it is not disputed that the parties are wife and husband. He cited the appeal decision in **Mugo Muiru Investments Limited Vs E.W.B & 2 Others 2017 eKLR [NBI Civil Appeal No 262 Of 2004]** where the Court Of Appeal stated as follows:

**“50. The appellant did not regard the issue of trust imposed on the chargor, S B, and its effect on the sale and transfer by HFCK as significant. As stated above, even though the matrimonial property was registered in the name of S B alone, he held the title and legal estate in trust for both himself and Elizabeth jointly. This proposition is buttressed by the decision in Gissing v. Gissing [1970] 2 All E.R. 780, [1971] AC 886. See also Falconer v. Falconer [1970] 3 All E R 449, [1970] 1 WLR 1333; and Hazell v. Hazell [1972] 1 All ER 923; [1972] 1 WLR 301. Lord Diplock in Gissing v. Gissing (supra) at pg 906 in [1971] AC 886 held that –**

**“in nearly all these cases, the inexorable inference is that the husband is to hold the legal estate in the house in trust for them both, for both to live in for the foreseeable future. The couple does not have in mind a sale, nor division of proceeds of sale, except in the far distance.”**

14. In case of **BWM VS JMC 2018 eKLR** the defendant argued that the plaintiff's prayer for a declaration that the suit land is matrimonial property is governed by the **Matrimonial Property Act Cap 49 Of 2013** and that if the court is to determine if the property was matrimonial or not the court would have to determine if the plaintiff and the defendant were spouses as defined in **Section 2** of that Act. The defendant had denied that the property was matrimonial. The parties in that case were, according to the plaintiff therein married under the African Christian marriage.

15. The court in the **BWM VS JMC 2018 eKLR** case, noting that the **Matrimonial Property Act** does not define the court that disputes relating to matrimonial property should be referred to and while dismissing the defendant's objection, stated as follows:

**“Much as the plaintiff purports to seek a declaration ...that the suit land be declared a matrimonial property, the substratum of the dispute at hand is the ownership of the suit land.”**

16. This suit and **BWM VS JMC 2018 eKLR** bear much similarity in terms of the marital relationship and the nature of orders sought.

17. As seen from the provisions of **Section 13** of the **Environment and Land Court Act** the jurisdiction of this court is very broad; as long as a claim relates to environment, title and use and occupation of land, the court verily has jurisdiction over such a matter.

18. In the present case the plaintiff also seeks a declaration that the suit land is matrimonial property. Such a prayer raises the issue of use and occupation of the land. The order sought that the defendant do transfer the land and developments thereon to her necessarily raises the issue of title to the land.

19. I find that there would be no ground upon which to hold that this court has no jurisdiction to hear and determine the present suit. Contrary to the defendant's assertion, this court has jurisdiction and the suit should be processed towards a hearing on its merits. Consequently the application dated **22/2/2021** and the preliminary objection dated **23/2/2021** are both hereby dismissed with costs to the plaintiff. The suit shall be mentioned on the **29<sup>th</sup> April 2021** for the issuance of a hearing date.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 21<sup>ST</sup> DAY OF APRIL, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**