



**RMW v ENN (Environment & Land Case E48 of 2020)
[2022] KEELC 3143 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E48 OF 2020**

JO MBOYA, J

JUNE 2, 2022

BETWEEN

RMW PLAINTIFF

AND

ENN DEFENDANT

RULING

Introduction

1. Vide notice of motion application dated January 28, 2022, the defendant/applicant approached the court seeking the following Orders:
 - a. That this application is premature, misconceived and ill-advised as it offends section 7 of the *Matrimonial Property Act*, 2013.
 - b. That the Honourable court lacks jurisdiction to entertain this suit.
 - c. That this suit be, and is hereby struck out and/or dismissed for want of jurisdiction;
 - d. In the alternative, this suit be and is hereby transferred to the High Court of Kenya at Nairobi, Family Division, for hearing and determination.
 - e. That the applicant be granted costs of this application and of the Suit.
2. The subject application is premised on the grounds contained in the body thereof and same is further supported by the affidavit of one, namely, ENN, who is the defendant/applicant therein. For clarity, the defendant/applicant emphasises the need to have the subject suit struck out for want and/or lack of jurisdiction.



3. Upon being served with the subject application, the plaintiff/respondent proceeded to and filed a replying affidavit sworn on the February 7, 2022, as well as Grounds of Opposition dated the February 7, 2022.

Deposition By the Parties:

Defendant's/applicant's Case:

4. Vide supporting affidavit sworn on the January 20, 2022, the deponent thereof, namely, the applicant has averred that the plaintiff/respondent and herself got married in the year 2013 and thereafter same cohabited as husband and Wife up to and including the year 2019, when same were separated, albeit without a formal dissolution of the marriage.
5. The deponent has further averred that the fact of the existence of Marriage has been variously alluded to in her statement of defense dated the November 6, 2020 and which statement of defense has not been denied and/or controverted vide any reply to statement of defense. In this regard, the deponent contends that the facts belying the marriage have therefore been impliedly admitted.
6. Further, the deponent has averred that the fact of the marriage between the plaintiff/respondent and herself is similarly documented vide various affidavits, which were sworn by both the plaintiff/respondent and herself. To this end, the deponent has alluded to the joint affidavits which have been availed to court by the plaintiff/respondent herein and which are contained at pages 44 and 81 of the plaintiff's own bundle.
7. Other than the joint affidavits, the applicant has also alluded to the plaintiff's/respondent's own affidavit sworn on the December 20, 2013, wherein the plaintiff/respondent confirmed under Oath that same is married to the applicant herein. for clarity, the plaintiff's/respondent's affidavit under reference is part of the applicant's bundle of documents.
8. Other than the foregoing, the applicant has also averred that during the subsistence of the marriage, the plaintiff/respondent and herself were required to and executed various charged documents, whereby the parties were required to execute spousal consent, to facilitate the charge over and in respect of the suit properties.
9. Owing to the execution of the spousal consent, the deponent has averred that either of them was granting authority to have the suit properties charged to and in favor of Housing Finance Company of Kenya and Standard Chartered Bank Limited, respectively.
10. Based on the foregoing, the deponent has therefore averred that there existed marital relationship between the plaintiff/respondent and herself and hence the issue of marriage is central to the determination of the subject dispute.
11. On the other hand, the deponent has also averred that the suit properties, which the plaintiff/respondent seeks to be declared as the owners thereof, were indeed acquired during the subsistence of the marriage and therefore same are matrimonial Properties.
12. Consequently, it is the deponent's position that the dispute beforehand concerns ascertainment of the extent of contribution between the applicant and the respondent towards the acquisition of the matrimonial properties and distribution of the said properties between the two parties.
13. In a nutshell, the deponent has therefore contested the Jurisdiction of this court to entertain and/or adjudicate upon the subject suit.



Response by the Plaintiff/respondent:

14. Vide replying affidavit sworn on the February 7, 2022, the plaintiff/respondent has averred that the applicant and himself never entered into and/or contracted any marriage at all.
15. Further, the respondent has averred that if there was any marriage between the applicant and himself then the applicant herein has not adduced and/or provided evidence of such marriage in accordance with the Marriage Act, 2014.
16. On the other hand, the respondent has further averred that contrary to the averments by the applicant, the name of the applicant was only included in the suit properties as a co-owner, on account of being a co-investor and not on the basis of any marriage.
17. Premised on the foregoing, the respondent has further averred that the suit properties are not matrimonial properties and in this regard, the dispute concerns the issues of title and not distribution of matrimonial properties.
18. Suffice it to note, that the plaintiff/respondent has also filed grounds of opposition, but which grounds of opposition are a complete replica of the replying affidavit, whose terms have been outlined herein before.

Submissions By the Parties:

19. The subject application came up for hearing on the May 4, 2022, when the parties herein agreed to canvass and/or dispose of same by way of written submissions.
20. Pursuant to the foregoing, the court proceeded to and issued directions on the filing and exchange of the submissions. In this regard, the defendant/applicant proceeded to and filed extensive Written submissions on the March 15, 2022 and supplementary submissions on the April 20, 2022.
21. On the other hand, the plaintiff/respondent filed his submissions on the March 24, 2022.
22. Briefly, it is the applicant's submissions that the plaintiff/respondent and the applicant herein contracted and/or entered into a marital relationship and were thus husband and wife, respectively w.e.f 2013.
23. Besides, the applicant has also submitted that following the marriage, the plaintiff/respondent and herself cohabited together and the cohabitation subsisted until the year 2019 when same terminated, albeit without any formal dissolution of the marriage.
24. Owing to the foregoing, the applicant has thus submitted that the determination of whether or not there existed marriage between the plaintiff/respondent and herself, would be crucial and/or critical in the determination of the subject dispute.
25. Secondly, the applicant has further submitted that the suit properties, which the plaintiff/respondent claims to be the owner thereof, were acquired and/or purchased during the subsistence of the marriage. in this regard, the applicant therefore contends that the suit properties are thus Matrimonial properties and can only be dealt with in accordance with the Matrimonial Property Act 2013.
26. In any event, the applicant has further submitted that the determination of whether or not the suit properties are matrimonial properties, will also be imperative before the court can venture to make a final determination on the issues raised by the plaintiff/respondent.



27. In support of the foregoing submissions, the applicant has relied on various decisions inter-alia, *F.R v G.L* (2020) eKLR, *UF v L.C.N* (2019) eKLR and *A. C. S v ECK & another* (2020) eKLR, respectively.
28. On his part, the plaintiff/respondent has submitted that the applicant and himself were not legally married or at all. In this regard, the respondent has relied on various sections, namely, sections 6, 12, 44, 59 and 92 of the *Marriage Act*, 2014, to buttress the submissions that without the alleged Marriage having been registered, then such a claim is a nullity in law.
29. Secondly, the respondent has further submitted that the concept of cohabitation and presumption of marriage, have been rendered irrelevant and redundant by dint of the provisions of the *Marriage Act*, 2014.
30. In the premises, it is the respondent's submissions that to the extent that no evidence of marriage as required under the law has been availed and/or placed before the court, then the issue of marriage is not available for determination.
31. On the other hand, the respondent has also submitted that the applicant herein has also not tendered and/or adduced any evidence to show that the suit properties were acquired during the subsistence of the marriage.
32. Thirdly, the respondent has further submitted that in the absence of proof that the suit properties are matrimonial properties, the provisions of section 7 of the *Matrimonial Property Act*, 2013, does not apply in respect of the subject matter.
33. Essentially, the plaintiff/respondent has contended that this court is thus seized of jurisdiction to entertain and adjudicate upon the subject matter.

Issues for Determination:

34. Having reviewed the notice of motion application dated the January 20, 2022, the supporting affidavit and the replying affidavit and having similarly considered the written submissions filed by the parties, the following issues arise and are thus germane for determination;
 - a. Whether this court is seized of Jurisdiction to entertain and/or adjudicate upon the subject dispute.
 - b. What orders are appropriate and/or just in respect of the subject matter.

Analysis and Determination:

Issue Number 1: Whether this Court is seized of Jurisdiction to entertain and/or adjudicate upon the subject dispute.

35. It is trite and established that jurisdiction is a threshold question and/or issue and therefore where jurisdiction of the court is questioned, it behooves the court to entertain and adjudicate upon the issue before venturing to address the matter in dispute any further.
36. For coherence, place and importance of jurisdiction of the court, has been dealt with and addressed in various decisions of the Court of Appeal, as well as the Supreme Court of Kenya.
37. In this regard, it is imperative to take cognizance of the holding in the case of *Republic v Karisa Chengo & 2 others* [2017] eKLR, where the Supreme Court observed as hereunder;



- (35) In the above regard, we note that in almost all the legal systems of the world, the term “jurisdiction” has emerged as a critical concept in litigation. Halsbury’s Laws of England (4th Ed.) Vol. 9 at page 350 thus defines “jurisdiction” as “...the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for decision.” John Beecroft Saunders in his treatise Words and Phrases Legally Defined Vol. 3, at page 113 reiterates the latter definition of the term ‘jurisdiction’ as follows:

“By jurisdiction is meant the authority which a Court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. 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”.

From these definitions, it is clear that the term “jurisdiction”, as further defined by [*The Black’s Law Dictionary*](#), 9th Edition, is the court’s power to entertain, hear and determine a dispute before it.

38. Other than the foregoing decision by the Supreme Court, the Court of Appeal also had an occasion to deal with and/or address the question on jurisdiction vide the decision in the case [*Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service*](#) [2019] eKLR, where the Court at paragraph 2 held as hereunder;
2. In common English parlance, ‘Jurisdiction’ denotes the authority or power to hear and determine judicial disputes, or to even take cognizance of the same. This definition clearly shows that before a court can be seized of a matter, it must satisfy itself that it has authority to hear it and make a determination. If a court therefore proceeds to hear a dispute without jurisdiction, then the result will be a nullity ab initio and any determination made by such court will be amenable to being set aside ex debito justitiae.
39. From the foregoing decisions, it is evident and/or apparent that a court of law must critically interrogate and appreciate the extent of its jurisdiction before venturing to entertain and adjudicate upon a subject dispute.
40. Consequently, it is therefore important to note that where a court is not seized of jurisdiction, there is no basis for postponement of a pronouncement on issue of jurisdiction. In any event, even if the court were to make any stride and/or determination in a matter albeit without jurisdiction, such determination would ipso facto be a nullity.
41. Having taken cognizance of the foregoing, it is now appropriate to venture into and discern whether the issues raised vide the subject dispute fall within the statutory jurisdiction of this court.
42. Suffice it to note that the plaintiff/respondent has conceded that the suit properties are registered in the Joint names of himself and the defendant/applicant. However, the plaintiff/respondent has gone ahead to contend that the registration of the properties in the Joint names of himself and the applicant, was informed merely because the applicant was a co-investor and not otherwise.



43. On the other hand, the plaintiff/respondent has further averred that the inclusion of the name of the defendant/applicant as a Joint owner of the suit properties, was inspired by an intention to marry the applicant, but which intention did not materialize.
44. Nevertheless, despite the foregoing contention by and/or on behalf of the plaintiff/respondent, it is important to take note of the following documents, which the Plaintiff/Respondent himself has availed as part of his bundle of documents. For clarity, the documents are;
- i. Joint affidavit sworn by the plaintiff/respondent and the defendant/applicant on the 9th January 2018, page 44 of the plaintiff's/respondent's bundle.
 - ii. Defendant's/applicant's affidavit, though sworn but undated, page 81 of the plaintiff's/respondent's bundle.
 - iii. Plaintiff's/respondent's affidavit, though sworn but undated, page 81 of the plaintiff's/respondent's bundle.
 - iv. Spousal consent duly executed by the defendant/applicant authorizing charge of property in favor of Standard Chartered Bank Ltd, page 148 of the plaintiff's/respondent's bundle.
45. Other than the foregoing documents which have been attached to the plaintiff's/respondent's bundle, there is also the affidavit of the plaintiff/respondent sworn on the December 20, 2013, contained at pages 27 and 28 of the defendant's/applicant's bundle.
46. It is worthy to note that from the documents which I have singled out and alluded to in the preceding paragraphs, the plaintiff/respondent herein declared under oath that same was lawfully married to the defendant/applicant.
47. At any rate, in the course of the charging of the suit properties, which were jointly registered in the names of the plaintiff/respondent and the defendant/applicants respectively, the plaintiff/respondent also procured the signature of the defendant herein as a spouse authorizing the charge of the suit properties.
48. In the premises, even though the plaintiff has now denied the existence of a marriage between himself and the defendant/applicant and has heavily relied on the provisions of the Marriage Act, 2014, one critical issue that would need to be addressed and/or resolved by the concerned court in respect of the subject matter, would be the issue of whether or not the plaintiff and the defendant were lawfully married and/or otherwise.
49. In my humble view, the issue as to whether there existed a legal marriage between the plaintiff/respondent and the defendant/applicant, is a matter that falls within the jurisdiction of the magistrate's court vide the provision of the Magistrate's Act 2015.
50. Alternatively, the determination of the issue pertaining to the existence of a legal marriage between the plaintiff/respondent and the defendant/applicant also falls within the jurisdiction of the family division of the High Court.
51. Simply put, the issue as to whether or not the plaintiff/respondent and the defendant/applicant were lawfully married, which is critical for the determination of the subject dispute, does not fall within the statutory mandate of this court.



52. Secondly, there is also the issue as to whether the suit properties were acquired during the subsistence of the marriage between the plaintiff/respondent and the defendant/applicant herein and if so, whether the suit properties are matrimonial properties in line with the provisions of *Matrimonial Property Act*, 2013.
53. Without venturing to address the issue, it is worthy to note that the suit properties are registered in the Joint names of the plaintiff/respondent and the defendant. Consequently, the suit properties are jointly owned.
54. On the other hand, it is also worthy to take cognizance that the registration of the suit properties in the joint names occurred and/or took place during the existing Legal regime pertaining to land registration and essentially the *Land Registration Act*, 2012 (2016).
55. Suffice it to note that under the *Land Registration Act*, 2012 and in particular, sections 91 and 93, respectively, there is a general presumption that a property that is registered in the joint names of two or more parties without specification of the nature of their interests shall be presumed to be tenants in common in equal shares.
56. For convenience, it is imperative to reproduce the said sections. Consequently, same are reproduced as hereunder;

“91. Meaning and incidents of co-tenancies

- (1) In this Act, co-tenancy means the ownership of land by two or more persons and includes joint tenancy or tenancy in common.
- (2) Except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal shares.
- (3) An instrument made in favour of two or more persons and the registration giving effect to it shall show—
 - (a) whether those persons are joint tenants or tenants in common; and
 - (b) the share of each tenant, if they are tenants in common.
- (4) If land is occupied jointly, no tenant is entitled to any separate share in the land and, consequently—
 - (a) dispositions may be made only by all the joint tenants;
 - (b) on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; and
 - (c) each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.



93. Co-ownership and other relationships between spouses:

Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the [Matrimonial Property Act](#).

57. Based on the foregoing provisions, it is apparent yet again that there are incidences that show that the suit properties may constitute matrimonial properties. In this regard, the interrogation as to whether or not same are indeed matrimonial must be dealt with under the [Matrimonial Property Act](#), 2013.
58. In my considered view, the twin issues of whether or not there exists a marriage between the parties and whether the suit properties are matrimonial properties, are issues that fall outside the jurisdiction of this court.
59. It is important to note that the jurisdiction of a court is statutorily circumscribed and/or provided for. Consequently, a court must adhere to and/or comply with the jurisdictional limitations imposed either by the [Constitution](#) or the parent statute.
60. In this regard, it is sufficient to take cognizance of the holding in the case of [Samuel Kamau Macharia v Kenya Commercial Bank Ltd](#) (2012) eKLR, where the Supreme Court of Kenya observed as hereunder;

(68) 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. We agree with counsel for the first and second respondents in his submission 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. This court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. 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](#). Where [the Constitution](#) confers power upon Parliament to set the jurisdiction of a court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.

61. In the premises, and being cognizant of the provisions of article 162 (2) (b) of [the Constitution](#) 2010, it is my considered view that this court is not seized of the requisite jurisdiction to entertain and/or adjudicate on the subject matter.
62. In a nutshell, I am obliged to down my tools.

Issue Number 2

What orders are appropriate and/or just in respect of the subject matter.



63. In respect of the subject application, the defendant/applicant has implored the court to either strike out the suit or to transfer same to the High Court for the hearing and determination.
64. Be that as it may, having found that the subject suit was filed and/or lodged in a court without the requisite jurisdiction, the question that remains outstanding and begging answer is whether this court can now assume jurisdiction and transfer the suit to the court that is deemed to seized of jurisdiction.
65. In my considered view, it behooves the litigants and their advocates to interrogate the jurisdiction of the various Superior courts and to approach the correct court(s) with disputes and/or claims.
66. However, where a dispute and/or claim is lodged in a court without the requisite jurisdiction, the court cannot arrogate unto itself any further mandate and/or jurisdiction in the matter, let alone jurisdiction to transfer it to another court, that is said to be seized of the requisite Jurisdiction.
67. In my humble view, to purport to transfer a suit that has been filed before a court without jurisdiction, would be tantamount to the court assuming some sort of jurisdiction, whereas a court has hitherto found and held that same is devoid of such jurisdiction. Simply put, such an action would be antithetical and inherently contradictory.
68. In any event, the Court of Appeal, which was the Apex Court then, in the case of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd* 1989 KLR 1, held as hereunder;
- ‘Jurisdiction is everything. Without it, a court has no power to take one more step. In the Matter of Advisory Opinions of the Supreme Court under article 163(3) of *the Constitution*, Constitutional Application No. 2 of 2011; the Supreme Court noted that The Lillian ‘S’ case [1989] KLR 1] establishes that “jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity...”
69. Similarly, the issue as to whether a suit that has been filed before a court without jurisdiction can be transferred to another court, which is deemed to have jurisdiction was also deliberated upon vide the case of *Albert Chaurembo Mumba & 7 others (sued on their own behalf and on behalf of predecessors and or successors in title in their capacities as the Registered Trustees of Kenya Ports Authority Pensions Scheme) Versus Maurice Munyao & 148 others (suing on their own behalf and on behalf of the Plaintiffs and other Members/Beneficiaries of the Kenya Ports Authority Pensions Scheme)* [2019] eKLR, where the Supreme Court observed as hereunder;
- (154) However, as it was well elucidated in the case of *Kagenyi v Musiramo & another* (1968) EALR 43, an order for transfer of a suit from one court to another cannot be made unless the suit has been brought, in the first instance, to a court which has jurisdiction to try it. It is therefore irrelevant as parties cannot consent to confer jurisdiction to a Court/tribunal where it is not provided by law.
70. Flowing from the foregoing, I am afraid that the subject suit that was filed before a court without jurisdiction cannot be transferred to the High Court, for purposes of hearing and determination, either as sought in the alternative or at all.



71. In short, the only remedy available once a court have found and held that same does not have the requisite jurisdiction is to strike out the impugned proceedings and/or suit and thereafter, the Parties concerned are at liberty to discern their next course of action, if any.

Final Disposition:

72. Having considered the issues outlined for determination and having determined same, one way or the other, it is now appropriate to make the final pronouncement.

73. Consequently and in the premises, it is my finding and holding that the subject dispute does not fall with the Jurisdiction of this Honourable court.

74. In the circumstances, the notice of motion application dated the January 20, 2022 is meritorious and same is therefore allowed in terms of prayer 3 thereof. In a nutshell, the plaintiff's/respondent's suit be and is hereby struck out.

75. The parties herein appeared to have had some semblance of relationship, which was blessed with an Issue. In this regard, and based on the semblance of relationship, the nature of which will be determined elsewhere, it would not be appropriate to condemn either party to bear the costs of the proceedings.

76. In short, either Party shall bear own costs.

77. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND ____ DAY OF JUNE 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

Kevin Court Assistant

Mr Odipo for the Plaintiff/ Respondent.

Mr. Awuor for the Defendant/ Applicant.

