



**CMM v ANM (Environment & Land Case E012 of 2022)
[2022] KEELC 14667 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14667 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E012 OF 2022**

**BM EBOSO, J
NOVEMBER 2, 2022**

BETWEEN

CMM PLAINTIFF

AND

ANM DEFENDANT

RULING

1. CMM [the plaintiff] initiated this suit through a plaint dated February 7, 2022. He seeks the following reliefs against the defendant:
 - a. A declaration that the defendant holds ½ of all that parcel of land in title no xxxx located in Kiambu in trust for the Plaintiff.
 - b. A declaration dissolving the trust over all that parcel of land comprised in title no xxxx located in Kiambu County registered in the name of the defendant who holds ½ of the property in trust for the plaintiff and the ½ of xxxx be transferred and registered in favour of the plaintiff.
 - c. A permanent injunction restraining the defendant by herself, her agents, servants or employees from selling, transferring, charging, or in any manner alienating all that parcel of land known as title no xxxx located in Kiambu County.
 - d. A mandatory injunction compelling the defendant by herself, her servant or agents or otherwise howsoever to forthwith and unconditionally release and handover the original title deed for the parcel of land comprised in title no xxxx located in Kiambu County which the defendant holds in trust for the plaintiff a duly executed land transfer form with all the necessary documents for the transfer of ½ of title no xxxx in favour of the plaintiff.
 - e. A mandatory injunction to compel the defendant/respondent by herself, her servant or agents or otherwise howsoever to forthwith and unconditionally release and handover all the seats



and tables and other hotel furniture catered away from the hotel erected on title no xxxx by the respondent, her agents, servants or employees.

- f. Damages for the loss of business occasioned by the actions of the defendant of carting away the tables and chairs and other furniture of the hotel business.
 - g. The costs of this suit be provided for.
2. The plaintiff's case in summary is that, him and the defendant, ANM, have lived together as husband and wife since the year 2008. From 2008 to 2013, they lived as husband and wife in [particulars withheld], Kenyatta University. In 2013, they relocated to House Number 002 in [particulars withheld], Juja, which he describes as their matrimonial home. He further contend that their relationship has been blessed with three children. One of the children is their biological child and two are adopted.
 3. It is the case of the plaintiff that at all material times, the defendant recognized him as a spouse by enlisting him as such in her employment medical insurance schemes at Kenyatta University, ICRAF and ILRI. He further contends that their respective families, friends and neighbours have known them to be husband and wife.
 4. The plaintiff further contends that during their period of long and extended cohabitation, they have jointly bought properties and caused some to be registered in their individual names. It is his case that all such properties are matrimonial properties as they were all acquired during the subsistence of their marriage.
 5. The plaintiff contends that in the year 2011, they jointly bought land parcel number xxxx [the suit property] at a consideration of Kshs 450,000. He adds that they both incurred conveyance expenses. The vendor was his sister, Salome Gathoni Kamau, who discounted the purchase price owing to their blood relation. It is his case that the suit property was registered in their joint names owing to the fact that they were husband and wife, and the property was intended to be matrimonial property. He contends that they subsequently jointly sourced for funds and developed a facility on the land, christened [particulars withheld], comprising of five shops, a hotel, dining hall area, store, twenty hotel rooms, and other amenities. He has been running the facility because the plaintiff is in fulltime salaried employment elsewhere. In 2021, they incorporated a company to run the facility, [particulars withheld], with the two of them as directors.
 6. The plaintiff adds that in 2020, they caused the suit property to be transferred into the name of the defendant purely to enable her secure a loan facility for the purpose of improving the facility which had already been erected on the land. He contends that the defendant was to hold the suit property in trust. He adds that subsequent to the transfer of his share in the suit property into the name of the defendant, the defendant unilaterally imposed and demanded rent form him, prompting him to initiate this suit, seeking the above reliefs.
 7. Together with the plaint, the plaintiff brought a notice of motion dated February 7, 2022, seeking an interlocutory injunction restraining the defendant against selling, transferring, charging or in any manner alienating the suit property, pending the hearing and determination of this suit. He further sought a mandatory order compelling the defendant to unconditionally release and hand over the original title deed with necessary instruments conveying back the ½ share of the suit property to him. Further, he sought a mandatory injunction compelling the defendant to hand over seats, tables and other hotel furniture carted away from the hotel by the defendant. The said application is the subject of this ruling. It was supported by the plaintiff's affidavit sworn on February 7, 2022 and a supplementary affidavit sworn on May 23, 2022 in which he reiterated his case as summarized above.



8. The defendant filed a statement of defence and counterclaim dated March 9, 2022. She prayed for the following verbatim reliefs in the counterclaim:
 - a. The plaintiff's suit be dismissed with costs.
 - b. An order compelling the plaintiff to pay the defendant monthly rent of Kshs 200,000 from September 2021.
 - c. Eviction of the plaintiff from land parcel number xxxx
 - d. An order that the defendant does not hold $\frac{1}{2}$ of parcel of land number xxxx in trust for the plaintiff.
 - e. An order that the defendant is the sole proprietor of land reference number xxxx.
 - f. An order that the plaintiff did not contribute any money towards construction of the Hotel built in xxxx.
 - g. An order that the parcel of Land Reference Number [particulars withheld] is not matrimonial property.
 - h. Costs of this suit with interest.
 - i. Any other order that this honourable court deems fit to grant.
9. Further, the defendant filed a replying affidavit dated March 9, 2022 in opposition to the plaintiff's application dated February 7, 2022. She further filed a further affidavit dated June 8, 2022.
10. The case of the defendant is that she is not married to the plaintiff. In 2010, the plaintiff introduced her to his sister, Salome Gathoni, who sold to her the suit property at Kshs 500,000. She gave the plaintiff the said purchase price in cash in two instalments to take it to his sister. The plaintiff did not contribute any money towards the purchase of the suit property. The plaintiff was merely a broker in the transaction.
11. She contends that the plaintiff caused the suit property to be registered in their joint names without her knowledge. In 2020, the plaintiff agreed to let her be the sole registered proprietor of the suit property. It is her case that she has so far spent Kshs 35,000 to develop the hotel and the other amenities that are on the suit property.
12. The defendant adds that she registered [particulars withheld] as a business in 2020 and subsequently decided to convert it into a limited liability company. She invited the plaintiff to join the company purely on business terms and she gave the plaintiff "49 shares and she took 51 shares". She adds that in July 2021, while in Adis Ababa, she learnt that the plaintiff had taken possession of the bar, restaurant and events park. On returning into the Country, she confronted the plaintiff who informed her that he had partnered with one George Mburu to operate the bar, restaurant and events park garden. She then informed them that they were to pay her a monthly rent of Kshs 200,000.
13. The application was canvassed through written submissions dated May 24, 2022 and further written submissions dated June 20, 2022, both filed by M/s H T & Associates. Counsel identified the following as the five key issues that fell for determination in the application.
 - i. Does the respondent hold $\frac{1}{2}$ share in title no xxxx in trust for the applicant?
 - ii. Were the applicant and respondent in relationship of marriage since 2008 and hence the property title no xxxx is a matrimonial property?



- iii. If not, was there a business between the applicant and the respondent and thus title no xxxx being the investment of the parties jointly, the respondent thus holds ½ of the same in trust for the applicant?
 - iv. If the property be deemed as matrimonial does the court have jurisdiction to grant the orders sought by the applicant?
 - v. Is the applicant entitled to the orders of injunction sought to preserve the property pending the hearing and determination of the suit?
14. On her part, the defendant filed written submissions dated June 8, 2022 through M/s Ndung'u Mwaura & Co Advocates. Counsel observed in paragraph 2 of the said written submissions that the plaintiff's application was premised on the ground that the defendant was his wife and that he [the plaintiff] owns half of the suit property which is registered in the name of the defendant. The defendant opposed the plea for interlocutory and permanent injunctive reliefs.
 15. I have considered the application dated February 7, 2022 together with the parties' respective pleadings in this suit. I have also considered the defendant's response to the application and the parties' respective submissions on the application. The following three (3) key questions fall for determination in the application: (i) Whether this court is the proper court vested with jurisdiction to adjudicate the dispute in this suit; (ii) Whether the applicant has satisfied the criteria for grant of interlocutory injunctive relief; and (iii) Whether the applicant has satisfied the criteria for grant of a mandatory injunction at the interlocutory stage. I will first dispose the question relating to the jurisdiction of this court to adjudicate the dispute in this suit.
 16. The plaintiff seeks a total of seven reliefs. The first relief is a declaration that the defendant holds half of the suit property in trust for him. The second relief is a declaration dissolving the trust and vesting one half into his name. The gist of the plaintiff's case is that they are husband and wife and that the suit property is a matrimonial property that was acquired by the two of them jointly during the subsistence of their marriage. He contends that he contributed 50% share in the acquisition of the suit property and in the actualization of the developments that are on the land. He further contends that the suit property was registered in their joint names as a matrimonial property on account of their subsisting marriage. It is his case that the subsequent conveyance of the suit property into the name of the defendant as the sole registered proprietor was to enable the defendant to access credit facility for the purpose of further improving the suit property and that the defendant was to hold the suit property in trust as a matrimonial property.
 17. The defendant admits cohabiting with the plaintiff but denies subsistence of a marriage between them. She contests the plaintiff's contention that the suit property is a matrimonial property. Her case is that she solely owns the suit property. By way of counterclaim she seeks orders, *inter alia*, that the suit property is not a matrimonial property; and that she does not hold ½ of the suit property in trust for the plaintiff. Further, she wants the plaintiff compelled to pay rent from September 2021 and an order evicting the plaintiff from the suit property.
 18. I have reflected on the question of jurisdiction of this court in the context of the dominant cause of action in this suit. Three key questions will have to be answered in the final adjudication of this dispute. The first question will be whether the plaintiff and the defendant are husband and wife. The second question will be whether the suit property is a matrimonial property, hence governed by the law relating to matrimonial property. The third question will be whether the plaintiff is entitled to ½ of the suit property on account of it being a matrimonial property that was acquired jointly as alleged or on account of any other lawful reasons.



19. Is this court the proper court to answer the above questions? My answer to the above question is in the negative. The question as to whether the plaintiff and the defendant are husband and wife is one to be answered by an ordinary civil/family/matrimonial court. It does not fall within the jurisdiction of this court as set out in Article 162(2)(b) of the [Constitution](#) and Section 13 of the [Environment and Land Court Act](#).
20. The question as to whether or not the suit property is matrimonial property, hence governed by the law relating to matrimonial property, is one to be answered in an action initiated within the framework of Section 17 of the [Matrimonial Property Act](#) as read together with Rules 6 and 30 of the [Matrimonial Property Rules 2022](#). 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.”
21. The framework in rule 6 was legislated in early 2022 to clear the confusion that existed in relation to the “court” contemplated under Section 17 of the [Matrimonial Property Act](#). The courts contemplated under Section 17 of the Act are now clearly specified in rule 6. It therefore follows that the jurisdiction to determine disputes relating to what is contended to be matrimonial property is vested in the High Court and, subject to pecuniary limits, the magistrate courts.
22. It accordingly follows that the question as to whether the plaintiff is entitled to ½ of the suit property on account of it having been acquired jointly as a matrimonial property is one to be answered by a matrimonial court within the framework of Section 17 of the [Matrimonial Property Act](#) and rules 6 and 30 of the [Matrimonial Property Rules 2022](#). The Environment and Land Court is, regrettably, not the court contemplated under the above law.
23. In [Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others](#) [2012] eKLR the Supreme Court of Kenya emphasized the centrality of jurisdiction in Kenya legal system in the following words:
- “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 itself jurisdiction exceeding that which is conferred upon it by law.”
24. Some decades back, Nyarangi JA echoed a similar principle in [Owners of Motor Vessel Lillian “S” v Caltex Oil \(Kenya\) Ltd](#) [1989] eKLR in the following words:
- “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.”

25. On my part, I would add that acquiescence of the parties does not confer jurisdiction on a court.
26. For the above reasons, this court finds that the dominant issues in the dispute in this suit are issues that fall within the jurisdiction of the High Court and, subject to pecuniary limits, the magistrate courts. The Environment and Land Court does not have jurisdiction to adjudicate those dominant issues.
27. The result is that this court will down its tools and transfer this suit to the High Court at Kiambu for adjudication of the dispute in tandem with the principle laid by the Supreme Court of Kenya in *Benson Ambuti Atega & 2 others v Kibos Distillers & 5 others*. For clarity, the Supreme Court of Kenya rendered itself thus:

“ 54. The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the petition. However, once it had established that the ELC did not have jurisdiction to hear and determine the petition, the appellate court should at that juncture have issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institution for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.”

28. In the end, this court finds that it does not have jurisdiction to adjudicate the dominant issues in this suit. Consequently, this suit is hereby transferred to the High Court at Kiambu. The unanswered issues in the application dated February 7, 2022 will be disposed by the court seized of jurisdiction to adjudicate the dispute. At this point, costs of the proceedings relating to the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 2ND DAY OF NOVEMBER 2022

B M EBOSO

JUDGE

In the Presence of: -

Mr Gitonga for the defendant

Alice Muchugi – defendant – present

Christopher – logged in but muted

Court Assistant: Ms Osodo

