



**REPUBLIC OF KENYA**

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

**ELC NO. 290 OF 2016**

**LUCY JEBET KIPTOO.....PLAINTIFF**

**VERSUS**

**KIPTOO KURUI.....1<sup>ST</sup> DEFENDANT**

**SALINA JEPKEMBOI ARAUSE.....2<sup>ND</sup> DEFENDANT**

**DAVID KIPKEMEI SIGEL.....3<sup>RD</sup> DEFENDANT**

**KIPKOSGEY LAMAI.....4<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a Preliminary Objection by the 1<sup>st</sup> Defendant dated 26<sup>th</sup> May, 2021 which is based on the following grounds;

a) That this Honourable Court lacks jurisdiction to hear and determine this matter as it concerns division of matrimonial property whose jurisdiction is the High Court Family Division.

b) That the parties herein are husband and wife and matrimonial property is not subject to division in the life of marriage between spouses.

2. In the original originating summons, the Plaintiff sued her husband as the Defendant. The originating summons was later amended to bring in other three Defendants. The 1<sup>st</sup> Defendant is the registered owner of **Olainguse/Olainguse Block 1 [Olainguse]18** as well as the beneficial owner of **Kondoo Farm No.382** whose title is yet to come out.

3. This originating summons appears to have been triggered by the 1<sup>st</sup> Defendant who married a second wife whom he settled on part of **Olainguse/Olainguse Block 1 [Olainguse]18** and sale of portions of the same land to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants. The Plaintiff has therefore petitioned this court for determination whether she contributed to the two properties and whether the 1<sup>st</sup> Defendant can apportion the two properties to the second wife without her consent.

4. The Plaintiff also prays for an eviction order against the second wife of the 1<sup>st</sup> defendant an order compelling the 1<sup>st</sup> Defendant to look for alternative accommodation for his second wife. The Plaintiff also prays for a declaration that the two properties are jointly owned by her and the 1<sup>st</sup> Defendant. She also prays for an order declaring the two properties matrimonial properties and for registration of the two properties jointly in her name and that of the 1<sup>st</sup> Defendant.

5. The Plaintiff finally prays for eviction of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from the portions they purchased. The parties herein were directed to file written submissions in respect of the preliminary objection. The 1<sup>st</sup> Defendant filed his submissions on 21<sup>st</sup> July, 2021. The Plaintiff filed her submissions on 16<sup>th</sup> August, 2021.

6. I have carefully considered the submissions by the Plaintiff as well as those of the 1<sup>st</sup> Defendant. There is no contention that the Plaintiff and the 1<sup>st</sup> Defendant are married and that their marriage has not been dissolved. The matrimonial property Act provides that division of matrimonial property can only be shared upon dissolution of marriage. In the instant case, the marriage of the 1<sup>st</sup> Defendant and the Plaintiff is still subsisting. The issue of division of property cannot therefore arise

7. Under Section 17 of the Matrimonial Property Act, a spouse who has any dispute over any property with his or her spouse can only

petitioner for a declaration of his or her rights in that property. The court with jurisdiction to entertain such a petition is the Family Division of the High Court. The Environment and Land Court cannot entertain any division or declaration of rights in matrimonial property as to do so will entail taking evidence as to what contribution each spouse made towards acquisition of the property in issue something which is expressly prohibited by the law and over which the Environment and Land Court has no jurisdiction to deal with.

8. The cases which the Plaintiff has relied on are distinguishable from the instant case. For instance, in the case of **Lucy Jebet Kiptoo =vs= Kiptoo Kurui Kericho ELC No.20 of 2017 (OS)** there was no issue of division of property. This is the same case in **John Kimani Njenga =vs= Margaret Wanjiru Kanyiri & 2 others [2015] eKLR** where there was no issue of division of matrimonial property.

9. On the other hand, the two cases cited by the 1<sup>st</sup> Defendant squarely apply to this case. There can be no division of matrimonial property during the subsistence of marriage of the spouses. The mere fact that the Plaintiff is seeking to evict the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants from the properties cannot clothe this Court with jurisdiction. The underlying issue is division of matrimonial property which cannot be done by either the Environment and Land Court or the High Court as the main parties are still married. I therefore uphold the Preliminary Objection on both limbs and proceed to strike out the originating summons together with all applications under it. As the Plaintiff and the 1<sup>st</sup> Defendant are a couple, I make an order that each party to bear their own costs.

*It is so ordered.*

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2021.**

**E.O. OBAGA**

**JUDGE**

In the virtual absence of parties who were aware of the date for ruling.

Court Assistant – Mercy

**E.O. OBAGA**

**JUDGE**