



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 2081 OF 2007

NANCY WAITHIRA MWANIKI [The Administrator of the estate of
LINAH NYOKABI NGATIA – Deceased]PLAINTIFF

- VERSUS -

CHARLES MWANIKIDEFENDANT

RULING

1. The late **Linah Nyokabi Ngatia** initiated this suit in the Environment and Land Division of the pre-2010 High Court through a plaint dated 16/11/2006. She subsequently filed an amended plaint dated 29/5/2009. She sought the following verbatim orders against the defendant:

1. **An injunction do issue against the defendant's agents and/or servants from interfering with L.R No.12151/2 and LR No.Ngong/Ngong /24830 until the final determination of this suit.**
2. **A declaration that L.R No.12151/2 and Ngong/Ngong /24830 is (sic) owned by the plaintiff and the defendant equally.**
3. **Costs of this suit.**

2. The gist of her case was that, she was a wife to the defendant prior to and at the time of initiating the suit. In 1999, during the subsistence of their marriage, they purchased land **Title Number Ngong/Ngong/24830** which they jointly developed. In 2003, also during the subsistence of their marriage, they jointly bought **Land Reference Number 12151/2** at Kshs 6,000,000. Subsequent to acquiring the two properties, the defendant was arrested and repatriated to Tanzania, where he was charged, convicted, and sentenced to serve a long jail term. In 2006, the defendant through his lawyer, sought to stop her from managing Land Reference Number 12151/2, contending that she was merely his managing agent as opposed to being a co-owner of the property. Aggrieved, she brought the suit.

3. The defendant filed a defence and a counterclaim dated 20/2/2007. His case was that the deceased was not his wife. He solely purchased Land Reference Number 12151/2 in 2003. The said property was not acquired during the subsistence of a marriage with the deceased or at all. In 2003, he appointed the deceased to be his property manager, with the mandate to collect rents from tenants, pay utility bills, and let out the property. In 2006, he terminated the deceased's agency services. The deceased became hostile to his new property managers and refused to hand over management of the property. Consequently, he sought the following verbatim reliefs against the deceased, by way of counterclaim:

- i. **An order of permanent injunction restraining the plaintiff by herself, her servants or agents from entering, remaining in, collecting rents, managing or in any way dealing with all the property known as LR No 12151, Kahawa Wendani.**
- ii. **An order to the plaintiff to pay the defendant all rents collected from the suit property from December 2003 to the date of judgment.**
- iii. **Costs of the suit**
- iv. **Interest in (iii) and (iv) above.**

4. Upon the promulgation of the Constitution of Kenya 2010 and the subsequent establishment and operationalization of the Environment and Land Court, the Environment and Land Division of the High Court at Nairobi became the Nairobi Environment and Land Court.

5. The deceased died while this suit was pending. Her mother, **Anne Waithera Ngatia**, and her brother, **Stephen Karanja Ngatia**, were appointed as administrators of her estate. The deceased's mother died and her brother moved to Qatar. Subsequently, the deceased's daughter, Nancy Waithira Mwaniki, was appointed as administrator of her estate. In December 2018, the **High Court in Nairobi High Court Succession Cause No. 460 B of 2010: In the Matter of the Estate of Linah Nyokabi Ngatia**, gave Nancy Waithera Ngatia one half share of LR 12151/2 [the suit property]. Subsequently, Nancy Waithira Mwaniki brought an application for substitution and she was, on 26/9/2019, made a plaintiff in this suit in her capacity as the administrator of the estate of the deceased [Linah Nyokabi Ngatia].
6. About fourteen years from the time the suit herein was initiated in the High Court, the defendant brought a notice of motion dated 1/12/2020, seeking an order dismissing the suit on the ground that the Environment and Land Court lacked jurisdiction to hear and determine the issues raised in the suit. The said application is the subject of this ruling.
7. The application was supported by an affidavit sworn on 1/12/2020 by the defendant's advocate, *Kiprop Chepsergon*. The gist of the defendant's objection to the jurisdiction of this court was that, through her pleadings, the deceased contended that she was married to the defendant and the defendant denied that fact. The defendant contended that the question as to whether there was any marriage between the plaintiff and the defendant could only be determined by a family court. The defendant further contended that the court with jurisdiction to determine whether the suit properties constituted matrimonial properties as alleged by the deceased was the family court.
8. The plaintiff opposed the application through her affidavit sworn on 18/1/2020. She contended that the reliefs sought in the amended plaint were within the jurisdiction of this court and that this court was the proper court to hear and determine the dispute.
9. The defendant filed his submissions dated 17/5/2021 through the law firm of *Chesikau & Kiprop Advocates*. Counsel identified 4 issues falling for determination: (a) *Whether the honourable court has jurisdiction to determine and declare the existence of marriage between the plaintiff and the defendant;* (b) *Whether the honourable court has jurisdiction to determine and declare the dissolution of marriage between the plaintiff and the defendant;* (c) *Whether the honourable court has jurisdiction to declare the suit properties as matrimonial property which ought to be divided between the plaintiff and the defendant;* (d) *Whether the honourable court has jurisdiction to hear and determine issues of maintenance of a child.*
10. On whether the Honorable Court has jurisdiction to determine and declare the existence of marriage between the plaintiff and the defendant, Counsel submitted that the Plaintiff's claim over the suit properties is based on the ground that the said properties were acquired during the existence of their marriage and one of the key issues to be determined is whether there was marriage between the plaintiff and the defendant and cited the case of **NLS V BRP(2016)eKLR**. Counsel further submitted that the suit properties were not matrimonial properties.
11. On whether the honorable court has jurisdiction to hear and determine issues of maintenance of a child, Counsel submitted that whether or not *Nancy Waithira Mwaniki* is a child of the defendant can only be determined in a Children's Court.
12. On whether the suit properties are matrimonial properties, Counsel opined that the suit properties were solemnly owned by the defendant and the plaintiff has no interests in the said suit properties.
13. I have considered the application, the response to the application, and the parties' respective submissions. I have considered the relevant constitutional and legal frameworks. Further, I have considered the parties' respective pleadings in the primary suit and in the counterclaim. The single question falling for determination in the application is whether this court is seized of jurisdiction to adjudicate the dispute in this suit.
14. Our superior courts have been categorical on the centrality of jurisdiction in the adjudication of disputes in our legal system. The Supreme Court of Kenya in **Samuel Kamau Macharia & another v Kenya commercial Bank Limited & 2 others [2012] eKLR** stated the following regarding the source and tenor of jurisdiction:
- “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.”**
15. Nyarangi JA outlined the following principles about jurisdiction in **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR**:
- “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 its tools in respect of the matter before it at the moment it holds the opinion that it is without jurisdiction.”**
16. The present suit was initiated by the deceased in the pre-2010 High Court of Kenya. Besides filing a defence to the suit, the defendant brought a counter-claim, seeking various reliefs against the deceased. No objection was raised to the jurisdiction of the pre-2010 High Court. Upon promulgation of the Constitution of Kenya 2010 and the subsequent enactment of the Environment and Land Court Act and the eventual operationalization of the Environment and Land Court, the case was transferred to the new court. No objection was raised against the transfer. No application has to date been made for transfer of the case to any division of the post-2010 High court of Kenya. Both the primary suit and the counterclaim are pending hearing and determination by this court. It is against the above background that the defendant moved this court through the instant application, seeking dismissal of the suit on the ground that this court did not have jurisdiction to adjudicate the dispute in the suit.
17. The broad jurisdiction of the Environment and Land Court of Kenya is spelt out in Article 162(2) of the Constitution in the following

words:

“162(2)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.”

18. Section 13 of the Environment and Land Court Act elaborates the above constitutional mandate of the court in the following framework.

“13. Jurisdiction of the Court

(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 Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 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;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

19. The deceased contended in the amended plaint that she was a wife to the defendant and that they acquired the suit properties during the subsistence of their marriage. On his part, the defendant was and remains unequivocal that the deceased was never his wife and that he solely acquired Land Reference Number 12151/2. He is also unequivocal that Land Reference Number 12151/2 was not acquired during the subsistence of a marriage with the deceased. He maintains that he engaged the deceased as a managing agent to manage the property.

20. It does therefore emerge that the key issue to be ultimately determined in this suit is whether the deceased and the defendant co-owned the two suit properties. In essence, the dispute in this suit is about ownership of the two properties. Secondly, at the time the dispute arose, and at the time this suit was initiated, the current legal framework in the Matrimonial Property Act 2013 had not been enacted. Does the Act divest this court of jurisdiction to adjudicate disputes relating to property in a scenario such as this one, where one party asserts that they jointly acquired property as spouses while the other party asserts exclusive right over the property and contends that they were never spouses? My answer to the above question is in the negative.

21. I take the above view because, first, the Matrimonial Property Act 2013 which contains the framework on how disputes relating to matrimonial property or disputed matrimonial property are to be redressed was expressly enacted to provide for the rights and responsibilities of **spouses** in relation to matrimonial property. The preamble to the Act provides thus:

“An Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.”

22. Secondly, the Act did not in any way divest from the Environment and Land Court the jurisdiction granted to the court under Article 162(2)(b) of the Constitution and **Section 13** of the Environment and Land Court Act. Indeed, Section 17 of the Matrimonial Property Act which contains the framework on how a person may seek redress relating to a right to matrimonial property provides the following provisions:

“17. Action for declaration of rights to property

(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under subsection (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

23. From the above framework, it is clear that Parliament deliberately avoided assigning jurisdiction under Section 17 of the Act to any specific court. No legislative instrument has been placed before the court to identify any specific court contemplated under Section 17 of the Act.

24. My view therefore is that, in a scenario such as this one, where spousal relationship is disputed and co-ownership is similarly disputed, in the absence of any express legislation divesting the Environment and Land Court of jurisdiction to dispose specific ownership disputes relating to land, the Environment and Land is within its mandate under Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, to adjudicate the present dispute. Were there a pending matrimonial petition in the High Court, I would have had no hesitation in transferring the suit to the High Court to be disposed by the Judge seized of the matrimonial petition because this is a dispute where there appears to be concurrent jurisdiction. There is however no evidence of any pending matrimonial petition.

25. The totality of the foregoing is that, it is the finding of this court that, the Environment and Land Court has jurisdiction to adjudicate the dispute in this suit which is predominantly about ownership of the suit properties. Consequently, the defendant’s notice of motion dated 1/12/2020 is rejected for lack of merit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 9TH DAY OF NOVEMBER, 2021

B M EBOSO

JUDGE

In the presence of: -

Ms Shikali for the Defendant

Court Assistant: Lucy Muthoni

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE