



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 348 OF 2017

MAS.....PLAINTIFF

VERSUS

JMM

Also Known as JMM.....DEFENDANT

RULING

1. This suit was commenced through a plaint filed on 28 September 2017. That plaint was later amended on 26 November 2020. The plaintiff has pleaded that she was the wife of the defendant until 25 February 2009 when their marriage was dissolved in the Kadhi's Court at Mombasa. She has pleaded that on 10 June 2004, during the subsistence of their marriage, they jointly took a mortgage facility for the purchase of a house on Plot No. *****/I/MN which they bought at Kshs. 2,500,000/=. They then commenced making joint payments until May 2007 when the defendant stopped remitting his share. At this time, it is said that the sum of Kshs. 1,800,000/= was still owing to the bank. The plaintiff pleads that to avoid losing the property, she solely completed the payments to the bank. She pleads that despite making the payments the defendant has refused to vacate the house. She has pleaded that she filed suit for the defendant's eviction, being Kadhi's Civil Case No. 51 of 2008 which the defendant challenged on appeal, which appeal was dismissed. She asserts that as a result of the defendant's failure to pay the monthly instalments to the bank, his interest terminated and his presence in the premises is thus unlawful. She contends that the defendant's continued presence in the house is causing her loss of Kshs. 40,000/= per month which she would otherwise get through rent. In the suit, she seeks the following orders (paraphrased for there are obvious errors):-

*(i) A declaration that the defendant's interest in the house on Plot No. *****/I/MN has determined and that the defendant's continued presence in the said house constitutes an act of trespass.*

*(ii) A declaration that the defendant has reimbursed himself for whatever contribution he made towards the purchase of the house on Plot No. *****/I/MN by virtue of his occupation.*

*(iii) A declaration that the plaintiff is the sole owner of Plot No. *****/I/MN.*

*(iv) A permanent injunction restraining the defendant or his servants and/or agents from entering, occupying, and/or trespassing into the house on Plot No. *****/I/MN.*

(v) An order of eviction against the defendant.

(vi) Costs of an incidental to this suit.

(vii) Interest at court rates.

(viii) Any other or further relief as this Honourable Court may deem fit to grant.

2. The defendant entered appearance and filed defence. In it he pleaded that the suit property was purchased jointly through a mortgage facility as their matrimonial home during subsistence of marriage. He asserted that the property is jointly owned. He further pleaded that their union had six children, and upon separation, the defendant continued living in the house with the children. He pleaded that the plaintiff moved out of the house on her own accord. He claimed that despite losing his job he made contributions towards the mortgage. He further pleaded that this court does not have jurisdiction to entertain any claim concerning matrimonial property and that jurisdiction is vested in the Family Division of the High Court. He pleaded that the suit is res sub judice owing to Mombasa High Court Civil Appeal No. 256 of 2010. Within the defence, he issued a preliminary objection that this court does not have jurisdiction and that the matter is res sub judice as the

same issues are pending before the High Court.

3. It is that preliminary objection which is the subject of this ruling.

4. I directed counsel to file written submissions and I have taken note of the submissions filed by Mr. Opolu, learned counsel for the defendant, and Mr. Hamza, learned counsel for the plaintiff.

5. Two issues have been raised in the preliminary objection. The first is that this matter is *res sub judice* as there is pending the case Mombasa High Court Civil Appeal No. 256 of 2010. The second is that this court has no jurisdiction.

6. From the material before me, I can see that the plaintiff had sued the defendant for a divorce before the Kadhi's Court. Within that case, she also sued for maintenance, custody of the children, payment of balance of dowry, and any other relief deemed fit. The matter was heard and the marriage dissolved. Custody of the children was given to the plaintiff with an order for the defendant to provide for their maintenance. It appears that subsequently there was an application, or suit, filed within the Kadhi's Court, seeking orders to have the defendant vacate the house. Those orders were allowed. This prompted the defendant to file the appeal Mombasa High Court Civil Appeal No. 256 of 2010. There is evidence that the said appeal was dismissed for want of prosecution on 15 December 2017. Given the fact that the appeal was dismissed, I do not see the argument of the defendant that this suit is *res sub judice*. It cannot be, because there is no other pending suit.

7. The second issue raised is that this court lacks jurisdiction. I have gone through Mr. Opolu's submissions but I have not seen anywhere where he has addressed the issue that this court lacks jurisdiction. I wonder whether this issue was dropped. In fact it appears as if all of Mr. Opolu's submissions were geared only towards addressing the *sub judice* issue. I am thus at a loss as to what exactly the defendant's arguments are on the issue of jurisdiction of this court. On my part, on the face of the pleadings before me, I do not see anything that would prevent this court from having jurisdiction. The prayers sought in the plaint are for a declaration of ownership of the suit property. The other related orders are for a permanent injunction to restrain the defendant from the suit property and eviction. Under Article 162 (2) (b) of the constitution this court has jurisdiction to hear disputes "relating to the environment and the use and occupation of, and title to land." This dispute, as far as I can see, relates to occupation and title to land for which this court would have jurisdiction. If it is the submission of the defendant that the issues herein can only be determined at the High Court, that submissions holds no water. Such issue arose in the case of *BWM vs JMC, Murang'a ELC No. 379 of 2017 (2018) eKLR*. In that case, a preliminary objection was raised that the Environment and Land Court has no jurisdiction over a matter relating to matrimonial property. Kemei J dismissed the preliminary objection and held as follows :-

"For avoidance of doubt, the Court notes that the matrimonial Property Act does not to define the Court that disputes relating to the Matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to occupation use and title to land. I find nothing to oust the jurisdiction of this Court and I proceed to determine the Preliminary objection."

8. I am in full agreement with the above dictum. So long as the question before this court will touch on title to land or occupation of it, this court would have jurisdiction, unless there is an explicit exclusion in statute. I have found none in this instance.

9. For the above reasons, I see no substance in the preliminary objection and the same is hereby dismissed with costs.

10. Orders accordingly.

DATED AND DELIVERED THIS 20TH DAY OF MAY 2021.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA