



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MILIMANI**

**ELC CASE NO.177 OF 2018**

**PATRICK J.KANYAGIA.....PLAINTIFF**

**VERSUS**

**VIOLET L MANINGO.....DEFENDANT**

**RULING**

1. This is a ruling in respect of a notice of motion dated 8<sup>th</sup> March 2021 in which the Defendant/Applicant seeks the following orders: -

***a) Spent***

***b) That the Applicant be allowed to regain possession and move in the main house on parcel of land LR No.Dagoretti/Riruta/2205 pending the sale of the said property.***

***c) That the Plaintiff/Respondent be ordered to facilitate and ensure that the Applicant is granted vacant possession of the main house on parcel of land LR No.Dagoretti/Riruta/2205.***

***d) That this Honourable court declares that the Defendant/Applicant as a joint proprietor is entitled to possess and live in the main house on parcel of land LR No.Dagoretti/Riruta/2205 pending the sale of the said property.***

***e) That in the alternative to prayers (b) and (c) above this Honourable court orders the Plaintiff/Respondent to pay to the Defendant/Applicant the sum of Kshs. 50,000.00 by the 5<sup>th</sup> day of every month being the amount the suit property would fetch as rent.***

***f) The costs of this application be in the cause.***

2. The Applicant and the Plaintiff/Respondent were cohabiting together and had two issues due to the union. In or about 1989, the two jointly acquired LR No.Dagoretti/Riruta/2205 (suit property) . In or around the year 1999, the Applicant was forced to move out of the suit property due to irreconcilable differences with the Respondent.

3. In the year 2000, the Applicant filed HCCC No.1496 of 2000 seeking orders of sale of the suit property and division of the proceeds. The Respondent filed a defence in which he opposed the sale. This suit was later dismissed for want of prosecution. The Respondent later filed the present suit where he sought a declaration that the suit property was jointly owned by him and the Applicant. The Respondent further prayed that the suit property be sold and proceeds there from be shared equally.

4. The Applicant filed a defence in which she contended that this court did not have jurisdiction to grant the orders sought by the Respondent. The Applicant raised a counter-claim in which she seeks half of the rental income from the suit property for the last 19 years at Kshs.43,000/= per month . In the alternative, the Applicant sought that the rental income from the suit property be remitted directly to the Applicant.

5. As this suit was pending, the parties herein agreed to go to the court annexed mediation. The parties entered into a partial agreement in which the suit property was to be sold and proceeds be shared as may be agreed in the mediation. It was further agreed in the partial mediation that each of the parties was to look for an independent valuer who was to value the suit property. The parties were at liberty to put forth their respective claims on cost of improvements to the suit property.

6. The Respondent put fourth his claim on improvement to the suit property but the Applicant did not result in collapse of the mediation. It is after the collapse of the mediation that the Applicant has come to court seeking to be allowe3d to regain possession of the suit property as

they look for a buyer. The Applicant contends that as a joint owner of the suit property, she is entitled to regain possession. She contends that she has been taking care of the children of the union alone and that she lost her job at Kenya Airways. The Applicant tried doing interior design but Covid 19 affected her business. As a result of this, she is unable to raise rent and it's on this basis that she wants to go back to the suit property.

7. The Applicant further states that though the suit property is jointly registered in the joint names of the two, the Respondent has been enjoying the rental income alone since 1999. The Applicant contends that lately, it is one Anne Kinyanjui who claims to be an adoptive daughter of the Respondent who occupies the suit. The Applicant has written to her to vacate but she has indicated that she cannot move out.

8. The Respondent has opposed the Applicant's application based on a replying affidavit sworn on 23<sup>rd</sup> April 2021. The Respondent contends that due to the partial mediation agreement, the Applicant's application has no basis. The Respondent further argues that the partial mediation agreement has sorted out everything and that the only issue remaining is how the money from the sale shall be shared depending on the contribution of each party made towards the acquisition of the suit property.

9. The Court directed parties herein to file written submissions. The Applicant filed her submissions dated 21<sup>st</sup> May 2021. The Respondent filed his submissions dated 26<sup>th</sup> May 2021. I have carefully considered the Applicant's application as well as the opposition to the same by the Respondent. I have also considered the submissions filed by the parties.

10. The parties herein being aware of their relationship have been careful not to say what is the status of their relationship. This has been so because of the issue of jurisdiction. what is however clear from the pleadings herein is that the issue is division of matrimonial property. If this be the case, then this is not the court with jurisdiction to do so. The Respondent has indicated that the mediation has sorted out most issues and what remains is the determination of what each party contributed to the acquisition of the suit property.

11. Division of matrimonial property is a preserve of the High Court. even the issue of the status of the two properties is also a preserve denying that this court has jurisdiction to determine the suit herein has gone ahead to mount a counter claim which seeks the sharing of the rental income. It is clear that at the end of the day, the issue for determination will be what will be each party's contribution to the acquisition of the suit property. This court will not have jurisdiction to do so. There is no way this court will give orders for regaining possession by the Applicant or payment of rent where the court does not have jurisdiction to adjudicate on the issues arising from the cohabitation of the Applicant and the Respondent which existed prior to 1999 when she moved out of the suit property.

12. It has been held that jurisdiction is everything without jurisdiction a Judge has no business making any more step. See the case of **Owners of the Moter Vessed " Lillian S" Vs Caltex Oil (Kenya) Ltd (1989)e KLR**. I therefore decline to grant the notice of motion dated 8<sup>th</sup> March 2021 for lack of jurisdiction. The parties are asked to move to the appropriate court with jurisdiction and file their claims there as this court cannot transfer a suit which was filed a wrong court. See the case of Phoenix of **E.A Assurance Ltd Vs S.M Thiga t/a Newspaper Service (2019) eKLR**.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF JUNE 2021.**

**E. O. OBAGA**

**JUDGE**

In the Virtual presence of:-

Mr Maina for Defendant/Applicant

Court Assistant: John

**E. O. OBAGA**

**JUDGE**