



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 17 OF 2017**

**VICTORINA NANJALA WEKESA.....PLAINTIFF**

**VERSUS**

**CLEOPHAS W. WASWA.....1<sup>ST</sup> DEFENDANT**

**ROY SASAKA TELEWA.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

By a plaint filed herein on 31<sup>st</sup> January 2017, **VICTORINA NANJALA WEKESA** (the plaintiff herein) sought Judgment against **CLEOPHAS WANYONYI WASWA** and **ROY SASAKA TELEWA** (the 1<sup>st</sup> and 2<sup>nd</sup> defendants respectively) in the following terms: -

- (a) A declaration that the land sale agreement between the 1<sup>st</sup> and 2<sup>nd</sup> defendants dated 3<sup>rd</sup> January 2017 is null and void for lack of spousal consent.
- (b) A permanent injunction to restrain the 1<sup>st</sup> and 2<sup>nd</sup> defendants acting by themselves, their agents and/or servants from ejecting the plaintiff and her children from E. BUKUSU/S. KANDUYI/9137 and 9138.
- (c) Costs of this suit.
- (d) Interest on (c) at Court rates.
- (e) Any or further relief.

The basis of the suit is not relevant for purposes of this ruling. However, what is important for now is that the plaintiff pleaded that she and the 1<sup>st</sup> defendant were married on 11<sup>th</sup> December 1998 and are blessed with four children. They constructed their matrimonial home on the land parcel **NO E. BUKUSU/S. KANDUYI/9137** and set up a timber business on the land parcel **NO E. BUKUSU /S. KANDUYI/9138**. The 1<sup>st</sup> defendant has now sold the land parcels **NO E. BUKUSU/S. KANDUYI/9137** and **9138** to the 2<sup>nd</sup> defendant which action the plaintiff avers is irregular, null and void and particulars thereof have been pleaded in paragraph 15 of the plaint.

Simultaneously with the plaint, the plaintiff filed an application under Certificate of Urgency seeking various interlocutory reliefs including an order of interim injunction to restrain the defendants acting by themselves or through their agents or servants from evicting and/or interfering with the plaintiff and her children's possession and use of the land parcels **NO E. BUKUSU/S. KANDUYI /9137** and **9138** pending inter – parte hearing. The application was placed before **KANIARU J** on 1<sup>st</sup> February 2017 who granted the order of temporary injunction pending inter – parte hearing. That order was subsequently extended by **KANIARU J** on 14<sup>th</sup> February 2017 to last upto 8<sup>th</sup> March 2017.

Meanwhile, on 7<sup>th</sup> March 2017, the 1<sup>st</sup> defendant filed his defence in which he pleaded inter alia, that the plaintiff made no contribution towards the purchase or construction of the land parcels **NO E. BUKUSU/S. KANDUYI/9137** and **9138**. He denied the allegations of irregularity in the sale of the said land adding that infact he had agreed with the plaintiff that the said land parcels be sold so that the family could relocate to other premises.

The 1<sup>st</sup> defendant also simultaneously filed a replying affidavit opposing the application for injunction.

The 2<sup>nd</sup> defendant also filed a defence on 9<sup>th</sup> June 2017 in which he denied that the sale agreement between him and the 1<sup>st</sup> defendant was irregular. He added that the plaintiff was aware and consented to the sale of the said parcels of land.

He also filed a replying affidavit opposing the plaintiff's application for injunction.

By an application dated 5<sup>th</sup> July 2017, the plaintiff sought the following two substantive orders: -

**1. Leave to amend the plaint.**

**2. An order of temporary injunction restraining the 1<sup>st</sup> defendant, his agents or servants from disposing or dealing with land parcels NO BUNGOMA MUNICIPALITY/416 and 417, EAST BUKUSU/SOUTH KANDUYI/7490, EAST BUKUSU/SOUTH KANDUYI/7967, EAST BUKUSU/EAST SANG'ALO 1989 and EAST BUKUSU/EAST SANG'ALO/1990 pending the hearing of the suit.**

That application was similarly opposed by the defendants who filed their separate replying affidavits.

The application was first placed before the late **MUKUNYA J** on 2<sup>nd</sup> October 2017. It was canvassed orally on 14<sup>th</sup> November 2017 with **MS MUMALASI** appearing for the plaintiff and **MR MURUNGA** for the 1<sup>st</sup> defendant and who also held brief for **MR OTSIULA** for the 2<sup>nd</sup> defendant. Attempts to strike a settlement appear to have failed and in a ruling delivered on 6<sup>th</sup> March 2018, **MUKUNYA J** dismissed the application stating that the Court had no jurisdiction to determine this dispute.

The import of that ruling is relevant for the purposes of the application now before me and I shall reproduce paragraph 5 thereof in which the Judge stated as follows: -

*5 "What is more, this suit as filed raises issues of matrimonial property. Under Section 7 of the Matrimonial Properties Act 2013, ownership of Matrimonial Property vests in spouses according to the contribution of either spouse towards its acquisition and are to be divided by spouses if they divorce or their marriage is otherwise dissolved. This Court is not a family Court. It cannot investigate the contribution and/or acquisition of family property. It cannot grant divorce and/or dissolve a marriage. It does not have jurisdiction to deal with matrimonial matters. There is a proper forum for such disputes. For the reason that this application has not met the threshold in **GIELLA .V. CASSMAN BROWN 1973 E.A 358**, and further that, this Court lacks jurisdiction to entertain matrimonial matters, this application is dismissed with no orders as to costs as the plaintiff and 1<sup>st</sup> defendant are man and wife. The costs of the 2<sup>nd</sup> defendant shall be in the suit." Emphasis added.*

No appeal appears to have been filed against that ruling.

Buoyed by that ruling, the plaintiff moved to this Court by her Notice of Motion dated 14<sup>th</sup> January 2021, and which is the subject of this ruling, seeking the following substantive orders: -

**1. That this Honourable Court be pleased to issue an order transferring this case to the High Court for hearing and final determination.**

**2. That costs be in the cause.**

The basis of the application is that the matrimonial home of the plaintiff and 1<sup>st</sup> defendant is on land parcels **NO EAST BUKUSU/SOUTH KANDUYI/9137 and 9138** which the 1<sup>st</sup> defendant has sold to the 2<sup>nd</sup> defendant and the plaintiff faces imminent eviction. That during the preliminary hearing when the plaintiff sought injunctive reliefs, the Court indicated that it had no jurisdiction to determine the matter as it is matrimonial in nature. That it is therefore imperative that this suit be transferred to the High Court for hearing and final determination and none of the parties will be prejudiced by that order.

Only the 1<sup>st</sup> defendant respondent to the application by filing grounds of opposition that the application does not meet the threshold set out under **Section 18** of the **Civil Procedure Act**.

The 2<sup>nd</sup> defendant appears not to have filed any response to the application.

The application has been canvassed by way of written submissions which have been filed by **MS MUMALASI** instructed by the firm of **ANNET MUMALASI & COMPANY ADVOCATES** for the plaintiff and by **MR MURUNGA** instructed by the firm **J. O. MAKALI & COMPANY ADVOCATES** for the 1<sup>st</sup> defendant.

I have considered the application, the supporting affidavit and the grounds of opposition by the 1<sup>st</sup> defendant as well as the submissions by counsel.

It is clear to me that the cornerstone of this application are the remarks of **MUKUNYA J** when by his ruling dated 6<sup>th</sup> March 2018 the Judge declined jurisdiction in this dispute and stated that this Court **"does not have jurisdiction to deal with matrimonial matters."**

The jurisdiction of this Court is set out in **Section 13** of the **Environment and Land Court Act**. The relevant provisions for purposes of this dispute are **Sections 13(1)** and **13(2)(e)** which read as follows: -

13(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.”

13(2)(e) “In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes –

(a) –

(b) -

(c) -

(d) -

(e) Any other dispute relating to environment and land.”

Section 150 of the Land Act provides that: -

“The Environment and Land Court established in the Environment and Land Court Act and the Subordinate Courts as empowered by any written law shall have jurisdiction to hear and determine disputes, action and proceedings concerning land under this Act.”

Article 162 (2) (b) of the Constitution provides as follows: -

162(2) “Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to –

(a) –

(b) The environment and the use and occupation of, and title to, land.”

There is no doubt that the dispute between the parties herein relates to land. That is clear from both the original plaint filed on 31<sup>st</sup> January 2017 and the proposed amended plaint dated 5<sup>th</sup> July 2017. I have not heard the defendants say otherwise in their respective defences. In declining jurisdiction in this matter, MUKUNYA J cited Section 7 of the Matrimonial Properties Act 2013 which deals with how matrimonial property vests in spouses and how it should be shared upon divorce. The Judge then stated that this not being a family Court, it could not deal with matrimonial matters. The Matrimonial Property Act does not define the Court that is vested with jurisdiction to determine disputes under the Act. It however defines matrimonial property to include matrimonial home or homes as well as household goods and any other movable property. The plaintiff’s claim is that the 1<sup>st</sup> defendant has sold land to the 2<sup>nd</sup> defendant which consists of matrimonial property. The view I take of the matter is that so long as the dispute relates to land, then this Court is vested with the pecuniary jurisdiction. The Matrimonial Properties Act has not vested any particular Court with the jurisdiction to handle disputes relating to matrimonial property. And more specifically, it has not taken away this Court’s jurisdiction to handle matrimonial disputes that relate to land. Indeed, I have previously handled disputes relating to matrimonial property involving land. See for example VANASIA IRIMA NYAGA .V. GERALD NYAGA MWANIKI 2016 eKLR. I am also aware that other Judges have also taken the same route including OKONGO J in NSG .V. SCG 2019 eKLR, KEMEI J in BWM .V. JMC 2018 eKLR and GACHERU J in GLADYS MUTHONI KIBUI .V. GEOFFREY NGATIA 2021 eKLR.

Given the firm pronouncement by MUKUNYA J, a Judge of concurrent jurisdiction, that this Court has no jurisdiction to determine this dispute, I have agonized on whether I can run away from that proposition. This is because I cannot purport to sit on appeal nor can a party re – agitate a matter already determined by a Court of concurrent jurisdiction. The Court of Appeal stated this very clearly in BELLEVUE DEVELOPMENT COMPANY LTD .V. HON JUSTICE FRANCIS GIKONYO & OTHERS C.A CIVIL APPEAL No 239 of 2017 [2018 eKLR] when it said: -

“This position is so well established that it would be a strange aberration for a Judge to embark on what is essentially an examination of the judicial conduct and pronouncements of Judges of the same status as himself, a task that is left to Courts and Judges of higher status in the hierarchy by way of appeals.”

I must therefore be very circumspect in this matter so as not to appear to be sitting on any appeal or allowing the plaintiff to re – litigate an issue that was already determined by MUKUNYA J in the ruling dated 6<sup>th</sup> March 2018.

Having said so, it is clear to me that the remarks by MUKUNYA J about this Court’s lack of jurisdiction were made obiter. The term obiter dictum is defined in BLACK’S LAW DICTIONARY 10<sup>TH</sup> EDITION as follows: -

“Latin “something said in passing.” A judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (although it may be considered persuasive).” Emphasis added.

I say so because, notwithstanding the fact that the Judge declined jurisdiction in the matter, he nonetheless proceeded to consider and dismiss

the plaintiff's application for a temporary injunction for not having met the required threshold. This is how he put it: -

***“For the reason that this application has not met the threshold in GIELLA .V. CASSMAN BROWN (1973) E.A 358, and further that, this Court lacks jurisdiction to entertain matrimonial matters, this application is dismissed with no orders as to costs as the plaintiff and 1<sup>st</sup> defendant are man and wife. The costs of the 2<sup>nd</sup> defendant shall be in the suit.”***

Clearly, where a Court has no jurisdiction, the only option is to down it's tools and transfer the matter to the Court with jurisdiction. Therefore, by making a finding that the plaintiff had not satisfied the requirements for an order of temporary injunction and proceeding to dismiss the application, the Court assumed jurisdiction. The comments about lack of jurisdiction must therefore be treated as obiter dictum.

It is also instructive to note that neither the plaintiff nor the defendants have questioned the jurisdiction of this Court to hear this dispute. The issue of jurisdiction was raised by the Court suo motto. In her submissions for the transfer of this case to the High Court, **MS MUMALASI** opined that the issue as to whether the plaintiff and 1<sup>st</sup> defendant are man and wife can be tried in the High Court and the second issue on whether the 2<sup>nd</sup> defendant can acquire the land in dispute can be tried by this Court. That would be cumbersome, unprocedural and illegal. It is a practice alien to our jurisdiction. A dispute can only be handled in one Court. In any event, I have already made a finding that this Court is seized with the necessary jurisdiction to determine this dispute. Besides, the relationship between the plaintiff and the 1<sup>st</sup> defendant is not an issue. The 1<sup>st</sup> defendant has already conceded in paragraphs 8 and 9 of his replying affidavit dated 6<sup>th</sup> March 2017 that he and the plaintiff are married with four children.

The up – shot of the above is that the plaintiff's Notice of Motion dated 14<sup>th</sup> January 2021 is dismissed. Since the plaintiff and 1<sup>st</sup> defendant are man and wife and the application was in any event precipitated by the Court ruling of 6<sup>th</sup> March 2018, there shall be no orders as to costs.

I further direct that since the Judge only dismissed the second limb of the application dated 5<sup>th</sup> July 2017, which dismissal shall stand, this matter be mentioned on 14<sup>th</sup> June 2021 for further directions with regard to the first limb of the application.

**Boaz N. Olao.**

**J U D G E**

**2<sup>nd</sup> June 2021.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 2<sup>ND</sup> DAY OF JUNE 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID 19 PANDEMIC GUIDELINES.**

**Boaz N. Olao.**

**J U D G E**

**2<sup>nd</sup> June 2021.**