



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MURANG'A

ELC NO 15 OF 2020

MWK.....APPLICANT

VS

PKI.....RESPONDENT

RULING

1. On the 21/7/2020 the Applicant moved the Court by way of an originating summons seeking interalia a declaration that the parcel No LOC11/MARAGI/xxxx (suit land or property) registered in the name of the Respondent and which was acquired through joint efforts of the parties be shared among the parties on prorate basis.
2. The Applicant averred that she is a former wife of the Respondent and that their marriage was dissolved on the 20/5/2020.
3. That during the subsistence of the marriage she made monetary contribution in the acquisition of the suit property.
4. The application was opposed by the Respondent who contended that he purchased the property without any contribution of the Applicant.
5. On the 31/5/2021 the learned counsels for the Applicant moved the Court by way of an oral submission that the value of the property is within Kshs 2 million and the crux of the Applicant's case is the division of property post-divorce and therefore urged the Court to transfer the suit to the High Court for hearing and determination.
6. Maintaining that this Court is devoid of jurisdiction, the learned counsel for the Respondents argued that this Court cannot transfer the suit to the High Court on account that it was filed in a Court without power to entertain it.
7. The Court directed the parties to address it on the issue of jurisdiction.
8. Parties elected to file written submissions which I have read and considered.
9. The Applicant submitted that the parties having been wife and husband before the dissolution of their marriage, are before the Court for the division of the suit land which is a matrimonial property. That this Court is cloth with the jurisdiction to hear and determine the matter to its logical conclusion. Reliance was placed on the case of **AKK Vs PKW CA No 61 of 2019** where the Court held that the trial Court erred in divesting itself of jurisdiction in a matter brought under section 17 of the Matrimonial Property Act.
10. The Respondent on the other hand submitted that the power to transfer suits is donated under section 18 of the Civil Procedure Act which empowers the High Court to transfer a suit for hearing and disposal to any subordinate Court or in any Court subordinate to it. He relied on the case of **Kagenyi Vs Musiramo & Anor Misc App No 39 of 1967** and the case of **Gaikia Kimani Kiarie Vs Peter Kimani Kiramba Misc App No 42 of 2019** in support of his opposition to the application.
11. It was his position that an order for transfer of a suit from one Court to another cannot be made unless the suit has in the first place been brought to a Court that has jurisdiction to try it.
12. The key issue is whether the Court can transfer the suit to the High Court.
13. Section 18 of the CPA donates power to this Court to transfer suits. It states as follows;

“Power of High Court to withdraw and transfer case instituted in subordinate Court

(1) On the application of any of the parties and after notice to the parties and after hearing such of

them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(b) withdraw any suit or other proceeding pending in any Court subordinate to it, and thereafter—

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) retransfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn as aforesaid, the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceed from the point at which it was transferred or withdrawn.

14. The power to transfer a suit is discretionary. The burden of providing sufficient reasons of the transfer rests with the Applicant. In this case the Applicant informed the Court that the pecuniary value of the suit land is Kshs 2 million and further that the matter is about the division of the suit land post divorce. If the subject matter is Kshs 2 million, it has not been explained why the Applicant seeks to transfer it to the High Court.

15. The suit is brought under the Matrimonial Act. My reading of the said Act states that the Court referred to under section 2 is the Resident Magistrate's Court established under [Section 3](#) of the Magistrates' Courts Act ([Cap. 10](#)).

16. A quick look at the jurisdiction of this Court under section 13 of the ELC Act does not include determination of marriage and divorce and connected matters.

17. With regard to the jurisdiction of the High Court, Article 165(3) of the Constitution stipulates that:-

“(3) Subject to Clause (5), the High Court shall have-

a) Unlimited original jurisdiction in criminal and civil matters;

b) Jurisdiction to determine the questions whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

c) Jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

d) Jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-

(i) The question whether any law is inconsistent with or in contravention of this Constitution;

(ii) The question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of this Constitution;

(iii) Any matter relating to Constitutional powers of State Organs in respect of County governments and any matter relating to the Constitutional relationship between the levels of government ; and

(iv) A question relating to conflict of laws under Article 191; and

(e) Any other jurisdiction original or appellate conferred on it by legislation.”

18. Article 165 (6) further gives the High Court Supervisory jurisdiction in the following terms:-

“(6) The High Court has supervisory jurisdiction over the subordinate Courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior Court.”

19. Article 162(2) (b) of the Constitution on the other hand empowers Parliament to “establish Courts with the status of the High Court to hear and determine disputes relating to the environment and the use and occupation of, and title to land.” In this regard and pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act, Act No. 19 of 2011.

20. Section 13 of the Environment and Land Court Act outlines the jurisdiction of the Environment and Land Courts as follows:-

(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.

20. The locus classicus case on the question of jurisdiction is the celebrated case of **Owners of the Motor Vessel “Lillian S” –vs- Caltex Oil (Kenya) Ltd (1989) KLR 1** where the Court stated that:-

“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 tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

21. I am guided by the Supreme Court in the case of **Republic –vs- Karisa Chengo & 2 Others (Supreme Court Petition No. 5 of 2015) 2017 eKLR**, the Supreme Court delivered itself as follows:-

“Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the Constitution or legislation.....

In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

22. Based on the finding that this suit was filed in the wrong Court that is to say a Court without jurisdiction, I find no legal basis to entertain the suit nor the application to transfer it to the High Court.

23. The application is unmerited and I dismiss the application and strike out the main Originating summons filed on the 21/7/2020.

24. The Respondent shall have the costs of the application and the suit.

25. Orders accordingly

DELIVERED, DATED AND SIGNED AT MURANG’A THIS 29TH DAY OF JULY 2021

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of;

Ms Waititu Advocate HB for Mr. Ndungu for Plaintiff/Respondent

T. M. Njoroge Advocate for the Defendant/Applicant

Kuiyaki/Alex, Court Assistants