



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 31 OF 2021

MARTHA WANJIRU IRUNGU.....PLAINTIFF/ APPLICANT

VERSUS

CYRUS MUCEIBU IRUNGU.....1ST DEFENDANT/RESPONDENT

HELEN WANJIRU IRUNGU.....2ND DEFENDANT/RESPONDENT

MAGUNA-ANDU WHOLESALERS (K)

LIMITED.....3RD DEFENDANT/RESPONDENT

THE LAND REGISTRAR

KIRINYAGA COUNTY.....4TH DEFENDANT/RESPONDENT

RULING

1. The Plaintiff/Applicant herein filed Notice of Motion dated 17th August 2021 seeking the following Orders;

a. Spent

b. Spent

c. Spent

d. THAT the Honourable Court be pleased to grant a temporary injunction restraining the 1st and 2nd Defendant/ Respondent either by themselves, their servants, agents, representatives and/or their employees or anyone claiming under them howsoever from transferring, interfering in any manner, alienating, charging, offering for sale or disposing off KIINE/RUKANGA/ 1494,KIINE/RUKANGA/1689,KIINE/SAGANA/57,KIINE/SAGANA/2307, K IINE/SAGANA/2432,MUTITHI/CHUMBIRI/219,MUTITHI/CHUMBIRI/220,MUTITHI/ CHUMBIRI/225,MUTITHICHUMBIRI/226,MWERUA/KIANDAI/249,MWERUA/ KIANDAI/807,MWERUA/KITHUMBU/778, MWERUA/KAGIO/1706,INOI/KERUGOYA/543,INOI/KAMONDO/2,KABARE/NYANGA TI/250,KIRINYAGA/GATHIGIRIRI/168,KIRINYAGA/GATHIRIRI/177 pending the hearing and determination of this suit.

e. That the Honourable Court be pleased to issue a declaration that the transfer, registration and change of title of the suit property known as KIINE/ RUKANGA/1690 by the 1st and 2nd Defendants was fraudulent and therefore null and void.

f. That the Honourable Court be pleased to issue and Order compelling the 4th Respondent to cancel the transfer and title of suit property known as KIINE/RUKANGA 1690 issued to the 3rd Respondent and for the same to be registered in the joint names of the plaintiff and the 1st Defendant.

g. That the Honourable court be pleased to grant a permanent injunction restraining the 1st, 2nd, 3rd and 4th Defendants/Respondents either by themselves, their servants, agents, representatives and/or their employees or anyone

claiming under them howsoever from transferring, interfering in any manner, alienating, charging, offering for sale or disposing off the properties known as KIINE/RUKANGA/1690 or any part thereof.

h. That the Honourable Court be pleased to grant a permanent injunction restraining the 1st, 2nd, 3rd and 4th Defendants/Respondents either by themselves, their servants, agents, representatives and/or employees or anyone claiming under them howsoever from transferring, interfering in any manner, alienating, charging, offering for sale or disposing off the properties listed or any part thereof.

2. The application was supported by the sworn Affidavit of **Marha Wanjiru Irungu** who averred that she has been married to the 1st Defendant/Respondent since the year 1977 with their union being solemnized under Kikuyu custom in the year 1983, they were blessed with three issues (now adults). That during the course and subsistence of their marriage they acquired and owned the listed properties. She mentioned in particular Sagana (Kiine/Rukanga 1689 & Kiine/Rukanga 1690) where they built their matrimonial home and both her and their son conduct farming activities. That it is unclear how the 1st Respondent married the 2nd Respondent but it is alleged that they have 2 children together.

3. That on or about the year 2018 she was involved in an accident that left her immobile. That it is during this time that the 1st and 2nd Defendant/Respondent began disposing the properties without her knowledge. In particular, the plaintiff averred that in the May 2021 he was informed by her neighbours that one of the properties i.e. **Kiine/Rukanga/1690** was in the process of being transferred to the 3rd Defendant/Respondent who was buying the property.

4. That she proceeded to register a restriction on the property on 31st May 2021. However, on 15th June 2021 the 4th Defendant/Respondent served her with a letter indicating she had lifted the restriction registered. It was her averment that the 4th Respondent explained she removed the restriction due to a protest letter dated 11th June 2021 by the 1st Respondent's advocates. That the 4th Respondent also indicated that a large sum of money had been paid by the 3rd Respondent.

5. That she conducted a search on 17th June 2021 which indicated that the property had been registered in the 3rd Respondent's name on 15th June 2021 the same day the 4th Respondent had issued to her the letter.

6. She averred that she subsequently applied for a caution on all the other properties on 1st July 2021. The same was heard on 4th August 2021 where the 4th Respondent directed that she should propose the properties she would like allocated and present to her husband's advocate. That the 4th Respondent indicated that she would make her decision on the caution application once the parties have agreed on the distribution of the properties. That as it stands no cautions have been registered on the properties and she is apprehensive that the 1st and 2nd Defendants/Respondents shall proceed to sell and/or dispose of the properties before the application for cautions are registered.

7. She also averred that she had provided both monetary, material and emotional support towards the acquisition of the properties in particular paying for the children school fees, catering for household expenses, offsetting the 1st Defendants medical bills at Chiromo and securing release of title deeds from Wachira Irungu & Co. Advocates.

8. The 1st and 2nd Defendants/Respondents filed Notice of preliminary objection dated 1ST September 2021 on the following grounds;

a. The Honourable Court has no jurisdiction under Article 162 (2) (b) of the Kenyan Constitution to hear this dispute touching on matrimonial property since the jurisdiction squarely lies with the Family Division of the High Court.

b. The suit ought to have been commenced by way of petition of the Originating summons and not by way of plaint.

c. That the plaintiff/Applicants suit and application are therefore incurably defective and ought to be struck out.

9. On 7th September 2021 this Court issued the following directions;

a. That the 1st and 2nd Respondents notice of preliminary objection dated 1st September 2021 be disposed of first by way of written Submissions.

b. That the 1st and 2nd Respondent to file and serve their written submissions within 7 days from today.

c. That the 3rd and 4th Respondent as well as the Applicant to file and serve their written submissions within 7 days from the date of service thereof. Any party who fails to comply with these directions will have their submissions not considered.

d. Ruling on 29/9/2021 virtually.

10. At the time of writing this Ruling none of the parties had filed their written submissions.

11. I have considered the application and the notice of Preliminary Objection. The Notice of preliminary objection raise the following issue for determination i.e. **whether this Honourable Court has jurisdiction to handle the suit as filed?**

DETERMINATION

12. A Preliminary Objection was described in the **Mukisa Biscuits Manufacturing Co. Ltd...Vs...West End Distributors Ltd (1969) EA 696** to mean:-

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”.

Further Sir **Charles Nebbold, JA** stated that:-

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does not nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

13. The question that has been raised asks whether this Honourable Court has jurisdiction to hear and determine questions relating to title, use occupation and disposition of matrimonial property.

14. **Article 162(2)(b) of the Constitution** states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, **Section 13 of the Environment and Land Court Act** expounds on the jurisdiction of this Court 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.”

15. In **Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] eKLR** the court was faced with a similar question it addressed itself as follows;

The dispute herein involves property situated on a parcel of land, and the specific prayers sought by the Plaintiff in the Plaint filed herein dated 18th March 2014 are a declaration that the Plaintiff is the owner of the said property, that that the continued occupation of the property by the Defendant is illegal, orders of eviction, and a permanent injunction restraining the Defendant from dealing with the suit property. These are clearly orders relating to the use, occupation and title to land and within the jurisdiction of this Court. In addition the Land Registration Act which provides for certain matrimonial property rights and co-ownership of the matrimonial home as between spouses specifically provides under section 101 thereof that this Court has jurisdiction to hear and determine disputes, actions and proceedings concerning land under the Act.

It is however notable in this regard that this Court shares concurrent jurisdiction with the High Court in certain matters relating to land, and this matters have been described in the Practice Directions On Proceedings In The Environment and Land Courts, and on Proceedings Relating to the Environment and the Use and Occupation of, and Title to Land and Proceedings in other Courts dated 25th July 2014 and published in Gazette Notice No. 5178 as cases touching on inheritance, succession and distribution of land under the Law of Succession Act. These cases shall continue to be filed and heard by the High Court or the Magistrates Courts of competent jurisdiction.

In addition if rights to matrimonial property are in dispute, section 17 of the Matrimonial Property Act of 2013 provides as follows:

“(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.”

No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction.

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 land.

16. Similarly in *Gladys Muthoni Kibui v Geoffrey Ngatia* [2021] eKLR the Court addressing the same question outlined the provisions of Article 162(2)(b) of the Constitution and Section 13 of the Environment and Land Court Act, 2011 and held as follows;

“There is no doubt from the foregoing that this Court has jurisdiction to determine the dispute before it which revolves around title to land. On whether the Court can determine a dispute over matrimonial property, so long as the dispute is over the use, occupation or title to land, this Court has jurisdiction to determine it whether such land is classified as matrimonial property or not....the Court has powers to issue declaration under Section 17 of the Matrimonial Property Act but CANNOT SEVERE the same as prayed by the Plaintiff on prayer item 1 and 3 of the O.S...From the above analysis the Court finds and holds that these proceedings were instituted prematurely with a view to distribute the matrimonial property as prayed. The Court holds that the only remedy is that the Plaintiff may seek an appropriate relief in the Family Division Court. Division of Matrimonial Property can only be done after dissolution of marriage. This Court has no Jurisdiction to deal with dissolution of marriages.”

17. In this case the plaintiff seeks inhibition remedies. She has cited particulars of fraud against the defendant and seeks cancellation of title that was allegedly illegally transferred by the Defendants/Respondents without her consent. The plaint by itself does not mention the need to subdivide/severe the titles. Borrowing from the cited cases above it is this court’s finding that it has jurisdiction to hear and determine the plaint as filed.

18. As to whether the suit ought to have been commenced by way of petition or originating summons and not by way of plaint. Order 37 Rule 11 of the Civil Procedure Rules provides that:

“Any person claiming to be interested under a deed, will, or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested.”

19. Order 37 Rule 19(1) of the Civil Procedure Rules provides leeway. It provides that:

“(1) Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.”

[Emphasis added]

20. In *Kenya Commercial Bank Ltd vs. Osebe*, Civil Appeal No. 60 of 1982 the Court of Appeal held;

“The procedure of originating summons is intended for simple matters and enables the court to settle them without the expense of bringing an action. The procedure is not intended for determination of matters that involve serious questions. The procedure should not be used for the purpose of determining disputed questions of fact.

The procedure of originating summons is designed for the summary or ad hoc determination of points of law, construction or certain specific facts for obtaining of specific directions of the court such as trustees, administrators or the courts execution officers”.

[Emphasis added].

21. The issues raised herein are not only disputed facts but raise queries on the conduct of the 4th Respondent. The allegations of fraud misrepresentation and forgery can be properly canvassed by way of plaint as opposed to Originating summons. This being the case and rehashing the provisions of Order 37 Rule 19(1) of the Civil Procedure Rules I do find that the plaint herein is properly filed.

22. The upshot of this determination is that the Notice of Preliminary Objection filed on 1st September 2021 lacks merit and the same is hereby dismissed. Consequently, the notice of preliminary objection is not upheld and same is hereby dismissed with costs in the cause.

DATED, DELIVERED VIRTUALLY AND SIGNED AT GARISSA THIS 29TH DAY OF SEPTEMBER, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. M/s kimiti for the Plaintiff/Respondent
2. Mr. Hassan for the Defendants