



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO E105 OF 2021

JOO.....PLAINTIFF

=VERSUS=

GKN.....DEFENDANT

RULING

1. The Plaintiff, JOO, initiated this suit through a plaint dated 16/3/2021. His case was that, he and the defendant solemnized a marriage on 3/8/2008, and they had lived as husband and wife since then. They had been blessed with two children. During the marriage, they “jointly acquired and developed an array of matrimonial properties”, including **Land Reference Number xxx/xxxx/xxx**, situated in Rangers Court, Kuguru Estate, South C, Nairobi (**the suit property**). They, however, got estranged and there was a pending divorce petition filed by the defendant, to wit, **Nairobi Chief Magistrate Court Divorce Cause No. 72 of 2020**. He had heard from reliable sources that the defendant was sourcing for a buyer of the suit property and was in the process of disposing of the suit property, oblivious of the fact that it was the family home.

2. Consequently, he sought the following verbatim reliefs against the defendant:

a) A declaration that the Plot LR No. xxx/xxxx/xxx situated

at Rangers Court, Kuguru Estate, within South C in Nairobi, is matrimonial property jointly acquired and developed by the plaintiff and the defendant.

b) A mandatory injunction restrain the defendant either by herself or representatives, servants, agents and assigns from howsoever selling, leasing, alienating, trespassing onto, entering into, subdividing, collecting rent from or otherwise interfering with plot LR No. xxx/xxxx/xxx situated at Rangers Court, Kuguru Estate within South C in Nairobi without the consent of the plaintiff.

c) An order compelling the defendant to deposit in court the original title document for Plot LR No. xxx/xxxx/xxx situated at Rangers Court, Kuguru Estate within South C in Nairobi.

d) Any other relief that this honourable court shall deem just and fit.

e) Costs of the suit with interest at court rates.

3. Together with the plaint, the plaintiff brought a notice of motion dated 16/3/2021, in which he sought an interlocutory injunctive order restraining the defendant against selling, leasing, alienating or in any other way interfering with the suit property. Further, he sought an interlocutory order compelling the defendant to deposit in court the original title relating to the suit property. The said application dated 16/3/2021 is one of the two items falling for determination in this ruling.

4. The second item falling for determination in the ruling is the defendant’s notice of preliminary objection dated 19/4/2021, through which the defendant objected to this suit and urged the court to strike it on the following verbatim grounds:-

a) This honourable court as constituted lacks jurisdiction to hear and determine this cause this being a matrimonial matter.

b) The above notwithstanding the suit is an abuse of the court process as it offends the provisions of Article 162(2)(b) of the Constitution and Section 5 of the Matrimonial property Act, 2013.

c) *The applicant lacks the locus stand to bring this suit.*

d) *The suit is bad in law in that the applicant has not attached any evidence in support thereof and the same ought to be struck off.*

e) *The suit is scandalous and vexatious and merely aimed at annoying the respondent and the respondent prays that the same be struck off with costs.*

5. A cursory examination of the above grounds in the notice of preliminary objection reveals that the notice of preliminary objection raises the question of jurisdiction of this court to adjudicate the dispute in this suit. Our jurisprudence on disposal of questions relating to jurisdiction is well settled. In the *locus classicus* case of **Owners of Motor Vessel 'Lilian S' v Caltex Oil (Kenya) Ltd (1989) 1 KLR**, Nyarangi JA outlined the relevant principle on disposal of jurisdictional questions as follows:

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

6. I will, in the circumstances, first dispose the notice of preliminary objection because it raises a jurisdictional question. I will thereafter dispose the notice of motion dated 16/3/2021.

7. Both the preliminary objection and the application were canvassed through written submissions. Canvassing the preliminary objection, counsel for the defendant submitted that it was not in dispute that the plaintiff and the defendant were husband and wife, having solemnized their marriage on 3/8/2008. Counsel added that during their marriage, the couple acquired several matrimonial properties, including the suit property. Counsel further submitted that the marriage had turned sour and the defendant had instituted divorce proceedings which were ongoing in the Chief Magistrate Court. Counsel argued that the court properly clothed with jurisdiction to hear and determine the issues in this suit was the Family Division of the High Court. It was the position of counsel for the defendant that this court lacked the requisite jurisdiction to adjudicate this dispute.

8. On his part, counsel for the plaintiff submitted that the jurisdiction of a court flowed from either the Constitution or from legislation or both. Counsel contended that **Section 13** of the Environment and Land Court Act vested in this court both original and appellate jurisdiction to deal with all disputes relating to matters set out in **Article 162(2)(b)** of the Constitution. Relying on the decision in **BWM v JMC (2018 eKLR)**, counsel urged the court to reject the preliminary objection.

9. I have considered the tenor and import of the preliminary objection dated 19/4/2021; the parties' respective submissions on the preliminary objection; the relevant constitutional and legal frameworks; and the relevant jurisprudence. Although the notice of preliminary objection itemized five grounds, the submissions tendered by counsel for the defendant only focused on ground nos 1 and 2. Nothing was submitted relating to the other grounds itemized in the notice of preliminary objection. The two grounds on which counsel for the defendant submitted focused entirely on the jurisdiction of this court to adjudicate this dispute. Consequently, the single question falling for determination in this ruling, in relation to the preliminary objection, is whether this court is the proper court vested with jurisdiction to adjudicate the dispute in this suit.

10. In **R v Karisa Chengo (2017) eKLR**, the Supreme Court of Kenya defined jurisdiction as follows:-

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance or as to the area over which the jurisdiction shall extend, or it may partake both these characteristics...where a court takes upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.”

11. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR**, the Supreme Court of Kenya outlined the following jurisprudential principle on the source and scope of jurisdiction of a court:

“A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

12. The broad jurisdiction of the Environment and Land Court of Kenya is spelt out in Article 162(2)(b) of the Constitution in the following words:

“162(2)Parliament shall establish courts with the status of the

High Court to hear and determine disputes relating to—

(a) employment and labour relations; and

(b) the environment and the use and occupation of, and title

to, land.”

13. Section 13 of the Environment and Land Court Act elaborates the above constitutional mandate of the court in the following framework.

“13. Jurisdiction of the Court

(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.

(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.

(4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.

(5) Deleted by Act No. 12 of 2012, Sch.

(6) Deleted by Act No. 12 of 2012, Sch.

(7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?

(a) interim or permanent preservation orders including injunctions;

(b) prerogative orders;

(c) award of damages;

(d) compensation;

(e) specific performance;

(g) restitution;

(h) declaration; or

(i) costs.

14. The above constitutional and statutory frameworks have been the subject of interpretation in a plethora of decisions by our superior courts [see Supreme Court and Court of Appeal decisions in the **Karisa Chengo Petition of Appeal** and **Appeal** respectively, and the Court of Appeal decision in **Kibos Distillers Limited & 5 others v Benson Ambuti Adegwa & 2 others**].

15. There is common ground that the plaintiff and the defendant are husband and wife. They are estranged. They have pending divorce proceedings initiated by the defendant. In his plaint and supporting affidavit, the plaintiff contends that the suit property is matrimonial property. Among the reliefs he seeks is a declaration to that effect. On her part, the defendant swore a replying affidavit in which she deposed that the suit property was not acquired during the subsistence of their marriage. She contended that the suit property was not matrimonial property. In her written submissions relating to the preliminary objection, she appeared to depart from that position and stated thus:

“Your Lordship, it’s not in dispute that the plaintiff and the defendant herein are husband and wife having solemnized their marriage on 3rd August, 2008 and during their conveture they acquired several matrimonial properties including plot no. LR No xxx/xxx, the suit property.”

16. It is therefore apparent from the pleadings and from other materials presented to the court at this stage that the plaintiff asserts that the suit property is matrimonial property and that the defendant ought to deal with it in tandem with the law relating to matrimonial property. Although, the defendant deposed in the replying affidavit that the suit property was not acquired during the subsistence of the marriage, she contends that the court vested with jurisdiction to deal with the dispute is the Family Division of the High Court and not this Court. It is therefore apparent that the gist of the dispute in this suit revolves around the rights of the estranged couple over the suit property. Is the Environment and Land Court the proper court vested with jurisdiction to deal with this kind of dispute?

17. My answer to the above question is in the negative. I say so because, the plaintiff has come to court asserting that the suit property is both a matrimonial property and a matrimonial home and that the defendant can only deal with it as such. The procedure for affirming or rejecting that contention is the one envisaged under the Matrimonial Property Act 2013. Although the Act does not expressly define the court envisaged to exercise jurisdiction under that framework, **Section 17** of the Act contains the following provisions on how a spouse is supposed to seek redress relating to a right over matrimonial property:

**“17. Action for declaration of rights to property
(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.”**

18. Further, given that the Matrimonial Property Act contemplates exercise of jurisdiction by a court but does not define that court, the fallback position, in my view, is Article 165(3)(a) of the Constitution which vests in the High Court unlimited original jurisdiction in criminal and civil matters, subject only to the disputes excluded under Article 165(5) of the Constitution.

19. It is therefore my finding that the present dispute relates to what is alleged to be matrimonial property. The procedure of redress for a dispute of this nature is provided under Section 17 of the Matrimonial Property Act. The court vested with jurisdiction to adjudicate the dispute, in the absence of express definition of the court contemplated under the Act, is the High Court, by dint of the provisions of **Article 165(3)(a)** of the Constitution. Consequently, my finding on the single issue in the preliminary objection dated 19/4/2021 is that the Environment and Land Court lacks jurisdiction to adjudicate this dispute.

20. Should this court, in the circumstances, strike out this suit? That would have been the fate of this suit until recently. In August 2020, the **Supreme Court of Kenya in Benson Ambuti Adega & 2 others v Kibos Distillers Limited & 5 others (2020) eKLR** emphasized the centrality of **Article 50** of the Constitution and emphasized that in a scenario such as this one, the proper recourse is to remit the dispute to the appropriate court/tribunal as opposed to shutting the litigant out of the seat of justice completely. The Supreme Court of Kenya rendered itself thus:

“The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate court should have at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.”

21. On my part, I have noted that the relevant rules on procedure and form contemplated under Section 17 of the Matrimonial Property Act have not been promulgated. It is therefore my view that the present suit can properly be remitted to the appropriate court in its present form.

22. Having come to the conclusion that the Environment and Land Court is not the proper court vested with jurisdiction to adjudicate the dispute in this suit, I will not delve into the merits of the application dated 16/3/2020. The said application will be disposed by the appropriate court.

23. In the end, I make the following disposal orders relating to the preliminary objection dated 19/4/2021 and the notice of motion dated 16/3/2021:

a) The defendant’s preliminary objection to the jurisdiction of this court over the dispute in this suit is upheld. The plaintiff shall bear costs of the preliminary objection.

b) This suit is hereby transferred to the Family Division of the High Court at Milimani, Nairobi.

c) The application dated 16/3/2021 shall be disposed by the said Division of the High Court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 28TH DAY OF OCTOBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mrs Wambugu for the Defendant

Court Assistant: Lucy Muthoni

NOTE:

This application was heard and a ruling date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the ruling virtually at Thika.

B M EBOSO

JUDGE