



**ZMZ v EMH (Family Originating Summons E003 of 2023)
[2023] KEHC 21397 (KLR) (19 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21397 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY ORIGINATING SUMMONS E003 OF 2023**

**G MUTAI, J
JULY 19, 2023**

BETWEEN

ZMZ APPLICANT

AND

EMH RESPONDENT

RULING

Introduction

1. Vide an Originating Summons dated February 21, 2023 and filed on February 26, 2023 the Applicant sought the following orders:-
 1. That pending the hearing and determination of this summons, the honourable court be pleased to preserve Apartment No G2 on Mombasa/Block XVII/8xx, Apartment No A9 on Mombasa/Block XVII/8xx and Apartment No G6 on Mombasa/Block X/3xxTudor, Mombasa;
 2. That the honourable court be pleased to declare and issue a declaration that Apartment No G2 on Mombasa/Block XVII/8xx, Apartment No A9 on Mombasa/Block XVII/8xx and Apartment No G6 on Mombasa/Block X/3xx Tudor, Mombasa are gifts given by the Respondent to the Applicant during the subsistence of their marriage;
 3. That the honourable court be pleased to issue a declaration that property known as Apartment No. 10 on Mombasa/Block XVII/6xx located in Tudor, Mombasa was acquired in the subsistence of their marriage and registered in the name of Ahira Company Limited fully owned by the Respondent and the same should be shared equally between the Applicant and the Respondent or as this Court deems fit;



4. That in the alternative this honourable court do order that the Applicant be compensated for her share in the immovable properties Apartment No 10 on Mombasa/Block XVII/6xx located in Tudor, Mombasa.
5. That the Respondent does pay costs of the proceedings.
2. The Applicant argued that the Respondent bought and gifted her the properties during the subsistence of the marriage. She averred that she contributed to the said properties directly and or indirectly. The Applicant further averred that the Respondent had somehow transferred the said properties to himself without her consent and that the said transfers were now the subject of criminal investigations due to the questionable way they were done. The Applicant stated that she has a daughter with the Respondent.
3. The Respondent did not file a response to the said Originating Objection. In lieu of doing so he filed a Preliminary Objection dated March 24, 2023 vide which he sought to have the Motion before this Court struck out on the ground that this Court does not have jurisdiction to hear and determine the same. In the Respondent's opinion, this cause ought to have been filed before the Environment and Land Court.
4. The matter was mentioned on June 20, 2023 before me. On the said date I directed that the Preliminary Objection raised by the Respondent be canvassed by way of Written Submissions. On July 10, 2023 upon confirming that both parties had complied I set down this matter for ruling on July 19, 2023.

The Submissions of the Respondent

5. The single contention raised by the Respondent is that this Court lacks jurisdiction to hear and determine this matter. the Respondent submits that the unlimited jurisdiction of the High Court in civil and criminal matters is circumscribed by the provision of Article 165 (5) (b) of the Constitution of Kenya, 2010 which provides that the High Court shall not have jurisdiction in respect of matters:-

' (b) falling within the jurisdiction of the Courts contemplated in Article 162(2).'

Article 162(2) states that:-

'Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to :-

...

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

6. The Respondent submitted that when an issue of jurisdiction is raised it must be dealt with in limine and resolved before anything else is done. Reliance was placed on the locus classicus case of Owners of the Motor Vessel Lilian 'S' versus Caltex Oil (Kenya) Ltd [1989]eKLR and in particular to the statement of Nyarangi JA to the effect 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 continuation of proceedings pending other evidence. A Court of law lays down its tools in respect of the matter before it the moment it holds that it is without jurisdiction.'

7. The Respondent also relied on the equally emphatic holding by the Supreme Court of Kenya in the case of Samuel Kamau Macharia versus KCB & 2 Others [2012] eKLR.



8. The Respondent though acknowledging that this Court has jurisdiction to hear matrimonial disputes submits that the jurisdiction of the Family Court is ousted in regard to an issue regarding ownership of property. In the opinion of the Respondent such dispute must be filed in the Environment and Land Court. In support of his argument this Court was referred to the case of *[Zipporah Njoki Kangara versus Rock and Pure Limited & 3 others \[2021\] eKLR](#)* where Naikuni, J of the Environment and Land Court agreed with the decision in *BWM versus JMC [2018]eKLR* where it was held that:-

' for avoidance of doubt, the Court notes that the Matrimonial Properties Act does not define the Court that disputes relating to the matrimonial property disputes should be referred for determination. It is the current legal position that the concurrent jurisdiction is given to the 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 occupation, use, and title to land. I find nothing to oust the jurisdiction of this Court and I proceed to determine the preliminary objection.'

I have quoted the above case in extent as it is, in my view instructive.

9. As the Applicant alleged fraud the Respondent relying on the case of *MWN versus HMM [2017] eKLR*, further argued that the High Court lacks jurisdiction. The Respondent submitted that being a Court without jurisdiction this Court may not transfer the case to the Environment and Land Court. In support of this contention the Court was referred to the holding of the Court of Appeal in *[Phoenix of East Africa Assurance Co Ltd versus SM Thiga trading as Newspapers Service \[2019\]eKLR](#)*.
10. The Court was urged to strike out the Originating Summons dated February 21, 2023 with costs to the Respondent.

Submissions of the Applicant

11. The Applicant filed Written Submissions dated June 30, 2023. It is the applicant's submission that this honourable Court has jurisdiction to hear and determine the matter. the Applicant referred the Court to Section 13 of the *[Environment and Land Court Act](#)*, No 19 of 2011 which defines the jurisdiction of the said Court. I was also referred to sections 6 and 14 of the *[Matrimonial Property Act](#)* which respectively define what matrimonial property is and state the presumptions that are made regarding properties acquired during coverture.
12. The Applicant submitted that the properties the subject of the dispute before this Court were acquired during the subsistence of the marriage. The marriage between them had since been dissolved. The Court was referred to the case of *ENN versus SNK* and *EKTM versus ECC*. The citations for these cases were however not provident.

Analysis of the Applicable Law

13. The Court of Appeal of Eastern Africa (per Law, JA) in the case of *Mukisa Biscuit Manufacturing Co Ltd versus West End Distributors Ltd (1969) EA 696* that:-

' a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of the 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.'



14. Sir Charles Newbold, P, in the above quoted matter stated that:-

' The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be called 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 has to be ascertained or if what is sought is the exercise of judicial discretion.'

15. I have already stated that the Respondent did not file a response to the Originating Summons. Can a decision be made regarding the preliminary objection without interrogating the facts? To do so we would have to assume that all the startling allegations made against the Respondent are indeed correct and that there is no contestation as to their veracity.

16. In this case the Applicant alleges that the subject properties, though purchased by the Respondent, were gifted to her during the subsistence of the marriage and registered in her name. She further alleges that the Respondent has since transferred them to himself and to a company he controls.

17. For this Court to determine whether it has jurisdiction I must first look at the [Matrimonial Property Act](#).

18. Section 6(1) of the said states that

' For the purposes of this Act, matrimonial property means:-

- a. Matrimonial home or homes;
- b. Household goods and effects in the matrimonial home or homes; or
- c. Any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.'

Section 14 states that: -

' Where matrimonial property is acquired during marriage: -

- a. In the name of one spouse, there shall be a reputable presumption that the property is held in trust for the other spouse; and
- b. In the names of the spouses jointly there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.'

Section 15 of the said Act provides that

' Where a spouse gives any property to the other spouse as a gift during the subsistence of the marriage there shall be a rebuttable presumption that the property thereafter belongs absolutely to the recipient.'

19. In this matter the parties got married on October 15, 2014. The properties were initially registered in the name of the Applicant on February 17, 2021 (flat No A9), February 2, 2021 (Flat No G2) and November 4, 2020 (Flat No G6). The Applicant avers that the said properties were gifted to her by her then husband during the subsistence of the marriage. It isn't at all clear at this point how the title to the said properties passed to the Respondent. That being the case the disputes between them falls in the



ambit of the Matrimonial Property Act and ought therefore to be heard by the Court with jurisdiction to hear and determine matters under the said Act.

20. It is true that the Matrimonial Property Act does not state which Court the matters arising under its provisions should be referred to. The Rules Committee in exercise of the powers conferred on it by section 18 of the Matrimonial Property Act, 2018 made the Matrimonial Properties Rules, 2022 (the Rules). Paragraph 6(1) of the said Rules provides as follows:-

- ' (1) an application to enforce a claim relating to matrimonial property may be made in any proceedings under the Act
- a. To the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate's Court ...'

It is therefore my finding that the proper Court to hear and determine disputes relating to the matrimonial properties whose values exceed the pecuniary jurisdiction of the Chief Magistrate's Courts is the High Court.

21. I have read the persuasive decisions that the Respondent referred to in support of his preliminary objection. With respect Zipporah Njoki Kangara case does not say that the High Court lacks jurisdiction to hear matrimonial properties cases involving land. As a matter of fact the case of BWNM versus JMC [2018] eKLR quoted by the said Court makes the proposition that various Court have concurrent jurisdiction. I must also point out that the said case was determined by a Court with equal status as this Court. Its decision is not binding (on this Court).
22. On the issue of fraud. It is my opinion that fraud is one of the grounds raised in the Originating Summons. It is in fact ancillary to the main ground. As I understand the dispute the main issue is whether the Respondent gave to the Applicant gifts during coverture which should now be deemed as absolutely belonging to her.
1. 'In *Suzanne Butler & 4 Others v Redhill Investments & Another* [2017]eKLR the Court stated the test to be used when following words: "When faced with a controversy whether a particular case is a dispute about land (which should be litigated at the ELC) or not, the Courts utilize the Pre-dominant Purpose Test: In a transaction involving both a sale of land and other services or goods, jurisdiction lies at the ELC if the transaction is predominantly for land, but the High Court has jurisdiction if the transaction is predominantly for the provision of goods, construction, or works. The Court must first determine whether the pre-dominant purpose of the transaction is the sale of land or construction. Whether the High Court or the ELC has jurisdiction hinges on the predominant purpose of the transaction, that is, whether the contract primarily concerns the sale of land or, in this case, the construction of a townhouse. Ordinarily, the pleadings give the Court sufficient glimpse to examine the transaction to determine whether sale of land or other services was the predominant purpose of the contract. This test accords with what other Courts have done and therefore lends predictability to the issue.'
23. I am in agreement with above quoted authority. The predominant issue in this matter is matrimonial property. The matter was therefore filed in the correct court.



24. The Environment & Land Court in Thika in [EMW versus RMK \[2022\] eKLR](#) held that: -

' in this case the Plaintiff's claim revolves around the division of property that she claims to be matrimonial property. For the Court to determine the case it must enquire as to the marital status of the parties. In this case the parties are still married but separated. The other issue is to determine which of the properties listed are matrimonial or not. Distribution of matrimonial property in an undissolved marriage is best left to the family Court.'

25. In [RW versus JMN \[2022\] eKLR](#) the Environment and Land Court it Nakuru (per Mwangi Njoroge J) stated that

' on the other hand the [Matrimonial Property Act](#), Act No 49 of 2013 does not specifically define 'Court' but it is trite that division of matrimonial property is determined by the High Court under its jurisdiction as provided under Article 165(3)(a) of the [constitution](#) of Kenya 2010.'

26. My finding therefore is that this Court has jurisdiction to hear and determine the matter before me. The preliminary objection is therefore dismissed. Each party will however bear own costs.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS AT MOMBASA THE 19TH DAY OF JULY 2023 VIA MICROSOFT TEAMS

.....

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Mwanzia for the Respondent;

Ms. Shamsa holding brief for Mr. Kebaso for the Petitioner; and

Mr. Arthur Ranyundo – Court Assistant.

