



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT

AT MOMBASA

ELC NO. 136 OF 2021

ZIPPORAH NJOKI KANGARA.....PLAINTIFF

- VERSUS -

ROCK AND PURE LIMITED.....1ST DEFENDANT

REGISTRAR OF LANDS MOMBASA.....2ND DEFENDANT

PETER NJOGU WAWERU.....3RD DEFENDANT

CATHERINE WANJIKU WARUGURU.....4TH DEFENDANT

RULING

I. PRELIMINARIES

1. The 1st, 3rd and 4th Defendants filed a Notice of Preliminary Objection on 15th September 2021.

II. The Defendants objection

2. They sought for the dismissal of the entire suit on the following grounds:-

a) That this Honourable court has no jurisdiction over the subject matter properties since they are alleged part of matrimonial property.

b) That this Honourable court does not have the requisite territorial jurisdiction over some of the properties herein that are located in Nairobi County.

c) That this Honourable court does not have jurisdiction over matrimonial property.

d) That this suit raises no reasonable cause of action within this Honourable court's jurisdiction as spelt out under Article 162 (2)(b) of the Constitution of Kenya and under Section 1 of the ELC Act.

3. The Honorable Court directed that the Preliminary Objection to be canvassed by way of written submissions. On 6th October 2021, Learned Counsel for the 2nd Defendant informed court they would not be participating in the Preliminary Objection.

III. SUBMISSIONS

4. On 30th September 2021, Learned Counsel for the 1st, 3rd and 4th Defendants filed submissions in support of the P.O. It was submitted that the Plaintiff's suit was anchored on her marriage to the 3rd Defendant, and the main cause of action relates to suit property acquired during the subsistence of the said marriage. The whole plaintiff's suit is based on matrimonial property and this court has no jurisdiction over matrimonial property. Counsel argued that the claim as filed by the plaintiff does not fall within the purview of this court's jurisdiction.

5. In addition, counsel submitted that this court does not have territorial jurisdiction to hear a cause of action relating to suit property in Nairobi County and the suit herein is not within the exceptions stipulated by Section 12 of the Civil Procedure Act. The suit property referred to as Nairobi/Block63/672 is situated in Nairobi, which is outside the territorial jurisdiction of this court. Learned Counsel maintained that there is no cause of action for this court to determine as the suit herein is premised on the marriage between the Plaintiff and the 3rd Defendants and that the Plaintiff has sought a declaration that the suit properties be declared as matrimonial properties. He relied on the case of **AKM – Versus - NNN (2019)eKLR**, where it was held that issues of matrimonial property are determined by the high court under its inherent jurisdiction. Learned Counsel urged court to find that it lacks the jurisdiction to hear this matter and dismiss the entire suit with costs to the 1st, 3rd and 4th Defendants.

6. On 4th October 2021, Learned Counsel for the Plaintiff filed submission in opposition of the Preliminary Objection, it was submitted that the Preliminary Objection is vague and should be dismissed with costs. Learned Counsel submitted that this court has original jurisdiction to adjudicate over the cause of action. The issues raised herein are matters of facts that invite the court to examine and test the facts and evidence raised in the Preliminary Objection which is short of being of pure point of law.

7. The Learned Counsel maintained that the dispute before court is that the suit properties were transferred to the 1st Defendant through connivance of 2nd, 3rd and 4th Defendants in disregard to Sections 28 and 93 (2) of the Land Registration Act. Learned Counsel argued that the Plaintiff does not seek division of property but rather rectification of the title deed. The Learned Counsel submitted that the 1st, 2nd and 4th Defendants were not party to the marriage between the Plaintiff and 3rd Defendant, therefore this suit can only be determined by this court. Court was urged to find that the Preliminary Objection is misconceived and is only calculated to frustrate the suit and should be dismissed with costs.

IV. ANALYSIS AND DETERMINATION

8. The Preliminary Objection herein seeks to oust the suit herein on the basis that this court lacks the jurisdiction to hear and determine the suit, which relates to matrimonial property.

In order to arrive at an informed and just decision, I have framed the following salient issues. These are:-

a) Whether the Preliminary Objection dated 15th September, 2021 by the 1st, 2nd & 3rd Defendants meets the fundamental threshold of a preliminary objection.

b) Whether this Honorable court has:-

i. jurisdiction over the subject matter properties taking that it is alleged part of it is matrimonial property.

ii. have the requisite territorial jurisdiction over some of the properties herein that are located in Nairobi County.

iii. jurisdiction over matrimonial property.

c) Who will meet the costs?

ISSUE NO. a). Whether the Preliminary Objection dated 15th September, 2021 by the 1st, 2nd & 3rd Defendants meets the fundamental threshold of a Preliminary Objection.

12. According to the Black Law Dictionary a Preliminary Objection is defined as being:

“In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”

The above legal proposition has been made graphically clear in the now famous case of ***Mukisa Biscuits Manufacturing Co. Ltd –VS- West End Distributors Ltd. [1969] E.A. 696***. Where Lord ***Charles Newbold P.*** held ***that a proper preliminary objection constitutes a pure points of law***. The Learned Judge then held 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 a demurer 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 in the exercise of judicial discretion. The improper raising of points by way of Preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”

13. I have further relied on the decision of ***Attorney General & Another – Versus - Andrew Mwaura Githinji & another [2016] eKLR:-*** as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a Preliminary Objection *inter alia*:-

(i) A Preliminary Objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.

(ii) A Preliminary Objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and

(iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.

14. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter. I therefore, affirm that the filed Preliminary objection by the Defendants herein is founded on all fours of an objection as stated hereof.

ISSUE No. b). Whether this Honorable court has:- i). jurisdiction over the subject matter properties taking that it is alleged part of it is matrimonial property; ii). have the requisite territorial jurisdiction over some of the properties herein that are located in Nairobi County.

15. Jurisdiction means a courts power to decide case or issue a decree. In Kenya, the Environment and Land Court is a statutory creation by the Constitution of Kenya under the provision of Article 162 (b). Here, the Courts are vested it with original and unlimited jurisdiction. From the preamble of the ELC Act, the jurisdiction of the court is defined as ***“.....a Superior court to hear and determine disputes relating to the environment and the use and occupation of, and the titles to, land and to make provisions for its jurisdiction functions and powers and for connected purposes.....”***

Under Sections 4 and 13 (1) of the Environment Land court Act this court has the legal mandate to hear any matter related to environment and land including the one filed by the Plaintiffs hereof. In the case of the ***ELC (Malindi) in the Kharisa Kyango – Versus - Law Society of Kenya (2014) eKLR***.

Further, in the now famous case of ***“Owners of Motor Vessel “Lilian S” – Versus - Caltex Oil (Kenya)***

Limited (1989) IKLR dealt with a court, jurisdiction thus:-

“Jurisdiction is everything. Without it, a court has no powers to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of the proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion it is without jurisdiction.....where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before Judgement is given”.

16. Additionally, still on the same point, in the case of ***“County Government of Migori – Versus - I N B Management IT Consultant Limited (2019) eKLR”*** whereby court being faced with an objection regarding jurisdiction, analyzed the law and observed as follows:-

“10- The jurisdiction point raised by the Respondent herein clearly meets the foregone criteria being a pure point of law. That jurisdiction is everything is a well settled principle in law. My Lordship Ibrahim, JSC in Supreme court of Kenya Civil application No 11 of 2016-“Hon (Lady) Justice Kalpana H Rawal Versus Judicial Service Commission and others when in demystifying jurisdiction quoted from the decision in Supreme court of Nigeria supreme case No 11 of 2012- “Ocheja Immanuel Dangama – Versus - Hon. Atoi Aidoko Aliaswan and 4 others where Walter Samuel Nkanu Onnoghen, JSC and expressed himself as follows;-

“.....it is settled that jurisdiction is the life blood of any adjudication because a court or tribunal without jurisdiction is like an animal without blood, which means it is dead. A decision by a court or tribunal without requisite jurisdiction is a nullity deed on arrival and of no legal effect whatever that is why an issue of jurisdiction is granted and fundamental in adjudication and has to be dealt with first and foremost.....”

17. This instant suit, the Plaintiff pursues inter alia the cancellation of the titles issued in the suit properties which she seeks to be declared as matrimonial property. The Defendants claim that this cause of action ousts the jurisdiction of this court to hear and determine matrimonial property. In my view, the issue before court is one on the ownership of the suit properties that places the cause of action squarely in the jurisdiction of the ELC Act and consequently the ELC Court. The Plaintiff claims that the Defendants fraudulently transferred the suit properties into the name of the 1st Defendant, without regard to the caution she had registered to secure her spousal rights in the suit properties.

18. A suit property, in relation to Matrimonial property is defined by **Section 6 (1)(c) of the Matrimonial Property Act, 2015** as ***“any other immovable and movable property jointly owned and acquired during the subsistence of the marriage”***. The determination as to whether or not the suit property is matrimonial does not oust the jurisdiction of this court. In the case of **BWM – Versus - JMC (2018)eKLR** it was held ***“For avoidance of doubt, the court notes that the Matrimonial Property Act does not define the court that disputes relating to the matrimonial property disputes should be referred for determination. It is this 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 occupation, use, and title to land. I find nothing to oust the jurisdiction of this court and I proceed to determine the Preliminary Objection. ”***

19. A preliminary objection can only be raised on a pure point of law and must not be blurred with factual details that can be subjected to contest in any way that can be proved by way or evidence. Reference is made to **Mukisa Biscuit Manufacturing Co. Ltd – Versus - West End Distributors Ltd. (1969) EA 696**. A preliminary may only be raised on a pure point of law, the **Supreme Court in Aviation & Allied Workers Union Kenya - Versus - Kenya Airways Ltd & 3 Others, Application No. 50 of 2014, [2015] eKLR**, held that ***“Thus a preliminary objection may only be raised on a ‘pure question of law’. To discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.”***

20. For a preliminary objection to succeed, the facts should not be disputed. Counsel for the plaintiff has

submitted that the fact the Ground (a) of the Preliminary O refers the suit properties as ‘alleged matrimonial properties’ goes to show that these are facts in dispute and the court ought to examine and test the facts and evidence raised. In **BWM – Versus - JMC (supra)** it was held **“For one to succeed in putting up a preliminary objection, it must meet the following criteria: it must be pleaded by one party and admitted by the other, must be a matter law which is capable of disposing of the law suit; must not be blurred by factual details calling for evidence; must not call upon the court to exercise discretion.”**

21. The Preliminary Objection invites court to find that the suit has no cause of action to be determined by court, and for this to be done court has to make reference to facts that are disputed by both parties. The court cannot from the face of the preliminary objection, conclude that the suit reveals no cause of action. There is need to consider factual evidence and court will exercise its judicial discretion. Once court steps out of the Preliminary objection, it ceases to be a point of law and cannot be sustained.

22. As stated above, the cause of action related to the alleged fraud perpetrated by the defendants in transferring the suit property from the name of the 3rd Defendant to the 1st Defendant, a company owned by the 3rd and 4th Defendant. The Plaintiff has asked court to secure her spousal rights over the matrimonial properties, which in my view fails within Section 28 of the Land Registration Act. The evidence before court, demonstrates that indeed the suit properties were transferred from the 3rd Defendant to the 1st Defendant. Court will make a determination as to who owns the suit property and for that to happen judicial discretion has to be exercised.

23. As regards the issue of territorial jurisdiction, I find that the provision of Section 13 of the Civil Procedure Act, cannot oust the jurisdiction of this court as vested by Article 162 (2)(a) of the Constitution.

24. Consequently, I proceed to find:-

a) THAT the Notice of Preliminary Objection dated 14th September 2021 has no merit. I therefore dismiss it with costs to the Plaintiff.

b) THAT this suit should be mentioned on 10th February, 2022 for Pre Trial Session under the provisions of Order 11 of the Civil procedure Rules, 2010 and fixing it for a full hearing date on a priority basis.

c) THAT the Costs to be borne by the 1st, 2nd, 3rd & 4th Defendants.

IT IS ORDERED accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 16TH DAY OF DECEMBER 2021

HON. JUSTICE L. L. NAIKUNI

JUDGE

ENVIROMNENT AND LAND COURT

MOMBASA

In the presence of:

Yumna Court Assistant

Mr. Odhiambo for the Plaintiffs.

Mr. Gitahi for the 1st, 2nd, 3rd & 4th Defendants.