



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 67 OF 2011 (O.S)**

**AS CONSOLIDATED WITH KITALE ELC NO. 86 OF 2012**

**- JANE ANYONA OMUTSANI -VS- NASIBI AORE**

**NASIBI AORE.....PLAINTIFF**

**VERSUS**

**JANE ANYONA OMUTSANI.....DEFENDANT**

**JUDGMENT**

**Background**

1. This is a judgment in respect of two suits **Kitale ELC No. 67 of 2011 Nasibi Aore -vs- Jane Anyona Omutsani** and **Kitale ELC No. 86 of 2012 Jane Anyona Omutsani –vs- Nasibi Aore** which were consolidated by an order of this court made on **29/4/2019**. The two suits concerns individuals who were formerly related by way of matrimony having been husband and wife for an approximate period of **30** years before a judicial separation order was issued on **28/7/2010**.
2. Thereafter matters relating to the issue of property in the marriage cropped up between the former spouses thus leading to the lodging of the two suits herein.
3. Though **Kitale ELC No. 67 of 2011** was filed by the husband before **Kitale ELC No. 86 of 2012** it would appear that **Kitale ELC No. 86 of 2012** was finalised before it and a judgment issued on **27/6/2013** (Obaga J.)
4. The plaintiff in **Kitale ELC No. 67 of 2011** was not so lucky as his suit was dismissed on **26/10/2016** for want of prosecution.
5. After the plaintiff successfully applied to have the judgment in **Kitale ELC No. 86 of 2012** set aside **Kitale ELC No. 67 of 2011** was subsequently also reinstated for hearing on **29/4/2019** on the basis that the two matters are inextricably intertwined. Vide the same ruling that reinstated **Kitale ELC No. 67 of 2011**, the two suits were consolidated, and **Kitale ELC No. 67 of 2011** made the lead file. For ease of reference Nasibi Aore, the plaintiff in **Kitale ELC No. 67 of 2011** will be referred to as “*the plaintiff*” in the consolidated suit while Jane Anyona Omutsani the defendant in that lead case, will be referred to as “*the defendant.*”

**The claim in Kitale ELC No. 67 of 2011**

6. The plaintiff in **Kitale ELC No. 67 of 2011** filed the originating summons dated **29/7/2011** on the same date. In that Originating Summons he seeks the following orders, verbatim:

1. (a) A declaration that the respondent, the registered proprietor of title No. Kitale Municipality Block 17/Bidii/32 holds the said parcel in trust for the plaintiff/applicant and subject to the rights, duties and obligations as trustee for the applicant who is the beneficial owner of the said land and all the developments therein in trust.

(b) An order that the defendant/respondent do transfer the said parcel of land to the plaintiff/applicant and do sign all documents of transfer and all manner of things required by law to effect the said transfer in favour of the plaintiff, his nominee or assign and in the event of non-compliance with the above, the Deputy Registrar do sign the necessary transfer documents and his name, designation and the seal of the court be sufficient authority for the Land Registrar to act and to effect the transfer of the said land in favour of the plaintiff.

**2. The defendant/respondent, her servants, agents or assigns or representatives be restrained by a temporary injunction from evicting, removing or dispossessing the plaintiff/applicant or taking possession of title No. Kitale Municipality Block 17/Bidii/32 measuring 5 ½ acres or thereabouts pending finalization of the proceedings herein.**

**3. Costs be paid by the respondent.**

7. The summons is supported by the sworn affidavit of the plaintiff dated **29/7/2011**. In that affidavit the plaintiff deposes that he and the defendant were married on **11/8/1979** under the **African Christian Marriage and Divorce Act Cap 151** of the Laws of Kenya; that they were blessed with **6** issues and they established their matrimonial home on the **Kitale Municipality Block 17/Bidii/32** (hereinafter "*the suit land*"); that he has resided on the suit land since **1992** when he purchased it; that since he was working in Nairobi at the time he authorized the defendant to register herself as the proprietor of the suit land to hold the same in trust for him and the children; that he has developed the land considerably; that the respondent obtained judicial separation orders in **Kitale CM Divorce Cause No. 8 of 2006** following marital differences; that in those proceedings the respondent admitted the plaintiff bought the suit land and he was in occupation thereon and that in view of the orders made in the divorce cause it has become necessary to this court to determine if the respondent holds the title in trust for the plaintiff. The plaintiff filed a further affidavit dated **18/7/2019** which I will analyze herein later after setting out the first response filed by the defendant.

8. The defendant filed replying affidavit dated **23/5/2012** in response to the originating summons. In summary the defendant stated that the plaintiff lacks *locus standi* to claim under the **Married Women's Property Act of 1882**; that the originating summons does not specify whether the plaintiff prefers a declaration of trust under the **Registered Land Act Cap 300** or the distribution of the matrimonial property under **Section 17** of the **Married Women's Property Act of 1882**; that the plaintiff has not listed all the matrimonial properties to enable the court to pronounce itself on each party's share; that the **RLA** provisions cited do not entitle the plaintiff to the orders sought; that it is true that the two got married in **1979** under **Cap 151** and were blessed with six issues of the marriage; that the defendant was also working during the marriage and both parties obtained several properties using their joint resources among which was the suit land; that other parcels are **Kitale Municipality Block 17/Bidii/149 measuring 21.44 ha in 1985, West Bunyole/Ebusikhale/2008 measuring 0.25 ha**, a quarter acre of the ancestral land at Ebusikhale in Luanda and a fully developed plot to wit, **LR 209/970/9** at Nairobi; that all the properties save the suit land were registered in the sole names of the plaintiff; that the plaintiff started seeking to dispossess the defendant of the suit land after she filed proceedings for orders judicial separation; that the court in the judicial separation cause granted the defendant occupation of the matrimonial home situate on the suit land to the exclusion of the plaintiff, thus triggering off this suit which was initiated in order to defeat the lower court's order; that since the plaintiff retained all the other matrimonial properties he cannot be heard to claim the ownership of the suit parcel; that the defendant helped the family with finances for subsistence and also helped repay the loan taken to purchase the Nairobi property when the plaintiff was interdicted in **1992** and that the suit lacks merit and should be dismissed.

9. In response to the replying affidavit of the defendant the plaintiff filed a further affidavit dated **18/7/2019**. He averred that he purchased **Kitale Municipality Block 17/Bidii/149** and **Kitale Municipality Block 17/Bidii/32** and paid for the latter land parcel by cheque; that he also purchased **West Bunyole/Ebusikhale/2008** with his own funds; that **West Bunyole/Ebusikhale/259** belongs to his late father and the defendant has no share therein; that he left a significant number of assets on the suit land when he was chased away and the defendant has wasted or disposed some of those assets and that at the moment, has no home and he resides in his father's home.

10. In response to the plaintiff's further affidavit dated **18/7/2019** the defendant filed her further affidavit sworn on **5/8/2019**. Therein she restated that the Nairobi property was bought through joint contribution of both parties; that the plaintiff paid part of purchase price of that property using part of proceeds of a loan he obtained from **Grindlays International Finance Kenya Ltd** (hereinafter "**GIFK**") which loan was later taken over by **Housing finance Co. (K) Ltd** (herein after "**HFCK**"); that she participated in the repayment of the said loan through monthly remittance of **Kshs.6062/=** from her account at **Barclays Bank of Kenya Ltd** (hereinafter "**BBK**"); that she stopped the said standing order in **BBK** when they got a tenant for the Nairobi property and used the rent to clear the outstanding the **HFCK** loan balance; that the balance of purchase price not catered for by the loan was paid through joint contributions from the plaintiff and the defendant; that part of the **HFCK** loan was also used to pay for **Kitale Municipality Block 17/Bidii/149**; that part of the consideration for **Kitale Municipality Block 17/Bidii/149** was paid by way of proceeds of sale of farm produce from the same parcel; that the defendant also contributed in the purchase of **Kitale Municipality Block 17/Bidii/149** partly by way of her repayment of **HFCK** loan and partly by her management of farming activities on the same parcel; that the plaintiff also used part of the proceeds of the **HFCK** loan to pay part of consideration of **Kitale Municipality Block 17/Bidii/32** and thereafter the defendant contributed towards the payment of the balance; that the matrimonial home on **Kitale Municipality Block 17/Bidii/32** was by way of joint efforts between the two parties herein; that at the same time the defendant paid school fees for the issues for the marriage and utility bills from her own salary; that she gave the plaintiff companionship, cared for the children, took charge of the domestic work and managed the matrimonial home during the marriage; that therefore her contribution to the acquisitions was both monetary and non-monetary; that the plaintiff has disposed of **13 acres** from **Kitale Municipality Block 17/Bidii/149** without the defendant's consent and also that the eviction of the plaintiff from the suit land was sanctioned by an eviction order in the divorce cause which granted the defendant exclusive occupation and use of the suit land; that the Nairobi property was sold by the plaintiff and without the consent of the defendant but the proceeds were placed in his bank account which was frozen by an order of this court and that the plaintiff and the defendant contributed equally to the purchase of **West Bunyole/Ebusikhale/2008**;

11. In a further response by the plaintiff his supplementary sworn on **15/10/2019** was filed. He attached numerous documents to that affidavit as evidence in this case. No further affidavits were filed by either party in this case thereafter.

**The claim in Kitale ELC No. 86 of 2012**

12. In **Kitale ELC No. 86 of 2012** the defendant in **Kitale ELC No. 67 of 2011** was the plaintiff. She commenced that suit by way of an originating summons under **Section 17** of the **Married Women's Property Act 1882** in which she sought a determination of the following questions, verbatim:

**(a) Whether the properties listed hereunder were acquired and improved by the joint funds/efforts and/or the indirect contribution/efforts of the plaintiff and defendant during their marriage and are therefore jointly owned by the plaintiff and the defendant.**

- (i) Kitale Municipality Block 19/ Bidii / 32 measuring 2.276 HA;
- (ii) Kitale Municipality Block 17/Bidii/149 measuring 21.44 HA;
- (iii) A quarter an acre of the ancestral land at Ebusikhale Luanda;
- (iv) A fully developed plot on LR No. 209/970/9 AT NAIROBI;
- (v) West Bunyole/Ebusikhale /2008;

(b) Whether the defendant should be restrained from drawing or otherwise dealing with Bank Account No. 600-000/168 at Housing Finance Limited which holds the net proceeds from the sale of that fully developed plot on LR No. 209/470/9 in the sum of Kshs.12,600,000/= and any other account that holds the net proceeds of the sale.

(c) Whether the properties listed hereinabove and registered in the sole names of the defendant with the exception of Kitale Municipality Block 19/Bidii/32 are held in trust for the plaintiff (and) therefore the plaintiff is entitled to control, utilize and occupy the said properties.

(d) Whether the properties whether movable or immovable listed herein above be equitably distributed and/or divided among the plaintiff and the defendant or the properties be sold and the net proceeds therefrom be shared equally between the plaintiff and the defendant or in such other just and equitable manner the court may deem (fit) and just to grant.

(e) Whether the defendant should be restrained from alienating, selling, disposing or changing or in any other manner dealing with the properties listed herein above pending the hearing and the determination of this summons.

(f) Who should bear the costs of this suit?

13. Each of the parties gave oral evidence and produced documents in their own case without calling any other witness.

#### The Plaintiff's oral Evidence

14. **PW1**, the plaintiff testified on **16/10/2019**. His evidence closely adopted the contents of his originating summons and the supporting affidavits: that he married the defendant in **1979** in a church wedding at Mariakani Church Of God; that they were blessed with **6** children of the marriage; he earlier worked with the East African Community but left that employment in **1990**; that the defendant then worked for the Roads Licensing Department Nairobi; that she was transferred to Kapenguria DC's Office in **1994** without his knowledge; that he now lives in Bunyore; he is now a farmer; that he obtained a **Ksh 700,000/=** loan from Shah & Shah Advocates and purchased a house in Milimani, Nairobi (**LR No 209/970/9**) for **Ksh 675,000/-**. He then mortgaged the title to that house to Grindlays Bank for the consideration of **Ksh 700,000/=** part of which proceeds he applied to the purchase of some **60** acres (**LR NO Kitale Municipality Block 17/Bidii/149**) and **LR No West Bunyore Ebusikhale /2008**; later he bought another parcel of 5.5 acres (**LR NO Kitale Municipality Block 17/Bidii/32**) from one Festo Obiri and had it registered in the defendant's name before the marriage was rocked by strife; that the intent then was to enable the defendant to acquire a bank loan; he also acquired a loan from Housing Finance Company Of Kenya with which he purchased the Nairobi house without any help from the defendant. He later sold the Nairobi house and deposited the moneys with Housing Finance Company of Kenya where it was frozen by a court order obtained by the defendant.

15. The plaintiff further testified that he extensively developed **LR NO Kitale Municipality Block 17/Bidii/32** with a cattle shed to accommodate **40** cattle, milking machines, fishponds, a poultry unit, borehole fitted with a pump a welding machine, a standby generator with a changeover switch, a grinder machine an electric drill and a residential house with a three phase electric supply. While he was still developing the land he was served with a decree dated **3/5/2011** in a divorce cause filed by the defendant; the decree stated that he should vacate the land. It is his evidence that the defendant was not involved in the purchase of the properties enumerated hereinabove and the construction of the house on **LR NO Kitale Municipality Block 17/Bidii/32** at all, part of the reason being that her salary was meagre; **Kshs 6250/=** per month, and she also depended on him financially. He testified that he also used to pay for all his children's school fees. He left the land in the hands of the defendant **2011** after the separation cause decree was served on him and according to him, thereafter the whole enterprise was run down by the defendant. He now lives on his father's farm in Luanda. It is the plaintiff's case that the defendant was not even aware of the location of the Bidii lands (**LR NO Kitale Municipality Block 17/Bidii/149** and **LR NO Kitale Municipality Block 17/Bidii/149**;) the plaintiff stated that the defendant refused to identify herself as his wife and lived with her cousin in the run up to the separation cause. She lived her own separate life, away from the plaintiff; her salary was not sufficient to meet even her bus fare and the two never had any financial links. When she left the plaintiff he put a tenant into the Nairobi house and left employment to care for the children of the marriage. His opinion is that the defendant can get one acre out of the suit properties and the rest can go to his children, two of whom have gotten their own children and rely on him for financial support.

16. On being shown a savings account passbook by counsel for the defendant during his cross-examination **PW1** maintained that the monies reflected thereon were not the defendants, and that the defendant had acquired the habit of "*collecting money on behalf of her boss*" which was reflected in the pass book. He also denied that part of the consideration for the purchase of the Bidii property was obtained from sale for farm produce grown by the defendant, who according to the plaintiff, never managed the farm at any time before the issuance of the order excluding him from the premises. The defendant also never participated in the repayment of any loans or construction of the Bidii house. The matrimonial home where the couple resided after their wedding was in Nairobi and they have never lived together in Kitale, and of the approximately **30** years of marriage, the couple only spent **10** years together in Nairobi after which the defendant only made what the plaintiff refers to as "*technical appearances*."

## The Defendant's oral evidence

17. DW1, defendant, gave evidence on **18/11/2019** and on **19/11/2019**. Her evidence is that she is a retired civil servant now conducting farming activities; **LR Number 209/970/9** was bought through the joint efforts of the two parties herein; she had a savings account with HFCK; she would save some money for the purpose of her small businesses but she withdrew some of the savings and gave it to the plaintiff as the head of the family for the purpose of repayments; she produced an original passbook for her account with the HCFK as evidence of her savings and maintained that the monies deposited in that account were hers. According to her the Nairobi property was not bought with the proceeds of any loan. Despite her participation she was not made a joint owner alongside her husband simply because they were already married. The plaintiff sold the Nairobi house without her consent in **2011** and used some of the proceeds while some remained in the HCFK account; though **LR NO West Bunyore Ebusikhale/2008** was bought from the plaintiff's uncle, it is not family land any more since it was also acquired through the joint efforts of the parties herein who contributed the consideration in equal proportions; **LR NO Kitale Municipality Block 17/Bidii/149** and **LR NO Kitale Municipality Block 17/Bidii/32** were purchased through a mortgage from Grindlays bank upon the security of the Nairobi house; by virtue of her contribution to the purchase of the Nairobi house which later became the security, the defendant maintains that she played a role in the purchase of **LR NO Kitale Municipality Block 17/Bidii/149**. The same was leased when the family was still living in Nairobi and she and the plaintiff would take turns to travel from Nairobi to go and oversee works on the said land; the proceeds of the farming enterprise would be deposited by the plaintiff in his account and they were later applied to the purchase of **LR NO Kitale Municipality Block 17/Bidii/32**; part of the lease proceeds obtained from the Nairobi house were also applied towards the purchase of the **LR NO Kitale Municipality Block 17/Bidii/32**. According to the witness the proceeds of the loan acquired from HFCK vide their offer in **DExh 1** dated **21/8/87** was used to repay the Grindlays Bank debt which by then had accumulated to **ksh 440,000/=** due to non-payment by the plaintiff; their matrimonial home was on **LR NO Kitale Municipality Block 17/Bidii/32** and after she was transferred from Nairobi to the Rift Valley in **1994** and stayed on the said land, and she would commute to her place of work from the premises while the plaintiff lived in Nairobi with the children, the latter who would stay with her when they visited Kitale. Besides the residential house on the said land, there is a prefabricated steel shed, a poultry house and a shop, a round house and a boys' cottage - a three roomed house. She found no fish in the ponds and the third pond had no water. She supervised the construction of the storehouse. The plaintiff took away the milk processing unit and the metal processing unit when he was served with the eviction order. The plaintiff also sold some **13** acres out of **LR NO Kitale Municipality Block 17/Bidii/149** and failed to apply the same toward the payment of school fees for the children as earlier intended. She moved out in **1994** and the couple divorced in **2010**; the plaintiff was interdicted and then lost his job for failing to attend duty in **1990** and thereafter his sole source of income remained the rent from the Nairobi house.

18. On cross-examination by Mr Wanyonyi, she stated that the plaintiff was at the time of their marriage an accounts clerk earning about **Ksh 12000/=** per month; that the couple's differences began in **1982**; that at the beginning they assisted each other and shared many things; she admitted that she was not made a party to the sale agreement for the Nairobi house; that she never changed her name on her identity card to reflect her marriage to him because the plaintiff insisted that she should not do so, for "*it may one day save a situation.*"

19. The plaintiff filed written submissions on **28/1/2020**. I have perused through the court record and found no submissions filed on behalf of the defendant.

### **General overview of the parties' respective claims.**

20. As is evident from the pleadings and evidence, the plaintiff has claimed only one property: **Title No. Kitale Municipality Block 17/Bidii/32**. He seeks *inter alia* a declaration that the defendant holds the title to the land in trust for him.

21. On the other hand the defendant, having secured **title No. Kitale Municipality Block 17/Bidii/32** vide orders made in the separation cause, now seeks a declaration under **Section 17** of the **Married Women's Property Act 1882** that the plaintiff holds in trust for the defendant the other properties registered in the sole name of the defendant which she claims were acquired and improved by the joint funds, efforts and or the indirect contribution or efforts of the plaintiff and defendant during their marriage, and which she claims are therefore jointly owned by the plaintiff and the defendant; these properties are as follows:

- i. Kitale Municipality Block 17/Bidii/149 measuring 21.44 HA;**
- ii. A quarter an acre of the ancestral land at Ebusikhale Luanda;**
- iii. A fully developed plot on LR No. 209/970/9 AT NAIROBI;**
- iv. West Bunyole/Ebusikhale /2008;**

## DETERMINATION

### **Issues for determination**

22. The issues that arise for determination are as follows:

- i. Whether this court has jurisdiction to hear and determine this consolidated suit;**
- ii. Whether the properties subject matter of this suit are matrimonial properties;**
- iii. Whether each of the parties who is registered as sole proprietor of any of the properties holds the property so registered in trust for the other;**

iv. Who should bear the costs of this suit?

(a) Whether this court has jurisdiction to hear and determine this consolidated suit.

23. The second and third issues for determination in this case as stated above, that is:

ii. Whether the properties subject matter of this suit are matrimonial properties.

iii. Whether each of the parties who is registered as sole proprietor of any of the properties holds the property so registered in trust for the other;

24. These are the substantive issues which, when examined in the light of **section 13** of the **Environment and Land Court Act** and **Article 162(2)(b)** of the **Constitution** will determine whether this court has jurisdiction to hear and determine this matter or not.

25. It is therefore an inescapable fact that this consolidated suit revolves around the sharing of matrimonial property and nothing else. The parties herein were married to each other. If the only connection that has brought the parties into conflict is their marriage, then I should find that this falls under the category of a matrimonial cause. The applicable law in this case is the **Matrimonial Property Act 2015** which is described in its preamble as “*an Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes*” and the **Constitution**. The proper forum to determine the dispute herein is the High Court.

26. In the case of **Owners of the Motor Vessel Lillian “S”** the court observed as follows:

“...I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance 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 the 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 cognisance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given”

See **Words and Phrases Legally defined – Volume 3: I – N Page 113**

It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined.”

27. This court is therefore duty bound to down its tools if it finds that it has no jurisdiction to determine this matter. The Environment and Land Court was created under the provisions of **Article 162 (2) (b)** of the **Constitution**. **Articles 162(2)** and **162(3)** of the constitution provide as follows:

(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.

(3) Parliament shall determine the jurisdiction and functions of the courts contemplated in clause (2).

28. Pursuant to **Article 162(3)** parliament enacted the **Environment and Land Court Act** whose **section 13** provides as follows:

**13. (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.

29. As indicated in the constitution the general framework under which this court should exercise its jurisdiction is in determining matters relating to the “*environment and the use and occupation of, and title to, land.*” That is the framework fleshed out in **section 13** of the **Environment and Land Court Act**.

**30. In Nairobi ELC Suit No. 317 Of 2014 Jane Wambui Ngeru Vs Timothy Mwangi Ngeru [2015] eKLR** the plaintiff sought An injunction to restrain the Defendant from interfering with Plaintiff’s quiet possession of the suit property, or in any other manner endangering the Plaintiff’s occupation of the suit property pending final determination of the suit and alternatively that the Defendant vacate the suit property, pending hearing and determination of this suit. Nyamweya J stated as follows:

**“The dispute herein involves property situated on a parcel of land, and the specific prayers sought by the Plaintiff in the Plaintiff filed herein dated 18<sup>th</sup> 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.”**

31. It is proper to note that in that cited case the plaintiff sought “*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.*” This contrasts sharply with the current case where the defendant has sought the court’s determination as to whether “*the properties (listed) were acquired and improved by the joint funds/efforts and/or the indirect contribution/efforts of the plaintiff and defendant during their marriage and are therefore jointly owned by the plaintiff and the defendant,*” and whether “*the properties whether movable or immovable listed herein above be equitably distributed and/or divided among the plaintiff and the defendant or the properties be sold and the net proceeds therefrom be shared equally between the plaintiff and the defendant or in such other just and*

equitable manner the court may deem (fit) and just to grant.”

32. This court finds the issues raised by the defendant to arise purely out of the parties’ matrimonial relationship. They are not issues arising purely out of “*the Environment and the Use and Occupation of, and Title to Land.*” For a court to determine the issue of distribution it has to find there was a marriage and interrogate the various factors to be considered in the distribution of matrimonial property.

33. I find nothing in the provisions of either **Article 162** of the **Constitution** or **Section 13** of the **Environment And Land Court Act** that suggests however remotely that the issues of whether the properties subject matter of this suit are matrimonial properties or whether each of the parties who is registered as sole proprietor of any of the properties holds the property so registered in trust for the other fall within the jurisdiction of this court.

34. In **Chuka HCCC. NO. 2 OF 2015 - AKM v NNN [2019] eKLR** the court observed as follows:

**“35. The issue before this court is division of matrimonial property or put it another way sharing of property acquired by two individuals during subsistence of their marriage. The marriage between the Plaintiff and the defendant was dissolved vide Chuka Principal Magistrate's Court Divorce Cause No. 4 of 2012 on 25<sup>th</sup> February, 2015. Upon dissolution of the said marriage, the Plaintiff brought this action to get a share of the properties she believes she made contributions towards their acquisition and developments thereon. Matrimonial proceedings for dissolution or other reliefs like maintenance are within the ambit of magistrate's court as provided under Section 2 of the Marriage Act. The Matrimonial Property Act No.49 of 2013 does not specifically define "court" but it is trite that issues of matrimonial properties are determined by the High Court under its inherent jurisdiction as provided under Section 3A of the Civil Procedure Act and Article 165(3)(a) of the Constitution of Kenya 2010.”**

**36. On the other hand, the jurisdiction of the ELC Court is limited by Article 162(2) and (3) of the Constitution of Kenya and Section 13(2) of the ELC Act No. 19 of 2011. Article 162(2) (b) states that ELC Court has the mandate to hear and determine disputes relating to use and occupation and title to land. The provisions of Section 13(2) of the ELC Act clearly gives power to ELC to hear and determine disputes relating to *inter alia*, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues. The division of matrimonial property upon dissolution of marriage in my view is outside the purview or the scope of ELC and the relief cannot be granted in that court and it is only to that extent that I find that this cause though it touches on similar properties like the ones mentioned in the cited ELC Court in Embu, is not *sub judice*. What this court is being called upon to do can only be done in this court. Although the issue of ownership is claimed at the ELC, the claim arises from the contribution made by virtue of marriage and it is not a challenge to the title of listed properties. As I have observed above the relationship between the parties herein was dissolved in 2015 and therefore the provisions of Matrimonial Properties Act No.49 of 2013 and Marriage Act No.4 of 2014 apply. (Emphasis mine)**

35. In the case of **P A W-M vs C M A W M MALINDI CIVIL APPEAL NO. 104 OF 2016 [2018] eKLR** the Court Of Appeal (Visram, Karanja & Koome JJA) was faced with a claim by the respondent that the High Court had no jurisdiction to determine issues relating to the use and occupation of, and title to land as **Article 165 (5) (b)** of the Constitution of Kenya. The court noted that there were two proceedings before the same Judge of the High Court: divorce proceedings and an originating summons for declarations that a certain property which was registered in the name of the husband is matrimonial property which is being held in trust for the wife and that upon such declaration, there be an order that the wife is entitled to exclusive possession of the same under common law. While declining to rule that the High Court did not have jurisdiction and also making a note of what happens in practice the court stated as follows:

**“However, what transpired before the learned Judge was different in the sense that both the divorce cause and the O/S were before the same Judge. The learned Judge separated the two matters by giving directions that they be heard separately which is a common practice in family matters as the grounds for divorce and rights to matrimonial property are distinct as they are also governed by different statutes. Accordingly, this ground of appeal is without merit.”**

36. I am persuaded beyond peradventure that the defendant’s claim herein falls under the jurisdiction of the High Court.

37. What then shall be said of the claim by the plaintiff which is under trust? He does not approach this court for subdivision of matrimonial property but the declaration that the defendant holds the property comprised in **Kitale Municipality Block 17/Bidii/32** in trust for him. Notably he has omitted any claim in respect of the other properties which the defendant has mentioned. That omission is clearly understandable: the other properties are registered in his sole name; were it not for the need to defend the claim filed by the defendant, he would have nothing to chase after therein. Should this court deconsolidate the matters and hear his claim and determine it?

38. The answer to that question in lies in the examination of the defendant’s claim wherein she has included that land in the separation cause and claimed that it is matrimonial property. As this court has found that the land parcel **Kitale Municipality Block 17/Bidii/32** was acquired during the subsistence of the marriage and the defendant has claimed so, that parcel cannot escape scrutiny for evidence of whether it is matrimonial property as defined by the law and that is within the mandate of the High Court. Consequently, there would be no need for this court to therefore attempt to address the plaintiff’s claim separately.

39. For the foregoing reasons I find that this court has no jurisdiction and it must down its tools. For that reason this court will not delve into an investigation into the merits of the other issues listed for determination as above. The consolidated suit is hereby dismissed for want of jurisdiction. Each party shall bear their own costs of the consolidated suit.

It is so ordered.

**Dated, signed and delivered at Nairobi via electronic mail on this 28<sup>th</sup> day of May, 2020.**

**MWANGI NJORGE**

**JUDGE, ELC KITALE.**