



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KITALE

ELC NO. 43 OF 2020 (OS)

FR.....PLAINTIFF

VERSUS

GL....DEFENDANT

RULING

The Application

1. By a notice of motion dated **10/7/2020** and filed on **15/7/2020** brought under **Order 40 Rules 1 & 2 of the Civil Procedure Rules, Sections 1A, 1B, 3A of the Civil Procedure Act**, the plaintiff/applicant seeks the following orders:

1. ...spent

2. ...spent

3. That the court do issue orders directed at the respondent restraining either himself, his servants or agents or workers from collecting or receiving or demanding for any rent on LAND PARCEL NO. xx (NGTOTOL), NAPETET PLOT NO. xxxx KANAMKEMER & PLOT NO. xxx KANAMKERER or selling, subdividing or demarcating the said property pending the hearing and determination of the main suit.

4. That the costs of this application be in the cause.

2. The application is supported by the affidavit of the plaintiff sworn on **10/7/2020**. The application is grounded on the following grounds: that the applicant and the respondent were married and cohabited together as such for a period of not less than one year but are estranged; that the applicant and the respondent during the course of their cohabitation as man and wife purchased **LAND PARCEL PLOT NO. xx (NGTOTOL), NAPETET PLOT NO. xxxx KANAMKEMER & PLOT NO. xxx KANAMKEMER** situated at Lodwar; that the properties are therefore matrimonial and both the applicant and the respondent contributed to developments thereon by putting up permanent residential housing to supplement their income and on average each property brought in income of about **Kshs.67,000/=** per month and the applicant has not received any income therefrom since the parties parted ways. The applicant avers that the respondent is in the process of disposing of some of the property without the applicant's consent or authority and that the applicant has suffered grave loss owing to the respondent's disregard for her wellbeing and in particular their relationship irretrievably broke down which event prompted her to leave her matrimonial home in **October, 2019** or thereabouts.

The Response

3. The defendant through his advocate filed grounds of opposition dated **24/7/2020** on **29/7/2020** opposing the application dated **10/7/2020** on the grounds that the suit and the application are filed within the confines of the **Matrimonial Property Act 2013** and predicated on the existence of a marriage; that the existence of such a marriage or its dissolution is a matter yet undetermined by any court and the suit and application are premature; that this court therefore lacks jurisdiction; that no proof of danger of disposal of the properties has been demonstrated by the applicant; that part of the subject matter land mentioned in the suit does not belong to the defendant as it was disposed of to a third party by the defendant and that the application is fatally defective as the supporting affidavit has not been commissioned. On the last point this court will summarily dispose of it by stating that upon perusal of the record it found the supporting affidavit before it is duly commissioned.

4. A section of the grounds of opposition were replicated in a notice of preliminary objection and they all boil down to the averment that this court lacks jurisdiction in the suit and the application.

Submissions

5. The plaintiff filed her written submissions on **30/7/2020**. The defendant filed his submissions on **5/8/2020**.

Determination

6. The issues that arise in the instant application is whether this court has jurisdiction to hear and determine this matter and whether the order of temporary injunction sought in the application ought to be granted.

7. In respect of the jurisdiction issue, the case of **Owners of Motor Vessel Lillian "S" vs Caltex Oil Kenya Ltd 1989 eKLR** is relevant where it was stated 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 take 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.

8. This court must therefore delve into whether it has jurisdiction or not before handling any other issue.

9. Regarding the issue this court must have recourse to the provisions of **Article 162(2)(b)** of the **Constitution of Kenya** which in the establishment of the Environment and Land Court provides 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.

10. This court must also refer to the provisions of **Section 13 (2)** of the **Environment and Land Court Act** which provides as follows:

"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.

11. It is clear that going by **Article 162 (2) (b)** of the **Constitution** and **Section 13** of the **Environment and Land Court Act**, any dispute regarding the use and occupation of and title to land fall within the jurisdiction of this court. It is noteworthy that the **Constitution** and the **Environment and Land Court Act** have not restricted the jurisdiction of this court to certain Acts of Parliament. All that is relevant is whether the dispute before court, whatever law is cited, revolves around the issue of the use and occupation of and title to land.

12. However, having regard to the Originating Summons before the court the distinguishing factor is that the plaintiff would need to establish that she was married to the respondent and that during the course of that cohabitation as man and wife they jointly acquired the suit properties. The alleged marriage between the parties is not capable of being established in a simple and straightforward manner by way of a marriage certificate as none has been preferred by the plaintiff, and it is doubtful that any such certificate would have resolved the matter herein perchance the defendant challenged it.

13. The defendant filed no reply to the Originating Summons and has therefore not admitted or denied the existence of the marriage in this suit. He submits that for this court to articulate itself on the division, or transfer or declaration regarding matrimonial property there would have to be a prior determination that such a marriage is dissolved. He submits that the prayer in the Originating Summons amounts to a prayer for division of the alleged matrimonial property. He cites the case of **AKM VS NNN 2019 eKLR** for the proposition. He also relies on **Section 7** of the **Matrimonial Property Act 2013** which provides that subject to **Section 6(3)** ownership of such property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

14. This court is of the view that a determination as to whether or not there was a marriage between the parties and, if so, whether the same was dissolved is not a question within its jurisdiction, not even within the most elastic limits of **Article 162(2)(b)** of the **Constitution** or **Section 13** of the **Environment And Land Court Act**.

15. In this court's opinion the genesis of the predicament the plaintiff finds herself in is the title to the Originating Summons he filed on the **15th July 2020**. That Originating Summons is intitled as follows:

“REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITALE

ELC CASE NUMBER 43 OF 2020”

16. The Originating Summons was apparently presented by the plaintiff's counsel at the Environment and Land Court Registry and court stamped, and thereafter treated as a land matter until the present Preliminary Objection came up for directions. That error of registration as a land matter was commenced by the plaintiff's counsel who failed to present the pleading at the proper registry and intitled it in a manner likely to mislead court officers.

17. I find that the objection by the defendant has merit. I would have been minded to dismiss the instant Originating Summons, but as **Article 159 (2) (d)** the **Constitution of Kenya** emphasizes the doing of substantive justice in litigation that has been actually presented before court, this court is of the view that justice will be better served by the issuance of an order transferring this matter to the High Court Kitale for hearing and determination. In the circumstances it pleases this court to preserve the application for future hearing before a competent court and therefore for clarity it is vital to stipulate here that this ruling will therefore not dismiss either the application or the main suit.

18. I therefore order that the suit and the application herein are hereby transferred to the High Court at Kitale for hearing and final determination and the file record shall be placed before the Deputy Registrar for her appropriate action in that regard at the earliest.

19. Each party shall bear their own costs of the proceedings of the instant Notice of Motion application between the date of its commencement and the date of issuance of these directions.

It is so ordered.

Dated, signed and delivered at Kitale via electronic mail on this 29th day of October, 2020.

MWANGI NJORGE

JUDGE, ELC, KITALE.