



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT NAKURU**

**ELCC No. 25B OF 2015**

**ACS.....PLAINTIFF**

**VERSUS**

**ECK.....1<sup>ST</sup> DEFENDANT**

**LC.....2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. This is a unique matter. The plaintiff is a married woman who has unfortunately not been blessed with any children of her own. She therefore contracted a woman to woman marriage with the first defendant under Kalenjin customary law. In the said arrangement, the first defendant is the wife, having been married by the plaintiff. Cognisant of the challenges facing the family and the cultural practices that allow for the arrangement, the plaintiff's husband MAT approved of the woman to woman marriage. As fate would have it, the first defendant who came into the marriage with seven children of her own, did not bear any children in her marriage to the plaintiff. Disagreements ensued, leading to the plaintiff seeking to evict the first defendant.

2. The plaintiff moved this court through plaint filed on 17<sup>th</sup> April 2015. She averred that she invited the first defendant to live with her on plot Nakuru/Teret/xxx in the year 2011 pursuant to the said marriage and that the first defendant moved in with her seven children including the second defendant. That since then, the defendants have been abusive and hostile to her leading to clan meetings where it was decided that the plaintiff gives the first defendant alternative land at Keringet and builds for her there. That despite demands to vacate, the defendants refused and instead went ahead to construct and farm on the suit property.

3. The plaintiff therefore seeks judgment against the defendants jointly and severally for:

*(a) That there be a mandatory injunction removing the defendants from parcel title Nakuru/Teret/xxx and an order that they never go back and occupy the land.*

*(b) An order that the defendants and all her children relocate to the plaintiff's plot at Keringet.*

*(c) That the customary marriage between ACS and EK be dissolved.*

*(d) Costs of suit.*

4. The defendants filed defence and counterclaim in which they averred that the alternative land at Keringet had no title and that the suit property is their only matrimonial home. They further reiterated that the first defendant is married to the plaintiff under Kalenjin customary law and that the plaintiff had allocated to her a parcel of land measuring 2 acres where the plaintiff assisted them to put up a homestead. The first defendant further averred that she is entitled to a portion of the parcel of land measuring 2 acres and that if the plaintiff wants divorce then the same should be done under customary law and the property distributed.

5. The defendants therefore seek dismissal of the plaintiffs' suit. They also pray for judgment against the plaintiff for:

*1. Permanent orders be issued restraining the plaintiff (now defendant) from evicting and/or interfering with the defendant's (now plaintiff) possession of the two (2) acres they are in possession in the suit land Nakuru/Teret/xxx.*

*2. That this Honourable court do issue a declaration that the said (2) two acres in occupation of the defendants (now plaintiff) belong to ECK and children of the marriage.*

### 3. Costs of the suit.

6. The matter then proceeded to hearing. I will greatly summarize the testimonies of the witnesses since as will become apparent later in this judgment, I cannot determine this suit on the merits.
7. The plaintiff testified as PW1 and stated that she lives and farms on Nakuru/Teret/xxx which was allocated to her by the government. She added that she did not have any children of her own and that she was therefore given the first defendant to marry. The first defendant came with seven children including the second defendant who is her son. That the first defendant was not blessed with any more children since the marriage. She added that she filed this case because despite living with the defendants for a while, they have refused to listen to her and that she parted ways with the first defendant when she told the first defendant that she did not want any relationship with her anymore.
8. PW1 further testified that she gave the first defendant a farm in Keringet but the first defendant refused to go there. She also gave the first defendant a farm in Nessuit but the first defendant refused to go there. That she offered the defendants another place to live because they had become a burden to her and were making noise every day. She added that they have had meetings with elders to resolve the dispute but the defendants refused to move. She declared that she cannot give the defendants even a spoonful of Nakuru/Teret/xxx, the suit property.
9. Under cross-examination, she stated that she was still living with the defendants as at the date of her testimony and that she had paid dowry in the form of some cows for the first defendant. She added that the defendants have a house on the suit property in which they live and that they also have another incomplete house which was built by the second defendant. That the defendants do farming and rear some cattle on the suit property.
10. MAT testified next as PW2 and stated that he lives on the suit property with the plaintiff who is his wife. He confirmed that the plaintiff married the first defendant and paid dowry for her since the plaintiff did not have any children. He added that the defendants have treated the plaintiff and him contemptuously as a result of which a misunderstanding arose and that the marriage between the plaintiff and the first defendant could not go on because of disrespect.
11. Other witnesses who testified in support of the plaintiff's case were KR (PW3) who is her brother in law and KAS (PW4) who is her elder brother. PW3 stated that the plaintiff and the first defendant have differences and that each of them does their own separate things.
12. The plaintiff's case was thereafter closed.
13. The second defendant, LC, opened the defence case as DW1. He stated that the first defendant is his mother and that the plaintiff herein married his mother under Kalenjini customs by giving four cows to his mother's family as dowry.
14. The first defendant testified as DW2 and stated that she is the plaintiff's wife. That the plaintiff married her because the plaintiff was not blessed with any children. She added that she was married at a traditional ceremony and that the plaintiff paid dowry of four cows. She also stated that she did not understand why the plaintiff sued her yet they were living together happily and that she does not know where to go if she is told to vacate the suit property.
15. Defence case was then closed. Parties then filed and exchanged written submissions.
16. For the plaintiff, it is argued that she has a right to quiet possession of her land pursuant to **Section 26 (I) of the Land Registration Act** and further that she is a registered owner of land with rights under Sections 24 and 25 of the aforesaid Act, which rights cannot be defeated by any claim from the first defendant who came to live with the plaintiff long after she had been allocated the suit property by the government of Kenya. Describing herself as old and frail and the defendants as a nuisance and an irritant, the plaintiff urged the court to issue orders of eviction against the defendants, an order that they stay away from Nakuru/Teret /xxx and an order compelling them to go and occupy plot 320 Nessuit Settlement Scheme.
17. For the defendants, it is argued that this court has no jurisdiction to determine divorce proceedings or order for the dissolution of the marriage and that pursuant to **Sections 2, 68 and 69 of the Marriage Act No. 4 of 2014**, jurisdiction to dissolve a customary marriage rests with a resident magistrate's court established under **Section 5 of the Magistrates' Courts Act, No. 26 of 2015**. To support that argument, reliance is placed on the case of **Kenya Ports Authority v Modern Holdings (E.A) Limited [2017] eKLR**.
18. The defendants further argue that a mandatory injunction removing the defendants from the suit property and an order that they never go back to the suit property is premature and cannot issue since the marriage is still subsisting and since the plaintiff's claim is one for distribution of matrimonial property and/or declaration of matrimonial property rights disguised as a suit for trespass.
19. Relying on **E. J. T v J. K. L. [2019] ekLR**, the defendants argue that the parties before this court are not strangers to each other but a couple who hold matrimonial property together. That in the absence of proof of divorce, the court's hands are tied with regards to distribution of the property.
20. It is further argued that the plaintiff has misconstrued the ritual of marrying a wife to merely welcoming a person to her parcel of land. That a wife is entitled to marriage rights and matrimonial property rights and she is not to reside at her matrimonial home at the will of the woman-husband. The cases of **Estate of Cherotich Kimong'ony (deceased) - Monica Katam vs Jackson Chepkwony & Another [2011] eKLR** and **Agnes Kwamboka Ombuna v Birisira Kerubo Ombuna [2014] eKLR** are cited. Additionally, it is argued that this court has no jurisdiction to determine a matrimonial property dispute as provided at **Section 17 of the Matrimonial Property Act, No. 49 of 2013** as read with **Section 13 of the Environment and Land Court Act**.
21. The defendants further argue that by virtue of the marriage between the plaintiff and the first defendant, the plaintiff who was childless

adopted the children of the first defendant as her own by operation of customary law. Reliance is placed on the case of **Estate of Cherotich Kimong'ony (deceased) - Monica Katam vs Jackson Chepkwony & Another** (supra) together with several extracts cited therein, **Emily Chepngeno Ruto & 6 others v David Kiprono Koske** [2019] eKLR and **Simon Langat & 6 others v Rebecca Chemutai Sinei** [2013] eKLR.

22. Regarding the issue of relocating them elsewhere, the defendants argue that neither the land in Keringet nor that in Nessuit belong to the plaintiff and that the plaintiff has failed to demonstrate that she owns the alleged parcels of land in Nessuit.

23. Lastly, the defendants argue that they are entitled to the two acres of land they occupy since the plaintiff has a duty under both customary and written law to provide a place for the first defendant as her wife and the children to settle; that the proposal by the clan to allocate the defendants only ½ acre contravenes their constitutional rights to property, equal rights to marriage, their rights to matrimonial property and the children's right to parental care; and lastly, that the court should decide the matter in the interest of justice and fairness which they argue favours them.

24. I have considered the pleadings, the evidence and the submissions. I have distilled the following issues for determination: whether this court has jurisdiction to grant dissolution of marriage, whether this court has jurisdiction to determine a matrimonial property dispute and whether the parties are entitled to the reliefs sought.

25. Jurisdiction is everything and a court cannot make any further step without it. See **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] eKLR. As was reiterated by the Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others** [2012] eKLR:

*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. ...*

26. More recently, the Court of Appeal stated in **Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service** [2019] eKLR as follows:

*... Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a compliant one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. ...*

*20. It is clear from the foregoing that the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void. ...*

27. This court's jurisdiction is provided for under **Article 162** of the **Constitution** as follows:

#### **162. System of courts**

*(1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).*

*(2) Parliament shall establish courts with the status of the High Court to hear and determine disputes relating to—*

*(a) ...*

*(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. So as to give effect to **Article 162 (3)**, parliament further legislated the court's jurisdiction under **Section 13** of the **Environment and Land Court Act, 2011** 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.**

29. Thus, the court has jurisdiction in matters to do with the environment and the use and occupation of, and title to land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69 and 70 of the Constitution**. The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights related to environment and land. See **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR**.

30. There is no dispute that the plaintiff and the first defendant are husband and wife pursuant to a woman to woman marriage contracted under Kalenjin customary law. Although the plaintiff attempted in her testimony to deny the existence of the marriage, paragraph 4 of her plaint speaks for itself: she stated there that the marriage was contracted and dowry paid. Parties are bound by their pleadings. See **Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others [2014] eKLR**. The marriage still subsists, hence the prayer for its dissolution.

31. A reading of **Article 162 (3)** and **Section 13 of the Environment and Land Court Act, 2011** does not yield any provision that allows this court deal with matrimonial disputes or to grant divorce. Instead, pursuant to **Section 69 of the Marriage Act No. 4 of 2014** as read with the definition of “court” at **Section 2** of the same statute, jurisdiction to dissolve a customary marriage rests with the resident magistrate’s court. Consequently, this court does not have jurisdiction to grant divorce or dissolution of marriage, be it a customary marriage or otherwise.

32. Does this court have jurisdiction to determine a matrimonial property dispute? If perchance a case is presented as a property dispute between spouses concerning the use and occupation of, and title to land, then this court will broadly speaking, have jurisdiction. The situation however changes entirely if the property involved is matrimonial property and the dispute is a matrimonial one. It all boils down to the facts and circumstances of each case.

33. Ultimately, the question is best resolved by applying the predominant purpose test. The test was explained in the case of **Suzanne Butler & 4 Others v Redhill Investments & Another [2017] eKLR** as follows:

*c. 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.*

*d. 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.*

*e. 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.*

34. To begin with, it is important to note that “matrimonial property” is defined at **Section 6 of the Matrimonial Property Act, 2013** to *inter alia* mean the matrimonial home or homes. The same statute further defines “matrimonial home” at **Section 2** to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, including any other attached property. A somewhat similar definition of matrimonial home is found at **Section 2 of the Land Registration Act, 2012**.

35. The suit property herein is Nakuru/Teret /xxx. Although the court has not been shown any certificate of title, there is no dispute as between the parties that the suit property is owned by the plaintiff who is the husband in the marriage and that both husband and wife together with the children who include the second defendant reside on it as their family home. The suit property is thus both matrimonial property and matrimonial home.

36. A reading of the plaint herein shows that at the core of the plaintiff’s decision to seek eviction of the first defendant and the children from the suit property and an order barring their return are disputes which arose between the parties in the course of their marriage. They are essentially spousal or matrimonial disputes. This is confirmed by the plaintiff’s testimony where she stated:

*... I filed this case because I have lived with the defendants for a while but they have refused to listen to me. ... I parted ways with E when I told her that I did not want any relationship with her anymore. I gave her a farm in Keringet but she refused to go there. I also gave her a farm in Nessuit but she refused to go there. I was offering them another place to live because they had become a burden to me. They make noise every day.*

37. The plaintiff’s prayers for eviction of the first defendant and the children from the matrimonial home and an order barring their return as

well as the first defendant's prayers in the counterclaim for a declaration that 2 acres of the matrimonial home belong to her and the children of the marriage are matters that would flow from a decree of dissolution of the marriage. In essence, the plaintiff and the first defendant are seeking distribution of matrimonial property between themselves. The predominant purpose of the litigation is resolution of a matrimonial dispute and by extension a dispute on distribution of matrimonial property. As was stated in EJT v JKL [2019] eKLR, distribution of matrimonial property cannot be done in the absence of divorce.

38. Although the plaintiff has laid a lot of emphasis on the rights of a registered proprietor of land under **Sections 24, 25 and 26** of the **Land Registration Act**, even if it had been shown that the plaintiff is a registered proprietor, her rights would be subject to the first defendant's spousal interest as provided under **Section 7** of the **Matrimonial Property Act, 2013**. The section envisages that matrimonial property shall only be divided between the spouses if they divorce or their marriage is otherwise dissolved. The dispute between the parties herein cannot be determined by this court since it has no jurisdiction to hear and determine a claim for dissolution of marriage.

39. In view of the foregoing discourse, this court lacks jurisdiction. The suit ought not to have been filed in this court. I have agonised over what to do with the suit and whether it is possible to save parties the expense of having to start fresh litigation before the appropriate court. Ultimately, I have come to the conclusion that the situation cannot be salvaged. To borrow the words of the Court of Appeal in Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service (supra), both the plaintiff's suit and the counterclaim were dead on arrival for being filed in a court without jurisdiction and cannot therefore be remedied.

40. In the end, I strike out both the plaintiff's suit and the counterclaim. Considering that the parties have close family ties, I order that each party bears own costs.

**Dated, signed and delivered at Nakuru this 12<sup>th</sup> day of November 2020.**

**D. O. OHUNGO**

**JUDGE**

In the presence of:

Ms Nancy Njoroge for the plaintiff

No appearance for the defendants

Court Assistants: B. Jelimo & J. Lotkomoi