



**BWM v MWN & another (Matrimonial Appeal E002 of 2025)
[2025] KEHC 13641 (KLR) (1 October 2025) (Judgment)**

Neutral citation: [2025] KEHC 13641 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MATRIMONIAL APPEAL E002 OF 2025
RM MWONGO, J
OCTOBER 1, 2025**

BETWEEN

BWM APPELLANT

AND

MWN 1ST RESPONDENT

SKK 2ND RESPONDENT

*(An appeal arising from the judgment of Hon. R.G. Mundia, PM,
delivered on 29th August 2024 in Embu MCELC No. E050 of 2022)*

JUDGMENT

Background

1. The appeal herein was filed in the Embu Environment and Land Court (ELC) as Civil Appeal No. E042 of 2024. Through the memorandum of appeal dated 10th September 2024, the appellant disclosed 9 grounds of appeal and sought the following orders:
 - a. An order setting aside the Judgment and Decree of the Chief Magistrate Court made on 29th August 2024 in MCELC/E050/2022;
 - b. An order dismissing the 1st Respondent's claim in its entirety; and
 - c. Costs of this appeal and the costs of the suit before the Chief Magistrate Court to be borne by the 1st Respondent.
2. When the matter was placed before K. Bor, J, she found that the dispute was a matrimonial in nature. In her ruling, she stated that the appeal could not be determined before the ELC because they were outside the jurisdiction of that court. the Judge made an order transferring the appeal to the High Court for hearing and disposal.



The Plaintiff

3. The matter before the trial court was instituted through a plaintiff under which the 1st respondent sought judgment against the appellant and the 2nd respondent for a declaration that land parcel number Ngandori/Kiriari/XXXX is matrimonial property and the transfer of the same to the appellant was null and void and should therefore be cancelled and ownership of the same be reverted to the 2nd respondent alone. She also sought general damages and costs of the suit.
4. It was the 2nd respondent/plaintiff's case that she was married to the 1st respondent under Kiambu Customary law in 1985 and they have been living as husband and wife for 37 years until the time of filing the suit. Despite the fact that the 2nd respondent/plaintiff participated in developing the land during the subsistence of her marriage to the 2nd respondent, the 2nd respondent transferred the named land to the appellant herein, fraudulently so.

The Hearing in the trial Court

5. The matter went to full hearing by way of viva voce evidence. The respondents testified that they were still married to each other. It appeared that the appellant was a tenant in one of their rental houses but later, the 1st respondent learned that the stated land had been transferred to her as co-owner with the 2nd respondent. In her testimony, the appellant stated that she knew that the 2nd respondent was a married man who had promised to marry her and that they had already planned to formalize their marriage. She said that she had started cohabiting with the 2nd respondent in 2021.

Finding of the Trial Court

6. In its judgment, the trial court found that the respondents were husband and wife and that the named property was matrimonial property. It held that the appellant had no claim over that property since she was an outsider and the property should never have been transferred to her in the first place.

Written Submissions on the Appeal

7. The appellant and 1st respondent filed written submissions as directed.
8. The appellant submitted that the trial court failed to consider important evidence to the effect that the 2nd respondent and the appellant were also married. That the marriage between the 1st and 2nd respondents could not be proved under section 59(1) of the *Marriage Act*. She argued that the marriage between the 1st and 2nd respondents did not comply with the registration requirements under the *Marriage Act*. She relied on the cases of ZOO v PA [2023] KEMC 37 (KLR) and Mark Kubai Kariuki & 2 others v Attorney General & 2 others [2015] KEHC 1527 (KLR).
9. The 1st respondent submitted that the suit land was matrimonial property within the meaning of section 6 of the *Matrimonial Property Act* and section 2 of the *Land Act*. She relied on section 26 of the *Land Registration Act* on validity of a title and section 12 of the *Matrimonial Property Act* which provides for spousal consent during alienation of matrimonial property. Further reliance was placed on the cases of Elijah Makeri Nyangw'ra v Stephen Mungai Njuguna & another [2013] KEHC 5046 (KLR) and VAL & another v JL & another; Kiptogom (Plaintiff to the Counterclaim); Lemarleni (Defendant to the Counterclaim) [2025] KEMC 11 (KLR). She argued that transfer of the land to the appellant as a co-owner with her husband was fraudulent and the trial court did not err in its judgment.



Issue for Determination

10. The core issue for determination is whether the court has jurisdiction to determine the appeal.

Analysis and Determination

11. Jurisdiction is the first and most critical issue that a court or tribunal must have before it is competent to embark on any task before it. Without jurisdiction, a Court cannot move. This was stated in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR) where it was held:

“By jurisdiction is meant the authority which a court has to decide matters that are before it or 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 both of 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 the 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...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 downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

12. Jurisdiction of a court or tribunal is conferred upon it by *the Constitution*, statute or both. The Supreme Court in Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] KESC 8 (KLR) expressed itself as follows:

“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. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by *the Constitution*. Where *the Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.”



13. The High Court’s vast jurisdiction is established under Article 165(3)-(5) of *the Constitution* as follows:

- “(3) Subject to clause (5), the High Court shall have
- (a) unlimited original jurisdiction in criminal and civil matters;
 - (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - (i) the question whether any law is inconsistent with or in contravention of this Constitution;
 - (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - (iv) a question relating to conflict of laws under Article 191; and
 - (e) any other jurisdiction, original or appellate, conferred on it by legislation.
- (4) Any matter certified by the court as raising a substantial question of law under clause (3)(b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
- (5) The High Court shall not have jurisdiction in respect of matters—
- (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in Article 162(2).”

14. This appeal has ended up before this court through a transfer order made by the Embu ELC court. Before that court, it appeared that since the dispute is matrimonial in nature, the appeal is better determined by the High Court. Therefore, it is the High Court’s Appellate jurisdiction that has been invoked; the subject matter being the lower Court’s decision. The 1st respondent, through the plaintiff in the lower court, sought for the following reliefs:



- a. A declaration that the land parcel number Ngandori/Kirigi/XXXX is matrimonial property and the transfer of the same to the appellant was null and void and should therefore be canceled and the ownership of the same do revert to the 2nd respondent alone;
 - b. General damages; and
 - c. Costs, interests and any other relief that the court may deem fit.
15. The suit was filed as ELC Case No.050 of 2022 invoking the Magistrates Court ELC jurisdiction. In paragraph 11 of the plaint, the plaintiff invoked the jurisdiction of the ELC Court stating that the Court had jurisdiction, despite the prayers seeking matrimonial remedies. The trial court was thus approached as an ELC Magistrate's court gazetted as such in line with section 26(4) and (5) of the *Environment and Land Court Act*. That provision is as follows:
- “Subject to Article 169(2) of *the Constitution*, the Magistrate appointed under sub-section (3) shall have jurisdiction and power to handle -
- (a) disputes relating to offences defined in any Act of Parliament dealing with environment and land; and
 - (b) matters of civil nature involving occupation, title to land, provided that the value of the subject matter does not exceed the pecuniary jurisdiction as set out in the Magistrates' Courts Act.
- (5) Appeals on matters from the designated magistrate's courts shall lie with the Environment and Land Court.” [Emphasis added]
16. As a matter of law, the jurisdiction of a Magistrate's ELC court is limited to the questions of occupation to, offences in respect of environment and land, and issues as to occupation and the title to land. This is what is in issue within its pecuniary jurisdiction established under section 7 of the Magistrates Court Act. From a reading of the above cited provision, it is clear that the trial court was moved as an ELC court. In being so moved, it lacked jurisdiction over matrimonial issues. Within its judgment, the trial court conflated its ELC or normal jurisdiction and determined that based on the evidence adduced, there was a marriage subsisting between the respondents at the time when the suit property was acquired and so it was declared to be matrimonial property.
17. It follows that given the limited jurisdiction of an ELC Magistrate's court, the trial court lacked jurisdiction as an ELC Court, as moved, to determine the issues in the manner that it did. Jurisdiction must be established at the point of filing the suit, in the course of the suit and even at the point of judgment. No amount of judicial craft could have conferred the trial court with jurisdiction to make a declaration on matrimonial property in the case before it whilst wearing its ELC jurisdictional cloak. In fact, it would have been prudent to strike out the plaint as soon as the trial court noticed that a part of the orders sought lay outside its jurisdiction.
18. Section 26(5) of the *Environment and Land Court Act* obliges an aggrieved party before the trial court, if she so desired, to appeal at the ELC court, which she did. At that point, there was no way that the appellant could bring her appeal to the High Court even though the issue is one of matrimonial property and not necessarily land occupation or title. Through the submissions filed herein, it appears clear that there is an issue of spousal consent that arose within the context of the *Land Act* and *Land Registration Act* as between the spouses prior to transfer. It is through this argument that the declaration of matrimonial property seems necessary or to be determined first.



19. Determination of what constitutes matrimonial property under *Matrimonial Property Act* usually depends largely on determination of the existence of the validity of a marriage under the *Marriage Act*. These issues cannot, and should not arise before an ELC court at whichever level because it lacks jurisdiction to determine them.
20. Indeed, it was necessary for a declaration of matrimonial property to be made for purposes of determining spousal consent under the *Land Act* or the *Land Registration Act*, that declaration is to be sought from a family court, which order would then be used to guide the ELC court accordingly.

Conclusions and Disposition

21. In the present case, the trial court lacked jurisdiction as an ELC Court to grant the orders sought in the plaint. To that extent, the suit was void ab initio. It follows that this court also lacks jurisdiction to entertain the appeal for three reasons:
 - a. The appeal arises from a suit that the trial court lacked jurisdiction to hear and determine as a ELC Court;
 - b. Part of the issues raised are issues on disposition of land, which issues are only determinable at the ELC; and
 - c. Appeals from the ELC Magistrate's court only lie at the ELC and not the High Court notwithstanding that the matter was transferred to this court.
22. Can the Court issue an order to strike out the plaint which would enable the parties to pursue determination of a marriage and/or matrimonial property before the appropriate court before ownership and disposition of the suit land can be determined? In the present circumstances, it is not even possible for this Court to order that the trial court's judgment be set aside and the plaint be struck out because it lacks jurisdiction to do so.
23. Accordingly, the appeal is hereby dismissed in entirety for want of jurisdiction.
24. Orders accordingly.

DELIVERED, DATED AND SIGNED AT EMBU HIGH COURT THIS 1ST DAY OF OCTOBER, 2025.

R. MWONGO

JUDGE

Delivered in the presence of:

Ms. Wanjiku holding brief for N. Mbogo for Respondent

Mr. Njenga for Appellant

Francis Munyao - Court Assistant

