

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E127 OF 2024

ISABELLA NJERI

PLAINTIFF

VERSUS

PAULINE MWIKALI KIELEKO 1ST

DEFENDANT HFC LIMITED

2ND DEFENDANT CHIEF LAND REGISTRAR, NAIROBI

..... 3RD DEFENDANT REGISTRAR OF TITLES

..... 4TH DEFENDANT COUNTERCLAIM

PAULINE MWIKALI KIELEKO

PLAINTIFF

VERSUS

ISABELLA NJERI 1ST

DEFENDANT

ANN CHEBET TOWEY 2ND

DEFENDANT

ELC CASE NO. E127 OF 2024

Ruling

RULING

1. What is before the Court for determination are two Notices of Preliminary Objections dated the 27th May, 2024 and 9th August, 2024 filed by the 2nd Defendant and the 2nd Defendant in the Counterclaim. The Plaintiff's suit commenced vide a Plaint dated 25th March 2024. The Plaintiff's case is that George Gudler Towey (deceased) hereinafter referred to as the 'deceased', whom she contends was her husband held **Land Reference Number 7336/132**, hereinafter referred to as the 'suit land', in trust as a spouse, thus she seeks cancellation of the title held by the 1st Defendant who acquired it vide an alleged sale, on the basis of lack of spousal consent. She also seeks orders compelling the 2nd Defendant to discharge the legal Charge registered over the title to the suit land.

2. The 2nd Defendant's Preliminary Objection is dated 27th May 2024. It contends that jurisdiction in this suit exclusively lies with the High Court. Further, that the Plaintiff lacks locus

standi to seek relief against it because she is not recognized under Section 103 of the Land Act and her interest if any, is subject to its interest pursuant to Section 25 (1)(a) of the Land Registration Act as it has Charged the suit land. Further, that its interest ranks in priority pursuant to Section 36 of the Land Registration Act.

3. The 2nd Defendant in the Counterclaim's Preliminary Objection is dated 9th August 2024. She contends that this Court lacks jurisdiction to hear and determine the Plaintiff's suit since the substratum of the suit is a determination of the validity and/or existence of a marriage between George Gudler Towey (deceased) as a husband to either the Plaintiff or the 1st Defendant, which issue is outside the purview of this court. Further, that the validity of the Charge over the suit land is outside this Court's scope. She insists that the Plaintiff lacks the locus standi to institute the suit for want of requisite authority to represent the estate of George Gudler Towey (deceased).

4. The two Notices of Preliminary Objection were canvassed by way of written submissions which were highlighted by the respective Counsels.

Submissions

5. In support of the Preliminary Objections, the 2nd Defendant submits that issues surrounding the Charge on the suit land are the preserve of the jurisdiction of the High Court. It further submits that the Plaintiff lacks capacity to seek relief against it, since she has no legal interest in the Charged property as conferred by Section 24 of the Land Registration Act. It points out that while her claim of interest is through her husband- George Gudler Towey (deceased), he voluntarily transferred the suit land to the 1st Defendant six (6) years, prior to his death. It argues that the Plaintiff cannot rely on Section 103 (1) (c) of the Land Act because no consent was required from her as the deceased did not consider her as a spouse. It reiterates that the Plaintiff cannot seek interest in property previously owned by the

deceased without taking out Letters of Administration pursuant to Section 82 of the Law of Succession Act.

6. To buttress its averments, it relied on the following decisions: **Bank of Africa Kenya Limited & another v TSS Investment Limited & 2 others [2024] eKLR; Allibhai v Shaffique Allibhai & I&M Bank Limited [2020] eKLR; Touristic Union International & another v Jane Mbeyu & another [1993] eKLR** and **R v The Business Premises Rent Tribunal & 2 others [2008] eKLR.**
7. The 2nd Defendant in the Counterclaim submits in support of the preliminary objections herein and insists that the suit is disguised as a land matter but in reality, coalesces family disputes requiring the Court to look into the validity of a marriage between George Gudler Towey (deceased) to either the Plaintiff or the 1st Defendant and whether the suit land is matrimonial property. Further, that the issue of validity of a Charge over the suit land also falls within the Jurisdiction of Commercial Courts.

8. She points out that the Plaintiff alleges that she was married to the deceased and has in support adduced a Certificate of marriage to that effect while on the other hand, the 1st Defendant has challenged the Plaintiff's marriage to the said deceased and adduced a marriage Certificate to him, including a statutory declaration sworn by him stating that he was never married at the time of the sale or transfer of the suit land, moreso to the Plaintiff. Further, that it is an issue that needs to be determined prior to the Court making a determination on whether it invokes the need for and the requirement of a spousal consent in the sale and transfer of the suit land. She also submits that the procedure for redress of disputes on matrimonial property is provided under section 17 of the Matrimonial Property Act, where the Court vested with jurisdiction to adjudicate the dispute is the High Court, by dint of Article 165 (3) (a) of the Constitution.

9. As to the issue of validity of the Charge over the suit land as between the 2nd Defendant and HFC Limited, she contends that it is an issue that does not fall on the 'use' nor on the 'occupation' of the suit land, thus it does not fall within the jurisdiction of the Environment and Land Court as envisaged under Article 162 of the Constitution and Section 13 (2) of the Environment and Land Court Act, as it concerns a commercial contract that ought to be determined by the High Court.
10. The 1st Defendant also submits in support of the preliminary objections. She urges the Court to dismiss the suit in its entirety for the Plaintiff's lack of locus standi for want of authority to represent the estate of the deceased and contends that the issue of locus standi is equivalent to a Court's jurisdiction thus its absence amounts to null and void proceedings. Her submissions mirror those of the 2nd Defendant in the Counterclaim that this Court lacks jurisdiction to interrogate matrimonial issues. To support her

arguments, she relied on the following decisions: **JOO v GKN [2021] eKLR (NAIROBI ELC CASE NO E105 OF 2021); Cooperative Bank v Patrick Kangethe Njuguna & 5 others [2017] eKLR; Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1; and Julian Adoyo Ongunga & Another v Francis Kiberenge Bondeva (Suing as the Administrator of the Estate of Fanuel Evans Amudavi (Deceased) eKLR** among others.

11. At the highlighting of submissions, the parties reiterated their written submissions. In opposition to the preliminary objections, Counsel for the Plaintiff extensively submitted that the preliminary objections are not merited since they do not raise a pure question of law. Further, that the case is properly before this Court. He insisted that the issue before the Court was not a matrimonial issue nor a succession cause but a claim over land and dispute over title to land. He argued that the Court should weigh what was before it and dismiss the preliminary objections.

12. To support her arguments, the Plaintiff relied on several cases including: **Aviation & Allied Workers Union Kenya v Kenya Airways Ltd & 3 others [2015] eKLR; Spine Bank Limited v ULR & 2 others; Zipporah Njoki Kangara v Rock and Pure Limited & 3 others [2021] KEELC 395(KLR); Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] KEELC 657 (KLR); Muinde v Mwanja & 2 others [2025] KEELC 984 (KLR) and BWM V JMC [2018] KEELC 4119(KLR)**, among others which the Court has carefully considered.

Analysis and Determination

13. The question for determination is whether the two instant Notices of Preliminary Objection dated the 27th May 2024 and 9th August 2024 respectively are merited.

14. On the raising of a Preliminary Objection, in the case of **Oraro v**

Mbaja [2005] eKLR, the Court stated that:

“A “preliminary objection”, correctly understood, is now well identified as, and declared to be a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.”

15. The Plaintiff claims to have been married to the deceased and that the suit land was matrimonial property. Further, that the deceased should have obtained spousal consent before Charging the said suit land to the 2nd Defendant. She argues that the 1st Defendant in the Counterclaim should have conducted due diligence before purchasing the said property. Further, that there could not have been a marriage between the 1st Defendant in the Counterclaim and the deceased. She insists that she has filed this suit to claim a

portion of the land and hence the dispute herein relates to title and can be handled by this Court.

16. The jurisdiction of the Environment and Land Court flows from Article 162 (2) & (3) of the Constitution and section 13 of the Environment and Land Court Act. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others (2012) eKLR**, the Supreme Court of Kenya stated that:

“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.”

17. It is the 2nd Defendant’s contention that the dispute in respect to the Charged property is a commercial transaction and this Court is devoid of jurisdiction to handle it. In **Co-operative Bank of Kenya Limited v Patrick Kangethe**
ELC CASE NO. E127 OF 2024 **Ruling**

Njuguna & 5 others [2017] KECA 79 (KLR), the Court of Appeal stated that:

“41. Furthermore, the jurisdiction of the ELC to deal with disputes relating to contracts under Section 13 of the ELC Act ought to be understood within the context of the court’s jurisdiction to deal with disputes connected to ‘use’ of land as discussed herein above. Such contracts, in our view, ought to be incidental to the ‘use’ of land; they do not include mortgages, charges, collection of dues and rents which fall within the civil jurisdiction of the High Court.

Emphasis Mine

18. Further, under the Matrimonial Properties Act, the High Court is granted jurisdiction to handle any dispute revolving around matrimonial property.

19. On matrimonial property Section 93 of the Land Registration Act provides that:

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the

subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the Matrimonial Property Act (Cap. 152).”

20. In **JOO v GKN [2021] KEELC 1293 (KLR)**, the Court stated that:

“9. It is therefore my finding that the present dispute relates to what is alleged to be matrimonial property. The procedure of redress for a dispute of this nature is provided under Section 17 of the Matrimonial Property Act. The court vested with jurisdiction to adjudicate the dispute, in the absence of express definition of the court contemplated under the Act, is the High Court, by dint of the provisions of Article 165 (3) (a) of the Constitution. Consequently, my finding on the single issue in the preliminary objection dated 19/4/2021 is that the Environment and Land Court lacks jurisdiction to adjudicate this dispute.”

21. Further, the Court held as follows in **GDM v Consolidated Bank of Kenya & another (Environment & Land Case E001 of 2022) [2023] KEELC 21952 (KLR) (29 November 2023) (Ruling):**

“Having looked at the pleadings before this court, I am of the considered view that this is a proper suit for this court to stay until the determination of whether the suit properties were matrimonial properties or not, after which the court can determine the element of whether spousal consent was procured or not and whether the 1st defendant could dispose of the properties due to the outstanding loan regardless of the rights, if any, of the plaintiff.”

22. The 2nd Defendant in the Counterclaim contended that the Plaintiff has no locus standi to file a suit on behalf of her alleged husband as she is not the registered owner, the suit land is not registered jointly and she has not taken out letters of administration. The Court of Appeal held as follows in

Virginia Edith Wamboi Otieno v Joash Ochieng Ougo & another [1987] eKLR:

“But an administrator is not entitled to bring action as administrator before he has taken out letters of administration. If he does, the action is incompetent at the date of its inception.”

23. From the facts before Court, I opine that before the Court can determine the dispute herein, it has to make a finding on whether there was a marriage between the deceased and the Plaintiff, whether the suit can be deemed as matrimonial property, if the Plaintiff can rightly represent the deceased estate without Letters of Administration Intestate and whether the Charge with HFC Limited is valid. In my view these issues cannot be separated from the dispute herein.

24. Based on the facts as presented while relying on the legal provisions cited and associating myself with the decisions quoted, I find that this Court is devoid of jurisdiction to handle disputes revolving around Charges and Mortgages,

Matrimonial Property and Succession matters. In my view, the Plaintiff does not even have locus standi to commence this suit.

25. I find that since this matter concerns a deceased person's estate, I direct each party to bear their own costs.

26. In the foregoing, I find the two Notices of Preliminary Objection merited and will proceed to strike out this suit.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 4TH
DAY OF NOVEMBER, 2025**

CHRISTINE OCHIENG
JUDGE

In the presence of:

Ngatia SC for Plaintiff

Mutuma holding brief for Ongoya for 1st Defendant and 2nd Defendant in the Counterclaim

Wawire for 2nd Defendant

ELC CASE NO. E127 OF 2024

Ruling

Court Assistant: Joan

ORIGINAL

ELC CASE NO. E127 OF 2024

Ruling

Page 17 of 17