

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT MERU**

**ELC APPEAL NO. E016 OF 2024**

TABITHA GACHERI KIRIMI .....APPELLANT

**VERSUS**

PAULINE MUTHONI LABAN .....RESPONDENT

***[Being an appeal from the judgment of Hon. T.M Mwangi – SPM delivered on 10<sup>th</sup> August 2023 in Meru CM ELC suit No. 138 of 2019].***

**RULING**

1. The Appellant herein approached the subordinate court *vide* Plaint dated 28<sup>th</sup> November 2019 and wherein the Appellant contended that the suit property, *namely*; L.R No. 23980/57 constitutes the Matrimonial property which was acquired by the appellant and one Moses Kirimi Mbogori [now deceased]. To the extent that the appellant contended that the suit property constituted matrimonial property, same [Appellant] sought *inter alia* declaration that the title in favour of the respondent is illegal, null and void for want of spousal consent.
2. According to the Appellant, the transfer and registration of the suit property in favour of the respondent was vitiated because the suit

property could not have been transferred to and registered in the name of the respondent without due regard to the provisions of section 93 of the Land Registration Act 2012, as read together with the provisions of the Matrimonial Property Act 2013. On the contrary, the respondent herein, posited that same was the 2<sup>nd</sup> wife [now widow] of Moses Kirimi Mbogori, now deceased. Furthermore, the respondent contended that the suit property constituted the house where same [respondent] resided/lived with Moses Kirimi Mbogori- now deceased.

3. Additionally, the respondent contended that Moses Kirimi Mbogori, now deceased, transferred or caused to be transferred the suit property unto her on or about the year 2015. In particular, it was contended that the transfer of the suit property was undertaken lawfully by the deceased.
  
4. The dispute between the parties was heard and determined by the trial court [Hon. T.M Mwangi – senior principal magistrate], *vide* Judgment delivered on 10<sup>th</sup> August 2023 and wherein the learned trial magistrate highlighted Three [3] issues for determination. The issues which were highlighted for determination are, *namely*: whether the defendant [now respondent] was the wife of the deceased; whether the suit property was matrimonial property; whether the transfer of the suit property was

fraudulent and illegal for want of spousal consent of the plaintiff [now appellant].

5. After highlighting the foregoing issues, the learned trial magistrate proceeded to and answered the issues in the following manner. Firstly, the learned magistrate found and held that the respondent was a wife of Moses Kirimi Mbogori, now deceased. Second; the learned trial magistrate held that the suit property was not matrimonial property and thus spousal consent was not a prerequisite to the transfer. Third; the learned trial magistrate held that the transfer was not fraudulent in so far as the appellant had not proved her contribution towards the acquisition of the suit property.

6. It is the said Judgment and the resultant decree that has aggrieved the appellant and thus provoking the subject appeal. Notably, the appellant would want this court to interrogate the Judgment of the trial magistrate and to discern whether the finding[s] that the respondent was a wife of the deceased was arrived at correctly or otherwise. In addition, the appellant would want this court to interrogate the evidence on record and the law and to declare the suit property as matrimonial property. Moreover, the appellant would want this court to decree that being

matrimonial property, no transaction thereto could be undertaken without her spousal consent. Finally, the appellant would want this court to adjudge the impugned transfer to be illegal on the basis of violation of inter alia the provisions of the Matrimonial Property Act 2013.

7. The Memorandum of appeal dated 5<sup>th</sup> March 2024; has highlighted various grounds.

8. The grounds are reproduced as hereunder;

- (i) *That the learned trial magistrate erred in law in assuming jurisdiction and sitting as a family/succession court by making a determination that the respondent was wife of late Moses Kirimi Mbogori under customary law.*
- (ii) *That the learned trial magistrate misdirected himself by taking into consideration issues for determination that were not pleaded and were not before the trial court for determination.*
- (iii) *That the learned trial magistrate erred in law and in fact in not appreciating sufficiently or at all the evidence tendered by the appellant on her contribution made in the acquisition of suit property.*

- (iv) *That the learned trial magistrate erred in law and fact in failing to hold that title No. 23980/57 was matrimonial property having been acquired during the subsistence of marriage and only registered in the name of one spouse.*
- (v) *That the learned trial magistrate erred in law and fact in holding that the respondent was a transferee for value without notice, despite the respondent having admitted in evidence that she, during the transfer, was the appellant, who was a spouse of the registered owner.*
- (vi) *That the learned trial magistrate erred in law and fact in holding that the suit property was not subject to overriding interests under section 28 (j) of the Land Registration Act as read together with the Matrimonial Property Act.*

9. Having reviewed the record of appeal; the memorandum of appeal; the Judgment of the trial court and the written submissions filed by/on behalf of the parties, I come to the conclusion that the critical issues that require determination before a final verdict can be arrived at gravitate around; whether the respondent was truly married to Moses Kirimi Mbogori [deceased]; whether the suit property was matrimonial property; whether the appellant demonstrated her contribution to the acquisition of the suit property; whether spousal consent was necessary before the impugned

transfer; and ultimately, the determination whether the transfer was fraudulent for lack of spousal consent.

10. There is no gainsaying that this court cannot address and resolve the ultimate issue, namely; whether the impugned transfer was fraudulent for lack of spousal consent without first and foremost determining the key issues that belie the dispute.

11. Nevertheless, it is not lost on me that appeals arising from and touching on disputes under the Matrimonial Property Act, 2013, do not lie to the Environment and Land Court. On the contrary, such appeals lie to the high court and hence the appellant herein ought and should have filed the subject appeal before the High Court.

12. **Rule 33 of the Matrimonial Property Rules, 2022** captures the jurisdiction of the high court to entertain appeals touching on and concerning disputes under the Matrimonial Property Act.

13. The said rule stipulates thus;

*(1) A party who is dissatisfied with an order or decision of a magistrates' court may appeal to the High Court as of right*

*within thirty days from the date of the order or decision complained of.*

*(2) An appeal lodged pursuant to paragraph (1) shall be in accordance with Order 42 of the Civil Procedure Rules (sub. leg).*

*(3) An appeal from the High Court to the Court of Appeal shall be in accordance with Part IV of the Court of Appeal Rules (sub. leg).*

14. I have internalized the import and tenor of the said provisions of the law and taking into account the pertinent issues for determination herein, I come to the conclusion that the environment and land court is not seized of the requisite jurisdiction to entertain the subject appeal. Suffice it to state that learned counsel for the appellant ought to have appreciated the legal issues underpinning the appeal. In my humble view, learned counsel for the appellant ought to have invoked the correct jurisdiction.

15. Moreover, it is not lost on me that jurisdiction of the court is donated by the constitution, the statute or the constitutive charter. In addition, a court of law cannot exercise jurisdiction which has not been donated under the law. Similarly, a court of law cannot arrogate unto itself jurisdiction on

the basis of strained reasoning, sympathy, empathy or in an endeavor to merely dispose of a matter.

16. In the case of **Samwel K. Macharia vs Kenya Commercial Bank Ltd (2012) eKLR**, the Supreme Court, [*the apex court*] stated as hereunder;

*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.*

17. Additionally, even though the advocate for the parties did not canvass the issue of jurisdiction; or appears to have acquiesced to this court handling/hearing the appeal, there is no gainsaying that jurisdiction cannot be conferred by way of acquiescence, consent, waiver or on the basis of ignorance of the law. Either way, a court of law is called upon to remain true to its calling, that is, to make decisions on the basis of the law and not otherwise.

18. In the case of **Kenya Ports Authority vs Modern Holdings [E.A] Ltd (2018) KECA, 293 (KLR)**, the Court of Appeal underscored the significance of jurisdiction.

19. For coherence, the court stated thus,

*This Court in **Adero & Another V Ulinzi Sacco Society Limited** [2002] 1 KLR 577, quite sufficiently summarised the law on jurisdiction as follows;*

**“1.....**

**2. The jurisdiction either exists or does not *ab initio* and the non-constitution of the forum created by statute to adjudicate on specified disputes could not of itself have the effect of conferring jurisdiction on another forum which otherwise lacked jurisdiction.**

**3. Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.**

**4. Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.**

**5. Where a cause is filed in court without jurisdiction, there is no power on that court to transfer it to a court of competent jurisdiction.**

**6. ....**

**7. ....[..” (Our emphasis)].**

20. Flowing from the foregoing, I must state that I have anxiously considered whether to strike out the appeal and let the axe fall where it belongs, or to remit the appeal to the High Court for hearing and determination in line with the provisions of ***Rule 33 of the Matrimonial Properties Rules 2022***.

21. In the course of my consideration, I have taken into account that the dispute under reference is not only emotive but equally sensitive. In this regard, I have reluctantly come to the conclusion that the course that

serves the interests of justice lies in remitting the subject appeal to the High Court, to enable the substantive issue[s] to be fully canvassed; and resolved.

22. In arriving at the foregoing conclusion, I have considered the ratio decidendi of the Court of Appeal in the case of *Mugendi v Kenyatta University & 3 others (Civil Appeal 6 of 2012) [2013] KECA 41 (KLR) (17 May 2013) (Judgment)*; the decision in *United States International University (USIU) v Attorney General; Outa & another (Interested Parties) (Petition 170 of 2012) [2012] KEHC 5516 (KLR) (3 August 2012) (Ruling)*; and the holding of the Supreme court in *Nicholus v Attorney General & 7 others; National Environmental Complaints Committee & 5 others (Interested Parties) (Petition E007 of 2023) [2023] KESC 113 (KLR) (28 December 2023) (Judgment)*, the latter where the Supreme Court highlighted the adoption/application of a nuanced approach.

#### **FINAL DISPOSITION**

23. For the reasons that I have outlined in the body of the ruling, I come to the conclusion that the interests of justice demand that the subject appeal be remitted to the high court for consideration and adjudication.

24. In the upshot, the final orders that commend themselves to the court are as hereunder;

- (i) **The directions pertaining to the delivery of Judgment in respect of the subject appeal by the Environment and Land court be and are hereby vacated.**

- (ii) **The subject Appeal be and is hereby remitted to the High Court for hearing and eventual determination.**
  
- (iii) **The High court shall be at liberty to exercise its jurisdiction in line with the provisions of Rule 33 of the Matrimonial Properties Rules 2022 as read together with /Article 165 (1) of the Constitution 2010.**
  
- (iv) **The costs of the Appeal shall abide the outcome of the appeal.**
  
- (v) **Either party shall be at liberty to apply.**

25.It is so ordered.

**DATED, SIGNED AND DELIVERED AT MERU THIS  
27<sup>TH</sup> DAY OF NOVEMBER 2025.**

**OGUTTU MBOYA, FCI Arb, CPM [MTI].  
JUDGE.**

**In the presence of:**

Hussein – Court Assistant

Mr. Mwirigi Batista for the Appellant

Mr. Denis Anyoka for the Respondent