



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KITALE**

**LAND CASE NO. 17 OF 2019**

**SUSAN KWAMBOKA NYAKUNDI.....PLAINTIFF**

**VERSUS**

**FREDRICK MATHENGE MACHARIA.....DEFENDANT**

**RULING**

1. This is a ruling on the preliminary objection raised by the defendant in this matter.
2. The plaintiff filed a plaint dated **20/2/2019** on **21/2/2019**. She also filed an application dated **20/2/2019** alongside that plaint.
3. The application seeks an order of interim injunction to restrain the defendant and his agents from interfering in any manner with title no. **Kitale Municipality/Koitogos Block 15** pending the hearing and determination of the main suit.
4. The applicant has brought the application pursuant to **Order 1A, 1B, 3 & 3A** of the **Civil Procedure Act and Section 6(1)** of the **Matrimonial Property Act 2013 Order 40 Rules 1, 2, 3 & 4** of the **Civil Procedure Rules, Order 51 Rule 1** of the **Civil Procedure Rules**.
5. The grounds upon which the application is made are contained at the foot of the application. Those grounds are that the parties herein are husband and wife who have been married since **2005** and were blessed with 2 children; that they have set up their matrimonial home at Kibomet Trans-Nzoia; that the respondent herein intends to throw the applicant and the children out of their matrimonial home and that the application has a good case with high chances of success.
6. The application is supported by an affidavit of the plaintiff dated **21/2/2019** which lays emphasis on the above grounds.
7. The defendant filed notice of preliminary objection and objected to the validity of the application and the entire suit. He averred that this court has no jurisdiction to hear and determine this suit as the dispute herein concerns matrimonial property which falls within the jurisdiction of the Family Division of the High Court.
8. The defendant replied to the application by way of a replying affidavit filed on **12/3/2019**.
9. The plaintiff filed written submissions on the preliminary objection on **18/3/2019** while the defendant on filed his submissions **21/3/2019**. I have considered those submissions.
10. The defendant's submission is that the issue before this court is whether this court has jurisdiction to hear and determine the suit. He cited **Article 162 (2) (b)** of the **Constitution** and **Section 13** of the **Environment and land Court Act** and relied on the case of **Kabilo Chepkok -vs- Francis Chepkor Tuwei Eldoret ELC Case No. 57 of 2016**. He pointed out that through the pleadings indicate that the plaintiff and the defendant had been living as husband and wife the defendant does not deny that fact. He emphasized that the concern of the plaintiff is that the defendant intends to evict her out the property, which allegations he has termed as baseless. He avers that in the circumstances and I quote the words of his counsel verbatim: "*it is presumed that the house standing on parcel No. Kitale Municipality Block 15/Koitogos is their matrimonial home unless proved otherwise*". He cites **Section 6** of the **Matrimonial Property Act 2013** which defines matrimonial property as "*(a) matrimonial home or homes*" and **Section 14 (a)** of the same Act which provides that where property acquired during marriage in the name of one spouse there shall be a presumption that it is held in trust for the other spouse.
11. He submits that based on those provisions of the law there is no doubt that the suit property is matrimonial property and should be dealt with under the Matrimonial Property Act.
12. On the other hand the plaintiff submits that under provisions of **Article 162 (2) (b)** of the **Constitution**, this court has jurisdiction to

hear and determine all disputes relating to the occupation and the user of land and title to land, and that this suit is for a declaration that the suit property is matrimonial property. She submits that this court therefore has jurisdiction to determine and grant the orders sought. She quoted the case of **B.W.M. -vs- J.M.C. - Murang'a ELC Case No. 379 of 2017**. However, I have noted that that decision can be distinguished on the basis that the defendant filed a defence denying that the suit property is matrimonial property and asserting that he is the registered owner of the land which was acquired prior to the marriage between the plaintiff and the defendant. In this case the defendant admits the contents of **paragraph 3, 4 and 5** of the plaint. Those paragraphs allege that the parties got married in **2005** and that they established their matrimonial home in Kibomet in Trans-Nzoia County and that they were blessed with two issues.

**13.** The contents of **paragraphs 6 - 10** of the plaint are however denied. Those paragraphs contain the allegation that the defendant has demanded that the plaintiff vacates the matrimonial home, that the defendant intends to bring another woman to the matrimonial home, that the defendant has caused other people to assault the plaintiff thus leading to a complaint pending before the police at Kitale Police Station and that the defendant has attempted to have the plaintiff, her children and her belongings taken to her parents.

**14.** It is curious that **paragraph 10** of the plaint is lumped up with **paragraph 6, 7, 8 and 9** in the corrective denial contained in **paragraph 4** of the defence. **Paragraph 10** states as follows:

**“It is the plaintiff’s case that the plot stands on that parcel No. Kitale Municipality Block 15/Koitogos in Kibomet on which the house stands is her matrimonial home and the defendant cannot purport to throw her out.”**

**15.** Considering the above analysis of the contents of the plaint and the defence one might conclude that the defendant is conducting himself like the man in the proverbial man-and-satyr aesopian fable by blowing both hot and cold with the same mouth.

**16.** Admissions have to be as plain as a pikestaff for them to win the trust of this court in giving final orders that would dispose of a claim.

**17.** In this case I cannot rely solely on the contents of the pleadings but also on the contents of the submissions made by counsel who is presumed to have instructions from his client of what to say. However, in my view, the two types of documents must supplement one another because they are all attributable to the defendant in the final analysis. The outcome of the above documentary analysis is a finding that the plaintiff expressly admits that the suit property is matrimonial property.

**18.** The contents of the last document filed by the defendant in these proceedings, that is, the submissions dated **19/3/2019**, are unequivocal as to what the admission of the defendant in this matter is: that the suit land is matrimonial property.

**19.** The question that now arises is: “Does that leave any other dispute pending before this court?”

**20.** The principal prayers in the plaint read as follows:-

**(a) A declaration that the plot standing (sic) on Kitale Municipality Block 15/Koitogos Kibomet where the house stands is the plaintiff’s matrimonial (sic) and the defendant has not right (sic) to throw her out.**

**(b) An order of permanent injunctions restraining the defendant from disturbing and /or in any way interfering with the plaintiff and the children over the matrimonial home.**

**(c) Costs.**

**21.** The admission of the plaintiff that the suit is a matrimonial home demands that **prayer (a)** be considered as settled.

**22.** What remains is **prayer (b)** which relates to a permanent injunction restraining the defendant from acts that might interfere with the plaintiff’s and her children’s occupation of the suit property. Does this court have jurisdiction to deal with **prayer No. (b)**?

**23. Article 162(2)(b) of the Constitution of Kenya** 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.**

**24. Section 13 of the Environment And Land Act**, an Act of Parliament to give effect to **Article 162(2)(b) of the Constitution**; to establish a superior court to hear and determine disputes relating to the environment and the ***use and occupation of, and title to, land***, and to make provision for its jurisdiction functions and powers, and for connected purposes provides as follows:

**(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) .....

(6) .....

(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. (Emphasis mine)

25. From a plain reading of the provisions of **Article 162** of the **Constitution** and **Section 13** of the Environment and Land Act, it is clear that the determination of disputes relating use and occupation of land is within the mandate of this court. This court is therefore not confined to handling disputes concerning title.

26. When the defendant avers that he is not disputing that the land is matrimonial property, he is only deemed to be admitting part of the plaintiff's claim.

27. The question as to whether the rest of the claim can be heard and determined by this court is subject to interpretation of the provisions of **Article 162** of the **Constitution** and **Section 13** of the **Act**.

28. In my view the use and occupation of land includes thereof use as a matrimonial home. In **Section 2** of the **Matrimonial Property Act**, "**matrimonial home**" is defined as "**any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.** (emphasis mine)

29. In view of the definition set out above, if the married couple were to consensually cease living in the premises in preference of another house, it is doubtful that the former would be called a "*matrimonial home*" though it may retain the title "*matrimonial property*" as the latter is a broader term.

30. The plaintiff and her children therefore have *use and occupation* of the matrimonial home as long as they are in physical possession of the premises alongside the defendant. Any eviction by the defendant may put an end to this use and occupation.

31. In my view this use and occupation of the matrimonial home is covered by the provisions of both **Article 162** of the **Constitution** and **Section 13** of the **Environment and Land Act** which grant this court jurisdiction to issue among others injunctive orders where they are deserved.

32. In **Jane Wambui Ngeru v Timothy Mwangi Ngeru [2015] eKLR [NAIROBI ELC SUIT NO. 317 OF 2014]** the court (Nyamweya J.) observed as follows regarding the provisions of the **Matrimonial Property Act**:

**“No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the Constitution under Article 165(3). The Marriage Act of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction.**

**It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land.”**

33. In the **Jane Wambui Ngeru case** the court proceeded to determine the issue of whether or not an injunction should issue against a spouse where a marriage had been annulled by a court in divorce proceedings. That decision is persuasive. In this case the defendant still holds that he and the plaintiff are still husband and wife.

34. In conclusion I therefore must reject the defendant's submission that this court has no jurisdiction.

35. The upshot of the foregoing is that the defendant's preliminary objection dated **11/3/2019** has no merit and it is hereby dismissed with costs.

**Dated, signed and delivered at Kitale on this 18<sup>th</sup> day of July, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

N/A for the Plaintiff

N/A for the Defendant

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**18/7/2019**