



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC CASE NO. 57 OF 2016

KOBILO CHEPKOK.....PLAINTIFF

VERSUS

FRANCIS CHEPKOK TUWEI.....DEFENDANT

RULING

This is the ruling in respect of a Preliminary Objection dated 23rd October 2017 by the defendant/respondent on the grounds that the court lacks jurisdiction to hear and determine this matter as it concerns division of matrimonial property which falls within the jurisdiction of the High Court Family division.

The court heard the application ex -parte and gave interim orders of injunction. When the matter came up for inter- parties hearing the defendant filed a notice of preliminary objection to the whole suit on the ground that the court lacks jurisdiction to hear this matter.

The court had earlier impressed upon the parties to try an out of court settlement but the parties were not able to settle the matter. The court is now called upon to rule on the preliminary objection by the defendant.

Counsel agreed to file list of authorities in respect of the preliminary objection. Both Counsel filed authorities in support of their client's case. Counsel for the plaintiff maintained that the court has jurisdiction to handle this matter as involves land ownership. It was further Counsel's submission that the Matrimonial Property Act 2013 does not specify the procedure for institution of suits and the court.

Counsel for the respondent submitted that the court does not have jurisdiction to hear cases involving matrimonial property and especially where the marriage is still subsisting.

Analysis and determination

The issue for determination is whether this Court has jurisdiction to hear and determine the Plaintiff's application and suit. If this question is answered in the affirmative, then the Court will then proceed to determine the substantive question as to whether the Plaintiff has met the threshold for the grant of temporary orders of injunction. But if the preliminary objection is upheld then it would be the end of the road for this suit in this court.

It is trite law as was laid down in the case of **Mukisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd (1969) EA 696**, that preliminary objections should be based purely on points of

law. Sir Charles Newbold P. stated that:

“A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

When dealing with preliminary objections the court should also be guided by Article 159 of the Constitution.

By a plaint dated 17th March 2016, the plaintiff herein filed that suit together with an application for injunction restraining the defendant from interfering with the suit land as she had contributed to the acquisition during the subsistence of their marriage.

The plaintiff prayed for a declaration by way of settlement that they jointly own the land parcels Known as UASIN GISHU/ BINDURA SETTLEMENT SCHEME/8 together with the subdivided portions namely UASIN GISHU/ BINDURA SETTLEMENT SCHEME/345, 346, 347, 348, 349,350, 351,352,353, and 354 and/ or a settlement of the respective shares and contributions to the marriage be based on their respective contributions in its acquisition and improvement.

The defendant filed a preliminary objection on the ground that the court does not have jurisdiction to hear this matter as it involves division of matrimonial property as such it falls under the Family division of the High Court.

The Plaintiff however submitted that this matter falls within the jurisdiction of this Court as provided for under section 13 of the Environment and Land Court Act, and Article 162 of the Constitution.

Article 162(2)(b) of the Constitution states that this Court shall have jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, section 13 of the Environment and Land Court Act provides for the jurisdiction of this Court 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.”

The reason for establishment of the Environment and land Court was to ensure that it deals with land and environment matters exclusively. It is a specialized court dedicated to land and environment matters. The mandate is very clear in the statute under section 13 of the Act.

In this current suit, I notice from the pleadings that the parties are still married and no separation or divorce proceedings have been filed in any court. The marriage is still subsisting. From the prayers in the

plaint, the plaintiff wants the court to declare by way of settlement that they jointly own the land parcels known as UASIN GISHU/ BINDURA SETTLEMENT SCHEME/8 together with the subdivided portions namely UASIN GISHU/ BINDURA SETTLEMENT SCHEME/345, 346, 347, 348, 349,350, 351,352,353, and 354 and/ or a settlement of the respective shares and contributions to the marriage be based on their respective contributions in its acquisition and improvement.

This will require the court to look into the contributions of each spouse during the marriage and apportion the contribution to each spouse and come up with a settlement. In my view this would be tantamount to determining distribution of matrimonial property in a marriage which has not been dissolved. The distribution of matrimonial property is best handled in the Family division of the High Court.

Further the court would not want to be a catalyst in marriage break ups by dividing property between spouses who are still staying together. What if midway they decide that they have mended their irreconcilable differences?

That aside, it is important to note that the 1st authority cited by Counsel for the plaintiff respondent is from the Family Division of the High Court and the citation is Matrimonial Cause. We must also distinguish the 2nd authority which is from the Environment and land Court. In this particular case of Jane Wambui Ngeru Vs Timothy Mwangi Ngeru Nairobi ELC No. 317 of 2014, the parties had already divorced and a decree absolute was issued on 12th May 2014. She was right to seek for eviction from the suit property.

As earlier sated that the parties in this suit are still staying as husband and wife which distinguishes this case with the previous one where the court held that it had jurisdiction to hear the matter.

The authority cited by Counsel for the Defendant respondent also buttresses the issue that division of matrimonial property cannot be done while the marriage is still subsisting. See Muranga HCCC No. 1 of 2013. (OS) This was further reinforced by Court of Appeal C A No. 2 of 2000. Peter Ndungu Njenga Vs. Sophia Watiri Ndungu.

From the foregoing I find that the preliminary objection has merit and is therefore upheld. This suit is hereby struck out with costs to the Defendant/ respondent.

Dated and delivered at Eldoret this 19th day of February, 2018

M.A ODENY

JUDGE

Ruling read in open court in the presence of Miss Tum for the Defendant and Mr. Mogambi holding brief for Mr. Kigamwa for Plaintiff.

Mr. Koech: Court clerk.