



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MURANG'A

ELC CASE NO. 379 OF 2017

B W M.....PLAINTIFF

VS

J M C.....DEFENDANT

RULING

1. The Plaintiff filed a suit against the Defendant on 29/5/17. The Plaintiff and the Defendant were at the material time married as husband and wife. The substratum of the case of the Plaintiff is that she caused and /or enabled the development of the suit property. She seeks an order of the Court that No.Makuyu/Kimorori/Block [particulars withheld] be declared matrimonial property.
2. The Defendant in his written statement of defence filed on 10/7/17 denied that the suit land is a matrimonial property and asserts in Para 3 and 4 that that he is the registered owner of the land which was acquired prior to the Plaintiff being married to the Defendant.
3. Alongside the plaint, on the 16th October 2017 the Plaintiff filed a Notice of Motion seeking orders interalia that the Court grant a temporary injunction restraining the Respondent by himself his agents servants from dealing interfering alienating the suit land pending the determination of the suit.
4. The application is supported by the grounds stated therein and the supporting affidavit sworn on the 29/5/17.
5. The Defendant responded through a Replying affidavit filed on 14/6/17 annexing a title deed to the suit land which shows that he is registered as the absolute proprietor of the suit land.
6. In her further affidavit dated the 6/7/17 the Plaintiff at para 2 states as follows;

“That further to my affidavit dated 25/5/17 and the Defendant’s replying affidavit dated the 13/6/17 I wish to state that I donot contest the averment that the subject property known as Makuyu/Kimorori/Block[particulars withheld] was purchased by the Defendant”.
7. On the 16/10/17 the Defendant filed a Preliminary Objection on the following grounds; -
 - a) The Honourable Court has no jurisdiction under Article 162(2) (b) of the Kenya Constitution 2010 to hear this dispute touching on matrimonial property as jurisdiction squarely lies with the Family Division of the High Court.
 - b) The suit ought to have been commenced by way of a Petition or Originating Summons and not by way of a plaint.
8. On the 9/11/2017 when parties appeared before the Court by consent they elected to canvass the preliminary objection by way of written submissions. The Plaintiff did not file any by the time of writing this ruling.
9. The Defendant submitted that the claim touches on matrimonial property whose jurisdiction is the family Court and not the Environment and Land Court. That the jurisdiction of the Environment and Land Court is to determine disputes on environment, use, title and occupation of land. He argued that the Plaintiff’s prayer for declaration of the suit property as matrimonial is governed by the Matrimonial Property Act Cap 49 of 2013. That in Order for the Court to determine whether or not the property is matrimonial, the Court would first determine whether the parties are spouses as defined under section 2 of the Matrimonial Act. He relied on the case of **ELC No.345 of 2014 John Kimani Njenga vs. Margaret Kanyuri & 2 others** to support his objection.

10. The background of this case is that the Plaintiff filed suit against the Defendant claiming that she is legally married to the Defendant under African Christian Marriage. That they both acquired the suit property No.Makuyu/Kimorori/Block [particulars withheld] jointly during the subsistence of the marriage. That in 2016 their union experienced unreconcilable marital problems hence the separation. That the Plaintiff has denied her access to the suit property which she terms as matrimonial. In addition she avers that the Defendant intends to dispose of the matrimonial property. She sought Orders declaring the suit property as matrimonial and thus jointly owned by the Plaintiff and the Defendant. She also sought a restraining Order restricting the Defendant from disposing of the property.

11. In his defence, the Defendant denied that the property is matrimonial and further that the Plaintiff has no rights over the suit property. He averred that the suit property was purchased by the Defendant and his deceased wife V W C in 2003 for the benefit of their 3 children. That the property was purchased before the Plaintiff got married to the Defendant and has not made any financial contribution to the acquisition.

12. The Defendant has filed written submissions while the Plaintiff did not. In the Written Submissions the Defendant submitted that the claim touches on matrimonial property whose jurisdiction is the family Court and not the Environment and Land Court. That the jurisdiction of the Environment and Land Court is to determine disputes on environment, use, title and occupation of land. He argued that the Plaintiff's prayer for declaration of the suit property as matrimonial is governed by the Matrimonial Property Act Cap 49 of 2013. That in Order for the Court to determine whether or not the property is matrimonial, the Court would first determine whether the parties are spouses as defined under section 2 of the Matrimonial Act. He relied on the case of **ELC No.345 of 2014 John Kimani Njenga vs. Margaret Kanyuri & 2 others** to support his objection.

Determination

13. The Jurisdiction of a Court flows from either the Constitution or legislation or both. In the case of the Environment and Land Court its jurisdiction is set out in written law; the starting point is Article 162(2) of the Constitution of Kenya 2012, which provides as follows; -

- “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).
- (2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—
 - (a); and
 - (b) the environment and the use and occupation of, and title to, land.
- (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.

14. The Environment and Land Court Act Section 13 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.”

15. It is generally accepted that this Court has very wide original and appellate powers to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution relating inter alia to use, occupation and title to land. Similarly, the Court can grant wide reliefs as stated above. The instant suit seeks declaratory orders that the suit property is matrimonial property.

16. Much as the Plaintiff purports to seek a declaration in her final prayers that the suit land be declared a matrimonial property, the substratum of the dispute at hand is ownership of the suit land. Having found that the suit land has a certificate of title registered in the name of the Defendant which the Plaintiff seeks to impair by claiming ownership of the suit land on account of the alleged developments, that places the case squarely in the jurisdiction of the ELC Act and consequently the ELC Court.

17. Further going by the strict interpretation of the definition given in the Matrimonial Act which defines matrimonial property as follows;

“For the purposes of this Act, matrimonial property means—

- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.“ (emphasis is mine)

It would appear that the question of improvement or development for that matter is not included. However as stated earlier, based on evidence, such a matter may also call for the exercise of discretion of the Court. That is left to the trial of the case.

18. For avoidance of doubt, the Court notes that the matrimonial Property Act does not define the Court that disputes relating to the Matrimonial property disputes should be referred for determination. 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 occupation use and title to land. I find nothing to oust the jurisdiction of this Court and I proceed to determine the Preliminary objection

19. As to whether the Preliminary objection as raised is a pure point of law, the Court in the case of **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696**, defined a preliminary objection as follows;

“.....a “preliminary objection” correctly understood, is now well defined 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, 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. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary point...Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence...”

20. In the case of **Oraro vs. Mbaja(2005) I KLR 141 Ojwang, J** the Court held as follows:-

“I think the principle is abundantly clear, a “Preliminary Objection” correctly understood, is now well defined 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, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principles a true preliminary objection which the Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a preliminary pointAnything that purports to be a preliminary objection must not deal with disputed facts, and must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence”

21. Further in the case of **Nitia Properties Limited – v- Jagjit Singh Kalsi & Another, C.A. No. 132 of 1937**, it must be borne in mind that for a preliminary point to succeed, the facts as alleged in the plaint are deemed to be correct. In the instant case, the facts as alleged in the plaint and defence are disputed and prima facie the claim in this suit cannot be deemed to be incontestably hopeless and be summarily dismissed by way of preliminary objection.

22. The effect of the case law cited above means for one to succeed in putting up a preliminary objection, it must meet the following criteria; it must be pleaded by one party and admitted by the other; must be a matter of law which is capable of disposing of the law suit; must not be blurred by factual details calling for evidence; must not call upon the Court to exercise discretion.

23. In the instant case for the preliminary objection to succeed, it has to be pleaded in plaint and admitted in the defense or it is a plea in other documents of the pleadings and admitted by the other party. In both the plaint and the affidavit by the Plaintiff she has stated that she assisted the Defendant in the development of the property pursuant to which although the suit land is registered in the name of the Defendant, it has become matrimonial property. The Defendant has not admitted any of the two allegations.

24. The substratum of this suit is ownership of the suit land which the Plaintiff alleges although registered in the name of the Defendant it changed its character following developments made thereof through her assistance. The document of title clearly shows that suit land is registered in the name of the Defendant. The Plaintiffs form of assistance which may cause change of character of the suit land is a matter for investigation and decision of the Court. It may require exercise of discretion (that is in the event that development will be found to have improved the value of the suit land and the question of legitimate expectation). Further the alleged matter relating to developments on the suit land and its value by singular efforts of the Plaintiff if any is a matter to be determined by evidence.

25. Consequently, from the above analysis the Court finds and holds that the preliminary objection fails the test set **Mukhisa Biscuit Manufacturing Co. Ltd. – v- West End Distributors Limited, 91969) EA 696.**

26. As regards whether the suit is incompetent on account of being filed by way of plaint instead of an Originating summons or petition, this Court shall be guided by the grain and spirit of Article 159 (2)(d) of the Constitution and the basic tenets of the rules of natural justice which require all parties must be heard – audi alterem partem as well as dispense substantive justice. Further, Courts are mandated not to give undue regard to technicalities through the overriding objectives as enshrined in Sections 1A and 1B of the Civil Procedure Act and as stated in **Douglas Mbugua Mungai -vs- Harrison Munyi, – Civil Application No. Nai. 167 of 2010 :-**

“We are as a matter of statute law required to take a broad view of justice and take into account all the necessary circumstances, factors, and principles and be satisfied at the end of the exercise that we have acted justly”

The same dicta were stated in **Stephen Boro Gitiha- vs- Family Finance Building Society & 3 Others, Civil Application No. Nai. 263 of 2009** as thus;

“The overriding objective overshadows all technicalities, precedents, rules and actions ... and whatever is in conflict with it must give way.”

Consequently, the Court will not determine this suit as incompetent.

27. The upshot is that the Preliminary Objection is dismissed.

28. Each party to meet their costs.

DATED, DELIVERED AND SIGNED AT MURANG'A THIS 8TH DAY OF MARCH 2018

J G KEMEI

JUDGE