



REPUBLIC OF KENYA



KENYA LAW
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**Kipyegon v Jepkemoi & 2 others (Environment and Land Appeal
E015 of 2023) [2024] KEELC 40 (KLR) (18 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 40 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E015 OF 2023**

**EO OBAGA, J
JANUARY 18, 2024**

BETWEEN

FREDRICK KIPYEGON APPELLANT

AND

JUDY JEPKEMOI 1ST RESPONDENT

KENYA COMMERCIAL BANK LIMITED 2ND RESPONDENT

VALLEY AUCTIONEERS 3RD RESPONDENT

RULING

1. This is a ruling in respect of a preliminary objection brought by the 2nd Respondent on the following grounds: -
 1. That this honourable court lacks jurisdiction to entertain the suit herein pursuant to the provisions of Article 162 (2) of the Constitution as read with the provisions of section 13 of the Environment and Land Act, 2011 and section 128 and 150 of the Land Act.
 2. That the nature of the claim and relief sought raised by the Applicant arise from a commercial dispute therefore the court has no jurisdiction.
 3. That the application herein is *res-judicata* as the same was dismissed on the 8th of September, 2023 in Eldoret CM ELC No. 197 of 2023 *Fredrick Kipyego Maiyo versus Judy Jepkemboi & 2 others*.
 4. Costs be provided for.
2. The Appellant and the 1st Respondent jointly purchased the entire LR. No Sergoit/Koiwoptaoi Block 3 (Shamtrek)/647 (suit property) which was registered in the name of Sarah Cheptepkeny. The sale



- agreement was entered into on 14.4.2014. According to the Applicant he was staying with the 1st Respondent as husband and wife.
3. On 19.9.2016 the two obtained a marriage certificate confirming that they were married under customary law. Prior to obtaining a marriage certificate, the 1st Respondent had obtained title to the suit property on 30.3.2016 in her own name. The 1st Respondent proceeded to take a loan from the 2nd Respondent and offered the suit property as security.
 4. The 1st Respondent failed to service the loan. The 2nd Respondent instructed the 3rd Respondent to advertise the suit property for sale in its statutory power to realize the security. The Appellant moved to the lower court and filed a suit as well as an application for injunction stopping the sale on ground that the 1st Respondent had fraudulently transferred the suit property into her own name and that he had not signed a spousal consent to charge the suit property.
 5. In a ruling delivered on 8.9.2023 the trial Magistrate dismissed the Appellant's application. This is what prompted the Appellant to file an appeal to this court and contemporaneously filed an application for stay of proceedings and for injunction. Before the Appellant's application could be heard, the 2nd Respondent raised the preliminary objection which is the subject of this ruling.
 6. The preliminary objection was disposed of by way of written submissions. The 2nd Respondent contends that what is in issue in this matter arose from a commercial transaction and that this court does not have jurisdiction to entertain this matter. The 2nd Respondent relied on the case of *Co-operative Bank of Kenya Limited –vs- Patrick Kangethe Njuguna & 5 others* (2017) eKLR where the Court of Appeal held that the Environment and Land Court had no jurisdiction to deal with disputes connected to mortgages and charges.
 7. The 2nd Respondent also relied on the case of *JOO – vs- GKN* (2021) eKLR where the Court stated as follows:-

“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...”
 8. On his part, the Appellant submitted that this court has jurisdiction to entertain the appeal as there is need to determine the issue of ownership before the court can decide whether there was spousal consent obtained. The Appellant also argued that the preliminary objection does not meet the threshold set out in the case of *Mukisa Bisuit Manufacturing company Limited –vs- West End Distributors Limited* (1969) EA 696.
 9. I have carefully considered the submissions by the 2nd Respondent and those of the Appellant. The only issue for determination is firstly whether the Appellant's application is *res judicata* and secondly whether this court has jurisdiction to hear this appeal as well as the application filed thereunder.
 10. On the first issue there is no doubt that the Appellant had filed an application for injunction which was dismissed. He has also filed another application before this court seeking for among others an injunction. It is important to note that the Appellant in this matter has moved the court in its appellate jurisdiction. The Appellant thus is at liberty to seek injunctive orders notwithstanding the fact that a



similar application was heard and determined before the lower court. The Appellant's application is therefore not *res judicata*.

11. On the second issue, it is clear that the main issue herein is on the charge of the suit property. The *Co-operative Bank of Kenya Limited case (supra)* is clear that the proper court to deal with matters relating to charges and mortgages is the High court and not the Environment and Land court. Besides this, there are issues of a matrimonial nature in this matter. For example, there is need to determine whether the suit property is matrimonial property or not and this question can only be determined by the High Court under the *Matrimonial Property Act*. I therefore find that this court has no jurisdiction to entertain the appeal as well as the application filed in it.

12. In the case of *Boniface Waweru Mbiyu -vs- May Njeru & another* (2005) eKLR, the court held as follows:-

“Whenever a matter is filed before a Court lacking jurisdiction, the professional error there committed is a fundamental one, which cannot be excused as an ordinary mistake by counsel and which should not be held to prejudice the client. As between the advocate and his or her client, such a professional error could very well lead to claims in tort. As for the Court, the matter thus filed is so defective as to be a nullity. It is incompetent and void in law; and therefore it is not a motion or suit that can be transferred to any other Court. It is the duty of the Court or tribunal before which such matter is first brought to declare its status as a nullity; and it follows that such matter has no capacity to be transferred to any other Court.”

13. Having found that this court lacks jurisdiction, I uphold the preliminary objection on grounds of lack of jurisdiction. I proceed to dismiss the appeal together with the application filed therein with costs to the 2nd Respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18TH DAY OF JANUARY, 2024.

E. OBAGA

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the virtual presence of;

Ms. Wanjala for M/s Kesei for Applicant.

M/s Mibei for Mr. Kirwa for Respondent.

Court Assistant –Laban

