



**Elisabeth v Goga (Environment & Land Case E018 of 2023)
[2024] KEELC 1130 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1130 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE E018 OF 2023**

E ASATI, J

FEBRUARY 29, 2024

BETWEEN

JASEMINE SULTAN ELISABETH PLAINTIFF

AND

JOSEPH GOGA DEFENDANT

RULING

1. This ruling is in respect of Notice of Motion application dated 2nd November, 2023 brought by the Plaintiff and the preliminary objection raised by the Defendant vide the Notice of Preliminary Objection dated 27th November 2023.

Preliminary objection

2. As the preliminary objection seeks to terminate both the application and the entire suit the court will deal with it first and the findings thereon will determine whether the court will proceed to deal with the application.
3. The Notice of Preliminary Objection was based on the grounds that:-
 - a. the issues raised in the application dated 2nd November, 2023 fall outside the jurisdiction of this Honourable court as is stated in article 162(2)(b) of the *Constitution* of Kenya 2010 and the Matrimonial Property Act Cap.49 of 2023 and Section 13 of the *Environment and Land Court Act* 2011 thus making the application and the entire suit incurably defective.
 - b. That this is not a land dispute but a dispute arising out of pre-nuptial agreement dated 4th July, 2022 hence a gross abuse of the court process.
 - c. The application and the entire suit should be dismissed.



4. Directions were taken on 7th December, 2023 by consent that both the preliminary objection and the application be canvassed together by way of written submissions.
5. In support of the Preliminary Objection, Counsel for the Defendant relied on the case of *Mukisa Biscuits Manufacturing Company v West End Distributors Ltd* (1969)EA 696 and *Fredrick Ngenga Thuo v Peter Mungai Njuho* [2017]eKLR on what constitutes a valid preliminary objection. That the Notice of Preliminary Objection filed by the Plaintiff is merited. That the Plaintiff's suit is purely anchored on a pre-nuptial agreement dated 4th July, 2022 and that the main cause of action relates to enforcement of pre-nuptial agreement that gives the Plaintiff 50% share ownership over the suit land parcel No. Kisumu/kanyakwar "B"/2448.
6. That the application and the entire suit as framed does not outline that there exists any dispute over the suit property rather than the dispute as presented by the Plaintiff which involves her 50% share right over the suit property as outlined in the pre-nuptial agreement. That according to *Black's Law Dictionary* Free Outline Legal Dictionary 2nd Edition, a pre-nuptial agreement is a legally binding agreement between a couple stating how the assets would be divided if the marriage fails to last.
7. Counsel submitted further that the provisions of Section 6(3) of the *Matrimonial Property Act* outlines that parties to an intended marriage may enter into an agreement before their marriage to determine their property rights. That the instant application and the plaint seek for declaration that the Plaintiff is entitled to 50% share of the suit property, the same having arisen from the pre-nuptial agreement. That such declarations are not within the purview of this court because the jurisdiction of this honourable court is limited by article 162(2) of the *Constitution* of Kenya 2010 and Section 13 of the *Environment and Land Court Act*. That this court has no jurisdiction on the prayer for declaratory rights under matrimonial property. That the applicant is entitled to ventilate her claim on property rights under section 17 of the *Matrimonial Property Act* being that her share in the property arises from pre-nuptial agreement executed between the parties. That the court does not have the jurisdiction to hear and determine the application and the suit as presented.
8. That it has not been indicated that there exists a dispute in relation to the use, occupation and title to the suit land. Counsel relied on the case of *Fredrick Nganga Thuo v Peter Mungai Njuho* [2017]eKLR. Counsel urged the court to allow the preliminary objections.
9. It was submitted on behalf of the applicant that the preliminary objection falls short of the requirement of a valid and sustainable preliminary objection on points of law. That section 6 of the Matrimonial Property Act does not deal with the question of jurisdiction and is therefore not offended by the suit. That the property, the subject matter of this suit, is not matrimonial property as known to section 6 of the *Matrimonial Property Act* 2013 and is therefore outside the jurisdiction of the family court contemplated thereunder.
10. That the court has jurisdiction to deal with all matters touching on title to real property including property which is the subject of prenuptial agreement as long as such a property does not answer to the definition of matrimonial property. That the prayers sought in the plaint all fall within the ambit of this court's constitutional jurisdiction as they are principally seeking a declaration of title to and judicial enforcement of the title as declared.
11. That the preliminary objection is not grounded on the law but based on a matter or matters of evidence about which the Defendant himself has filed a defence and denied resulting into a joinder of issue that can only be resolved by adducing of formal evidence. That the objection is therefore premature. That the preliminary objection is founded on a misconception that the provisions of an Act of Parliament



such as the *Matrimonial Property Act* can supersede those of the constitution as to take away from this court jurisdiction expressly provided under article 162(2) of the *Constitution* of Kenya 2010.

12. Counsel relied on the case of *Kenya Hotel and Allied Workers Union v Armo Aquinus Ltd t/a Lily Palm Resort* [2021]eKLR where it was held that;

“ thus a preliminary objection may only be raised on a pure question of law. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record”.

13. Counsel submitted that section 6 of the *Matrimonial Property Act* applies to married or formerly married people. That in the instant case, there was no marriage and the parties had only entered into a prenuptial agreement. That the Act provides for the right and responsibilities of spouses in relation to Matrimonial Property and for connected purposes. That section 17 of the Act relates to a person and a spouse and a person and a former spouse. That in the instant case, the parties only cohabited but have never formalized their cohabitation into a marriage and hence the Matrimonial Property Act is not application.

14. Counsel submitted further that even if the parties had been former spouses, this court is the only one clothed with jurisdiction to determine the matter arising out of occupation and title to land. Counsel relied on the case of *Zipporah Njoki Kangara v ROCK & Pure Limited & 3 Others* [2021]eKLR to support the submissions.

15. And relying on the case of *BMW v JMC* [2018]eKLR, Counsel submitted that the determination as to whether or not the suit property is matrimonial does not oust the jurisdiction of this court, that the Matrimonial Property Act does not define the court that disputes relating to matrimonial property should be referred to for determination and that it is the correct legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this court. That 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.

Counsel urged the court to find that the preliminary objection was not merited and to dismiss it with costs.

16. I have considered the preliminary objection and the rival written submissions filed in support and in opposition thereof. There is only one issue for the court to determine as regards the preliminary objection; whether the preliminary objection is properly raised and whether the same has merit. The threshold of a preliminary objection was set in the case of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] E.A 696 relied on by both parties herein. In the case the court held that;

“...a Preliminary Objection consists a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may disposed of the suit.

Examples are on objection to the jurisdiction of the court or plea of limitation or a submission that the parties are bound by contract giving rise to the suit to refer the dispute to arbitration.”

The court further held 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.”

17. From the foregoing decision, a preliminary objection must be based on pure points of law, must arise from the pleadings, may dispose of the suit if argued as a preliminary point and must be argued on the assumption that all facts pleaded by the opposite party are correct; it cannot succeed if any fact has to be ascertained; or if what is sought is the exercise of the court’s discretion.

The Preliminary Objection raised by the Defendant herein relates to a plea of lack of jurisdiction. It is raised on the law and the facts as presented in the plaint and the application. I find that the preliminary objection is properly before the court.

18. On whether or not the preliminary objection has merit, the claim herein as pleaded in the plaint is for title to land. Although the origin of the claim is a pre-nuptial agreement, the claim is for recovery of land due to the applicant. Pre-nuptial agreements in Kenya are provided for under Section 6(3) of the *Matrimonial Property Act* which provides that parties to an intended marriage may enter into an agreement before their marriage to determine their property rights. There is no evidence that the parties are formally married. There is also no evidence that the suit land is matrimonial property. It is indeed true that Court have concurrent jurisdictions in matrimonial property matters as submitted by the applicant. The claim in this matter is predominantly land hence this court has jurisdiction under article 162(2) of the *Constitution* and Section 13 of the *Environment and Land Court Act*. The applicant is suing for recovery of a share of the land due to her pursuant to the pre-nuptial agreement. She is not seeking for interpretation of the pre-nuptial agreement or declaration of any matrimonial rights.
19. I find, on the basis of the foregoing, that the court has jurisdiction. The preliminary objection is therefore dismissed.

The application

20. The application before court for determination is the Notice of Motion dated 2nd November, 2023 brought by the Plaintiff. The application seeks for;
- a. an order of restriction be registered against the property Kisumu/kanyakwar “B”/2448 restraining any sale, transfer, charge, change of character or any other dealing adverse to the Plaintiff’s interest until the suit is heard and determined.
 - b. an interlocutory order of injunction do issue restraining the Defendant from transferring, parting with possession, sub-dividing or in any way howsoever dealing with the property Kisumu/kanyakwar “B”/2448 in a manner adverse to the 50% proprietorship given to the Plaintiff in the pre-nuptial agreement dated 4th July, 2022.
 - c. Costs of the application.
21. The application is based on the grounds that the Plaintiff and the Defendants are parties to a pre-nuptial agreement in which the Plaintiff is entitled to a 50% proprietorship over land parcel No.kisumu/kanyakwar “B”/2448. The agreement empowers the Defendant to sell the property and pay the Plaintiff 50% proceeds thereof within reasonable time from the month July, 2022. The Defendant has reneged on the pre-nuptial agreement by opting not to marry the Defendant and has further failed to sell the property to pay the Defendant as agreed. That the Plaintiff has reasonable cause to believe that her interest in the property is at risk of loss unless the Honourable court intervenes by granting the orders prayed for. That the pre-nuptial agreement and the unfulfilled written promises by the Defendant to pay the Plaintiff her 50% share over the property constitute valid and actionable admissions of liability which gives her case very high probability of success.



22. The application was supported by the contents of the Supporting Affidavit of the Plaintiff.
23. The application was opposed vide the contents of the Replying Affidavit sworn by Joseph Goga on 29th November, 2023 and the annexures thereto.
24. The grounds for grant of interlocutory injunction were set out in the case of *Giella v Cassman Brown Co. Ltd* (1973) 358 that the Applicant must establish a prima facie case with a probability of success, an interlocutory injunction will not normally be granted unless the Applicant would suffer irreparable injury which would not adequately be compensated in damages and that when the court is in doubt, it will decide the application on a balance of convenience. A prima facie case was defined by the Court of Appeal in *Mrao Ltd v First American Bank Kenya Ltd & 2 Others* [2003] eKLR as follows:

“a prima facie case in a civil Application includes but is not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.”

The applicant’s claim is based on recovery of 50% of the suit property as agreed in the prenuptial agreement.

25. I have considered the application and the grounds raised in opposition thereto. I find that it is important to preserve the status quo of the suit land pending hearing and determination of the suit. I allow the application and make the following orders: -
 - d. A restriction be registered against the land parcel Kisumu/kanyakwar “B”/2428 restraining any sale, transfer, charge, change of character or any other dealing adverse to the Plaintiff’s interest in the said parcel of land to last until the suit is heard and determined.
 - e. A temporary order of injunction is hereby issued restraining the Defendant from transferring, parting with possession, sub-dividing or in any way howsoever dealing with the property Kisumu/kanyakwar “B”/2448 in a manner adverse to the 50% proprietorship given to the Plaintiff in the pre-nuptial agreement dated 4th July, 2022.
 - f. Each party to bear its own costs of the application.

Orders accordingly.

RULING, DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 29TH DAY OF FEBRUARY 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

E. ASATI

JUDGE.

In the presence of:

Maureen: Court Assistant.

No appearance for the Plaintiff/Applicant.

Nyakongo holding brief for Ngala Awino for the Defendant/Respondent.

