

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC. CASE NO. 342 OF 2015

LUCY WAMBUI GATHARA.....PLAINTIFF

VERSUS

NJENGA KAMUMU MWEMA.....DEFENDANT

RULING

Coming up before me for determination is the Notice of Preliminary Objection dated 15th July 2015 raised by the Defendant, Njenga Kamumu Mwema, to the effect that this suit should be summarily dismissed for the reason that this court does not have jurisdiction to hear this suit which concerns a matrimonial dispute in the absence of a divorce decree.

I have considered the Preliminary Objection and the submissions filed by both the Defendant and the Plaintiff. The test of whether an application is a proper preliminary objection has been stated in the case of **Equity Bank Limited –vs.- Bryan Yongo & another [2014] eKLR** where the court held that,

“Any true Preliminary Objection should not be entangled with factual issues.”

In the case of **Mukisa Biscuits Manufacturing Co. Ltd –vs- West End Distributor Ltd [1969] E.A 696**, Law JA stated that,

“So far as I am aware, a preliminary objection consists of 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 dispose of the suit.”

The issue of jurisdiction is a point of law which forms a preliminary point that may dispose of the suit. In this particular suit, the claim being made by the Plaintiff over the suit property is premised on a purported marital relationship between her and the Defendant, whom she claims is her husband and father of her children. Such a claim properly falls within the ambit of the Family Division rather than the Environment and Land Court.

Further, the issue of res judicata does not arise for the reason that the other cited similar suit being Senior Principal Magistrates Court at **Githunguri Civil Suit No. 53 of 2014** was dismissed by that court for want of jurisdiction on 28th January 2015.

Instead of dismissing this suit, the suit is hereby transferred to the Family Division for hearing and disposal.

DELIVERED, SIGNED AND DATED AT NAIROBI THIS 1ST DAY OF SEPTEMBER 2017.

MARY M. GITUMBI

JUDGE