

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ENVIRONMENT AND LAND CASE NO. 146 OF 2013

M Z.....PLAINTIFF

-VERSUS-

O A.....DEFENDANT

RULING

1. This is a ruling on the preliminary objection raised questioning the jurisdiction of this Court to entertain this matter. The defendant submits that they were married with the plaintiff and therefore the land in dispute is a matrimonial property. The plaintiff on her part submits this Court had jurisdiction as this Court has powers to determine disputes on use and occupation to land. The plaintiff urged the Court to find there is a resultant trust and that there is no evidence of marriage. That the issue of marriage is factual and you have to determine under what legal system it was done. She urged the Court to dismiss the objection.

2. This Court is alive to the legal provision set out in the renowned case of Lilian S that without jurisdiction this Court should not move an inch further with the case. Secondly this Court is alive to the principle of law that parties are bound by their pleadings. This was the holding of the Court of Appeal in the recent case of **Ali Mbwana & 11 others vs Mohamed Ali Askul (2015) eKLR**. In the plaint before Court, the plaintiff has described the defendant as her lover not husband. In the prayers contained in the plaint, the plaintiff prays for

a) a declaration that the defendant holds the property being plot No Kwale/Ukunda/[particulars withheld] in trust for the plaintiff and the defendant to transfer the plot to the plaintiff

b) A permanent injunction

3. In the statement of defence filed at paragraph 5(ii) the defendant pleaded that the plaintiff is married to him. Besides this averment, there is nothing in the body of the defence giving details of this marriage. I have also perused the list of documents filed by the defendant and find none listing the issue on marriage. It is therefore right for the plaintiff to submit that the marriage alluded to by the defendant is an issue of fact which then cannot oust jurisdiction of this Court. The jurisdiction of the Court can only be ousted by legal provisions and in this case, none has been provided.

4. Lastly, the orders sought by the plaintiff in her pleadings does not touch on the manner on how to deal with matrimonial property. Since it is the plaintiff's case, the defendant cannot change the course of her intention unless the defendant counter – claimed. In the result, I find no basis for the preliminary objection and hereby dismiss it.

Ruling Dated and Delivered at Mombasa this **18th** day of **September, 2015**

A. OMOLLO

JUDGE