



REPUBLIC OF KENYA



KENYA LAW
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FHJ v EAR (Civil Appeal 108 of 2019) [2025] KECA 596 (KLR) (21 March 2025) (Judgment)

Neutral citation: [2025] KECA 596 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPEAL 108 OF 2019
J MOHAMMED, LK KIMARU & AO MUCHELULE, JJA
MARCH 21, 2025

BETWEEN

FHJ APPELLANT

AND

EAR RESPONDENT

(An appeal from judgement of the Environment and Land Court of Kenya at Meru (L.N. Mbugua J.) dated 7/3/2018 in ELC Cause No. 47 of 2017)

JUDGMENT

Introduction

1. This appeal relates to a claim in respect of ownership of unregistered parcel of land known as Plot KXXX situated within Isiolo County at Kambi Juu (the suit property). FHJ is the appellant and EAR is the respondent. From the record, the appellant and respondent were married on 19th April 2003 under the Christian Marriage and Divorce Act and were blessed with one child. In 2007 the appellant and respondent separated.
2. The respondent moved the Environment and Land Court (ELC) seeking inter alia a declaration that she is the proprietor of the suit property; and an order of permanent injunction restraining the appellant by himself or his agents and/or servants from selling, entering, evicting or in any way interfering with her use and occupation of the suit property.
3. The respondent contended that she and the appellant had separated for 10 years at the time of filing the suit. That despite being in possession of the suit property, the appellant trespassed thereon and made efforts to sell the suit property. It was the respondent's case that she bought the suit using a loan from Equity Bank and cash from her Sacco. The respondent relied on copies of a letter of offer from Equity Bank and payment receipt from Isiolo Teachers Sacco. The respondent also relied upon a letter from the then Isiolo County Council and another one from the Ministry of Lands, Planning Department confirming her proprietorship of the suit property.



4. In denying the claim, the appellant maintained that he got married to the respondent in the year 2003 but the two thereafter separated. The appellant contended that he is the owner of the suit property having bought it in the year 2005 from one Evanson Matheri Kariuki (deceased) at Kshs.60,000/=. Further, that he developed the same by fencing and putting up temporary structures thereon.
5. The appellant raised a counterclaim and sought for restitution of the suit property to him. According to the appellant, the respondent stole the Sale Agreement, the marriage Certificate and other personal documents from him, and through fraud and illegality caused the suit property to be assigned a different number, Plot Number XXX by Isiolo County Government. The appellant claimed that the respondent was therefore holding the suit property in trust for him. In proof of ownership of the suit property, the appellant relied upon a Chief's letter used in the application for a water meter in respect of the suit property and receipts from the Isiolo Water and Sewage Company issued in his name. The appellant also produced a bill issued by the Isiolo County Government to him in respect of payment of registration and part development plan fees for the suit property.
6. Upon consideration of the evidence, the ELC dismissed the appellant's counterclaim and allowed the respondent's claim, declaring the respondent as the owner of the suit property. The ELC also issued an injunction against the appellant restraining him from interfering with the respondent's use and occupation of the suit property.
7. Aggrieved by the said judgment and orders of the ELC the appellant preferred the instant appeal against the entire judgment. In his Memorandum of Appeal, the appellant contends that the ELC erred in law and fact:
 - i. by finding for the respondent where she had not proved her case on a balance-of probabilities;
 - ii. by finding for the respondent in a case it had found that the parties do not have usual documents that manifest ownership;
 - iii. by dismissing the respondent's counterclaim which had merit;
 - iv. in the manner it analyzed the evidence of the witnesses and therefore arrived at a wrong decision;
 - v. when she failed to find that before her was a matrimonial property dispute so that she could down her tools and refer the matter to the appropriate court. That the ELC lacked jurisdiction to hear and determine the matter.
8. The appellant prays that the appeal be allowed; and that the appellant be awarded the costs of the instant appeal and the costs in the ELC.

Submissions by Counsel

9. The appeal was heard by way of written submissions. Learned counsel Mr. Mwanzia was in attendance for the appellant while learned counsel Mr. Mwenda was in attendance for the respondent. Both counsel relied on their written submissions. Mr. Mwanzia submitted that the parties are husband and wife although separated and that the suit property was bought during the pendency of the said marriage. Counsel asserted that the ELC had no jurisdiction to hear and determine a matter whose subject is matrimonial property.
10. Counsel submitted that it is common ground that the appellant and the respondent are married and that the subject matter in dispute relates to the suit property, which was acquired during the subsistence of this union. Counsel asserted that the issue before the ELC was whether or not the suit property



was matrimonial property. Counsel relied on the decision of *AKK vs PKW* [2020] eKLR where this Court held that it is the High Court that has jurisdiction to hear and determine matrimonial property disputes. Counsel submitted that in the circumstances, the ELC ought to have downed its tools, as the dispute was the preserve of the High Court.

11. Counsel further submitted, without prejudice, that should this Court find that the ELC had jurisdiction to hear and determine the dispute between the parties, it is contended that the evidence tendered by the appellant was not taken with the weight it deserved. That had the court done so, it would have found that indeed there was evidence that it was the appellant who bought the suit property from one Matthew Kariuki (deceased).

Counsel further submitted that the widow of the deceased testified in support of the appellant's case.

12. Mr. Mwenda opposed the appeal and submitted that the parties are married but have been separated for more than 16 years. Counsel submitted that during the pendency of the marriage, the respondent successfully applied and was advanced a loan by Equity Bank to purchase the suit property. That the respondent took possession of the suit property and enjoyed quiet possession until January and February 2017 when the appellant trespassed on the suit property precipitating the filing of the suit in the ELC.
13. Counsel further submitted that the respondent adduced documentary evidence to prove how she acquired the suit property including a letter from Equity Bank confirming the advancement of the loan. Counsel further submitted that the respondent solely bore the financial burden of servicing the loan advanced. Counsel further submitted that there was evidence that the respondent had obtained another loan from Isiolo Teachers Sacco Limited. Counsel asserted that this evidence disproved the appellant's contention that the respondent had no financial capacity or means to purchase the suit property. Counsel asserted that on the contrary, the appellant did not prove how he obtained the money to purchase the suit property.
14. On the ground that the ELC did not have jurisdiction to hear and determine the matter before it, counsel submitted that it is trite practice that parties to a suit are bound by their pleadings. That the appellant's defence and counter-claim did not deny the jurisdiction of the ELC. Further, that the issue of jurisdiction was not raised before the trial court and the appellant cannot therefore purport to raise it at the appeal stage.
15. Counsel further submitted that the ELC correctly considered the evidence before it and made a well-reasoned and balanced decision in accordance with the required standards and the law. Counsel urged this Court to dismiss the appeal with costs for lack of merit.

Determination

16. This is a first appeal thus this Court is obligated to re-valuate the evidence and the entire record and arrive at its own conclusion. Rule 31
 1. of the Court of Appeal Rules 2022 empowers this court to re-appraise itself on the evidence. It states as follows:-

“On an appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power—

A - to re-appraise the evidence and to draw inferences of fact.”



Further reliance is put on this court's decision in *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR where it was held that:-

“... an appeal to this Court from a trial by the High Court is by way of retrial ... this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect.”

17. Upon considering the pleadings and evidence as highlighted above and upon scrutiny of the impugned judgment, we discern the following issues for determination in this appeal:-

- a. Whether the ELC has jurisdiction to deal with matrimonial property;
- b. Who is the owner of the suit property and whether the property was matrimonial property; and
- c. What orders should the Court grant in the circumstance.

18. We will first deal with the issue of jurisdiction as this may dispense with the other grounds of appeal. Counsel for the appellant contended that the suit property was a matrimonial property and that the ELC therefore lacked jurisdiction to deal with the suit before it. The ELC in its judgment observed that none of the parties claimed that the suit property was matrimonial property. Counsel for the appellant faults the ELC's failure to find that the dispute before it related to matrimonial property thus it ought to have downed its tools for lack of jurisdiction and refer the matter to the appropriate court.

19. As stated in the oft cited case of *Owners of Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd* [1989] eKLR:

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law should down its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction...Where a court takes upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing.

Jurisdiction must be acquired before judgment is given.”

20. Matrimonial property has been defined under the Matrimonial Property Act under Section 6 to mean —

- “(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.”

21. Section 7 of the *Matrimonial Property Act* provides as follows:

“Subject to section 6 (3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

22. The question is whether the ELC has jurisdiction to determine issues dealing with matrimonial properties. The issue of jurisdiction was well described in the Supreme Court's decision in *Samuel*



Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR at paragraph 68 thereof that:-

“A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.” ... the issue of jurisdiction goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings...”

23. It is therefore pertinent to determine whether the ELC has jurisdiction to determine a dispute over land forming part of matrimonial property. The Jurisdiction of the ELC is provided under section 13 of the Environment and Land Court Act, 2011 as follows:-

“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.”

24. In the persuasive decision of the ELC in AKM vs NNN [2019] eKLR it was held that issues of matrimonial property are determined by the High Court under its inherent jurisdiction.

25. In AKK Vs PKW [2020] eKLR this Court held as follows:

“It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of Section 7, the High Court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved.”

26. By parity of reasoning, we find that the ELC erred in finding that it had jurisdiction to hear and determine the suit before it.

26. On the contention that the issue of jurisdiction was not raised at the ELC and cannot therefore be raised at the appeal stage, we are guided by the decision of this Court in Kenya Ports Authority vs Modern Holding [EA] Limited [2017] eKLR which stated as follows:

“We have stressed that jurisdiction is such a fundamental matter that it can be raised at any stage and even on appeal, though it is always prudent to raise it as soon as the occasion arises. It can be raised at any time, in any manner, even for the first time on



appeal, or even viva voce and indeed, even by the court itself provided that where the court raises is suo motu parties are to be accorded the opportunity to be heard.”

27. In the circumstances we find that this appeal has merit and is allowed.
28. The suit is transferred to the High Court from the ELC where it shall be heard on merits as a matrimonial property dispute.
29. The order that commends itself to us is that each party will bear their own costs of the appeal.
30. It is so ordered.

DATED AND DELIVERED AT NYERI THIS 21ST DAY OF MARCH, 2025.

JAMILA MOHAMMED

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JUDGE OF APPEAL

L. KIMARU

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JUDGE OF APPEAL

A. O. MUCHELULE

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

Deputy Registrar

