



Kangara v Rock and Pure Limited & 2 others (Environment & Land Case 136 of 2021) [2024] KEELC 4527 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEELC 4527 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 136 OF 2021
LL NAIKUNI, J
MARCH 19, 2024**

BETWEEN

ZIPPORAH NJOKI KANGARA PLAINTIFF

AND

ROCK AND PURE LIMITED 1ST DEFENDANT

REGISTRAR LAND MOMBASA THROUGH ATTORNEY GENERAL 2ND DEFENDANT

PETER NJOGU WAWERU 3RD DEFENDANT

JUDGMENT

I. Introduction

1. The Judgment before this Honourable Court pertains to the suit instituted by the Zipporah Njoki Kangara the Plaintiff herein through a Plaint dated 10th July, 2021 and filed on court on 13th July, 2021. The suit was against the Rock and Pure Limited, Registrar of Land Mombasa, Peter Njogu Waweru and Catherine Wanjiru Waruguru Alias Cate Waruguru 1st, 2nd, 3rd and 4th Defendants herein.
2. The Plaintiff as per the Plaint is described as a female adult of sound mind, and disposition residing and/or working for gain in Mombasa in the Republic of Kenya suing above-named Defendants; the 1st Defendant who is described as a limited liability company duly incorporated and having its registered offices at Nairobi and with branches all over the country dealing in the business of mobile communication and trading inter-alia within the Republic of Kenya. The 2nd Defendant is described as the Mombasa county, Registrar of Lands who is mandated with the custody of all lands records, maintenance of the lands register within Mombasa and registration of the various interest in land within the County of Mombasa. He is being sued through the office of the Hon Attorney General who is the official legal representative of government agencies and institutions. The 3rd Defendant is described as a Male adult presumably of sound mind and disposition residing and/or working for gain



in Mombasa, Nairobi and Kirinyaga within the Republic of Kenya and finally the 4th Defendant is described as a female adult presumably of sound mind and disposition residing and/or working for gain in Nairobi and Laikipia County and currently serving as the Women representative Member of parliament Laikipia County in the Republic of Kenya.

3. Upon service of the Plaint to the Defendants, the 1st, 2nd and 4th Defendant filed their memorandum of appearance and filed their statement of defence dated 18th February, 2022 on the 21st February, 2022.
4. It is instructive to note that from the very onset, the proceedings were conducted on the premises that the Plaintiff and the 3rd Defendant were spouses in a marriage solemnized and celebrated holy matrimony. However, in the course of the hearing and from the evidence adduced it emerged that the matrimony was dissolved pursuant to the due process of the law. Clearly, that had direct effect to the Judgement by this Court in as far as its Jurisdiction on the distribution and management of matrimonial properties is concerned.
5. Nonetheless, on 23rd March, 2022 upon all parties having fully complied on the Provisions of Order 11 of the Civil Procedure Rules 2010 on the Pre - Trial conference, it was fixed for full trial on 20th September, 2022.

II. The Plaintiff's case

6. Based on the filed pleadings by the Plaintiff and the Plaintiff the brief facts of the case are that the Plaintiff and the 3rd Defendant were a legally married couple via a holy matrimony celebrated via church wedding solemnized on the 20th November, 2010 which marriage still subsisted upto the date of filing this case. The union between the Plaintiff and the 3rd Defendant was blessed with three (3) issues namely JTW born on 15th February, 2011; TMN born on 6th March, 2016 and TNW born on 15th November, 2020. The 3rd Defendant deserted his matrimonial home in December 2020, entered into an illicit romantic relationship with the 4th Defendant. Both the 3rd and 4th Defendants registered the 1st Defendant company and used the office of the 2nd Defendant to transfer all the matrimonial properties co - owned between the Plaintiff and the 3rd Defendant in favour of the 1st Defendant leaving the Plaintiff and the issues of their marriage, who are still minors destitute. The Plaintiff averred that currently, together with her children still reside in their matrimonial home situated in Shanzu within the County of Mombasa which was family owned house built on Plot No. CR.43991, CR.43992, CR.43865 was a three-storey developed building with rental apartments that brought monthly and annual income while properties CR.44515, CR.44516 Mombasa and Nairobi/Block 63/672 were yet to be developed.
7. Sometime in June 2021, the Plaintiff went to conduct due diligence at the Lands registry to ascertain if the cautions she had previously launched were still in place. But she was shocked to establish that all her matrimonial properties, including the one she was currently residing in as the family home had been transferred to a company not known to her, trading in the names and style of "Rock and Pure Limited", the 1st Defendant herein. Further, while at the Land Registry, Mombasa, the Plaintiff established that it was the 3rd Defendant who caused the 2nd Defendant to transfer the matrimonial properties in favor of the 1st Defendant without acquiring spousal consent from her as required by the Law.
8. Additionally, the Plaintiff's complaint against the 2nd Defendant was based on the fact that on the 11th November, 2020, she registered a caution against the said properties which were approved and duly registered and caution notice published by the 2nd Defendant. Hence, she was therefore shocked to learn that a transfer was executed by the 2nd Defendant on the 19th April, 2021 despite of the caution having been registered and never removed as required through the due process of the law. The Plaintiff



- discerned that the 2nd Defendant never served her with a notice to lift or remove the caution by the 1st and the 3rd Defendants neither did he conduct due diligence before registering any dealings on the property by first and foremost investigating if the Plaintiff's spousal consent was given/granted prior to the transfer of the properties which raised an aspect of fraudulent dealing on his part.
9. The 1st Defendant was a company whose directors were the 3rd and 4th Defendants who were drinking buddies turned into illicit lovers, whom together had dispossessed the Plaintiff her matrimonial properties. They had reduced her into a tenant in her own home. They were threatening on evicting her and the minors and may sell, transfer or charge the property any moment. The mischief of the illegal transfers was that upon perusal of the 1st Defendants' CR12, the Honourable Court would realize that the 3rd Defendant had transferred all his matrimonial Properties to a company where he owned minority shares of 300 shares while his Co - Director and drinking buddy /concubine the 4th Defendant herein was the majority shareholder at 700 shares which simply meant all the Plaintiff's spousal rights had illegally been transferred and bequeathed to her husband's concubine without having obtained her spousal consent.
 10. The Plaintiff relied on the following particulars of breach of duty of care and negligence by the 3rd Defendant:-
 - a. Clogging on Plaintiff's civil rights as provided in the land instruments.
 - b. Conducting transfer against the properties where cautions had been duly and legally registered.
 - c. Effecting transfer without seeking and obtaining spousal consent as required by the Law.
 - d. Clogging on the Plaintiff's consumer protection rights and the rights under the constitution of Kenya 2010.
 - e. Transferring matrimonial property without following due process.
 - f. Acting in bad faith and Malice.
 - g. Breach of duty of care to the family of the Plaintiff.
 11. The Plaintiff was apprehensive that the 3rd Defendant and his concubine may sell, transfer or charge the property at any moment leaving her and the minors destitute and homeless. As a proof to the above, sometime on the 12th May, 2021 in the morning on or before 12.00 noon, the 3rd and 4th Defendants in company of the 3rd Defendant's sister, her husband and another male stranger who introduced himself as a Land Valuer amongst other strangers visited the Plaintiff at her matrimonial home, gained forceful ingress, valued the property and the contents therein, threatened to evict the Plaintiff and when they noticed that they were being video recorded, descended on the Plaintiff with blows and kicks, grabbed the Plaintiff's mobile phone containing the video evidence, crashed it on the ground and stole it.
 12. During the above melee the Plaintiff was subjected to physical and verbal assaults by the Defendants in the presence of the minors, neighbors and private guards who had been attracted by the malice. The event was reported at Bamburi Police Station vide OB NO. 41/12/05/2021 16:30HRS. The Plaintiff was further treated at Tudor Clinic for injuries suffered in the hands of the 3rd and 4th Defendants. Since the attack and verbal threats particularly by the 3rd and 4th Defendants, the Plaintiff had been constantly living in fear for her life and that of her children because: -
 - a. The 3rd Defendant was not only dangerous and short-tempered person but armed and possess a fire arm license.



- b. The security guards “Radar Security” who were manning the main gate towards the Plaintiff’s home mysteriously left their usual base and their security signboard that was erected there was removed on the night of 12th May, 2021 by unknown people.
 - c. On the main road leading to the Plaintiff’s gate, there had been a strange Motor Vehicle KCV 605Z which had been parking and was driven by strange people which had been stalking the Plaintiff and stopping and questioning any person who entered and left the Plaintiff’s home including service providers, demanding to know reasons and their missions at the Plaintiff’s home.
 - d. With respect to the above the said Motor Vehicle had been speeding off whenever the Plaintiff approached it. The matter was reported at Bamburi Police station vide OB NO.27/14/05/21 at 14.55 Hours and no action had been taken so far.
 - e. The Defendants had been and were continuing to give false, libelous information to the media to the detriment of the Plaintiff to wit; that there had been ongoing divorce proceedings between the Plaintiff and the 3rd Defendant when the same was not true which necessitated Civil Suit No. E478of 2021 and E190 of 2021 where the court gave restraining orders against the Defendants.
 - f. The Plaintiff was afraid that she has already been dispossessed of her matrimonial properties through fraud and illegality and that unless this Honorable Court intervened soon, she might be rendered destitute and homeless together with her children despite residing in their own home.
13. The Plaintiff also relied on the following particulars of breach of duty of care by the 1st and 4th Defendant:-
- a. Entering a land transaction without conducting due diligence to ascertain matrimonial rights if any.
 - b. Transferring matrimonial property in an obvious case where spousal consent was mandatory.
 - c. Fraudulent transfer of the properties.
 - d. Failure to inquire from the Plaintiff if at all she had given her spousal consent.
 - e. Trespass.
 - f. Attacking the Plaintiff at the matrimonial suit.
 - g. Acting in bad faith and Malice.
14. As a result of the said illegal and fraudulent actions and omissions of the Defendants of disintitling Plaintiff and her minors, the Plaintiff had suffered embarrassment, loss and damages for which she held the 1st, 2nd, 3rd and 4th Defendants jointly and severally liable for damages and she had been unable to access credit facilities from financial institutions. Despite demands being made and notice of intention to sue having been given, the Defendants had refused, neglected and/or ignored to remove and/or rectify the fraudulent transfer.
15. There was no divorce suit between the 3rd Defendant and Plaintiff, and all disputes between the Plaintiff the 3rd and 4th Defendant had been disclosed. The cause of action arose in Mombasa within the Jurisdiction of this Honourable Court.



16. In a nutshell, the Plaintiff prayed for Judgment to be entered against the 1st, 2nd, 3rd and 4th Defendants jointly and severally for:
- a. A declaration that the transfer, registration of title suit properties known as CR.43865 CR.43991, CR.43992, CR.44515, CR.44516 in Mombasa transferred to Rock and Pure Company Limited is null and void.
 - b. An order compelling the 2nd Defendant to cancel the transfers and titles and registration of the suit properties known as CR.43865 CR.43991, CR.43992, CR.44515, CR.44516 in Mombasa.
 - c. An order declaring, suit properties known as CR.43865CR.43991, CR.43992, CR.44515, CR.44516 in Mombasa and Nairobi/Block 63/672 as Matrimonial properties.
 - d. An order compelling the 2nd Defendant to cancel the transfers, titles and registration of the suit properties known as CR.43865 CR.43991, CR.43992, CR.44515, CR.44516 in Mombasa and rectify the register to make the Plaintiff and the 3rd defendant as co-owners of the properties.
 - e. General damages for the unlawful transfers.
 - f. Damages and declaration that the Plaintiff's consumer rights were violated Contrary to Section 66 (1) of the *Consumer Protection Act*.
 - g. An order of permanent injunction restraining the 1st, 3rd and 4th Defendants whether by themselves their agents, assigns, friends and family or anyone acting through their orders or under their authority from entering or breaking in without warrants, victimizing, threatening, evicting or in any way interfering with the Plaintiff's peaceful enjoyment and use of her matrimonial property either through valuation, search charging, sale, auction and transfer or advertisement of Property number CR.43865 CR.43991, CR.43992, CR.44515, CR.44516 situated in Mombasa and Nairobi/Block 63/672.
 - h. General and exemplary of punitive damages for illegal transfer and injurious falsehood, financial, moral and social embarrassments jointly and severally against the 1st and 3rd and 4th Defendants and interests thereon at Court rate.
 - i. General damages for negligence against the Plaintiff by the 1st and 2nd Defendants.
 - j. Costs of this suit and interest thereon at court rates.

17. The Plaintiff called its first witness on the 20th September, 2022 where the Witness testified as follows:

A. Examination in chief of PW - 1 by Mr. Odhiambo Advocate.

18. PW – 1 was sworn and testified in English language. She introduced herself as Zipporah Njoki Kangara, the Plaintiff herein. She informed the Court that the 3rd Defendant was her husband and there were still married. She had no relationship with the 4th Defendant who was a Member of Parliament who was currently the women representative for Laikipia County. According to the witness her complaint against the Land Registrar was for causing the transfer of the suit properties which were matrimonial assets to the 1st Defendant without having obtained the spousal consent as required by law. Besides, this happened while there had been registered a Caveat by herself.
19. She told the Court that she was a Civil Servant at the Kenya Bureau of Standards, in the inspection department. A copy of their Certificate of Marriage was produced as Plaintiff Exhibit No. 1. The PW



- 1 and the 3rd Defendant celebrated their holy matrimony on 20th November, 2010. They were blessed with three (3) children. (This Court's opinion was that for the purposes of the security of the children and future repercussions of their identities/names being in the public remain un - disclosed).
20. According to the witness the children resided at their matrimonial home which were on Plot No. 43865, 43991 and 43992 respectively. The children and her resided there. She had no relationship with the 4th Defendant. The properties were transferred to the 1st Defendant. She conducted a search (page 21 to 29) and found it had been removed and properties transferred to the 1st Defendant. On 14th May, 2021 her husband the 3rd Defendant, the 4th Defendant, one Irene Njeri a Land Valuer went to their house. The Land Valuer took notes. The PW – 1 questioned this visit but instead of getting an answer, the Land Valuer assaulted her. She reported the matter at Tudor Police Station (See pages 112 to 113 - is an OB extract) and later taken to Tudor Sub – County Hospital. She was issued with an out patient attendance note (page 57 and 58).
21. She saw a motor vehicle bearing registration no. KCV 605Z at page 113. It was roaming around. It belonged to Irene Njeri. The PW – 1 reported the matter to the police but they never took any action. On 3rd November 2020, the PW – 1 lodged a Caveat against all these properties at the Land Registry. It was indicated at page 99. She never gave any spousal consent for the transfer of the property to the 1st Defendant on 19th April, 2021. She acquired the property during the pendency of their marriage. She had never made any effort to reach the 4th Defendant.
22. She testified that she recognized the two persons at page 14. The Caveat was lifted/removed without her knowledge. If he had sought for the spousal consent she would not have granted it as it was a matrimonial property. She wished to be granted the relief sought from the filed Plaintiff. She wished to adopt her witness statement as part of her evidence in chief.

B. Cross examination of PW - 1 by Mr. Makuto Advocate.

23. PW – 1 told the Court that she lodged a Caveat on 3rd November, 2020 (page 99) against all the matrimonial properties. It was signed by Mr. S.K. Mwangi as the Land Registrar. Her address was 17816 – 00100 Nairobi. She gave the reasons for the caveat as she did not want any other party transacting with the property without her knowledge. She claimed spousal interest. She lodged the Caveat on 3rd November, 2020 and it was registered on 6th November, 2020. But in April, 2021, she realized it was removed. By this time, the property had changed hands to the 1st Defendant.
24. The witness testified that the intentions to register the Caveat on 6th November, 2020 by her names. It bore her postal address. However she never received any notices. It was signed by Mr. Wanjohi. She only dealt with the Land Registrar called Mr. Mwangi. She had never issued a spousal consent form nor was she issued with any notice for removal of the Caveat.

C. Cross examination of PW - 1 by Mr. Obonyo Advocate.

25. PW – 1 confirmed having given the whole information to the Land Registrar prior to registering of the Caveat. She gave them the postal address. Despite of this, she insisted never having received the notices for the removal of the Caveat. She also gave away her mobile phone numbers. She confirmed that it was the 3rd Defendant who was the registered owner of the suit properties but now they were under the names of the 1st Defendant. She had never been the registered owner to any of those properties. The properties were registered as matrimonial properties which were acquired during the subsistence of their marriage.



26. The witness stated that she was relying on the sale agreements. She had not produced anything to show how that the properties were acquired. There were six (6) properties. She had the sale agreement showing how and when the properties were acquired but she never had the agreements in Court. She knew the caveat could be removed. There were three (2) ways of removing a Caveats which were:-
- a. Through a court order; or
 - b. By the Land Registrar.
27. She told the Court that for a property which was registered in the husband's name, she had no idea whether he would transfer them without her authorization. She had contributed to the acquisition of the property. She had no proof that they had acquired the property together with her husband. She had no relationship with the 4th Defendant. PW – 1 only sued the 4th Defendant as she was a director of the 1st Defendant and had no personal claims. She had no relationship with the 1st Defendant. PW – 1 had never reached out to the 4th Defendant.
28. She confirmed that having produced all the original documents. She had not produced a certificate of production. She saw a Land Valuer come to her place. They were not parties to the suit. She was aware of the matrimonial cause which was being handled before a competent court and also as it applied to the children. She claimed the two properties to revert back as matrimonial property. She wanted the properties to go back to the 3rd Defendant. She did not want the properties to be used in any other way. Prayer No. (d) of the Plaint, she told the Court that she would have liked to have the property to be registered in her names and the 3rd Defendant's name only and not 1st nor 4th Defendants as it was currently.
29. She told the Court that she had proved the exemplary damage. She had no idea about the Plaintiff Company. She was seeking for the restrictions on dealing with the suit property. She would still want to revoke the title. She would want the titles to go back to Peter Njogu for the sake of the minors.

D. Re – examination of PW - 1 by Mr. Odhiambo Advocate.

30. She reiterated the that the error on the birth of one of the Children was caused by her Advocate. It was not normal for a married couple to keep receipts of all the properties they purchased. Catherine, the 4th Defendant had 700 shares in the 1st Defendant company which was a majority share. The witness never got the notice of the removal of the Caveat. She knew about it on April 2021. According to her she suffered a great deal of embarrassment and suffering from the acts and deeds by the Defendants herein.
31. On 20th September, 2022 the Learned Counsel for the Plaintiff Mr. Odhiambo marked the close of the Plaintiff's case.

III. The 1st, 3rd and 4th Defendant's case

32. On 21st February, 2022, the 1st, 3rd and 4th Defendants filed a Statement of Defence dated 18th February, 2022. They prayed for the Plaintiffs suit to be dismissed with costs to them.
33. In their defence, they denied the contents of the Plaint and averred being strangers to the allegations therein. The 3rd Defendant, in response to the contents made out under Paragraph 6 of the Plaint acknowledged that indeed he had been legally married to the Plaintiff, though he had initiated the Divorce Cause proceedings in the "Chief Magistrate's Court Divorce Case No. 145 of 2021 Peter Njogu Waweru-Versus- Zipporah Njoki Kangara" due too irreconcilable differences. The Defendants admitted the contents of Paragraph 7 of the Plaint.



34. The 1st, 3rd and 4th Defendants, in response to the averments made out under Paragraphs 8 and 9 of the Plaintiff, stated that this Honourable Court lacked jurisdiction to make a determination as was not vested with powers to adjudicate upon Matrimonial Properties which formed the subject properties. In answer to Paragraphs 10 to 13 of the Plaintiff, the 3rd Defendant stated that he was the sole registered proprietor of the subject properties, having acquired the same using his own resources while he was still a bachelor. He averred that he had been in possession of the same and thus his rights over the said properties had accrued and were legally and fully enforceable. The 3rd Defendant pleaded the Doctrine of Proprietary Estoppel against the Plaintiff and stated that nothing in the *Land Act* prevented his reliance on that doctrine.
35. In a further answer to the above, the 1st, 3rd and 4th Defendants stated that the spousal consent was not obtained since the subject properties were not matrimonial properties. Therefore there was no need to obtain spousal consent. The 3rd Defendant further averred that the Plaintiff had no right to claim any property as she never contributed anything towards the acquisition of the same or developed the same and had only brought this suit to lay claim to the suit properties for her own benefit. The averments made under the contents of Paragraph 14 of the Plaintiff were denied.
36. The 3rd Defendant denied any mischief as alleged by the Plaintiff and all the particulars of breach of duty of care and negligence alleged by the Plaintiff under paragraph 15 of the Plaintiff and further stated that the subject properties were not matrimonial properties as the Plaintiff claimed. In the alternative, the provision of Section 6(3) of the *Matrimonial Property Act* provides that ownership of Matrimonial property rests in the spouses according to the contribution of either spouse towards its acquisition, and the 1st, 3rd and 4th Defendants asserted that the Plaintiff had not tendered evidence to prove that she made any contribution in accordance with requirements under Section 7 of the cited Act.
37. The Defendants vehemently denied the averments made out under Paragraphs 16 - 20 of the Plaintiff. The 1st, 3rd and 4th Defendants denied the particulars of breach of duty of care as alleged in Paragraph 19 of the Plaintiff and put the Plaintiff to strict proof thereof. The 3rd and 4th Defendants were strangers to the contents of Paragraph 19 (c), (d), (e) and (f) and therefore were unable to plead to the same. The aim of the Plaintiff was to benefit from the 3rd Defendant's sweat when she did nothing to contribute towards purchase of the said properties, and therefore the subject properties should not be treated as matrimonial properties. The Defendants denied the allegations of loss or damage to the Plaintiff was caused or occasioned by reason of the alleged fraudulent actions and omissions on the part of the 1st and 4th Defendants as alleged. The particulars of breach of duty of care set out in the Plaintiff were denied as if the same were set out and traversed seriatim. The Defendants further denied that the Plaintiff had suffered any embarrassment, loss and damage at all as alleged in paragraph 20 of the Plaintiff.
38. The 1st, 3rd and 4th Defendant denied having ever been served with any notice of intention to sue or demand as alleged under paragraph 21 of the Plaintiff. Hence, the Plaintiff was not entitled to costs. The 3rd Defendant denied the contents of paragraph 22 of the Plaintiff, and stated that he had initiated Divorce proceedings in "Chief Magistrate's Court Divorce Case No.145 of 2021 Peter Njogu Waweru-Versus- Zipporah Njoki Kangara" due to irreconcilable differences.
39. The 1st, 3rd and 4th Defendants admitted the jurisdiction of the Honourable Court in as far as the cause of action never involved matrimonial property. There was a suit pending in Court in Mombasa MCC No. 748 of 2021 between the parties herein over the same subject matter and the 1st, 3rd and 4th Defendants shall raise a Preliminary Objection in due course that a similar suit was pending in another Court between the parties herein concerning this subject matter.
40. On 27th July, 2023, the Defendant called his first witness DW 1 who told the Court that.



E. Examination in Chief of DW - 1 by Mr. Obonyo Advocate.

41. DW – 1 was sworn and testified in English language. He told the Court that he was Peter Njogu Waweru and he knew the Plaintiff. He stated that she used to be wife. As far as he was concerned they had already divorced in May 2023. The proceedings in the Divorce Cause in CMCC E145 of 2021 commenced during the pendency of this suit. The Decree Nisi was issued on 13th April, 2023 before Chief Magistrate Hon. J.B. Kalo. They were awaiting the Decree Absolute. He was a director in the 1st Defendant company. He knew Catherine, the 4th Defendant who was also a director in the 1st Defendant company.
42. The witness told the Court that he recorded the witness statement dated 15th February, 2022 which he adopted as his evidence in Chief. There was a list of documents dated 15th February, 2022 which he produced as Defendants Exhibit 1 to 5. He had been read the prayers sought by the Plaintiff. He objected to that as the properties in question were all his. He had acquired and he used them to earn an income and for trade. He would use the properties to pay school fees for his children. The case before Tononoka Children Court and the Divorce Cause had been concluded.
43. He told the Court that the properties that the Plaintiff wanted were in the name of the Company and not his name. The Plaintiff wanted these properties to be registered in their names. DW – 1 stated that was wrong as he got the properties way before their marriage with the Plaintiff. She had been working all through. They had agreed that whatever the properties one acquired it be registered in the name of the spouse that bought it.
44. The witness stated that the Plaintiff had been working and earning well. She also had her properties. She never brought the documents of her properties in this Court. According to him the suit properties were not matrimonial properties. The removal of the caveat was by the Land Registrar. The Plaintiff was called to raise any objection why the Caveat should not be removed but she never attended the session. Hence the caveat was removed legally as per the law. He was concerned that the Plaintiff had never asked him to register the said properties in their names.
45. According to him, his children, lived at Utange Estate and schooling at Nyalı School. He supported them with the up keep, shelter, clothing and food.

F. Cross examination of DW - 1 by Mr. Odhiambo Advocate.

46. DW – 1 informed the court that he never had any evidence to show that he was paying for the property. They married on 20th November, 2010. Their children lived in Utange of the County of Mombasa at one of the Company’s properties. They used to live with the Plaintiff there. He confirmed that they were living on the property which was owned by him and which were not matrimonial properties. The transfer of the property to the 1st Defendant was done on 2nd December, 2014. It was documented on page 22. The removal of the Caveat was by the Land Registrar. He had 20 shares in the 1st Defendant’s company and the 4th Defendant had 80 shares. This was done through a verbal agreement between them.
47. According to the witness, the Tononoka case, the Plaintiff being the mother was granted the custody of the minors. They lived in Mombasa while he lived in Nairobi. His property could not be auctioned as he was a hard working person; He never had any resolution on the transfer of the property. He wanted the property to be retained in the Company names.



G. Re - Examination of DW - 1 by Mr. Obonyo Advocate.

48. The witness told the Court that he wanted the property to be retained in the names of the Company. He started buying property before the marriage but registration occurred later on during the pendency of the marriage. He was aware that the Land Registrar was summoned to court to come and testify on the issue of Caveat and how it was removed after she declined to honour the notices. There was no threat against the children. The Court gave the Plaintiff and the 3rd Defendant parental responsibilities. Between themselves as the directors of the company they engaged on verbal agreements. His wife had property in her names but she never brought them to Court.
49. He confirmed that the property was not matrimonial property. The issue here was about her wanting the suit property into her names. The internal matters of the company were dealt with there. He was never asked to bring any resolution otherwise he would be willing and ready to do so.
50. On 27th July, 2023 the Defendants through their Counsel Mr. Obonyo marked the close of their case.

IV. Submissions

51. On 27th July, 2023 being a family matter, the Honourable Court was able to persuade the parties to reach a draft consent based on an out of Court and amicable resolution in tandem with the provision of Article 159 (2) (c) of *the Constitution*, 2010 and Section 20 (1) and (2) of the Environment and *Land Act*, No 19 of 2011. Unfortunately, on 21st September, 2023, Court was informed that the Plaintiff had backed out of the agreed the proposed consent and wished that the matter proceeded on for Court's final determination through a Judgement.
52. Thus, the Honourable Court in the presence of all the parties gave directions on the disposition of the Plaint dated 12th July, 2021 by way of written submission. Pursuant to that on 6th November, 2023 the Honourable Court that by the time of penning down the Judgement only the Plaintiff had fully complied. Thus, the Judgment date was reserved to be on notice.

A. The Written Submissions of the Plaintiff

53. On 17th October, 2023, the Plaintiff through the firm of Messrs. Derrick Odhiambo Advocates filed their written submissions dated 12th October, 2023. Mr. Odhiambo Advocate commenced the submissions by stating that the Plaintiff herein instituted this suit against the Defendants vide a Plaint dated 12th July 2021, seeking for the following prayers as set out above.
54. On the issues for determination, the Learned Counsel relied on the following three (3) issues. Firstly, on whether the properties known as CR.43865, CR. 43991,CR.43992, CR. 44515, CR 44516 situated in Mombasa and Nairobi/Block 83/672 should be considered as Matrimonial Property. The Learned Counsel submitted that as corroborated by both their testimonies, the Plaintiff and the 3rd Defendant were married on 20th November, 2010 and were blessed with three (3) issues who were yet to attain the age of majority. Currently, they were under their mother's (the custody suit being "Children's Cause (Tononoka) No. E190 of Zipporah Njoki Kangara – Versus - Peter Njogu Waweru and attached herewith was a copy of the Judgment/Pleadings. The Judgment condemned the Respondent not to evict the Plaintiff from the suit property and to pay school fees for the minors an aspect that the Defendant had refused to honor the Court order.
55. Accordingly to the Learned Counsel, unfortunately and further to the above, during the pendency of their marriage, the 3rd Defendant deserted the Plaintiff and their children and began an illicit relationship with the 4th Defendant. Thereafter he transferred and caused to be registered the properties



to the 1st Defendant company. The 3rd Defendant used the office of the 2nd Defendant to transfer all the matrimonial properties co-owned between the Plaintiff and the 3rd Defendant in favour of the 1st Defendant, leaving her and the issues of their marriage, who were still minors destitute and/or exposed to unforeseen risks. During the hearing, the PW - 1 testified that the properties referred to as CR43991 and CR43992 make up their matrimonial homes as she and the couple's children resided in the said properties since their purchase in 2014. PW – 1 further adduced copies of title deeds that supported the same vide her list of Documents dated 12th July 2021, which was adequately adopted by the court at the hearing.

56. The Learned Counsel asserted that the Matrimonial Properties Act defines a Matrimonial home as any property that is owned and/or leased by one or both spouses and occupied or utilized by the spouses as their family home and included any other attached property. During cross examination, the 3rd Defendant admitted that prior to their divorce, the Plaintiff, their children and himself resided in the said properties since the year they were purchased (year 2014). It was on that ground that he submitted that said admission should cement the Plaintiff's contributions and ownership of the said properties.
57. The Learned Counsel further contended that the Plaintiff's right with regards to this suit was protected by dint of the provision of Articles 43 & 45 (3) of *the Constitution* of Kenya 2010 which this court had jurisdiction and powers to protect. The Plaintiff further testified and adduced sufficient evidence apartments that brought in income for the family and that CR 44515, the said properties were purchased during the pendency of the marriage and to which the Plaintiff effectively made vast contributions to the development and maintenance of the properties.
58. The Learned Counsel argued that it was the 3rd Defendant's testimony that the matrimonial home and/or properties were purchased in the year 2014, which was during the subsistence of the marriage. The 3rd Defendant further testified that he and the Plaintiff agreed that every property purchased during the subsistence of the marriage would not be considered as matrimonial property and that the said purchases would be owned by and/or registered solely in the name of the spouse who purchased the property. He told the Court that the Plaintiff never made any monetary contributions towards the purchase of any of the properties. She earned a reputable salary and therefore could purchase and own property. Thus, she was not entitled to claim ownership of the aforementioned properties.
59. The Learned Counsel argued that the 3rd Defendant's testimony should be disregarded as he failed to adduce any Pre-nuptial contracts, documents and/or sufficient evidence that prove that such an agreement ever existed. The provision of Section 6 of the *Matrimonial Property Act*, No. 49 of 2013 defines a Matrimonial Property as:-
 - a. A 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 substance of the property.
60. The Act further states that the ownership of the Matrimonial Property vests in the spouses according to the contribution of each spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
61. As per the provision of Section 2 of the *Matrimonial Property Act*, contribution was defined as monetary and non-monetary contribution which includes:
 - a. Domestic work and management of the Matrimonial Home.



- b. Child care.
 - c. Companionship
 - d. Management of the family business or property; and
 - e. Farm work.
62. To buttress on this point, the Learned Counsel relied on the case of:- “ELC (Murang’a) Cause No.32/2017: M.W.K VS S.K.K and Five Others”; where the Learned Judge cited the provision of Section 93 (2) of the [Land Registration Act](#) No. 3 of 2012 provides: -
- “If land is held in the name of one spouse only but the other spouse(s) contributes by their labour or other means to the productivity, upkeep and improvement of the land, that spouse (s) shall be deemed by virtue of that labour to have acquired an interest in that land in the nature of an ownership in common with the spouse in whose name the certificate of ownership or customary certificate of ownership has been registered and the rights gained by spouse(s) shall be recognized in all cases as if they were registered.”
63. The Learned Counsel submitted that with the support of the aforementioned Statutory Provisions and authorities, he averred that the properties known as CR.43865, CR.43991, CR.43992, CR.44515, CR 44516 situated in Mombasa and Nairobi/Block 83/672 does satisfy the criteria of being matrimonial Properties as per the law and thus the Plaintiff should be considered as the legal proprietor and co-owner of the suit properties.
64. The Learned Counsel further asserted that as a Co - Owner of the properties, the Plaintiff’s consent was required to allow the transfer and/or sale of the said properties to the 1st Defendant. Thus the said transfer should be declared invalid and/or unlawful. In the case of “Kadzo Mkutano – Versus - Mukutano Mwamboje Kadosho & 2others [2016] eKLR” the Judge held that:-
- “Section 28 of the [Land Registration Act](#) recognizes spousal rights over matrimonial property as an overriding interest. Spousal consent, is therefore required before a spouse can sell matrimonial property. In the absence of such a consent, the sale becomes null and void”
65. Secondly, on whether the caution dated 6th November 2020, was properly lifted as per provision of Sections 71 to 75 of the Lands Registration Act No. 3 of 2012. The Learned Counsel contended that the Plaintiff testified that following the 3rd Defendant’s desertion and the discovery of his illicit relationship with the 4th Defendant, she visited the Mombasa County Lands Offices and placed a caution on the properties restricting any third party from conducting any business on the said property without being informed of the same or without her consent. The Plaintiff further testified that upon placing the Caveat, she issued the 2nd Defendant with sufficient information including how to contact her in the event that a third party made an application to have the said Caveat removed, withdrawn and/or lifted. However, on 22nd June 2021, the Plaintiff conducted an official search of the properties and discovered that the 2nd Defendant had without notifying and/or serving her with any requisite notices, lifted the said caution and unlawfully endorsed the transfer the ownership of the properties to 1st Defendant.
66. The 3rd Defendant further testified that he made an official application to have the Caveat removed as required by the Law. However, the 2nd Defendant and he failed to adduce sufficient evidence that showed that the Plaintiff was notified of the said Application by him and/or the 2nd Defendant and that she failed to respond or make an objection to the said Application within the stipulated timeline.



67. To support his argument, the Learned Counsel relied on the provision of Section 71 (1) of the [Land Registration Act](#) that states:-
- a. a Caution will include a Notice in the form of a register to the effect that no action of a specified nature in relation to the land in respect of which the notice has been entered may be taken without first informing the person who gave the notice
 - b. A Caveat places a Caution on an immovable property within the Republic of Kenya, and they include a person who: -
 - i. claims the right, whether contractual or otherwise, of creation by an instrument registrable under this Act;
 - ii. is entitled to a licence; or
 - iii. has presented a bankruptcy petition against the proprietor of any registered land, lease or charge, may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting the land lease or charge
68. Further, the provision of the Section 71 (2) of the Lands Registration Act, Cap 3 of 2012 further stipulates that the purposes of a Caution include:
- a. To forbid the registration of dispositions and the making of entries; or
 - b. forbid the registration of dispositions and the making of entries to the extent expressed in the caution.
69. According to the Learned Counsel, the Act further stipulates that the Registrar bears the discretion to accept or reject such an application if it deems that the same is unnecessary or whose purpose can be effected by the registration of an instrument under this Act and that upon satisfaction of the above sections, the Caveat shall be registered in the appropriate register. It was clear that the Plaintiff satisfied all the requirements needed to place a Caveat on the properties as supported by the provision of Section 71 (1)(a) of the [Land Registration Act](#), Laws of Kenya and thus the Land Registrar obliged and registered the caution on 6th November 2020.
70. The Learned Counsel further submitted and as supported by Section 73 of the Lands Registration Act that a registered Caution may be withdrawn by the cautioner or removed by order of the court. The Act further states that upon an application of any person interested, the Registrar may serve a notice on the cautioner warning the cautioner that the caution will be removed at the expiration of the time stated in the notice.
71. The Act further issues the procedure that a registered Caution should be withdrawn following the said Application and service of the notice to the Cautioner and the procedure includes:-
- a. If a cautioner had not raised any objection at the expiry of the time stated, the Registrar may remove the caution.
 - b. If the cautioner objects to the removal of the caution, the cautioner shall notify the Registrar, in writing, of the objection within the time specified in the notice, and the Registrar shall, after giving the parties an opportunity of being heard, make such order as the Registrar considers fit, and may in the order provide for the payment of costs.



- c. After the expiry of thirty days from the date of the registration of a transfer by a chargee in exercise of the chargee's power of sale under the law relating to land, the Registrar shall remove any caution that purports to prohibit any dealing by the chargee that was registered after the charge by virtue of which the transfer has been effected.
- d. On the withdrawal or removal of a caution, its registration shall be cancelled, and any liability of the cautioner previously incurred under the provision of Section 74 shall not be affected by the cancellation.
72. The Learned Counsel opined that the withdrawal of the said caveat was not done as per the proper procedure and that the Defendants' actions clearly show that they colluded and created a ploy to deprive the Plaintiff of her proprietary rights and interests without taking into consideration the consequences that their actions would have on the minors. The Learned Counsel relied on the case of:- "ELC (Thika) MISC APP NO.38/2017; Re Withdrawal of Caution by Mary Njeri Mwaura [2017]eKLR": where the Learned Judge cited the provision of Section 73(1) of the Land Registration Act provides that: -
- "A caution may be withdrawn by the Cautioner or removed by order of the court or subject to sub-section 2 by order of the Registrar."
73. Thirdly, on whether the 2nd Defendant breached its duty of care owed to the Plaintiff. The Learned Counsel posited that the provision of Article 260 of the Constitution of Kenya, 2010, defines a public officer as any State officer or any person other than a state officer who holds a public office. As per the above qualification, it was clear that the 2nd Defendant in its capacity of a public Officer, was entrusted with the duty of care to all persons that it ought to provide services to provided it's in the limits of the Authority the office was established under. The 2nd Defendant breached its duty of care owed to the Plaintiff through its actions and/or by colluding with the 1st, 3rd, and 4th Defendants at the expense of the Plaintiff's and her children's constitutional rights and freedoms.
74. On this legal point the Learned Counsel relied on the case of "Christine Kalama – Versus - Jane Wanja Njeru & another [2021]eKLR" who cited Caparo case where the Court stated:
- "What emerges is that, in addition to the foreseeability of the damage, necessary ingredients in any situation giving rise to a duty of care are that there should exist between the party owing the duty and the party to whom it is owed a relationship characterized by the Law as one of proximity or neighborhood, and that the situation should be one in which the Court considers it fair, just and reasonable that the Law should influence a duty of a given scope upon the one party for the benefit of the other....."
75. In conclusion, the Learned Counsel submitted that they prayed that this Honourable Court established under the provision of Article 165 of the Constitution of Kenya 2010 has original unfettered jurisdiction to test matters of Law, facts and evidence before it and find that the suit is merited Protect the innocent Plaintiff together with her minors and allow the suit with costs.

V. Analysis and Determination

76. I have carefully read and considered the pleadings herein by the Plaintiff and the Defendant, the written submissions, the myriad of cases cited herein by parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.



77. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has issues for its determination. These are:-
- a. Whether this Honourable Court has the jurisdiction to deal with matrimonial property.
 - b. Who will bear the Costs of suit.

ISSUE No. a). Whether this Honourable Court has the jurisdiction to deal with matrimonial property

78. Under this sub title, the Honourable Court examines if this Honourable Court has the requisite jurisdiction. Based on the filed pleadings by the Plaintiff and the Plaintiff the brief facts of the case are that the Plaintiff and the 3rd Defendant were a legally married couple via who celebrated and solemnized their holy matrimony through a church wedding 20th November, 2010 which marriage still subsisted upto the date of filing the case. The union between the Plaintiff and the 3rd Defendant was blessed with three issues namely JTW born on 15th February, 2011, TMN born on 6th March, 2016 and TNW born on 15th November, 2020. The 3rd Defendant deserted his matrimonial home in December 2020, entered into an illicit romantic relationship with the 4th Defendant, registered the 1st Defendant company and used the office of the 2nd Defendant to transfer all the matrimonial properties co-owned between the Plaintiff and the 3rd Defendant in favour of the 1st Defendant leaving her and the issues of their marriage, who are still minors destitute. The Plaintiff averred that currently, together with her children still reside in their matrimonial home in Shanzu which is family owned house built on plot No. CR.43991, CR.43992, CR.43865 is a three-storey developed building with rental apartments that bring monthly and annual income while properties CR.44515, CR.44516 Mombasa and Nairobi/Block 63/672 are yet to be developed.
79. However, the 3rd Defendant in his statement as DW - 1 informed this Court that, during the pendency of this proceedings the Plaintiff who had been his wife and himself had already divorced in May 2023. This was through the Divorce Cause proceedings in the “Chief Magistrate’s Court Divorce Case No. 145 of 2021 Peter Njogu Waweru-Versus- Zipporah Njoki Kangara”. Indeed, the Decree Nisi was issued on 13th April, 2023 before the Chief Magistrate Hon. J.B. Kalo. They were awaiting for the Decree Absolute anytime. Undoubtedly, these facts were never controverted. If anything, the marital status of the parties seemed to have been commonly agreed upon by the parties. In the given circumstances, therefore, the cause of action and the substrata of the case changed drastically. The pith and substance is now on the management and the distribution of matrimonial property after the dissolution of the Marriage pursuant to the Provision of Section 6 and 7 of the Matrimonial Causes Act. Thus, is this Court clothed with the Jurisdiction to continue hearing and determining this case? The answer is in the negative.
80. Certainly, the jurisdiction of this Court is being challenged. Jurisdiction of a Court is everything and once the Court makes a finding that it is devoid of it, it must down its tools at once and take no more step. It has been said that jurisdiction is everything and without it, a court has no power to make any step. This was stated in the classic case of “The Owners of the Motor Vessel “Lillian S” – Versus - Caltex Oil (Kenya) Ltd (1989) KLR 1.” Where Nyarangi J.A. held as follows:

‘I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. 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 downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.’

81. I am guided by the Supreme Court in the case of “Republic – Versus - Karisa Chengo & 2 Others (Supreme Court Petition No. 5 of 2015) 2017 eKLR”, the Supreme Court delivered itself as follows:-

“Flowing from the above, it is obvious to us that status and jurisdiction are different concepts. Status denotes hierarchy while jurisdiction covers the sphere of the Court’s operation. Courts can therefore be of the same status, but exercise different jurisdictions. That is why this Court has reaffirmed its position that the jurisdiction of Courts is derived from the Constitution or legislation.....

In addition to the above, we note that pursuant to Article 162(3) of the Constitution, Parliament enacted the Environment and Land Court Act and the Employment and Labour Relations Act and respectively outlined the separate jurisdictions of the ELC and ELRC as stated above. From a reading of the Constitution and these Acts of Parliament, it is clear that a special cadre of Courts, with sui generis jurisdiction, is provided for. We therefore entirely concur with the Court of Appeal’s decision that such parity of hierarchical stature does not imply that either ELC or ELRC is the High Court or vice versa. The three are different and autonomous Courts and exercise different and distinct jurisdictions. As Article 165(5) precludes the High Court from entertaining matters reserved to the ELC and ELRC, it should, by the same token, be inferred that the ELC and ELRC too cannot hear matters reserved to the jurisdiction of the High Court.”

82. In determining the issue of jurisdiction, the Supreme Court in the case of “Samuel Kamau Macharia & Another – Versus - Kenya Commercial Bank Limited & 2 others” held as follows:

“..... a court can only exercise jurisdiction that has been donated to it by either the constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”

83. Article 162(2)(b) of the Constitution confers this Court with jurisdiction over disputes relating to the environment and the use and occupation of, and title to land. In addition, Section 13 of the Environment and Land Court Act expounds on the jurisdiction of this Court as follows:

- “(1) 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
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.
- (4) In addition to the matters referred to in subsections (1) and (2), the Court shall exercise appellate jurisdiction over the decisions of subordinate courts or local tribunals in respect of matters falling within the jurisdiction of the Court.
- (5) Deleted by Act No. 12 of 2012, Sch.
- (6) Deleted by Act No. 12 of 2012, Sch.
- (7) In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including?
 - (a) interim or permanent preservation orders including injunctions;
 - (b) prerogative orders;
 - (c) award of damages;
 - (d) compensation;
 - (e) specific performance;
 - (g) restitution;
 - (h) declaration; or
 - (i) costs. (e) any other dispute relating to environment and land.”

84. This being a Court of record, it will be recalled that during the course of this proceedings, the 1st, 3rd and 4th Defendants filed a Notice of Preliminary Objection on 15th September 2021. Through the said objection, they sought for the dismissal of the entire suit on the following grounds:-

- a. That this Honourable court has no jurisdiction over the subject matter properties since they are alleged part of matrimonial property.
- b. That this Honourable court does not have the requisite territorial jurisdiction over some of the properties herein that are located in Nairobi County.
- c. That this Honourable court does not have jurisdiction over matrimonial property.
- d. That this suit raises no reasonable cause of action within this Honourable court’s jurisdiction as spelt out under Article 162 (2)(b) of *the Constitution* of Kenya and under Section 1 of the ELC Act.

84. On 16th December, 2021 the Court delivered its ruling dismissing the objection mainly on the ground that the issues before Court was emanating from a married spouses. From the surrounding facts and interferences, the circumstances have changed completely. By then the marriage union had not been dissolved. However, the situation has now changed as shall be deliberated on later in this Judgement.



Therefore, it was clear that this Honourable Court is clothed with jurisdiction to determine all disputes pertaining to environment and land. Section 2 read together with Section 6 of the *Matrimonial Property Act* defines matrimonial home to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property; matrimonial property on the other hand means the matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned or acquired jointly during the subsistence of the marriage. The 3rd Defendant told the Court that the properties that the Plaintiff wanted were in the name of the Company and not his name. The Plaintiff wanted these properties to be registered in their names was wrong as he got the properties way before their marriage. She had been working all through; they agreed that whatever the properties one acquired. They had agreed that whatever properties one acquired, they should register it in the name of the spouse that bought it.

85. According to him, his children, lived at Utange Estate and schooling at Nyali School. He supported them with the up keep, shelter, clothing and food. He started buying property before the marriage but registration occurred later on during the pendency of the marriage. He was aware that the registrar was summoned to court to come and testify on the issue of caveat and it was removed but she declined. There was no threat against the children. The Court gave the parental responsibilities to the Plaintiff and 3rd Defendant. Between themselves as the directors of the company he engaged on verbal agreements. His wife had property in her names but she never brought them to Court. It is therefore apparent that the gist of the dispute in this suit revolves around the rights of the estranged couple over the suit property. Is the Environment and Land Court the proper court vested with jurisdiction to deal with this kind of dispute?

86. In the case of “Sophy Njiri – Versus - National Bank of Kenya & Another (2015) eKLR” the Court held as follows:

“A spouse has a right to the matrimonial home, and if that right is threatened or is being affected by some action by another person, the spouse may apply to Court for relief”.

87. Where there is a dispute with respect to matrimonial property, Section 17 provides the procedure to be followed in agitating those rights. It says:-

“(1) A person may apply to a Court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

(2) An application under Sub-section (1)—

(a) shall be made in accordance with such procedure as may be prescribed;

(b) may be made as part of a petition in a matrimonial cause; and

(c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”

88. From the above provisions of the MPA it follows that the current legal position is that concurrent jurisdiction has been given to many Courts to hear disputes relating to matrimonial property. The *Marriage Act* of 2014 in addition provides that the Courts that will hear matrimonial causes arising under the Act are resident magistrate's Courts and within the limits provided under the law as to their jurisdiction. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by *the Constitution* under Article 165(3). Equally this Court enjoys jurisdiction over



matrimonial properties except where it involves matrimonial causes which is in the province of the High Court and the Magistrates' Court in line with their respective jurisdictions.

89. This Court in determining the jurisdiction to determine Matrimonial Property Disputes held as follows: -

“ 18. In interpreting the above section the Hon. Justice Nyamweya in *Jane Wambui Ngeru v Timothy Mwangi Ngeru* [2015] e KLR noted in this respect that –

“No particular Court is identified by the Act, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by *the Constitution* under Article 165(3). The *Marriage Act* of 2014 in addition provides that the courts that will hear matrimonial causes arising under the Act are resident magistrate's courts and within the limits provided under the law as to their jurisdiction.

It is thus the current legal position that concurrent jurisdiction is given to various courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land.”

19. This Court therefore adopts a similar position and finds that it has the Jurisdiction to adjudicate this matter as the same relates or involves land, and therefore the defendants submissions in this regard has no basis.”

90. From the above authority, it can be said that land disputes are cross cutting issue especially in High court and the sister courts of equal status.

91. As indicated above, in this case, critically speaking the cause of action has now changed from the time of instituting the suit to now that the marriage has been dissolved. As it stands now, the Plaintiff claim revolves around the management and distribution of property that she claims to be matrimonial property. The Court would need to indulge on certain issues into more robust and details. These would include:-

- a. What is the marital status of the parties herein?
- b. Whether the suit properties were Matrimonial property or not?
- c. When (was it during the pendency of matrimonial relationship or not) and how were the properties acquired and by who?
- d. Whether the spouses made any contribution to the acquisition and maintenance of these properties?
- e. What were the equitable, fair and reasonable shares to be apportioned to each of the spouses after the dissolution if the marriage?
- f. Whether the spousal consent would be required for the transfer of any of these properties?

92. Legally speaking, these are fundamental issues which this Court may not have the legal mandate nor capacity to adjudicate on. These are issues which fall within the ambit the High Court family Court. The parties' divorce having been brought to the attention of the Court, it is my finding that the right forum for the parties to litigate on the dispute in accordance with the provision of Section 17 (b) of *Matrimonial Property Act* is in the Probate Court. I discern that the Court with jurisdiction is the one



that the suit in MCC Cause No. E145 of 2021 and/or High Court family division where the marriage was concluded and dissolved.

93. In the case of “Isack M’inanga Kieba – Versus - Isaaya Theuri M’lintari & Isack Ntongai, (Scok) Petition 10 Of 2015”, the Supreme Court held;

“Each case has to be determined on its own merits and quality of evidence. It is not every claim of right to land that will qualify as a customary trust. In this regard, we agree with the High court in Kiarie – Versus - Kinuthia, that what is essential is the nature of the land intention of the parties---. Some of the elements that would qualify a claimant as a trustee are; the land in question was before registration family, clan, or group land; the relationship of the claimant to such family, clan, or group is not so remote or tenuous as to make his/her claim idle or adventurous; the claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances, the claim is directed against the registered proprietor who is a member of the family, clan, or group”.

I reiterate that the Plaintiff’s claim falls under Section 17 of the Matrimonial Properties Act, 2013 which is under the jurisdiction of the High Court. I therefore find that this Honourable Court lacks the jurisdiction to hear and determine this suit. Should this court, in the circumstances, strike out this suit? That would have been the fate of this suit until recently. In August 2020, the Supreme Court of Kenya in “Benson Ambuti Adegwa & 2 others – Versus - Kibos Distillers Limited & 5 others (2020) eKLR” emphasized the centrality of Article 50 of the Constitution and emphasized that in a scenario such as this one, based on ‘the Doctrine of Exhaustion’, the proper recourse is to remit the dispute to the appropriate court/tribunal as opposed to shutting the litigant out of the seat of justice completely. The Supreme Court of Kenya rendered itself thus:

“The Court of Appeal, in our view, gave quite an elaborate and definitive definition pertaining to the jurisdiction of the trial court in hearing and determining the Petition. However, once it had established that the ELC did not have the jurisdiction to hear and determine the Petition, the appellate court should have at that juncture issued appropriate remedies, which could have included, but not limited to, remitting back the matter to the appropriate institutions for deliberation and determination. Also, once it had determined that the ELC did not have the jurisdiction to hear and determine the issues before it, it should have held that any determination made was void ab initio, and that the appellate court therefore and with respect failed to properly exercise its discretion and supervisory mandate in this instance.”

94. On my part, I have noted that the relevant rules on procedure and form contemplated under Section 17 of the Matrimonial Property Act have not been promulgated. It is therefore my view that the present suit can properly be remitted to the appropriate court in its present form. The suit should be transferred to the High Court family Division under the provision of Sections 15 and 18 of the Civil procedure Act, Cap. 21. Having come to the conclusion that the Environment and Land Court is not the proper court vested with jurisdiction to adjudicate the dispute in this suit, I will not delve into the merits of the suit dated 10th July, 2021.



ISSUE No. b). Who will bear the Costs of suit

95. It is trite law that the issue of costs is at the discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The Black Law Dictionary defines cost to mean:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

96. The provision of Section 27 of the *Civil Procedure Act*, Cap. 21 hold that costs ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) provide as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.”

97. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir Dinshah Fardunji Mulla in his book *The Code of Civil Procedure*, 18th Edition, 2011 reprint 2012 at 540, is that costs must follow the event unless the court, for some good reasons, orders otherwise.

98. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “*Morgan Air Cargo Limited – Versus - Evrest Enterprises Limited* [2014] eKLR” the court noted that;

“The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”

99. In this case, as this Honourable Court has opined above, the Plaintiff has failed to prove her case and therefore failed in her claim. The Honourable Court has determined that it has determined that it has no jurisdiction to determine this suit. The 1st, 2nd, 3rd and 4th Defendants have the costs of the suit.

VI. Conclusion and Disposition

100. In the end, having caused such an in-depth analysis to the framed issues herein, the Honourable Court on the preponderance of probabilities finds that the Plaintiff has not established her case against the Defendant herein. Thus, the Court proceeds to make the following specific orders:-



- a. THAT Judgement be and is hereby entered in favour of the 1st, 2nd, 3rd and 4th Defendants as against the Plaintiff herein as per the Statement of Defence dated 18th February, 2022 with costs.
- b. THAT the suit as per Plaintiff dated 10th July, 2021 and filed on 13th July, 2021 be and is hereby struck out.
- c. THAT this suit be and is hereby transferred to the Family Division of the High Court at Mombasa.
- d. THAT the suit to be mentioned in the presence of all the parties herein on 16th April, 2024 before the Deputy Registrar in Charge of the High Court Family Division for purpose of taking further direction on the disposal of the matter of the administration and distribution of the suit properties herein.
- e. THAT the 1st, 2nd, 3rd and 4th Defendants shall have the costs of the suit by the Plaintiff dated 10th July, 2021 to be borne by the Plaintiff.

It is so ordered accordingly.

JUDGMENT DELIVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 19TH DAY OF MARCH 2024.

.....

HON. JUSTICE L. L. NAIKUNI,

ENVIRONMENT AND LAND COURT AT MOMBASA

Judgement delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. No appearance for the Plaintiff.
- c. Mr. Oyas Advocate holding brief for Mr. Obonyo for the 1st, 3rd & 4th Defendants.
- d. No appearance for the 2nd Defendant.

