



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC CASE NO. E10 OF 2021 (OS)

RW.....PLAINTIFF

VERSUS

JMN.....DEFENDANT

RULING

The Application

1. By a Notice of motion application dated **27/05/2021** and filed in court on **28/05/2021** and which has been brought under **Section 12(2)** of the **Matrimonial Property Act, 2013**, **Section 68(1)** of the **Land Registration Act, Order 40 Rule 1 and 2 of the Civil Procedure Rules, 2010** the applicant seeks the following orders:

1. ...Spent

2. ...Spent

3. That pending hearing and determination of the suit herein, an order of inhibition be issued inhibiting registration of any dealing in respect of parcels of land known as **DUNDORI/LANE BLOCK xxxx (NEW GAKOE) and **DUNDORI/LANET BLOCK xxxx (NEW GAKOE)** by way of transfer, charge, subdivision or any other dealing whatsoever.**

4. That the plaintiff be awarded costs of this application.

2. The application is supported by the sworn affidavit of RW, the Plaintiff applicant herein sworn on **27/05/2021**. The grounds on the face of the application and the supporting affidavit are that the applicant and the respondent are husband and wife married under the Kikuyu customary law in **1993** and were blessed with three children; that between the years **1996-1999** in the course of their marriage, they purchased the suit parcels of land known as **Dundori/Lane Block xxxx (New Gakoe)** and **Dundori/Lanet Block xxxx (New Gakoe)** registered in the name of the respondent; that they jointly contributed to the acquisition of the suit parcels and constructed a **3-bedroomed** permanent house on the suit parcels which became their matrimonial home; that the plaintiff solely catered for the expenses for completion of the matrimonial home and financed improvements inside and around the home; that she sourced the funds for purchase and construction among other improvements from her salary and loans and that in view of her direct contribution to the purchase and development of the matrimonial homes, she is entitled to equal share with that of the respondent; that their marriage has been on the rocks but she is yet to institute matrimonial proceedings; that in one of their many altercations, the respondent threatened to dispose the suit parcels by charging them and subsequently defaulting on repayment, inevitably leading to foreclosure; that the respondents threats have led her to file the instant application in order to avoid a situation where he actualizes the threat to the irreversible suffering of their three children who would be left with nowhere to go.

The Response

3. In response to the application the respondent JMN filed his sworn replying affidavit on **23/08/2021** and a notice of preliminary objection which upon perusal has not been found in the court record. The respondent deposed that the instant application is misconceived, inept, bad in law and an abuse of the court process; that they are indeed husband and wife blessed with three children but that he purchased the suit properties solely from his own money without the applicant's contribution and the suit properties were not jointly registered; that he financed the construction of the house through loans and his salary; that the applicant did purchase some tiles for renovation of the kitchen which he had already completed constructing; that the loans alleged to have been advanced to the applicant have no nexus with purchase of the suit properties since at the time they were taken in **1993** and **1997**, there were no plots for developments hence the money could have been directed to other use and not the plot development.

4. The respondent stated that they have been having marital issues known to the family and that he welcomes divorce and further, that he has no intent of disposing any of his properties. He finally deposed that the application fails to meet the threshold as per **Section 17** of the **Matrimonial Property Act** to warrant granting of the order sought and urged the court to dismiss the application.

5. The preliminary objection he raises is to the effect that this court lacks jurisdiction to hear the instant case.

6. The applicant filed a further affidavit dated **28/10/2021** where she reiterated the contents of her supporting affidavit and added that albeit the sale agreement only shows the respondent as the purchaser, she was actively involved in identification of the suit properties and directly contributed in their acquisition and that it was agreed that the respondent participates in the transactions on behalf of both of them as a couple; that despite joint contribution in acquisition of the suit properties, both the respondent and applicant had agreed to have the suit properties registered in the name of the respondent given that their marriage was thriving at the time; that owing to the respondent's condescending attitude towards her substantial contributions of the suit properties, she believes that the respondent would not hesitate to dispose of the suit properties at the earliest opportunity and urged the court to grant her an order of inhibition as prayed; that this court has jurisdiction to hear and determine the case as the declarations sought are in respect of land.

Submissions

7. The applicant filed her submissions on **02/11/2021** and further submissions on **08/12/2021** while the respondent filed his submissions on **19/11/2021**.

Determination.

8. The two issues that arise for determination in the instant application are as follows: firstly, whether the claims made by the applicant falls under the jurisdiction of this court pursuant to **Article 162(2) of Constitution** and **Section 13(2) of ELC Act No.19 of 2011** or this court pursuant to **Article 165(3) (a)** as well as the **Marriage Act No. 4 of 2014** and the **Matrimonial Property Act No. 49 of 2013** and secondly, whether the applicant should be granted the orders sought.

9. Jurisdiction is everything and this court should first establish the same before it can proceed further in analyzing and making a determination of the applicant's claim. The respondent stated that they had filed a preliminary objection raising the issue of jurisdiction and even though the physical copy is not in the court record, both parties have addressed it in their submissions and this court is therefore able to determine it.

10. In the present application, the applicant despite seeking to be granted an order of inhibition, has also dwelt on the issue of sharing of matrimonial property allegedly acquired by herself and the respondent herein during their marriage which is still subsisting. The applicant contends that she made substantial contributions towards the acquisition of **DUNDORI/LANE BLOCK xxxx (NEW GAKOE) and DUNDORI/LANET BLOCK xxxx (NEW GAKOE)** the subject properties herein and that she is apprehensive that the respondent will dispose of the suit properties to her detriment as well as that of their children. She based this allegation on the threats she claims she received from the respondent during one of their many altercations.

11. The applicant stated that their marriage has since been undergoing serious challenges but she is yet to file divorce proceedings against the respondent. She has filed her main application vide originating summons dated **27/05/2021** seeking for orders *inter alia* that the suit properties be declared as matrimonial properties *and be shared equally among them*.

12. The respondent on the other hand argued that at no point does he intend to dispose of the suit as he lives there together with his family. He also submitted that this court does not have jurisdiction to hear and determine this application as it does not relate to environment and use of the subject properties.

13. The jurisdiction of the ELC Court is limited by **Article 162(2) and (3) of the Constitution of Kenya** and **Section 13(2) of the ELC Act No. 19 of 2011. Article 162(2)(b)** which states that **ELC Court** has the mandate to hear and determine disputes relating to use and occupation and title to land.

14. In particular the provisions of **Article 162(2)** of the **Constitution of Kenya 2012** provide as follows: -

“(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause (2).

(2) Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating to—

(a); and

(b) the environment and the use and occupation of, and title to, land.

(3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in clause (2)”.

15. The provisions of **Section 13(2)** of the **ELC Act** clearly gives power to ELC to *hear and determine disputes relating to inter alia, environment, land use planning, title, boundary disputes, land administration and management, choses in action or other instruments granting enforceable interests in land among other related issues.*

16. On the other hand, the **Matrimonial Property Act No. 49 of 2013** does not specifically define "court" but it is trite that division of

matrimonial property is determined by the High Court under its jurisdiction as provided under **Section 3A of the Civil Procedure Act and Article 165(3) (a) of the Constitution of Kenya 2010**. It is my opinion that in one part of this claim what this court is being called upon to do in terms of division of matrimonial property can only be done in the High court. However that part of the claim is severable and its inclusion does not invalidate any other claim that may be properly before this court and of which this court may possess jurisdiction to deal.

17. The issue of ownership of the properties arises in this matter from the plaintiff's claim that she contributed to the acquisition and improvement of the suit property. Ownership goes into the issue of title and that is perfectly within the jurisdiction of this court as it is a challenge to the defendant's title to the suit properties.

18. My sister Hon Justice Kemei had this to say in the case of **B W M v J M C [2018] eKLR** when confronted with a similar challenge in a matrimonial setup:

“16. Much as the Plaintiff purports to seek a declaration in her final prayers that the suit land be declared a matrimonial property, the substratum of the dispute at hand is ownership of the suit land. Having found that the suit land has a certificate of title registered in the name of the Defendant which the Plaintiff seeks to impair by claiming ownership of the suit land on account of the alleged developments, that places the case squarely in the jurisdiction of the ELC Act and consequently the ELC Court.”

19. I had no difficulty dealing in the same manner with similar issues in **Kitale Land Case No. 67 of 2011 (O.S) Nasibi Aore-Vs- Jane Anyona Omutsani** as consolidated with **Kitale Elc No. 86 Of 2012 - Jane Anyona Omutsani -Vs- Nasibi Aore** as well as **Kitale Land Case No. 39 Of 2020 Chepkaptul Akudi James Kukui Lortole**

20. I am of the view that this court has jurisdiction to hear and determine all parts of this dispute as relate to title, use and occupation of land as described in **paragraph 17** herein before. It is not in dispute that both the applicant and respondent are married and that no matrimonial proceedings have been commenced. However it is clear from the case of **AKK vs PKW [2020] eKLR** that a declaration as sought may be made at the judgment stage of this litigation notwithstanding that the marriage has not been.

21. **Section 68(1) of the Land Registration Act** provides as follows:-

“The court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge.”

22. In the ELC Appeal case of **Daniel Gitau Kuria v Muthoni Mbugua Ndumo & 3 others [2021] eKLR** the learned Judge in making his determination cited the case of **Dorcas Muthoni & 2 Others Vs Michael Ireri Ngari (2016) eKLR** where the court held as follows:-

“An order of inhibition issued under Section 68 of the Land Registration Act is similar to an order of prohibitory injunction which bars the registered owner of property under dispute from registering any transaction over the said property until further orders or until the suit in which the said property is a subject is disposed off. The Court issuing such an order must be satisfied that the applicant has good grounds to warrant the issuance of such an order because, like an interlocutory injunction, such an order preserves the property in dispute pending trial”. [Emphasis mine]

23. In the instant case, the title to the suit property is in the name of the defendant and absent any prohibitory measures it runs risk of alienation which would render these proceedings nugatory. The nature of the claim itself renders the plaintiff likely to suffer loss that can not be compensated for by way of damages as the claim directly relates to her matrimonial rights. It is also the opinion of this court that the applicant has demonstrated that she has a *prima facie* case with high a high probability of success upon trial.

24. Consequently this court finds that the application dated 27/5/2021 has merit and it is granted in terms of **prayer no (3)** thereof. Such inhibition shall be registered against the suit titles until the final determination of the instant suit. The costs of the application shall be in the cause. The parties shall comply with the rules and attend a mention before this court virtually on 3/3/2022 for the fixing of a hearing date.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 3RD DAY OF FEBRUARY, 2022.

MWANGI NJOROGE

JUDGE, ELC, NAKURU