



**Linck v Linck (Environment & Land Case E063 of 2022)
[2023] KEELC 17729 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17729 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E063 OF 2022**

**A NYUKURI, J
MAY 31, 2023**

BETWEEN

ANNE MATHILDE PETITPIERRE LINCK APPLICANT

AND

ROBERT SCHIOLER LINCK RESPONDENT

RULING

Introduction

1. Before court is a Notice of Preliminary Objection dated 8th September 2022 filed by the Defendant seeking to have the application dated 4th August 2022 and the entire suit struck out on the following orders;
 - a. That the issues raised in the Notice of Motion application dated 4th August 2022 fall outside the jurisdiction of this Honourable Court as is stated in Article 162 (2) (b) of *the Constitution* of Kenya 2010, Section 6 (1) of the *Matrimonial Properties Act* Cap 49 of 2013 and Section 13 (b) of the *Environment and Land Court Act* 2011 thus making the application and the entire suit incurably defective in law.
 - b. That the issues raised in the Notice of Motion dated 4th August 2022 and the entire suit indicate this is not a land dispute but a dispute arising out of matrimonial property hence a gross abuse of the court process.
 - c. That the Defendant is wrongly enjoined in this matter, as the company the Plaintiff is claiming to own shares is a separate legal entity from the Defendant and can sue and be sued in its own name.
 - d. That the Notice of Motion dated 4th August 2022 and the entire suit herein should thus be dismissed with costs to the Defendant.



2. The Plaintiff filed a replying affidavit in response to factual matters raised in the Preliminary Objection.
3. The Preliminary Objection was disposed by way of written submissions. On record are the Defendant's submissions filed on 6th October 2022 as well as the Plaintiff's submissions filed on 25th October 2022.

Defendant's Submissions

4. Counsel for the Defendant submitted that jurisdiction is a pivotal point which ought to be determined at the preliminary stage. Counsel argued that jurisdiction flows from the law and referred the court to the cases of *Petrojessica Enterprises Ltd v. Leventis Technical Co. Ltd Belgore*, *Patrick Ndegwa Munyua v. Benjamin Kiiru Mwangi & Another* [2020] eKLR and *Owners of the Motor Vessels "Lillian S" v. Caltex Oil Kenya* [1989] KLR 1 for the proposition that where a court finds that it has no jurisdiction to hear and determine a matter, it ought to down its tools and not take any further step.
5. Reliance was also placed on the cases of *Mukisa Biscuits Manufacturing Co. Ltd. V. West End Distributors Ltd* [1969] EA 696 and *Avtar Singh Bhamra & Another v. Oriental Commercial Bank, Kisumu HCCC No. 53 of 2004*, on what constitutes a Preliminary Objection.
6. It was contended on behalf of the Defendant that the jurisdiction of this court flows from Article 162 (2) (b) of *the Constitution* as well as Section 13 (2) (a) to (e) of the *Environment and Land Court Act*. Counsel argued that the jurisdiction of this court does not extend to distribution and or transfer of shares in land held by parties in regard to matrimonial property. Counsel submitted that Section 6 (1) of the *Matrimonial Properties Act* defines what constitutes matrimonial property to include matrimonial homes household goods and effects in the matrimonial home and immovable and movable property jointly owned and acquired during the subsistence of the marriage. Counsel referred to Section 17 of the *Matrimonial Property Act* of 2013 to state that no particular court is identified by the Act but since the Plaintiff had sought for orders beyond land jointly acquired, this matter ought to be heard and determined by the High Court and not this court.
7. Reliance was placed on the case of *Gladys Muthoni Kibui v. Geoffrey Ngatia* [2021] eKLR, for the proposition that in a case involving matrimonial property, the Plaintiff should seek relief in the Family Division Court. Counsel argued that the issues raised don't touch on land but on distribution of the same. In that regard, counsel referred to the case of *National Land Commission v. Afrison Export Import Limited & 10 Others* [2019] eKLR.
8. On whether the Defendant is a proper party to this suit, counsel argued that the orders of injunction sought are against a Defendant in his capacity as a director/shareholder of a company and that therefore the suit is against a company and not against the Defendant and counsel argued that a company is a separate legal entity from its directors. Counsel referred to the cases of *Salomon v. Salomon* [1897] AC 78 and *Victor Mabachi & Another v. Nurtturn Bates Ltd*, Civil Appeal No. 247 of 2005 [2013] eKLR.
9. Counsel argued that Section 27 of the *Civil Procedure Act* provides that costs follow events and contended that the suit should be struck out with costs to Defendant.

Plaintiff's Submissions

10. Counsel for the Plaintiff submitted that the Preliminary Objection raised, lacks merit and does not constitute a Preliminary Objection as it is based on contested matters. Reliance was placed on the cases of *Mukisa Biscuits Manufacturing Company Ltd v. West End Distributors Ltd* [1969] EA 969 and *Kenya National Trading Corporation v. Bawazir & Co.* [1993] Ltd Nairobi High Court Civil Case No. 258 of 1997.



11. Counsel argued that whereas the Defendant argued that the dispute herein is not a land dispute, he admits in his replying affidavit that Title No. Athi River/Athi river Block 6 (suit property) is the subject of this suit. Counsel took the position that the Preliminary Objection raised a mix of facts and law and that therefore the same did not constitute a preliminary objection. Counsel argued that the question of whether the Defendant is a director or not is a matter to be determined at the hearing.
12. The Plaintiff submitted that the suit property is not matrimonial property.
13. Counsel referred the court to Article 159 (2) (d) of *the Constitution* to contend that this court is enjoined by *the Constitution* to administer substantive justice. To buttress this argument, counsel relied on the case of *Stephen Boro Gitiba v. Family Finance Building Society & 3 Others*, Civil Application No. Nai 263 of 2009 for the proposition that the overriding objective overshadows technicalities as well as precedents and rules.

Analysis and Determination

14. I have carefully considered the Preliminary Objection as well as submissions filed by the parties. In my view, two issues emerge for determination;
 - a. Whether the Preliminary Objection filed by the Defendant constitutes a proper Preliminary Objection.
 - b. Whether the Preliminary Objection herein is merited.
15. A Preliminary Objection is a pure point of law raised in regard to pleadings where the underlying facts are not in dispute. The right to be heard on merit is a Constitutionally protected right under Article 50 of *the Constitution* and therefore the court ought to be vigilant to ensure that any matter raised as a Preliminary Objection is determined as such only when it is without ambiguity a pure point of law anchored on agreed facts, hence the point of law raised should be sufficient to dispose of the suit as the same ought to be devoid of contested allegations.
16. In the case of *Mukisa Biscuits Manufacturing Company Limited v. West End Distributors Ltd* [1969] EA 696, the court held that a Preliminary Objection is in the nature of a demurrer as it raises a pure point of law on the assumption that all the pleaded facts are correct.
17. In the instant objection, the Defendant has raised two matters; namely that this court lacks jurisdiction as the suit property is matrimonial property and that the Defendant is wrongly sued as the company where the Plaintiff claims to own shares is a separate legal entity.
18. Having considered the pleadings, I note from paragraph 3 of the plaint that the fact that the Plaintiff and the Defendant had been husband and wife who divorced vide a decree dated 30th June 2022 Kajiado CMC Divorce Petition No. E31 of 2021, is noted as a material fact. The Plaintiff also stated that the suit property is owned through Kaharabu Limited whereof she owns 999 shares while the Defendant owns 1 share. Another material fact in paragraph 10 of the plaint is that apart from the suit property, the parties jointly own 1 rally car Porsche 911 registration number 673 CYA with a value of Kshs. 28 million, household goods, an extensive collection of African Art worth Kshs. 20 million, two gold mining dredges, 2 gold detecting machines, gold digging equipment, 1 trailer valued at Kshs. 2 million, a motor vehicle registration number KBE ---V Landcruiser of approximate value of Kshs. 2 million, and motor vehicle registration number KAZ ---A with approximate value of Kshs. 2 million.
19. In paragraph 17 of the plaint, the Plaintiff has sought for an order compelling the Defendant to share in equal proportions with the Plaintiff on account of joint acquisition by virtue of being husband and wife, all the above properties plus an old fridge, washing machine, beds, sofa set, television set, cutlery,



- crockery, linen, lawn mower, gardening tools, wheel barrows, horses, paint, fencing wire and wood planks, among other items.
20. Ultimately, the Plaintiff sought for the equal share from those items together with money in a joint Bank Account at Diamond Trust Bank.
 21. I have considered the defence and in paragraph 10 of the defence, the Defendant states that the items listed in paragraphs 10 of the plaint were acquired during the subsistence of their marriage and that the same can be described as matrimonial property, hence the dispute should be heard by the family court.
 22. The Defendant conceded to the jurisdiction of this court in relation to the suit property only.
 23. In view of the above, the fact that the Plaintiff has sought in the suit for sharing of property both movable and immovable, which property was acquired during the subsistence of their marriage is not disputed. It is also not disputed that beside the suit property, the Plaintiff seeks for orders compelling equal sharing of the property acquired during the subsistence of the marriage.
 24. For the above reasons, I find and hold that the dispute herein is in respect of properties acquired by the parties during the subsistence of their marriage. Under Section 6 of the *Matrimonial Properties Act*, matrimonial property is defined as the matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
 25. In the premises, I reject the Plaintiff's submission that the suit has nothing to do with matrimonial property. In the premises, I find and hold that the underpinning facts are not in dispute and therefore this is a proper Preliminary Objection which is raised as jurisdiction.
 26. Under Rule 6 of the *Matrimonial Property Rules* 2022, the court with jurisdiction to determine a matrimonial dispute is the High Court and where the subject matter does not exceed the pecuniary jurisdiction of the Magistrate Court, the matter is determined by a Magistrate or a Kadhi where the spouses profess the muslim faith.
 27. While this court's jurisdiction flows from Article 162 (2) (b) of *the Constitution* as read with Section 13 of the *Environment and Land Court Act* to hear and determine matters touching on the environment, the use and occupation of and title to land, this is not a blanket cheque that clothes the court with jurisdiction in relation to all land matters. The *Matrimonial Property Act* vide Section 6 thereof defines matrimonial property to include immovable property acquired during the subsistence of the marriage, hence a dispute on land which is matrimonial property ought to be determined by the Family Court.
 28. In the premises, I find and hold that this court has no jurisdiction to hear and determine the suit as framed by the Plaintiff. As the dominant issues raised in this matter ought to be heard by the family court, I hereby transfer this matter to the High Court sitting at Machakos for hearing and determination. For avoidance of doubt, the interim orders issued herein are discharged.
 29. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31ST DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;

Ms Ngina for Defendant/Respondent



Mr. Jaoko for Plaintiff

Josephine – Court Assistant

