



**ACL v WKL; Kenya Electricity Transmission Company Limited (Interested Party)
(Matrimonial Cause 7 of 2015) [2023] KEHC 3191 (KLR) (30 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 3191 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE 7 OF 2015
TM MATHEKA, J
MARCH 30, 2023**

BETWEEN

ACL APPLICANT

AND

WKL RESPONDENT

AND

KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED . INTERESTED PARTY

JUDGMENT

1. The applicant herein, by Originating Summons dated 7th April,2016 brought under Article 45(3) & 159 of *the Constitution* of Kenya 2010,Section 6,7,12(1),12(3),12(5) And 17 of *Matrimonial Property Act*, 2013 seeks the following reliefs;
 - i. That this Honourable Court does make a Declaration that Land Parcels known as L.R NO. RONGAI/RONGAI/2/83 & L.R NO.8907/1 all situate in Rongai are Matrimonial Properties.
 - ii. That this Honourable Court Does make a Declaration that the Applicant and Respondent are both entitled to equal share of L.R NO. RONGAI/RONGAI/2/83 & L.R NO.8907/1 all situate in Rongai
 - iii. That this Honourable Court does make an order directing the apportionment of equal share to the Applicant and Respondent herein over the Properties known as L.R NO. RONGAI/RONGAI/2/83 & L.R NO.8907/1 All Situate In Rongai
 - iv. Spent



- v. That the costs of this suit be borne by the Respondent.
2. The application is based on the grounds on its face and supported by the affidavit of Ann Chepkorir Leitich sworn on the same date.
 3. She deposed that on or about the year 1971 she got married to the respondent under Kalenjin Customary Law and they were blessed with seven children. Namely; Evelyne Leitich; Florence Leitich; Emily Leitich; Judith Leitich; Antoinette Leitich; Job Leitich; And Abraham Leitich.
 4. That during the subsistence of their marriage the respondent became cruel to her and to their children, necessitating her to file a suit seeking separation. The Judgment on the same was delivered on 19th October, 2004 granting her inter alia possession of the parcel of land in Rongai, Rongai/Rongai/2/83 And L.R 8907/1 to utilise for the upkeep of their children; together with an order denying the respondent access to their Rongai Farm.
 5. She deposed that they built a matrimonial property on the property and that is where she brought up all their children.
 6. It was her deposition that she is a farmer and she utilised the land rearing animals and growing crops for her subsistence and that of the children.
 7. Although the suit property is registered in the respondent's name she contributed directly and indirectly to the purchase of the same.
 8. She averred that since delivery of the judgment in 2004 she enjoyed quiet possession of the property until sometime in the year 2012 when the respondent sent surveyors to the land with the aim of subdividing the same.
 9. She stated that she placed cautions on the aforesaid parcels of land so as to prevent the respondent from dealing with the same without her knowledge. However, the respondent used the police and provincial administration to intimidate her to vacate the property. That through her advocates a demand notice was sent to the police to stop their constant harassment of her.
 10. It was her averment that sometimes in the year 2015 the respondent caused mutation of L.R Rongai/Rongai/2/83 and subdivided the same into various parcels though the title deeds are yet to be issued.
 11. That in view of the above, she is apprehensive the respondent might fraudulently dispose off all the parcels of land inclusive of the one where their matrimonial home is built thereby leaving her and her children destitute.
 12. She believes that the Land Parcel Number L.R 8907/1 being their matrimonial home cannot be disposed of without her consent.
 13. The respondent opposed this application through his Replying Affidavit sworn on 9th May, 2016. He confirmed that he and the applicant were still married. That she had always resided on land parcel no. L.R 8907/1 that sits on 30 acres, which is not subdivided and is registered under his name.
 14. He stated that the lower court did not transfer L.R No 8907/1 to the applicant, and that the applicant had not made any contribution to the purchase of the parcel of land or the construction of the matrimonial home. That he bought the land with the house already constructed and denied having sent any surveyors to that parcel of land.



15. With Respect To L.R Rongai/Rongai/Block 2/83 (Chepseon) he annexed the mutation forms, the LCB consent and the certificate of compliance demonstrating that the same was subdivided in 2014, and the original title closed giving way to the following titles and their beneficiaries.

PARCEL NO.	BENEFICIARY	
i. I	RONGAI/RONGAI/ BLOCK2/787-	ABRAHAM KIPNG'ENO TOO
ii. Ii	RONGAI/RONGAI/BLOCK 2/798	JOB KIPYEGON TOO
iii. Iii	(RONGAI/RONGAI/BLOCK 2/799	ANNTONETE CHEPKURUI LEITICH
iv. Iv	RONGAI/RONGAI/BLOCK 2/800	JUDITH CHEROTICH LEITICH
v. V	RONGAI/RONGAI/BLOCK 2/801	EMILY CHEMUTAI LEITICH
vi. Vi	RONGAI/RONGAI/BLOCK 2/802	FLORENCE CHERONO LEITICH
vii. Vii	RONGAI/RONGAI/BLOCK 2/803	EVELYN CHEBET LEITICH
viii. Viii	RONGAI/RONGAI/BLOCK 2/804	EVELYN CHEBET LEITICH
ix. Ix	RONGAI/RONGAI/BLOCK 2/805	WILSON LEITICH
x. X	RONGAI/RONGAI/BLOCK 2/806	FLORENCE CHERONO LEITICH
xi. Xi	RONGAI/RONGAI/BLOCK 2/807	EMILY CHEMUTAI LEITICH
RONGAI/RONGAI/BLOCK 2/808	JUDITH CHERUTICH LEITICH	
RONGAI/RONGAI/BLOCK 2/809	ANNTONETE CHEPKURUI LEITICH	
RONGAI/RONGAI/BLOCK 2/810	KENYA ELECTRICITY TRANSMISSION COMPANY	



16. He averred that save for parcels no. Rongai/Rongai/Block 2/805 and Rongai/Rongai/Block 2/810, all the beneficiaries of the other subdivisions were their children with the applicant as set out in the applicant's Affidavit.
17. All the beneficiaries were joined herein vide a Consent Order of 21st March 2021.
18. He stated that he disposed off Parcel No. RONGAI/RONGAI/BLOCK 2/810 to Ketraco in order to get money for purposes of discharging RONGAI/RONGAI/BLOCK 2/83 (The Mother Title) from National Bank where the land had been used as security for a loan of Ksh. 1,000,000/=.
19. He contended that the applicant's fears that he may fraudulently dispose off the land are farfetched, imaginary and baseless and that he is aware the applicant left the country on 5th February, 2016 and came back sometimes in May 2016 and as such he was doubtful that she appeared before the commissioner for oaths on 7th April 2016 as she purports.
20. Lydia Wanja, the manager conveyancing, litigation and prosecution with the Ketraco swore a Replying Affidavit on 25th October, 2022. She deposed that following this court's (A.K Ndung'u J) Ruling of 7th February, 2017, the prayers sought with respect to Rongai/Rongai/Block 2/83 were overtaken by events as it no longer exists. That since there was no appeal against the ruling of 7th February, 2017, it remained binding upon the parties.
21. She averred that via a newspaper advert of 27th May, 2015, the public was notified by the National Land Commission of the project to construct the 499/220kv Olkaria Lessos-Kisumu transmission line to evacuate electricity from geothermal generation plants of Olkaria.
22. That the said notice indicated that compensation details would be communicated to the affected individual landowners and that any objections regarding the wayleaves should be made to the chairman, National Land Commission.
23. She was aware that following parcels of land belonging to the applicant, respondent and the other beneficiaries were earmarked for construction of the project and subsequently Ketraco issued offers for compensation which she set out in her affidavit.
24. She deposed that with respect to compensation due to the parties, the Ketraco computed the limited loss of use of land as per the valuations provided and in accordance with the Resettlement Policy Framework 2011 (RPF 2011) and prepared letters of offer to the affected parties. That the interested party was to only pay the parties upon compliance with the terms set out in the offer and that from the table above only Florence Cheroni Leitich has been compensated.
25. With respect to Rongai/Rongai/Block 2/810, she averred that the same was purchased by Ketraco at Kshs. 39,000,000.00/= upon the respondent executing the necessary transfer documents and obtaining spousal consent from his then wife Margaret Chepkosgei Leitich.
26. She stated that following a successful transfer Ketraco was issued with a title for parcel Rongai/Rongai/Block 2/810 and continues to enjoy quiet possession as a bonafide purchaser and registered owner and that only the Environmental and Land Court pursuant to section 13 of the [Environment and Land Court Act](#) No.19 of 2011 can grant orders with respect to this parcel of land.
27. She deposed that notwithstanding the foregoing, the Ketraco and the larger public will suffer great prejudice if any adverse orders are granted over the affected project parcels as it will expose the public to intermittent or unstable power supply which may damage households' appliances, factory machinery or imminent loss of business.



28. She urged the court to decline any orders that may affect parcel Rongai/Rongai/Block 2/810 or any other parcel affected by the project.
29. The applicant Ann Chepkorir Leitich filed a Supplementary Affidavit on 11th November, 2022. She averred that no spousal consent was obtained from her to date regarding the subject properties and the purported spousal consent dated 5th June, 2014 could not obtain at all since the properties herein had never been co-owned by Mary Chepkosgei and the respondent.
30. She stated that the transactions undertaken by the Ketraco were illegalities and void ab initio as her consent was not obtained and none of the beneficiaries participated in the same and/or approved the sale and transfers for which compensation would hoist.
31. The suit was disposed off via Written Submissions.

APPLICANT’S SUBMISSIONS

32. On what constitutes matrimonial property and whether the property in dispute is a matrimonial property, the applicant submitted that L.R No. Rongai/Rongai/2/83 & L.R No.8907/1 qualify as matrimonial properties as they were acquired during the subsistence of marriage between her and the respondent.
33. She submitted that she contribute directly to the purchase, acquisition and the maintenance/ improvement of the property during the subsistence of her marriage with the respondent.
34. On whether the respondent could dispose off matrimonial property without considering her interest, she submitted in the negative. She argued that owing to her intricate role played in the acquisition of the suit property, the property could not be validly sold without her consent.
35. She contended that in this matter she faces threat of eviction and permanent loss of matrimonial property and is bound to suffer irreparable harm as demonstrated since the remainder of her family resides on the suit premise with no alternative home.
36. With respect to mandatory injunction, the applicant submitted that the principles for grant of mandatory injunctions were set out in the case of Kenya Breweries Ltd. Another vs Washington Okeyo [2002] I E. A 109 wherein it was held that there must be special circumstances shown over and above the establishment of a prima facie case for a mandatory injunction to issue.
37. She argued that she had demonstrated that above irreparable harm she had a personal attachment to the property being the only one available to her and her children.
38. She submitted that pursuant to the provisions of Section 24(a),26(1) and 30(3) of the [Land Registration Act](#) she is the rightful and equal owner of the suit property and as such she deserves to enjoy quiet possession and the 2nd defendant is in illegal purchase. She relied on Joyce Nyansiaboka Onchomba vs Joseph Kenyanya & 2 Others [2013] eKLR in this regard.
39. She submitted that she will suffer irreparable harm if the 2nd defendant assumes occupation on the backdrop of illegal purchase and SWM vs MKK [2007] eKLR where the court stated;

“In this case the plaintiff has proved that she is the owner of the suit property. The defendants are therefore trespassers on the suit property. The plaintiff having satisfied the court that the defendants are trespassers on the suit property, the plaintiff is entitled to an injunction to restrain the defendants once evicted from trespassing once again into the suit property.”



40. The applicant submitted that the suit property is matrimonial property and that the respondent held the same in trust for her and her children. She relied on section 4 and 6 of the [Matrimonial Property Act](#) as well the decision in *Agell vs Richard Mbole Kimuyu* [2013] eKLR where the court held that;
- “If legal ownership of such property is registered in the name of only one of them, that one is deemed to hold the land in trust beneficially for himself and the other person”.
41. She submitted that the balance of convenience tilts in her favour because the property is the only place she had known as her home together with her children and if prayers sought are not granted she will be evicted by the interested party.
42. On whether the sale was valid and whether the purchaser acquired a valid title, she submitted that in view of lack of consent from her the sale transaction between the respondent and the interested party was illegal and fraudulent. That the principle of “*nemo dat quod non habet*” shows that one cannot pass or confer title upon another he or she does not have.

SUBMISSIONS BY THE RESPONDENT

43. The respondent filed his Submissions on 8th November, 2022 and supplementary submissions on 5th December, 2022.
44. On what comprise matrimonial properties, the respondent cited the provisions of Section 6 of the [Matrimonial Property Act](#) and Section 2 and submitted that L.R No Rongai/Rongai/2/83 ceased to exist at the time of institution of this suit in the year 2016 as the same had been subdivided and titles deeds issued to the current proprietors as detailed in his Replying Affidavit which position was also appreciated by the court in the Ruling of 8th February 2017.
45. He argued that this property cannot be addressed by this court as it previously held that the same has been overtaken by events.
46. He further submitted that the applicant had not tendered any proof to show that she contributed towards its acquisition. He argued that the applicant had a duty to prove her contribution towards the subject property. for this proposition reliance was placed on *Kimani vs Kimani* (1997) LLR 553 cited with approval in *Kamore vs Kamore* [2000] 1 EA 80 where it was held that it is the duty of the appellant to prove that she contributed directly or indirectly towards the acquisition of the properties in respect of which she claimed to be entitled to a share without losing sight of the fact that in regard to indirect contribution, the same was invariably to be considered in its own special circumstances and *P N N vs Z W N* [2017] eKLR where the court stated that division of Matrimonial Property between spouses shall be based on their respective contribution to acquisition.
47. It was the respondent’s position that this land was not available for distribution. He cited the case of *Elizabeth Wanjiru Karuga vs Paul Karuga* [2017] eKLR where the court observed that the land sold to third parties was not available for distribution. the court in that regard stated as follows:
- “.... however, taking into account the fact that Langas Block 111 608 was sold to a third party, a bona-fide purchaser for value, the same is not available for distribution. The applicant also sold Kipkarus L.R 12429. The only portion that is available for distribution is Langas block 111 609.”
48. The respondent disputed the assertion that the aforesaid subdivision and transfer of the former land to third parties was marred with fraud. He submitted that the applicant had a duty to plead and prove the allegation of fraud. for this Proposition reliance was placed on the case of *Vijay Morjaria vs*



Nansingh Madhusingh Darbar & Another [2000] eKLR, Ndola vs Ndolo (2008) 1KLR (G & F)742 & Christopher Ndaru Kagina vs Esther Mbandi Kagina & Another [2016] eKLR.

49. Regarding L.R NO. 8907/1, the respondent submitted that it is common ground that he solely acquired the same and that it comprises a house and its acreage is 30. He conceded that this is a Matrimonial Property as defined in Section 2 of the Matrimonial Property Act 2013 and prayed the same be distributed equally between him and the applicant.

SUBMISSIONS BY KETRACO

50. Ketraco submitted that the applicant has made unsubstantiated allegations of fraud against it and failed to show the area she has been cultivating in L.R No. Rongai/Rongai/2/83 (The Former Parcel) considering the sub-divisions were done prior to filing this suit. That the issue of fraud is unpleaded and not particularised in the OS. Reliance was placed on Laban Omuhaka Otumbula vs Truphosa Okutoyi [2019] eKLR & C O Okere vs Esther Nduta Kiiyukia & 2 Others [2019] eKLRE wherein the it was held that fraud must be pleaded and threshold of proof is higher than that of a balance of probabilities.
51. It was submitted further that KETRACO followed due process in acquiring Rongai/Rongai Block 2/810 and its title has never been challenged in any court of competent jurisdiction and that further it has not been cited for breach or contempt of any orders with respect to the former parcel or resultant sub-divisions and as such no sufficient grounds have been laid to warrant grant of the orders sought.
52. It was argued for KETRACO that following the Ruling of 17th February 2017 by this court any issue in respect of former parcel of land is res judicata and contrary to Section 7 of the Civil Procedure Act, Cap 21 of the Laws of Kenya; that the issue on the former land and the resultant subdivision can only be determined by environment and land's court pursuant to Section 13 of the Environment and Land Court Act No.19 of 2011.

ISSUES FOR DETERMINATION

53. Having considered the application, the rival affidavits and the respective submissions the main issues for determination are:
1. Whether the suit properties L. R NO. RONGAI/RONGAI/2/83 & L. R NO.8907/1 are matrimonial property.
 2. Whether L. R NO. RONGAI/RONGAI/2/83 is available for distribution.
 3. Whether the applicant contributed towards the acquisition and the development of the matrimonial properties.
 4. Whether the Applicant is entitled to an Equal Share of the Matrimonial Properties.

ANALYSIS

ISSUE NO. 1- Whether The Suit Properties L. R NO. RONGAI/RONGAI/2/83 & L. R NO.8907/1 Constitute Matrimonial Property

54. It is not disputed that parties herein were married under kalenjin customary law and are currently separated. the applicant submitted that the suit properties qualify to be matrimonial property as they were acquired during the subsistence of the marriage between her and the respondent.



55. On the part of the respondent he did not dispute that the said suit properties were acquired during the subsistence of the marriage. However, he disputed that L.R No. Rongai/Rongai/2/83 is not a Matrimonial Property as it no longer exists in view of subdivisions that were made prior to filing of the instant suit. Regarding L. R. No. 8907/1 the respondent concurred that it is a Matrimonial Property.

56. Section 6 (1) of the Matrimonial Property Act defines matrimonial property as follows:

“

“(1) For the purposes of this Act, Matrimonial Property Means—

(A) The matrimonial home or homes;

(b) Household goods and effects in the matrimonial home or homes; or

(c) Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.

(3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.

(4) A party to an agreement made under subsection (3) may apply to the court to set aside the agreement and the court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

57. Pursuant to the above provision and considering that the respondent did not dispute that these properties were acquired during the subsistence of marriage, it goes without saying that the two properties answer the description of matrimonial property.

ISSUE NO.2 – Whether l. R. no. Rongai/Rongai/2/83 is available for distribution

58. With respect to this property, the respondent submitted that the same is not available for distribution. The respondent admitted having subdivided this land in 2014 and stated that the titles to the subdivision had already been issued. Actually the same were requested for and were deposited in court pending the hearing and determination of this OS.

59. In addition, this court (Justice A K Ndung'u) pronounced itself on the status of this parcel of land in its ruling of 8th February 2017. That Ruling was never appealed against. Essentially the court expressed the view that the land having been subdivided in 2014 and titles issued to the interested parties the court could not issue preservative orders. In the circumstances the property would not be available for distribution.

60. In addition, the evidence shows that the same was distributed to among others the children of the applicant who did not appear when served with the application or make any responses.

ISSUE NO.3 whether the applicant contributed towards the acquisition and the development of the matrimonial properties.

61. It is not in dispute that the LR NO. 8907/1 was purchased together with the matrimonial home. It is also not disputed that there was a case in court over the said home in 2016 however it is not correct



for the applicant to argue that the land was allocated to her by the court. What is clear is that she was allowed to till the land and utilise it for farming. The respondent does not dispute that the applicant lives there and had been living there with the children. Other than that she has utilised the property since that court order the applicant has not demonstrated any monetary contribution to the purchase of the property and did not give any evidence with respect to the other non-monetary contributions. It is not lost to me that under section 14 of the *matrimonial property act* there is a rebuttable presumption that the property acquired in the name of one spouse is being held in trust for the other spouse. The said Section 14 of the *Matrimonial Property Act* provides;

Where matrimonial property is acquired during marriage-

- (a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse and
- (b) In the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interest in the matrimonial property are equal."

62. The court in *TMW vs FMC* [2018] eKLR cited *Njoroge vs Ngari* [1985] KLR, 480, where the court had held that -

"... if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made contribution towards its acquisition, then each spouse has proprietary interests in that property. Thus, it is important to mention that the act takes into account non-monetary contribution and provides that a party may acquire beneficial interest in property by contribution towards the improvement of the property equal to the contribution."

63. The applicant's share would depend on proof that she contributed directly or indirectly towards the acquisition of the same

64. Contribution is defined by Section 2 of the *Matrimonial Property Act* to mean monetary and non-monetary contribution. Non- monetary contribution includes:

- A. Domestic work and management of the matrimonial home;
- B. Child care;
- C. Companionship;
- D. Management of family business or property; and
- E. Farm work

65. In *NWM vs KNM* (2014) eKLR, it was stated that: -

"...the court must give effect to both monetary and non-monetary contributions that both the applicant and the respondent made during the currency of the marriage to acquire the matrimonial property."

66. The applicant claimed that she made monetary contributions towards the acquisition of the subject properties. However, no tangible evidence was adduced to support this position. It is trite law that he who alleges must prove. (see Section 107-109 of the *evidence act*). It was also the applicant's position that she made non-monetary contribution towards acquisition of the subject properties by taking care of the house, children and offering companionship to the respondent.



67. The evidence on record shows that the applicant only resided in L.R.No. 8907/1. This is where her family lived. She raised all her children in the matrimonial home on this property. Her children with the respondent are all adults now. Her non-monetary contribution of the applicant is not disputed by the respondent. He submits that that contribution makes her entitled to half the property. He goes further to add that there is a family business on plot 122 Salgaa Trading Centre which he would like this court to distribute in the same manner.
68. However, this plot 122 Salgaa Trading Centre was not part of the properties mentioned in the Originating Summons. There is no evidence before me as to what could be the contribution of each party other than the respondent's statement that is registered in his name and managed by an agency. I decline to make any orders with respect to this property.
69. Be that as it may the Supreme Court In Petition No. 11 of 2020 Joseph Ombogi O vs Martha Bosibori Ogentoto and the The Federation Of Women Lawyers (Fida Kenya) & Another stated as follows:
- “...The equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that article 40(1) and (2) of *the constitution* which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language. While therefore reiterating the finding in Echaria, we also find that Article 45(3) Acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in *the constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co-ownership of property (hence vesting of property rights) and Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only. The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfil their obligation of proving what they are entitled to by way of contribution”
70. I am guided and bound by this holding.

ISSUE NO.4- Whether the applicant is entitled to an equal share of LR 8907/1.

71. This is conceded by the respondent.
72. There was no evidence that the respondent had made any attempts to subdivide or sell the property where the matrimonial home is, or anything to demonstrate that he had made any attempt to evict the applicant from the property.
73. In the end the following orders issue:
- a. A declaration be and is hereby issued that land parcels known L.R.No.8907/1 situate in Rongai is matrimonial property. The property as L.R No. Rongai/Rongai/2/83 is not matrimonial property for purposes of distribution.
 - b. A declaration be and is hereby issued that the applicant and respondent are both entitled to equal shares of L.R No.8907/1 situate in Rongai
 - c. An order do and is hereby issued directing the apportionment of equal share to the applicant and respondent herein over the property known as L.R No.8907/1 situate in Rongai.



- d. The applicant's share to contain the matrimonial home.
- e. Each party to bear its own costs.

Dated, Signed and Delivered Virtually this 30th March, 2023.

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Mumbua T Matheka

Judge

Judgment HCMAT PPTY Cause 7/15 [8]

