



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**MMN v LNN (Civil Case 3 of 2019) [2023] KEHC 20743 (KLR) (26 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20743 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT EMBU**  
**CIVIL CASE 3 OF 2019**  
**LM NJUGUNA, J**  
**JULY 26, 2023**  
**IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S**  
**PROPERTY ACT 1882**

**BETWEEN**

**MMN ..... APPLICANT**

**AND**

**LNN ..... RESPONDENT**

**JUDGMENT**

1. The applicant filed originating summons dated October 8, 2007 under section 17 of the Married Women's Property Act 1882, seeking:
  - a. That a declaration do issue that the properties known as
    - i) Ngandori/Manyatta/T.142;
    - ii) Ngandori/Manyatta/T.139;
    - iii) Ngandori/Manyatta/T.83;
    - iv) Ngandori/Manyatta/T.6;
    - v) Ngandori/Manyatta/T.15
    - vi) Ngandori/Manyatta/T.203;
    - vii) Ngandori/Manyatta/T.196;
    - viii) Ngandori/Kirigi/T.246;
    - ix) Ngandori/Kiriari/T.232;



- x) Gatheri/Nembure/LR 4273;
  - xi) Gatheri/Kithimu/LR 6784;
  - xii) Gaturi/Gathimu/LR 6784; and
  - xiii) Gaturi/Gathimu/LR 7161.
- b. With all buildings and developments thereon acquired by the joint funds and efforts of the applicant and the respondent during their marriage, and all registered in the name of or in possession of the respondent, are owned jointly by the applicant and the respondent;
  - c. That a declaration do issue that the respondent holds the said properties in trust for the applicant; That the said properties be settled for the benefit of the applicant in such a manner and proportions as this honorable court deems fit and just;
  - d. That the respondent himself, his agents and/or his servants be restrained from alienating, encumbering or in any other manner disposing off the said properties and where he has dealt with them in any manner prejudicial to the applicant's interests, then be ordered to compensate her share at the market rates at the hearing of this suit; and
  - e. That the respondent be condemned to pay the costs of this application and the incidentals thereto.
2. The application was premised on the ground that the said properties had been acquired through joint efforts of the applicant and the respondent.
  3. In the supporting affidavit, the applicant averred that she and the respondent were married in the year 1976 through Kikuyu Customary Law and they do not have any children. That together, they acquired the above-listed properties jointly through direct and indirect contributions. That in 1993 the respondent opted to marry another wife whom he gave some of the properties. That vide Embu District Land Tribunal in Land Dispute Case No 38 of 2003 the elders awarded the applicant part of the matrimonial property. This award was adopted by the court as judgment in Embu Senior Principal Magistrate's Court as award no 2 of 2006. Being dissatisfied with the decision of the district land tribunal, the respondent appealed to the Provincial Land Appeals Committee which appeal was dismissed. That vide Embu High Court Miscellaneous Application No 114 of 2006, the respondent applied for judicial review of the decision in the Embu Senior Principal Magistrate's Court as award no 2 of 2006 and the high court found that the District Land Tribunal lacked jurisdiction to adjudicate matrimonial property, ownership of land and land registered under Registered Land Act (now repealed).
  4. In a replying affidavit dated May 13, 2008, though the respondent denied that the properties were bought through contribution by both of them, he further admitted that is true that the applicant contributed towards some of the properties and he is willing to transfer parcel no Ngandori/Manyatta/203 to her. He averred that he sold some of the properties in order to sustain his second wife and her 5 children and that it would be unfair to share the properties equally in total disregard of the second wife and their 5 children.
  5. The court directed that the matter proceeds to hearing and thereafter parties to file their written submissions.
  6. PW1 who is the applicant adopted her witness statement as evidence-in-chief stating that she was indeed married to the respondent but they got divorced in 1984. She averred that the properties were



acquired between 1976 and 1984. That in 1993 the respondent remarried and he took everything away from her including her business rendering the applicant miserable, living in a rented house in Kiambuthi and the respondent has never allowed her to enjoy the properties. That she demands to be given the following properties:

- i. Ngandori/Manyatta T.142
  - ii. Ngandori/Manyatta T.139
  - iii. Ngandori/Manyatta T.83
  - iv. Ngandori/Manyatta T.6
  - v. Ngandori/Kirigi T.246
  - vi. Gaturi/Nembure/4273 half share
7. PW2 who is the sister to the applicant adopted her witness statement dated March 25, 2019 as her evidence-in-chief. In the statement, she stated that the applicant and respondent got married in 1976 under Kikuyu Customary Law and all the rites were performed. That the applicant was incapable of bearing children, and as a result the respondent started to physically assault the applicant which led to their separation. That the two worked together to purchase several properties during their marriage. That some of the properties were bought solely by the applicant but could not be registered in her name due to barriers in traditions.
8. DW1 who is the respondent adopted his witness statement dated March 10, 2023 as evidence-in-chief. He stated that they attended Embu District Land Tribunal in Land Dispute Case No 38 of 2003 whose outcome was adopted in Embu Senior Principal Magistrate's Court as award no 2 of 2006. That upon appeal, the District and Provincial Land tribunal decisions were set aside in judicial review in Embu High Court Miscellaneous Application No 114 of 2006. He stated that he indeed married another wife who bore him children unlike the applicant. That he averred that the applicant took issue with the fact that the second wife bore children and she left the home to a place of her choice. He denied that the applicant contributed in purchasing the properties stating that the applicant's tailoring business was too small to manage the investments claimed. That the applicant disregarded the order of the court setting aside the decisions of the land tribunals and she transferred the properties to third parties. He also claimed *res judicata* as the issues in the application were dealt with in the previous suits.
9. In the applicant's submissions, she stated that the suit is to be guided by the Married Women's Property Act, 1882, because it was filed prior to commencement of the *Matrimonial Property Act* 2013. For this, she relied on the decision in the case of *JOO Vs MBO [2020] eKLR*. She further confirmed that the properties were purchased within the subsistence of the marriage as follows:
- a. Ngandori/Manyatta/T.142- December 16, 1987
  - b. Ngandori/Manyatta/T.139- August 26, 1985
  - c. Ngandori/Manyatta/T.83- May 23, 1985
  - d. Ngandori/Manyatta/T.6- March 29, 1982
  - e. Ngandori/Manyatta/T.15- February 12, 1986
  - f. Ngandori/Manyatta/T.203- May 11, 1987
  - g. Ngandori/Manyatta/T.196- May 11, 1987



- h. Ngandori/Kirigi/T.246- October 16, 1986
  - i. Ngandori/Kiriari/T.232- November 26, 1980
  - j. Gatari/Nembure/LR 4273- January 31, 1983
10. That following the proceedings at the District land tribunal, the respondent proceeded to transfer the titles awarded to the applicant. However, she stated that when the awards of the district and provincial land tribunals were set aside by the high court, the respondent did not have the titles transferred back to his name. It is her case that failure by the respondent to transfer the titles back to his name is enough proof that he intends that the properties remain in the name of the applicant. The applicant claimed interest in the properties which are in the category of matrimonial property and for this they relied on the case of Peter Mburu Echaria Vs Priscilla Njeri Echaria (2007) eKLR where the court in discussing distribution of matrimonial property cited the cases of *Nderitu Vs Nderitu Civil Appeal No 203 of 1997 (unreported)*, *Muthembwa Vs Muthembwa Civil Appeal No 74 of 2001 (unreported)*. She also relied on section 7 of the Married Women's Property Act 1882.
11. The respondent in his submissions stated that he is indeed the husband of the applicant and the position has not changed, which he argues, is why he cannot give her the properties she is demanding. He relied on the case of *Peter Ndungu Njenga Vs Sophia Watiri Ndung'u (2000) eKLR* and section 7 of the *Matrimonial Property Act* 2013. He stated that of the properties claimed in the originating summons, he does not recognize Gatheri/Kithimu/LR 6784 and Gatari/Gathimu/LR 6784 for which the applicant failed to produce documentation. That he acknowledged the applicant's claim over Ngandori/Manyatta T.142, Ngandori/Manyatta T.139, Ngandori/Manyatta T.83, Ngandori/Manyatta T.6, Ngandori/Kirigi T.246 and Gatari/Nembure/4273 half share. He further argued that the high court order dated July 6, 2007 ought to have ordered that any subsequent transactions on the titles be cancelled because 3 of the titles had passed to 3<sup>rd</sup> parties being the applicant's nephew(s) and purchaser(s). That he instituted Embu ELC Case No 1 of 2021 against the plaintiff for wrongfully alienating his land and the same is still pending before the court.
12. With regard to the foregoing, I find that the issues before the court are:
- a. Whether the Married Women's Property Act 1882 applies to this case;
  - b. Whether or not the applicant has made a legitimate claim under section 7 of the Married Women's Property Act, 1882; and
  - c. Whether the claim for res judicata by the respondent is properly founded.
13. In determining whether the Married Women's Property Act, 1882 applies, I have noted that the originating summons dated October 8, 2007 was filed on October 16, 2007. At the time, the statute applicable was the Married Women's Property Act, 1882 which ceased to apply in Kenya on January 16, 2014 when the *Matrimonial Property Act* no 49 of 2013 was enacted. In my considered view, the Married Women's Property Act, 1882 shall apply in determining this matter.
14. In the case of *R W Vs A M K [2015] eKLR* the court held that even though the suit was still not determined after enactment of the *Matrimonial Property Act* no. 49 of 2013, it had been filed when the Married Women's Property Act, 1882 was in force. The court further held that the *Matrimonial Property Act* no 49 of 2013 could not be applied retrospectively. In this, the court cited with approval, the case of *MM -VS- BAM - Nairobi Civil Appeal No 267 of 2011* where the Learned Judges referred to the Supreme Court decision in *Samuel Kamau Macharia & another Vs Kenya Commercial Bank*



Limited & 2 others [2012] eKLR where quoting from Blacks Law (6th Edition), defined retrospective law as :

' A law which looks backward or contemplates the past; one which is made to affect acts or facts occurring, or rights accruing, before it came into force. Every statute which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability in respect of transactions or considerations already past. One that relates back to a previous transaction and gives it a different legal effect from that which it had under the new law when it occurred.'

15. As to the legitimacy of the applicant's claim under the applicable law, the originating summons is premised on the provisions of section 17 of the Married Women's Property Act, 1882. This section allowed married women to bring claims relating to matrimonial property against their husbands. It states:

' In any question between husband and wife as to the title to or to possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High- Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit : Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be ; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this Act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be) by writ of certiorari or otherwise as may be prescribed by any rule of such High Court ; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court : Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room : Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter of any such application for the purposes of costs or otherwise, be treated as a stakeholder only.'

16. From the evidence tendered before this court, there is no doubt that the applicant and the respondent are husband and wife, having been married under the Kikuyu Customary Law. PW2 confirmed that the respondent satisfied all the rites as required. I have taken note that the applicant claimed to have divorced the respondent but the respondent claims he is still married to the applicant. Throughout the



proceedings, I have not seen evidence pointing towards a divorce but rather, there is plenty evidence showing that the applicant moved out of the matrimonial home. This is merely a separation and not a divorce.

17. I am now faced with the question whether the claim on the properties is legitimate. The court is called upon to exercise its discretion as provided for under section 7 of the Married Women's Property Act, 1882. In the case of *MWW Vs SWM [2017] eKLR* the court stated thus:

' In *Rimmer versus Rimmer (1952) ALL E ER 863* where he cited with approval a passage from the judgment in *Newgrosh versus Newgrosh* (unreported); in that case Bucknil LJ, said of section 17 as follows:

' That section 17 gives the judge a wide power to do what he thinks under the circumstances is fair and just. I do not think it entitles him to make an order which is contrary to any well-established principle of law, but subject to that, I should have thought that disputes between husband and wife as to who owns property which at one time at any rate, they have been using in common are disputes which may very well be dealt with by the principle which has been described as 'palm tree justice'. I understand that to be justice which makes orders which appear to be fair and just in the special circumstances of the case'.

18. Of great importance is for this court to establish the measure of contribution by both parties in acquiring the properties. In the case of *Peter Mburu Echaria Vs Priscillah Njeri Echaria [2007] eKLR* the court stated:

' In all cases involving disputes between husband and wife over beneficial interest in the property acquired during marriage which have come to this court, the court has invariably given the wife an equal share. However, a study of each of these cases shows that the decision in each case was not as a result of the application of any general principle of equality of division. Rather, in each case the court appreciated that for the wife to be entitled to a share of the property registered in the name of the husband, she had to prove contribution towards the acquisition of the property. The court considered the peculiar circumstances of each case and independently assessed the wife's contribution as equal to that of the husband.'

In the same case, the learned judge also invoked the international conventions such as Article 16 (1) (h) of the Convention on the Elimination of All Forms of Discrimination against Women; article 16 (1) of the Universal Declaration of Human Rights; and article 7(d) of the Protocol to the African Charter on Human and People's Rights on the Rights of Women; he held that equal sharing of matrimonial property whenever occasion arises is the way to go.

19. In the present case, the applicant stated that she contributed towards acquisition of the properties but for some of them, the respondent was the sole registered proprietor due to barriers of tradition forbidding women to own land, a fact that the applicant decries. However, neither the applicant nor the respondent has been able to prove their monetary (or otherwise) contribution towards acquisition of the suit properties. Nevertheless, this does not deter the court from applying its discretion. Being informed by decision in the case of *Peter Mburu Echaria vs Priscillah Njeri Echaria* (supra), it is my view that the properties were acquired with a 50:50 contribution by the applicant and the respondent but the court notes that the parties herein are still a husband and wife as no evidence has been availed to the court to prove that they are divorced. As such, the court can only issue declaratory orders on the



legal entitlement of the parties but not on division of the properties. The actual division and transfer to be effected upon dissolution of the marriage.

20. From the pleadings and evidence tendered, I acknowledge that some of the properties have been transferred to third parties and the decision herein will affect the current ownership of the properties. However, litigation must come to an end at some point. In as much as the circumstances of this case tempt me to go into issues of the disposition of the various properties, I shall leave that to the correct forum as stipulated under Article 162(2)(b) which established the Environment and Land Court. In addition, I have taken note that the respondent has filed Embu ELC Case No 1 of 2021 against the applicant and the same is pending before the court and I hope through the said suit, the issue of disposition of the affected parcels of land will be well addressed.
21. The respondent claimed the matter herein is res judicata as the issues were determined in Embu High Court Miscellaneous Application No 114 of 2006. I have noted that the previous suit merely quashed and set aside the findings of the district and provincial land disputes tribunals which attempted to adjudicate the matter without jurisdiction to do so. If anything, the district land tribunal attempted to address all the issues in the originating summons but it lacked jurisdiction to do so. This left the issues in the originating summons unattended and which issues remain life before me today. In my view, the respondent's claim of res judicata fails instantly.
22. Having taken into account the pleadings and submissions by the parties, the evidence and section 17 of the Married Women's Property Act, 1882, I do find that the application is merited and it is hereby allowed. The following orders to subsequently issued:
  - a. A declaration that the following properties are matrimonial properties and were acquired jointly by the applicant and the respondent in equal shares.
    - i) Ngandori/Manyatta/T.15
    - ii) Ngandori/Manyatta/T.203
    - iii) Ngandori/Manyatta/T.196
    - iv) Ngandori/Kiriari/T.232
    - v) Gatheri/Nembure/LR 4273
  - b. However for the following properties:
    1. Ngandori/Manyatta/T.142
    2. Ngandori/Manyatta/T.139
    3. Ngandori/Manyatta/T.83
    4. Ngandori/Manyatta/T.6
    5. Ngandori/Kirigi/T.246Were disposed off and they belong to third parties as per the certificates of official searches annexed to the respondent's replying affidavit filed on February 5, 2021.
  - c. Each party to bear their own costs.
23. It is so ordered.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 26<sup>TH</sup> DAY OF JULY, 2023.**



**L. NJUGUNA**  
**JUDGE**

