



REPUBLIC OF KENYA



LWG v JK (Civil Suit 10 of 2017) [2022] KEHC 15601 (KLR) (24 November 2022) (Judgment)

Neutral citation: [2022] KEHC 15601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL SUIT 10 OF 2017
MM KASANGO, J
NOVEMBER 24, 2022**

BETWEEN

LWG APPLICANT

AND

JK RESPONDENT

JUDGMENT

1. LWG (hereafter the former wife) was married to J K (hereafter the former husband) on January 9, 2009. That marriage was celebrated at the district commissioner’s office at Kiambu West, Kiambu county. Prior to the formalization of their union by that marriage the couple had lived together in ‘come we stay’ relationship for one year. The former wife has approached this court through an originating summons dated January 26, 2012. By that summons she seeks the following prayers.
 1. That it be declared that the properties [moveable and immovable] acquired by joint funds and efforts of the applicant and the respondent (being the following) are owned jointly by the applicant and the respondent.
 - a. A land parcel no Karai/Gikambura /(withheld).
 2. That this honorable court be pleased to order the division of the said property.
 3. That the respondent be restrained from alienating encumbering, disposing and or dealing in any manner with the said property .
 4. That the respondent be condemned to pay costs of this application and incidentals thereto.
2. The summons was filed by the former wife while she was acting in person. I highlight this because after receiving the parties *viva voce* evidence and also final submissions it became obvious that what the parties in this case seek in a determination of the contribution each party made if any of the purchase which is registered in their joint names. The property the subject of the summons is KARAI/ GIKAMBURA/ (withheld). The parties also seek for division of that property. That indeed was the



evidence adduced. The court shall proceed to determine what the parties placed before this court by the evidence not withstanding that the pleadings before court do not directly bring out all those issues.

3. In concluding as I do above, I find solace in two decisions of the Court of Appeal where the said court ratified the determination of an issue brought forth by the parties but where the issue was not pleaded. The first Court of Appeal case I cite in that regard *Transworld (K) Limited v Robin Makori Ratemo* (2008) eKLR as follows:-

“22. In *Odd Jobs v Mubia* [1970] EA 476 Duffus P while considering the question whether an unpleaded issue can form the basis of a decision, rendered himself as follows:-

‘Generally speaking pleadings are intended to give the other side fair notice of the case that it has to meet and also to arrive at the issues to be determined by the court. In this respect a trial court may frame issues on a point that is not covered by the pleadings but arises from the facts stated by the parties or their advocates, and on which a decision is necessary in order to determine the dispute between the parties.’”

4. The second case I rely on is the case of *Christopher Orina Kenyariri t/a Kenyariri and Associates Advocates v Salama Beach Hotel Limited & 3 Others* 2017 eKLR viz:-

“However, if it appears from the cause followed at trial that an unpleaded issue has been left to the court to decide, the trial court may validly determine the unpleaded issue. (See *Odd Jobs v Mubia* [1970] 476, and *Baber Alibhai Mawji v Sultan Hashim Lalji & Another*, CA No 296 of 2001). The parties neither raised the issue of *res judicata*, nor canvassed or left it to the learned judge to decide. As this Court stated in *Kenya Ports Authority v Kuston* [2009] 2 EA 212, the responsibility of a court is to rule on the evidence or issues on record and not to introduce extraneous matters not dealt with by the parties.”

5. The former wife’s case is that prior to getting married to her former husband, she had been looking to invest in an immovable property. Her evidence was supported by the testimony of her Mother, Hannah Wambui Gichuru. Her mother testified that:-

“My daughter L was in the process of purchasing a plot when they met with the said man (the former husband).

Somewhere along the way, the seller of the plot she was to buy changed her mind about the same. So, my daughter decided to look for an alternative. That’s when K (the former husband) introduced her to a cousin of his who was selling his land.”

6. The said mother further testified that since her daughter and the former husband had just settled down together, she advised her daughter to have the subject property registered in both hers and the former husband’s name. The mother stated that the said advise did not please the daughter for the reason that the daughter said the former husband was not contributing any money towards that purchase.

7. The former wife produced the sale agreement in respect to the subject property dated July 27, 2009, signed by the vendor and the two purchasers, that is, the former husband and former wife. The purchase price was kshs 348,200. The agreement provided that Kshs 200,000 was paid on execution of that agreement and the balance Kshs 148,200 would be paid when the transfer was affected. The former wife produced her bank statement which shows that, on July 29, 2009 ksh.200,000 was withdrawn. Further, the former wife produced a bankers’ cheque for kshs 148,000 and a bank statement of the former wife’s account which reflects the withdrawing of kshs148,200.



8. The former husband failed to prove either by documentations or otherwise of his direct contribution towards the purchase price of the subject property.
9. He was required to do so by provision of section 7 of the *Matrimonial Property Act* which states: -
 - “... Ownership of matrimonial property vests in the spouse according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage otherwise dissolved.”
10. The former husband oscillated from one position to another on the issue of contribution. He at one time stated that he and the former wife jointly raised the funds for the purchase of the subject property. Later, he stated that he paid the broker’s and surveyor’s fees. He also stated that he sent money to the former wife through Mpesa and has continued to pay for insurance cover for their child. In all those assertions, the former husband failed to produce evidence in support of those contentions. He was indeed unable to prove direct contribution. There is evidence the former husband was sued by the former wife for the child’s maintenance. The former husband in that action did not deny failure to maintain the child but rather pleaded he did not have sufficient finance to support the child and also because he was supporting his parents and his family members.
11. The subject property is registered in the joint names of both parties. Section 14(b) of *Matrimonial Property Act* provides: -
 - “Where matrimonial property is acquired during marriage -
 - (a) ...
 - (b) In the names of the spouses jointly there shall be rebuttable presumption that their beneficial interest in the matrimonial property is equal.”
12. The presumption under that subsection is rebuttable. The former wife, as stated above proved by documented evidence that the funds for the purchase of the subject property were from her sole bank account. That evidence shows she paid for the purchase with no monetary contribution of the former husband. The former wife has rebutted the presumptions in Section 14(b) to the required standard of civil burden of proof.
13. I however take cognizance of the fact that the parties cohabited for one year, prior to them formalizing their marriage and within 6 months of that formalization the subject property was purchased. I would in my opinion evaluate the indirect contribution the husband might have made in that marriage to be for the value of Kshs.10,000. I will therefore order that the property do vest in the sole name of the former wife on condition the former wife does pay the former husband Kshs.10,000. Because of the acrimony that I witnessed in court during the hearing between the parties, the said amount shall be deposited into this Court.

DISPOSITION

14. The judgement of this court is as follows: -
 - a. L W G shall deposit kshs 10,000 into this court the assessed contribution of J K to the purchase of KARAI GIKAMBURA /withheld.
 - b. On that deposit being made the title of KARAI /GIKAMBURA /withheld shall be cancelled and the said property shall be registered in the sole name or L W G



- c. At the reading of this judgment a mention date shall be fixed when this court shall confirm deposit of kshs 10,000 by L W G as ordered in a above.
- d. Each party shall bear their own costs of this suit.

JUDGMENT DATED AND DELIVERED AT KIAMBU THIS 24TH NOVEMBER, 2022.

MARY KASANGO

JUDGE

In the presence of:-

Coram:

Court assistant:- Mourice/Julia

Mr Muigai instructed by Musyoka Muigai and Co Advocates for L W G

For applicant: - John Kamau

Court

Judgment delivered virtually,

MARY KASANGO

JUDGE

