



**JNM v LWK (Civil Appeal 45 & 54 of 2015 (Consolidated))
[2017] KEHC 3554 (KLR) (16 August 2017) (Judgment)**

Joseph Njeru Mbogo v Lilian Wangai Kathuri [2017] eKLR

Neutral citation: [2017] KEHC 3554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL APPEAL 45 & 54 OF 2015 (CONSOLIDATED)**

FN MUCHEMI, J

AUGUST 16, 2017

BETWEEN

JNM APPELLANT

AND

LWK RESPONDENT

JUDGMENT

1. Being dissatisfied with the judgment of Embu Principal Magistrate in CMCC No. 116 of 2014 the appellants in appeals Nos. 45 and 54 both of 2015 filed the separate appeals which were consolidated.
2. For purpose of this judgment, the appellant in HCA No. 45 of 2015 will hereinafter be referred as “the appellant” in the consolidated appeal while the appellant in HCA No. 54 of 2015 will be referred to as the respondent.
3. The appellant was the plaintiff in CMCC No. 116 of 2015 while the respondent was the defendant. Judgment was entered in his favour that LR Gatruri/Githimu/xxxx and LR Gatari/Githimu/xxxx were properties of the appellant and not matrimonial properties. The appellant’s prayer that vehicle registration No. KBD xxxx belongs to him was dismissed. As such the vehicle was declared the property of the respondent. Each of the parties appealed against the orders which were not in their favour.
4. The appellant faults the magistrate in holding that the vehicle registration No. KBD xxx was the property of the respondent instead of holding that it was matrimonial property. He relies on the ground that he is solely the one who raised the money to purchase the said vehicle. It is also claimed that the magistrate erred in failing to order eviction of the respondent from L.R. Gatari/ Githimu/xxxx which was a prayer in the plaint.



5. The respondent faults the magistrate for failing to hold that she did not contribute to the construction of the house on L.R. Gaturi/Githimu/xxx and for finding that it was not matrimonial property.
6. The respondent alleges that LR Gaturi/Githimu/xxxx and xxxx should not have been declared properties of the appellant and that the order for removal of caution of the two parcels was a misdirection.
7. The appeal raises the following issues for determination:-
 - (a) Whether the magistrate's court was possessed of the jurisdiction to determine the matter.
 - (b) Whether the declarations made on L.R. Gaturi/Githimu/xxxx and Gaturi Githimu/xxxx that the parcels were the properties of the appellant was a misdirection.
 - (c) Whether the learned magistrate erred in finding that the vehicle registration No. KBD xxxx was the property of the respondent.
 - (d) Whether the order for removal of caution in respect of L.R. Gaturi/Githimu/xxxx and xxx were based on law and evidence.
 - (e) Whether the magistrate erred in failing to order that the respondent be evicted from L.R. Gaturi/Githimu xxxx.
 - (f) Who should meet the costs of the appeal.
8. It was submitted by the respondent that the Senior Principal Magistrate court had no jurisdiction to determine the issues relating matrimonial property. A look at the plaint shows that the relevant prayer reads as follows:-

A declaration that land parcels Nos Gaturi/Kithimuxxxx and Gaturi/Githimu/xxxx are not matrimonial properties and lifting of cautions lodged against them and the defendant.

9. Section 17(1) of the *Matrimonial Property Act* confers jurisdiction to “court” without singling out whether it is the High Court or the Resident Magistrate's court. It provides that:-
 - (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
 - (2) An application under subsection (1)—
 - (a) shall be made in accordance with such procedure as may be prescribed;
 - (b) may be made as part of a petition in a matrimonial cause; and
 - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.
10. The respondent relied on the case of *Ngeru v Ngeru* ELC Civil Suit No. 317 of 2014 where the court in relation to a similar argument on the issue of jurisdiction held as follows:-

No particular court is determined by the *Act*, and can therefore be any Court that has been given jurisdiction to hear matrimonial disputes. The High Court is in this regard granted original and unlimited jurisdiction in civil matters by the *Constitution* under article 165(3). The *Marriage Act* of 2014 in addition provides that the courts that will hear matrimonial



causes arising under the Act are Resident Magistrate's courts and within the limits provided under the law as to their jurisdiction.

11. The prayer before the Principal Magistrate Court was of declarations which the court has jurisdiction to determine. The suit touched on a disputed matrimonial property in the same suit where the court gave orders for the dissolution of the marriage. I therefore find that the magistrate was vested with jurisdiction to determine the issues before him.
12. It follows that the ground on lack of jurisdiction has no merit.
13. The appellant produced certified copies of register for L.R. xxxx and xxxx in evidence before the magistrate. For the first parcel, it was transferred to the appellant by one Patrick Gichovi Mbogo on 11/12/2000. The respondent placed a caution against the title on 17/07/2013.
14. The second parcel LR xxxx is registered in the name of Patrick Gichovi Mbogo on 8/09/1997 as a gift from one Mutitu Mbogo. It was cautioned by the respondent on 17/07/2013.
15. The case of the respondent is that she sold her own land LR No Gaturi/Nembure/xxxx and used the proceeds to develop LR xxxx which had an incomplete house. She said in cross-examination that she spent about Kshs.800,000/=. It was her evidence that she contributed to the development of LR xxxx since 2009 when the parties started staying together as husband and wife.
16. The respondent stated that her reason for placing caution against the titles of the two parcels was to protect her own interest and that of her children.
17. It is not in dispute that the two properties were acquired long before the parties became husband and wife. This was in the year 1997 and 2009 respectively. The parties are in agreement that their marital relationship started in the year 2009.
18. Under Section 9 of the Matrimonial Property Act, it provides:-

Where one spouse acquires property before or during he marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.
19. The law is clear that matrimonial property is what the parties acquire during the subsistence of the marriage. It therefore follows that the properties in issue were acquired before the parties started staying together as husband and wife and long before the customary marriage ceremonies were conducted. The properties are both registered in the names of the appellant.
20. The respondent's claim is based on contribution made to complete the house the appellant had started constructing before the year 2009. Although she claims to have contributed funds to complete the house, the respondent did not produce any evidence of any funds she may have received or generated and how she utilized them. The few receipts she attached had no details of whom they were issued to and where the meagre materials purchased were taken. The total amount from the four receipts amounted to a negligible sum of Kshs.27,300/=.
21. The respondent's witness in his statement did not give any figure of how much funds for labour he was paid for the work he did. He said he left the construction incomplete. Neither was the work done quantified by an expert to prove that the respondent used any funds on the building. The witness was not called to testify for his evidence to be tested in cross-examination.



22. The other issue that arises is whether the contribution to the cost of construction affects the ownership of the property. I am of the considered view that it does not unless the court is hearing a dispute of division of property which was not the case here.
23. The burden of proof is on the respondent to satisfy the court that LR Nos Gaturi/Githimu/xxxx and xxxx are matrimonial properties. It is my finding that she failed to discharge the burden. I reach a conclusion that the magistrate did not err in his finding on this issue.
24. The learned magistrate dissolved the marriage between the parties which decision is not a subject of this appeal.
25. The appellant obtained orders to the effect that the two properties belonged to him. The respondent's reason for lodging cautions against the properties were given as protection of her interests and that of the five children of the parties. This statement carries the case further towards succession rights which do not exist herein. I am of the considered opinion that the properties having been declared the properties of the appellant, there is no justification for existence of the cautions. The learned magistrate's decision ordering for removal of the cautions was based on the law and the facts.
26. In regard to the vehicle KBD xxxx, the evidence of the appellant was that he is the one who purchased the vehicle using a loan advanced to him by Equity Bank. He annexed a bank statement showing a deposit of Kshs.500,000/= in his account followed by a withdrawal in Mombasa. He says he bought vehicle registration number KAW xxxx Toyota Corolla which the parties later agreed to sell. The proceeds of sale were used to buy the vehicle whose ownership is in dispute registration No KBD xxx Toyota station wagon.
27. The respondent annexed a copy of log book showing the vehicle is registered in the joint names of herself and consolidated bank who advanced her a loan. She gave the money to the appellant to buy her the vehicle.
28. The appellant did not produce any documentary evidence on the source of the funds for purchase of the vehicle. The deposit was done on 19/10/2011 and withdrawal done on the same date at Mombasa. The appellant did not produce any evidence to support the alleged source of funds or to support the bank transactions and the sale.
29. On the other hand the respondent produced a copy of logbook to prove that she was the co-owner of the vehicle with Consolidated Bank. This is credible proof of ownership. I find that the magistrate's decision on the declaration that the vehicle registration number KBD xxxx belonged to the respondent was supported by cogent evidence.
30. The court having made the declarations on the properties in favour of the appellant, was under an obligation to determine the prayer seeking eviction orders. The respondent was living in the home on LR xxxx during the hearing of the case and may still be living there. The property having been declared as belonging to the appellant and the marriage having been dissolved, the respondent had no business to continue living on the land.
31. The respondent contended that the magistrate erred in failing to give an eviction order against the respondent. In the judgment the magistrate gave the declaration sought that the two properties LR xxxx and xxxx belonged to the appellant. The orders for removal of caution were also given removing any restrictions on the ownership.
32. The prayer for eviction was one of the prayers in the plaint. Having obtained the declaration and the removal of caution orders. I am of the considered opinion that the order for eviction ought to have followed. It was an error not to grant the prayer for eviction since the respondent had proved his case.



33. In effect, I hereby order that an eviction order issued against the appellant from LR No Gaturi/Githumu/xxxx within a period of 60 days.
34. With the exception of this last order, the rest of the appeal stand dismissed with no order as to costs.
35. Each party will meet their own costs of this appeal and of the court below.
36. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 16TH DAY OF AUGUST, 2017.

F. MUCHEMI

JUDGE

In the presence of:-

The appellant – Joseph Njeru Mbogo

