



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wainaina v Gaitho (Land Case Appeal E015 of 2024)  
[2025] KEELC 3858 (KLR) (8 May 2025) (Judgment)**

Neutral citation: [2025] KEELC 3858 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA  
LAND CASE APPEAL E015 OF 2024**

**JM KAMAU, J**

**MAY 8, 2025**

**BETWEEN**

**BETH WAMBUI WAINAINA ..... APPELLANT**

**AND**

**WAINAINA NJUGUNA GAITHO ..... RESPONDENT**

*((Being an appeal against the Ruling of the Honourable E  
Wanjala Principal Magistrate delivered on 8th August 2024))*

**JUDGMENT**

1. In the Originating Summons dated 14/12/2023, the Appellant sought for Orders that there be:
  - a. A declaration that Land Reference Number NYANDARUA/MKUNGI/1X4 was a matrimonial home.
  - b. Whether the Applicant and the Respondent contracted customary law marriage in 1973.
  - c. Whether the marriage was dissolved and a decree nisi issued vide Engineer Senior Principal Magistrate's Court Divorce Cause No. E004 of 2022.
  - d. Whether the applicant and the Respondent during the substance of their marriage used and applied their income unsparingly towards acquisition and development of their acquired matrimonial property.
  - e. Whether the Respondent secretly cause subdivisions of parcel No. NYANDARUA/MKUNGI/114 into parcel Numbers Nyandarua/Mkungi/590 and 591 and parcel Numbers Nyandarua/Mkungi/590 subdivided into Nyandarua/Mkungi/43XX2, 4XX3, 3X4, 4XX5 and 4XX6, before disposing parcels Numbers Nyandarua/Mkungi/591 to Dickson Karanja Kariuki.



- f. A declaration that the remaining portion parcel Number Nyandarua/Mkungi/4XX6 currently registered in the name of Wainaina Njuguna Gathio be transferred to the Appellant
  - g. An order that properties and the income from the same be settled in proportions aforesaid or as the court may order.
  - h. That the Respondent be restrained from disposing of any of the above stated properties pending the determination of this Suit.
  - i. That in default of the Respondent signing the necessary transfer forms, the Registrar of the High Court of Kenya be authorized to sign all documents required to effect transfer in place of the respondent or any other person holding any title or interest on behalf of the respondent to effect the orders of the court in favour of the Appellant.
2. In the Supporting Affidavit sworn on 14/12/2023 the Appellant deponed that she married the Respondent in 1973 under Kikuyu Customary Law but there are no issues of the marriage save the ones the Appellant brought into the marriage viz, Kingu, and Kimanjulu. A Divorce was filed in Engineer SPM'S Court being Divorce Cause No. E004 of 2022 and Judgment was delivered on the 16/2/2023 dissolving the marriage. That after chasing the Appellant from the Matrimonial home in 2008 the Respondent secretly caused the sub-division of Nyandarua Mkungi/114 into parcel numbers Nyandarua/Mkungi/ 4382, 4383,4384, and 4386 and Nyandarua/Mkungi/591 and this last one he transferred to Dickon Karanja Kariuki.
  3. In his Replying Affidavit sworn on 15/4/2024, the Respondent said that he married the Appellant in 2005 and not 1973 having been a widower before. He said that she had no children and that she started demanding that the Respondent transfers his parcel of land to her or else she leaves him. She also demanded that he disowns his children and that they should not live on the aforesaid parcel of land and that she attempted to sell the land but was stopped by his children.
  4. The Lower Court delivered Judgment on 8/8/2024 to the effect that the Respondent bought the Suit land before the Appellant married him and as such the Appellant did not contribute to the acquisition of the same and therefore dismissed the Appellant's claim without costs.
  5. Consequently, the Appellant appealed to this Court on the grounds that:
    1. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant testified that she married the Respondent in 1973 hence arriving at the incorrect finding that it was not disputed that Appellant and the Respondent got married in 2001.
    2. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Appellant helped pay the loan on the suit property, did domestic work, offered companionship and childcare and hence the Appellant contributed to the acquisition and development of the suit property making it matrimonial property.
    3. The Learned Trial Magistrate erred in law and in fact by failing to appreciate that the Respondent himself acknowledged the Appellant's contribution and promised to give her two acres of the suit property and build her house.
  6. The Appellant therefore prayed that her Appeal be allowed, Judgment of the Principal Magistrate given on 8/8/2024 be set aside and her plea in the Originating Summons dated 14/12/2023 be allowed. She also prayed for costs of the suit and the Appeal.



7. *The Constitution* of Kenya, 2010, in Article 45 (1) and (3) says that the family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State, and that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
8. Under section 2 of the *Matrimonial Property Act* No. 49 of 2013, contribution is defined to mean both monetary and non-monetary contribution. Non-monetary contribution includes: Domestic work and management of the matrimonial home; Child care; Management of family business or property; and Farm work. Section 7 of the same Act stipulates that ownership of Matrimonial Property depends on each spouse's contribution to wit: -

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
9. Section 9 of the Act recognizes contribution through improvement of a property acquired before or during the marriage in the following terms:

Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the 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.
10. Section 14 of the Act provides that:

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 interests in the matrimonial property are equal.
11. In Kenya, property owned by a spouse before marriage generally remains their separate property. However, the other spouse may acquire a beneficial interest in it if he/she contributes to its improvement. Prenuptial agreements can also be used to delineate separate and matrimonial property.
12. The *Matrimonial Property Act* preserves the legal principle of separation of property acquired before or after marriage subject to rules on commingling or improvement by the other spouse. Thus, simply put, if you keep your separately owned property as truly separate from jointly owned property, then you retain your interest 100% in the said assets.
13. Matrimonial assets are defined to include the family home and goods therein and assets acquired jointly during the marriage. On the other hand, non-matrimonial assets are those acquired separately by a person and his/her spouse before or during the marriage. It is important to note that a spouse may additionally acquire a beneficial interest in separately owned property based on contribution e.g., through improving that asset or through commingling.
14. On own perusal of the Appellant's evidence in totality, which was largely uncontroverted, I am quite satisfied that it did not establish her financial contribution to the purchase of the properties. The exact



proportion of her contribution is not ascertainable with any measure of precision as was succinctly put by a five-judge bench of this Court in ECHARIA –VS- ECHARIA

"Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property."

15. The Appellant has not shown how she helped pay the loan on the suit property, did domestic work, offered childcare since the two never sired any and hence how the Appellant contributed to the acquisition and development of the suit property making it matrimonial property. On the issue of children, it is very unfortunate that the Appellant found some children who had lived with their father peacefully and whose parents had already acquired some properties during the lifetime of their mother and now wanted them out and dispossessed without her having contributed in any way to the acquisition and/ or improvement of the properties.
16. The Appellant can also not get orders that would disentitle another person (Dickson Karanja) who was not a party to the suit thus prejudicing him and condemning him unheard. Consequently, this Appeal is hereby dismissed with costs.

**JUDGMENT DATED AND SIGNED AT NYANDARUA THIS 8TH DAY OF MAY, 2025**

**MUGO KAMAU**

**JUDGE**

