



REPUBLIC OF KENYA



KENYA LAW
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EWM v JMK (Civil Appeal E052 of 2022) [2025] KEHC 9542 (KLR) (3 July 2025) (Judgment)

Neutral citation: [2025] KEHC 9542 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E052 OF 2022
JK NG'ARNG'AR, J
JULY 3, 2025

BETWEEN

EWM APPELLANT

AND

JMK RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Wang'uru (Hon. G.M. Mutiso, PM.) delivered on 19th March 2019 in Divorce Cause No. 2 OF 2018)

JUDGMENT

1. The respondent filed a petition dated 14th January 2018 under the provisions of the *Marriage Act* and the *Matrimonial Property Act*. He sought for orders that the marriage between himself and the appellant be dissolved; that the parcels of land namely L.R. No. Kirinyaga/Gathigiriri/XXXX, XXXX and XXXX be declared to exclusively belong to the respondent and costs of the petition.
2. The gist of the petition was that the respondent and the appellant were lawfully married at Gathigiriri Catholic Church Kirinyaga District on 13th August 1994. They lived and cohabited as husband and wife at Kiamanyeki, Kangai and Gathigiriri Kirinyaga County and were blessed with ten issues; eight of them were alive adults. The respondent accused the appellant of treating him with cruelty resultantly driving him out of the matrimonial home where the appellant resided. He contended that amounted to constructive desertion. The respondent further submitted that he was the proprietor of the suit properties having acquired them before he was married to the respondent.
3. In an undated answer to the petition, the appellant accused the respondent of concealing material facts in the following manner: the respondent summoned her before the Deputy County Commissioner Mwea East to discuss the restrictions placed on the suit parcels of land; the respondent was intent on disposing of the parcels of land having subdivided them; the caution lodged by the appellant galvanized the filing of the petition; the particulars of cruelty were a red herring from the fact that the respondent had since married another woman; that he voluntarily left the matrimonial home to live with his second



wife; the appellant was intent on leaving his kin landless; she was entitled to marital rights over the properties; and the marriage had not irretrievably broken down. She urged the court to dismiss the petition and find the properties matrimonial and ought to be reserved.

4. In its judgment dated 19th March 2019, the trial court found that the marriage between the parties had irretrievably broken down on account of the matrimonial offence of cruelty. The court further found that the properties namely L.R. No. Kirinyaga/Gathigiriri/XXXX and L.R. No. Kirinyaga/Gathigiriri/XXXX belong to the respondent having been acquired in 1970. As for L.R. No. Kirinyaga/Gathigiriri/XXXX, the same was declared matrimonial property and the appellant held a life interest.
5. It is those findings that have triggered this appeal. In her memorandum of appeal dated 8th June 2022 and filed on 9th June 2022, the appellant raised six grounds disputing the findings of the learned magistrate. Those grounds are summarized as follows: the marriage between the appellant and the respondent had not irretrievably broken down; the trial court ought to have declared all the suit properties as matrimonial; and the trial court disregarded her evidence particularly that she contributed towards acquisition of the suit properties. She thus prayed that the appeal be allowed, the judgment delivered on 19th March 2019 be set aside and costs of this appeal.
6. The appeal was canvassed by way of written submissions. The appellant's undated written submissions contended that the trial court made erroneous findings absent a green card documenting that the properties were obtained in 1970 when the suit parcels of land were registered in the respondent's name in 2016. She argued that since the properties emanated from a morphosis of Kirinyaga/Gathigiriri/XXX, all the properties should be declared matrimonial property.
7. She submitted that it was improper for the trial court to conduct twin proceedings; the divorce proceedings ought to have preceded the dispute over matrimonial property. She fortified that submission with the reliance of section 7 and 17 of the *Matrimonial Property Act*. Submitting on the divorce proceedings, she urged that she was a staunch Catholic that did not want a divorce. As such, the parties could not be divorced. In any event, no matrimonial offence, that is cruelty or adultery, had been proved on a balance of probabilities. Finally, she argued that the mere lack of records was not akin to a failure to contribute to the acquisition of matrimonial properties. She prayed that the appeal be allowed.
8. The respondent opposed the appeal. In his written submissions dated 4th September 2023, the respondent submitted that the marriage between himself and the appellant had irretrievably broken down with no means of salvation. He argued that the trial court properly found that on account of having lived separately for four years, the ground of desertion supported the divorce. He submitted that the findings by the learned magistrate on the suit properties were lawful and just in line with the provisions of section 6 (1) and (4) of the *Matrimonial Property Act*. Citing several decisions, he prayed that the appeal be dismissed with costs.
9. I have considered the written submissions, examined the memorandum of appeal and record of appeal and analyzed the law. The duty of this court as a first appellate court was articulated by this court in Joseph Ndungu Kagiri vs. Republic [2016] KEHC 4153 (KLR) that held as follows:

“The principles to be kept in mind by a first appellate court while dealing with appeals are:-[1]

- a. There is no limitation on the part of the appellate court to review the evidence upon which the order appealed against is founded and to come to its own conclusion.



- b. The first appellate court can also review the trial court's conclusion with respect to both facts and law.
- c. It is the duty of a first appellate court to marshal the entire evidence on record and by giving cogent and adequate reasons may set aside the decision appealed against or the entire proceedings if they are flawed.
- d. When the trial court has breached provisions of *the constitution* or ignored statutory provisions, or misconstrued the law, or breached rules of procedure, or ignored crucial evidence or misread the material evidence or has ignored material documents, or in any manner compromised the accused rights to a fair trial or prejudiced the accused etc. the appellate court is competent to reverse the decision of the trial court depending on the materials in question.

In addition to the above principles, I may add that the duty of a first appellate court was authoritatively summarized by the Supreme Court of India in the case of *K. Anbazhagan v. State of Karnataka and Others*, [2] as follows:

“The appellate court has a duty to make a complete and comprehensive appreciation of all vital features of the case. The evidence brought on record in entirety has to be scrutinized with care and caution. It is the duty of the Judge to see that justice is appropriately administered, for that is the paramount consideration of a Judge. The said responsibility cannot be abdicated or abandoned or ostracized, even remotely,The appellate court is required to weigh the materials, ascribe concrete reasons and the filament of reasoning must logically flow from the requisite analysis of the material on record. The approach cannot be cryptic. It cannot be perverse. The duty of the Judge is to consider the evidence objectively and dispassionately. The reasoning in appeal are to be well deliberated. They are to be resolutely expressed. An objective judgment of the evidence reflects the greatness of mind – sans passion and sans prejudice. The reflective attitude of the Judge must be demonstrable from the judgment itself. A judge must avoid all kind of weakness and vacillation. That is the sole test. That is the litmus test.”

- 10. The trial court considered the parties' viva voce evidence coupled with the documentary evidence adduced. The record before us shows that the respondent testified as PW1. His evidence was that he married the appellant in 1971 but had a church wedding in 1994. The marriage certificate was adduced in evidence. His evidence was that they had lived together from 1971 to 2014 and were blessed with eight children; all of whom were within the age of majority. He contended that after they got married, the respondent proved to be uncooperative and difficult.
- 11. He recalled that the appellant deserted their matrimonial home in Gathigiriri and was assaulted by the respondent and their children on several occasions. Those incidences were reported at the police station. She even threatened to kill him. He testified that his mother died in his matrimonial home that he owned. That prior to their union, he had acquired the suit properties. The titles were adduced in evidence. He produced a judgment in Civil Case No. 115 of 2017 where the court tried to have the parties reconcile. He remembered an incident where they went to Father Nyagah and the District Commissioner for conciliative talks but yielded no fruits.
- 12. PW1 informed that the properties were subdivided into three portions in 2016 from original property given to him by the clan in 1960. His intention was to buy other land and give his children. He did not want to share out the properties with the appellant for he was of the view that she will be married to another man. However, he was not averse to giving her a share. He thus pitted to give her one



property and sell the remainder. He clarified that the matrimonial home was erected on land parcel no. Kirinyaga/Gathigiriri/XXXX. He urged the court that for those reasons, his petition be allowed.

13. DW1, the appellant testified that she married the respondent in 1984 and solemnized their union at Gathigiriri Catholic Church. They had ten children but two of them passed on. She was currently residing with the children. She was emphatic that she did not want to divorce the respondent. She however stated that the respondent, on his own volition, deserted their matrimonial home in Gathigiriri. It had been three years since he had departed. She accused him of infidelity with JN. Denying that she was ever cruel to him, she testified that it was the respondent who beat him. She maintained that she never denied him his conjugal rights. She was adamant that their marriage was retrievable.
14. Speaking to the matrimonial home, she testified that land parcel no. Kirinyaga/Gathigiriri/XXX gave rise to the subdivision of the three suit properties. She stated that the land belonged to the respondent's parents handed over to the respondent before the birth of their children. She had placed a caution on the property measuring 5.6 acres. It was her desire that the property be distributed to herself and her children who would each get ½ acre. She prayed that the petition be dismissed or in the alternative, the property to be subdivided.
15. The trial court proceeded to determine both the divorce cause and the issue of matrimonial property simultaneously; an issue that was raised by the appellant not at trial but only in this appeal. In her view, the trial court ought to have granted a decree nisi first before the issue of matrimonial property was addressed. Firstly, it is important to point out that the respondent only raised this issue at the appeal stage. In fact, at trial, she also sought orders for matrimonial property. I therefore find that the argument is an afterthought.
16. Secondly, section 17 (1) of the *Matrimonial Property Act* provides that:

“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.”
17. That provision is reinforced under rule 5 (1) (b) of the Matrimonial Property Rules. Essentially, my understanding of the provision is that rights to be declared or sought can be pursued by any party during the pendency of their union or after. Furthermore, it does not indicate that these orders can only be sought separately and distinctively from a divorce cause. If anything, hearing the dispute simultaneously would be efficacious saving the court's precious judicial time and resources depending on the facts and circumstances of the case.
18. Thirdly, rule 6 of the Rules provides that an enforcement of claim of matrimonial property may be filed at the High Court or magistrate's court depending on the pecuniary jurisdiction of the subject matter. The appellant has failed to demonstrate how the properties exceeded the pecuniary jurisdiction of the trial court. In light of the above, I find that the trial court ably and aptly addressed the issues before it having been vested with the proper jurisdiction. The appeal on that issue accordingly fails and is therefore dismissed.
19. Turning to the merits, it is apparent from the testimonies of both parties that they were married in 1971 but the union was solemnized in Gathigiriri Catholic Church as per the marriage certificate in 1994. They have eight living children all of whom are adults. It is also conceded by the parties that they had not lived together for a duration of at least three years as husband and wife when the respondent left the matrimonial home.



20. Additionally, the proceedings in Civil Case No. 115 of 2017 demonstrated the animosity that brewed between the parties with the possibility of reconciliation thinning and about to reach unsalvageable points. Though efforts were made to resolve the issues pirouetting their marriage, that was an exercise in futility. I therefore find that the marriage was properly dissolved save to add that the same was also on account of desertion.
21. On the matrimonial property, it is also conceded by both parties that the suit properties are a subdivision from the original property namely L.R. No. Kirinyaga/Gathigiriri/XXX given to the respondent by his kin. The appellant did confirm this in her cross examination. This property was given to the respondent before his union with the appellant. The respondent would later subdivide the property into Kirinyaga/Gathigiriri/XXXX, XXXX and XXXX; all registered in his name.
22. Section 6 of the Matrimonial Property Act defines matrimonial property to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage. A matrimonial home is any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.
23. It is clear that the properties acquired by the respondent were obtained before marriage and cannot therefore be classified as matrimonial property. However, L.R. No. Kirinyaga/Gathigiriri/XXXX became the property that the parties resided on as husband and wife. The appellant continued to live on that property. The respondent furthermore stated that he was willing to surrender one property and retain the rest. I therefore find that the learned magistrate properly found that the respondent held a life interest over it.
24. Ultimately, the trial magistrate properly analyzed the issues before him. I see no reason why I should disturb those findings. In the end, I find that the appeal lacks merit. It is dismissed but with no order for costs.

It is so ordered.

**JUDGEMENT DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF JULY 2025
IN THE PRESENCE OF;**

.....

J. NG'ARNG'AR

JUDGE

Kemuntho for the Appellants

Ombachi for the Respondents

Siele /Mark (Court Assistants)

