



REPUBLIC OF KENYA



**KENYA LAW**  
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**JGK v FWK (Civil Case 19 of 2017) [2023] KEHC 20328 (KLR) (13 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 20328 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MERU**

**CIVIL CASE 19 OF 2017**

**TW CHERERE, J**

**JULY 13, 2023**

**BETWEEN**

**JGK ..... PLAINTIFF**

**AND**

**FWK ..... DEFENDANT**

**JUDGMENT**

1. J.G.K (Plaintiff) took out an Originating Summons dated 19<sup>th</sup> May, 2017 filed on 23<sup>rd</sup> May, 2017. The OS is supported by Plaintiff's affidavits sworn on 22<sup>nd</sup>, May, 2017 and 05<sup>th</sup> October, 2017 and annexures thereto.
2. To her pleadings, Plaintiff listed LR. Kianjai/Mituntu/257, LR. Kianjai/Mituntu/258, LR. Nyaki/Mulathankari/ 155, LR. Kiirua/Ruiri/1583 and Plot No. 61 Ruiri Market as having been acquired during the subsistence of the marriage between her and the Defendant and sought determination of the following issues:
  1. Spent
  2. Whether Plaintiff is entitled to share or get the whole of all the above mentioned properties which are registered in the name of the Defendant
  3. Whether Plaintiff contributed to the acquisition of the properties named herein above
  4. Whether Defendant should forfeit his share to the extent of the properties he has disposed off without sharing the proceeds with the Plaintiff
  5. What is the order on costs



### **Plaintiff's case**

3. At the hearing, Plaintiff stated that she and the Defendant married on 03<sup>rd</sup> June, 1978 but the marriage was lawfully dissolved by an order dated 11<sup>th</sup> April, 2003. Plaintiff gave no evidence concerning LR. Kianjai/Mituntu/258 and LR. Nyaki/Mulathankari/ 155, but stated that LR. Kianjai/Mituntu/257, LR. Kiirua/Ruiri/1583 and Plot No. 61 Ruiri Market were acquired during the subsistence of the marriage and that she contributed to their acquisition from her salary as a teacher and also put up a permanent matrimonial home on LR. Kianjai/Mituntu/257. Plaintiff urged that LR. Kianjai/Mituntu/257 be distributed solely to her on the ground that Defendant had disposed of LR. Kiirua/RUIRI/1583 and Plot No. 61 Ruiri Market without sharing the proceeds with her.

### **Analysis and determination**

4. I have considered the evidence on record in the light of the pleadings, exhibits and the submissions filed on behalf of the Plaintiff and I have deduced the issues for determination as follows:
  - a. Whether LR. Kianjai/Mituntu/257, LR. Kiirua/ruiri/1583 and Plot No. 61 Ruiri Market are matrimonial properties
  - b. Whether Defendant disposed of LR. Kiirua/RUIRI/1583 and Plot No. 61 Ruiri Market without sharing the proceeds with Plaintiff
  - c. Whether LR. Kianjai/Mituntu/257 should be distributed solely to the Plaintiff
5. Defendant opposed the Plaintiff's claim by his replying affidavit sworn on 08<sup>th</sup> November, 2017 and annexures there and a witness statement filed on 17<sup>th</sup> May, 2021 but did not attend the hearing and did therefore not adduce any evidence in support of assertions made therein. The pleadings by the Defendant are therefore mere allegations devoid of proof. The foregoing does however not lessen the Plaintiff's burden to prove her claim on a balance of probability.
6. Section 6(1) of the *Matrimonial Property Act* No. 49 of 2013 (the Act) defines matrimonial property to mean:
  - a. Matrimonial home or homes
  - b. Household goods and effects in the matrimonial home or homes or
  - c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage
7. Both parties are in agreement that LR. Kianjai/Mituntu/257 was acquired by the Defendant around 2017 which was during the subsistence of their marriage contracted on 03<sup>rd</sup> June, 1978. The parties also agree that the matrimonial home was established on LR. Kianjai/Mituntu/257 with each of the parties claiming to have been the one that put up the matrimonial home.
8. To the extent that LR. Kianjai/Mituntu/257 is where the matrimonial home was established, the asset is by virtue of Section 6(1) the Act is Matrimonial property.
9. Concerning the contribution of the parties to the acquisition of LR. Kianjai/Mituntu/257, none of them was able to demonstrate their direct or indirect contribution to its acquisition and the court in the circumstances of this case makes a finding that the property was jointly acquired during the subsistence of the marriage.



10. Plaintiff did not tender any evidence to demonstrate that LR. Kiirua/RUIRI/1583 was registered in the name of the Defendant. Plaintiff similarly failed to demonstrate that Plot No. 61 Ruiru Market which Defendant conceded he had disposed off was acquired during the subsistence of the marriage. To that end, I do not find any evidence upon which this court can make a finding that LR. Kiirua/RUIRI/1583 and Plot No. 61 Ruiru Market are or were matrimonial property.
11. Flowing from the foregoing finding, I have come to the conclusion that the Plaintiff has not demonstrated that Defendant is disentitled to LR. Kianjai/Mituntu/257.
12. Concerning division LR. Kianjai/Mituntu/257 which is the only matrimonial property that the Plaintiff has been able to prove, this court has a duty to make a fair and equitable division of the acquired matrimonial property guided by the provisions of article 45(3) of *the Constitution*. The Article makes provisions regarding the rights of parties during marriage and upon dissolution and anchors the principle of “equal rights” and provides as follows:

“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.”
13. The Supreme Court in stated as follows concerning application of Article 45 (3):

While article 45(3) of the dealt with equality of the fundamental rights of spouses during and after dissolution of marriage, equality did not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither did the reading of that provision lead to the assumption that spouses were automatically entitled to a 50% share by fact of being married.

The stated equality under article 45(3) of the meant that the courts were to ensure that at the dissolution of a marriage, each party to a marriage got a fair share of the matrimonial property based on their contribution.
14. Unlike the Defendant who only exhibited a drawing plan, Plaintiff has demonstrated by evidence in the form of quotations and receipts for purchases of building materials and payment for installation of utilities that she has exclusively made substantial developments on LR. Kianjai/Mituntu/257 including putting up a permanent house which she occupies whereas the Defendant occupies a semi-permanent house on the same land.
15. Division is best done by considering the respective contribution of each party to ensure no party is unfairly denied what they deserve as well as ensuring that no party is unfairly given more than what he or she has contributed.
16. From the foregoing, I find that the interest of justice dictate that the permanent house lying on LR. Kianjai/Mituntu/257 be distributed to the Plaintiff exclusive.
17. For the reasons that I have outlined hereinabove, the respective claims by the parties herein are determined as follows:
  1. LR. Kianjai/Mituntu/257 is matrimonial property
  2. LR. Kianjai/Mituntu/257 shall be distributed in equal shares to the Plaintiff and the Defendant with the Plaintiff’s portion being excised from the part where the permanent house is situated
  3. This being a family matter, each party shall bear its own costs to these proceedings

**DATED AT MERU THIS 13<sup>TH</sup> DAY OF JULY 2023**



**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Morris Kinoti

For Plaintiff - Mr. Muthomi for John Muthomi & Co. Advocates

Defendant - In person -Present

