



REPUBLIC OF KENYA



**KENYA LAW**  
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**LWK v JNM (Civil Appeal 177 of 2017)  
[2023] KECA 1399 (KLR) (24 November 2023) (Judgment)**

Neutral citation: [2023] KECA 1399 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NYERI  
CIVIL APPEAL 177 OF 2017  
W KARANJA, J MOHAMMED & LK KIMARU, JJA  
NOVEMBER 24, 2023**

**BETWEEN**

**LWK ..... APPELLANT**

**AND**

**JNM ..... RESPONDENT**

*(Being an appeal from the judgment and decree of the High Court of Kenya at Embu (Muchemi J.) delivered on 16th August, 2017 in Civil Appeal No. 45 of 2015 as consolidated with Civil Appeal No. 54 of 2015)*

**JUDGMENT**

1. This is a second appeal arising from the judgment of the High Court at Embu (Muchemi, J.) dated August 16, 2017, in Civil Appeal No. 45 of 2015.
2. The suit was originally instituted by the respondent before the Chief Magistrate's Court at Embu, on 13<sup>th</sup> May, 2014, as Civil Case No. 116 of 2014. The respondent sought, inter alia: a declaration that the marriage between himself and the appellant was irretrievably broken down and should therefore be dissolved; and a declaration that land parcels L.R. Nos. Gatari/Kithimu/xxxx and xxxx, as well as motor vehicle registration number KBD xxxN, did not constitute matrimonial property, and belonged exclusively to the respondent.
3. The respondent's case was that he got married to the appellant in 2009 under the customary law rites. This was after the demise of his first wife in 2008. He sought the dissolution of the marriage on the ground of cruelty, averring that the appellant was disrespectful, and mistreated his children from his previous marriage to his deceased wife. With respect to the suit properties, the respondent contended that he acquired land parcel L.R. No. Gatari/Githimu/xxxx in 1998, and L.R. No. Gatari/Githimu/xxxx in the year 2000, during the subsistence of the marriage with his deceased wife. He averred that he constructed a house on Parcel Number xxxx with his first wife, but she died before they could move into



the house. He asserted that he buried his first wife on Parcel Number xxxx. The respondent stated that the appellant, on 17<sup>th</sup> July 2013, registered a caution against the two parcels of land, claiming beneficial interest. He further averred that he financed the purchase of motor vehicle registration number KBD xxxN. The respondent urged the trial court to declare that the said properties belonged exclusively to him.

4. On her part, it was the appellant's case that the two parcels of land constituted matrimonial property, and that she contributed to the completion of their matrimonial home located on Parcel Number xxxx. She further added that she fully financed the purchase of motor vehicle registration number KBD xxxN, without any financial assistance from the respondent.
5. After hearing the parties, the trial court (Hon.Oigara, PM), in his judgment dated 30<sup>th</sup> September, 2015, found that the marriage between the appellant and the respondent had indeed irretrievably broken down, and allowed dissolution of the same. The trial court determined that the respondent had acquired and developed land parcels L. R. Number Gatari/Githimu/xxxx and xxxx before marrying the appellant, and that the properties did not therefore constitute matrimonial property. The learned magistrate determined that the appellant had failed to provide proof of contribution towards the development of the properties, to warrant any beneficial claim over the said properties. The learned Judge determined that motor vehicle registration number KBD xxxN was registered in the appellant's name, and belonged to her, and that the respondent failed to prove that he financed purchase of the said vehicle.
6. Both the appellant and the respondent challenged this decision of the trial court before the High Court at Embu, in Civil Appeal No. 45 of 2015 and Civil Appeal No. 54 of 2015 respectively, with respect to the orders that were not in their favour. The two appeals were consolidated and heard together. The respondent faulted the trial magistrate for failing to find that motor vehicle registration number KBD xxxN belonged to him, as he solely financed the purchase of the vehicle, and for failing to grant the requested order that the appellant be evicted from L. R. Number Gatari/Githimu/xxxx, which was one of the prayers in his plaint.
7. The appellant, on her part, challenged the decision of the trial court on grounds that the learned magistrate erred: in finding that the appellant did not contribute towards building the matrimonial home on land parcel L.R. No.Gatari/Githimu/xxxx; in finding that land parcels L.R. No. Gatari/Githimu/xxxx and xxxx did not form part of matrimonial property and belonged exclusively to the respondent; and lastly, in determining the issue of what constituted matrimonial property, without jurisdiction to do so.
8. The first appellate court (Muchemi, J.) in her judgment delivered on August 16, 2017, determined that the trial court had jurisdiction to deal with the question of matrimonial property, and that magistrates' courts have jurisdiction to deal with matrimonial property disputes within the limits provided under the law as to their pecuniary jurisdiction. The learned Judge upheld the trial court's holding with respect to the beneficial interest of the parties in relation to Land Parcels Numbers 5831 and 7567, as well as motor vehicle registration number KBD xxxN. The learned Judge further issued an order directing the appellant to vacate L. R. Number Gatari/Githumu/xxxx.
9. It is this decision of the learned Judge that provoked the appellant to lodge the instant appeal. The appellant proffered seven grounds of appeal. In a nutshell, the appellant faulted the trial court for finding that she did not contribute towards the construction of the matrimonial home situated on Land Parcel Number Gatari/Githimu/xxxx. She was aggrieved by the learned Judge's decision, that Land Parcels Number Gatari/Githimu/xxxx and xxxx, did not constitute matrimonial property, and that they exclusively belonged to the respondent. She took issue with the fact that the learned Judge



failed to consider the provisions of article 45 of *the Constitution* which stipulates that parties to a marriage are entitled to equal rights at the time of the marriage, during the subsistence of the marriage and at the dissolution of the marriage. The appellant therefore urged us to allow her appeal as prayed, and set aside the decision of the High Court in its entirety and find in her favour as prayed.

10. The appeal was canvassed by way of written submissions. Counsel for the appellant, Mr. Karigi, submitted that section 7 of the *Matrimonial Properties Act* provides for both monetary and non-monetary contribution, in determining the beneficial interest of parties to a marriage in a matrimonial property. Counsel stated that the appellant and her witnesses had given oral evidence of how she contributed to the construction of the matrimonial home, and as such, the learned Judge erred in failing to take into account the appellant's non-monetary contribution in the development of the said property. He pointed out that article 45 (3) of *the Constitution* gives parties to a marriage equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. Counsel relied on the decisions of this court in Civil Appeal No. 127 of 2011, *Agnes Nanjala William vs Jacob Petrus Nicolas Vander Goes* and *PNN vs ZWN* [2017] eKLR.
11. On the other hand, counsel for the respondent, Ms. Thungu, urged that the dispute before the lower court did not encompass division of matrimonial property, but rather, a declaration that the suit properties did not constitute matrimonial property, and as such, the trial court was properly seized of the matter. Counsel submitted that the appellant did not file any counter-claim, neither did she prove contribution, monetary or non-monetary, with regards to the acquisition and development of Land Parcels L.R. Number Gaturi/Githimu/xxxx and xxxx. Counsel added that the respondent acquired both parcels of land prior to the marriage between himself and the appellant. Counsel explained that the respondent buried his first wife on Parcel Number xxxx, where they had built a homestead. Counsel submitted that the appellant failed to prove how she had contributed to the improvement of Plot Number xxxx where the respondent had already constructed a home, prior to their marriage in 2009. Counsel stated that the trial and first appellate courts properly analyzed the contribution of each party to the marriage towards the acquisition and development of the suit properties, and came to the right conclusion. She therefore invited us to dismiss the appellant's appeal as it lacks merit.
12. This being a second appeal, our jurisdiction is limited to matters of law only. In *Charles Kipkoeb Leting v Express (K) Ltd & Another* [2018] eKLR, this court stated as follows with regards to the duty of the second appellate court:

“...on a second appeal, the court confines itself to matters of law only, unless it is shown that the courts below considered matters they should not have considered or failed to consider matters they should have considered or looking at the entire decision, it is perverse.”
13. Having carefully considered the record in light of the grounds of appeal, rival submissions set out above and the principles of law relied upon by the respective parties, the issues that fall out for determination are as follows:
  - i. Whether L.R. Nos. Gatimu/Githimu/xxxx and xxxx constitute matrimonial property; and
  - ii. whether the appellant is entitled to beneficial interest in L.R. No. Gatimu/Githimu/xxxx, on account of having contributed towards development of the matrimonial home.
14. Section 6 of the *Matrimonial Property Act*, 2013 defines matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other movable or immovable property jointly owned and acquired during the subsistence of the marriage.



15. Section 7 of the Act provides for ownership of matrimonial property and states as follows:
- “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.”
16. A further reading of the Act at section 9 stipulates as follows: -
- “Where one spouse acquires property before or during the 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 property equal to the contribution made.”
17. It is important to note from the onset that, from a perusal of the pleadings in this case, the instant dispute revolves around a declaration of the rights of parties with regard to the suit properties, and not orders for division of said properties in a typical case of division of matrimonial property. The trial court, by virtue of Section 17 of the *Matrimonial Property Act*, had jurisdiction to make declarations in so far as the interest of the parties in the suit property was concerned.
18. Section 17 provides as follows:
1. “A person may apply to a court for declaration of rights to any property that is contested between that person and a spouse.
  2. An application under subsection (1) –
    - a. shall be made in accordance with such procedure as may be prescribed;
    - b. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”
19. In this case, it is not disputed that the L.R. Nos. Gaturi/Githimu/xxxx and xxxx (‘the suit properties’) were acquired by the respondent prior to his marriage to the appellant. The title documents adduced in evidence, clearly indicates that Parcel Number xxxx was acquired by the respondent in the year 1998, while Parcel Number xxxx was acquired by the respondent in the year 2000. The fact that the parties celebrated their marriage in 2009 is also not disputed. Guided by Section 9 of the *Matrimonial Property Act* reproduced above, the suit properties, which were acquired prior to the marriage, cannot therefore constitute matrimonial property in this appeal. This was properly observed by the learned Judge as well as the trial court. This Court sees no legal reason to depart from the concurrent findings of the two Courts below.
20. The appellant faulted the learned Judge for failing to take into consideration the provisions of Article 45 (3) of *the Constitution* in determining her claim of beneficial interest in the house located on Parcel Number xxxx. Article 45 (3) of *the Constitution* provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of marriage.
21. The Supreme Court, in *JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & Another (Amicus Curiae)* (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment) observed as follows, with respect to interpretation of Article 45 (3) in relation to matrimonial property:
- “...the equality provision in article 45(3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or



are married to each other. To do so would mean that article 40(1) and (2) of *the Constitution* which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC’s language.

While therefore reiterating the finding in Echaria, we also find that Article 45(3) acts as a means of providing for equality as at the time of dissolution of marriage but such equality can only mean that each party is entitled to their fair share of matrimonial property and no more. Nowhere in *the Constitution* do we find any suggestion that a marriage between parties automatically results in common ownership or co- ownership of property (hence vesting of property rights) and Article 45(3) was not designed for the purpose of enabling the court to pass property rights from one spouse to another by fact of marriage only.

The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.”

22. The appellant in this case, contended that she contributed to the development of the Parcel Number xxxx, by financing the completion of a house that the respondent had started constructing thereon, prior to their marriage. As was correctly observed by the two courts below, the appellant failed to adduce sufficient evidence to back her claim that she financed the construction of the said home. Counsel for the appellant, in the written submissions faulted the first appellate court for failing to take into consideration the appellant’s non-monetary contribution, which entitled her to beneficial interest in Parcel Number xxxx.
23. It is our considered view that the appellant did not claim any non-monetary contribution after failing to establish monetary contribution before the two courts below. It is our finding that the appellant fell short of proving contribution, either directly or indirectly, towards acquisition and development of the suit properties. Having determined that the appellant did not establish any beneficial interest over the suit properties, the learned Judge acted within the law in directing that the cautions registered against the suit properties by the appellant be lifted. The further order that the appellant vacates the suit properties was the natural consequence of the finding made by the two courts below that the respondent was the legal owner of the two parcels of land. Consequently, we find no reason to interfere with the finding of the first appellate court.
24. We find that the appellant’s appeal to be devoid of merit and is hereby dismissed in its entirety.
25. Each party shall bear their own cost of the appeal.

**DATED AND DELIVERED AT NYERI THIS 24<sup>TH</sup> DAY OF NOVEMBER, 2023.**

**W. KARANJA**

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**JUDGE OF APPEAL**

**JAMILA MOHAMMED**

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**JUDGE OF APPEAL**

**L. KIMARU**

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**JUDGE OF APPEAL**



*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

