



REPUBLIC OF KENYA



KENYA LAW
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**Macharia & 2 others v Waithaka (Environment and Land Appeal
E017 of 2021) [2023] KEELC 239 (KLR) (26 January 2023) (Judgment)**

Neutral citation: [2023] KEELC 239 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MURANGA
ENVIRONMENT AND LAND APPEAL E017 OF 2021
LN GACHERU, J
JANUARY 26, 2023**

BETWEEN

ELIZABETH WANJIRU MACHARIA 1ST APPELLANT

ROBERT WAITHAKA MACHARIA 2ND APPELLANT

HANNAH WANGUI MACHARIA 3RD APPELLANT

AND

DOUGLAS MACHARIA WAITHAKA RESPONDENT

*(Being an Appeal from the Judgement of Hon. E. Muriuki Nyaga(SPM),
in ELC No. 23 of 2020 delivered on 31st August 2021)*

JUDGMENT

- 1 The Appellants herein were the Defendants in Murang'a Chief Magistrates Court ELC Case 23 of 2020, while the Respondent herein was the Plaintiff.
- 2 By a Plaint dated 27th May 2020, the Plaintiff had sought for orders against the Defendants jointly and severally as follows;
 - a. An order that the Defendants be ordered to give vacant possession to Land Parcel No. Loc.19/Gacharageini/1189, forthwith failure to which eviction orders shall be issued against them.
 - b. Costs of the suit and Interest
 - c. Any other relief that this Court may find just.
- 3 In the said Plaint, the Plaintiff (Respondent) averred that he is the registered proprietor of land parcels No. Loc.19/Gacharageini/1189, and Ngobit/Muhonia Block 1/575. He also averred that he is desirous of distributing his lands and wished to have Loc.19/Gacharageini/1189, jointly registered



in his name and that of Samuel Kamunge Macharia, and transfer Ngobit/Muhonia Block 1/575, to the Defendants but the Defendants, had refused to vacate land parcel No. Loc.19/Gacharageini/1189. That the Defendants in a bid to frustrate his intentions had caused him to be summoned at the Local administration's offices where it was intimated to him that the office would ensure that the Defendants get a share out of land parcel No. Loc.19/Gacharageini/1189. Therefore, the Plaintiff's claim was for the Defendants to vacate land parcel No. Loc.19/Gacharageini/1189.

- 4 The suit was contested by the Defendants (Appellants) herein jointly via a Statement of Defence and Counterclaim dated 7th July 2020. The Defendants denied all the allegations in the Plaintiff and put the Plaintiff to strict proof of the same. It was the Defendants averments that although the property is registered in the Plaintiff's name, he holds the same as matrimonial property in a customary trust for his wife who was the 1st Defendant. That the Plaintiff is married to the 1st Defendant having conducted a customary wedding on 10th February 1982, which was later followed by a Christian marriage solemnized on 19th December 1992.
- 5 Further that the Plaintiff and the 1st Defendant have 3 children namely Robert Waithaka Macharia, Hannah Wangui Macharia and Samuel Kamunge Macharia, and they have resided on the property for 38 years. That the Plaintiff intends to illegally evict the Defendants from the matrimonial home without any justifiable cause as he intends to sell the suit land which is matrimonial property. That Ngobit/Muhonia Block 1/575, is uninhabited land in an arid area in Laikipia County and the Plaintiff's intends to render the Defendants destitutes by evicting them from their land being land parcel No. Loc.19/Gacharageini/1189. That the Plaintiff's intentions are illegal and untenable as he has not made any preparations to provide for his wife, the 1st Defendant. That the 1st Defendant has contributed immensely to the development of land parcel No. Loc.19/Gacharageini/1189, for over 38 years and she also contributed to the acquisition of Ngobit/Muhonia Block 1/575 in 2017, thereby creating a matrimonial customary trust. That the Honourable Court lacks Jurisdiction to grant the prayers sought by the Plaintiff and they would raise a Preliminary Objection at the requisite time.
- 6 In the Counterclaim, the Defendants reiterated the contents of the Defence and stated that Land Parcel No. Ngobit/Muhonia Block 1/575 and land parcel No. Loc.19/Gacharageini/1189, are matrimonial properties and the Plaintiff holds them in a customary trust, particularly for his wife the 1st Defendant herein. The Defendants particularized the customary trust created over the suit land and counterclaimed against the Plaintiff for Orders as follows;
 - a. A declaration that the parcels of land known as Land Parcel No. Ngobit/Muhonia Block 1/575, and land parcel No. Loc.19/Gacharageini/1189, are held by the Plaintiff in customary trust on behalf of the 1st Defendant.
 - b. An order that the Land Registrars Murang'a and Laikipia to add Elizabeth Wanjiru Macharia, as a proprietor on the titles of Land Parcel No Ngobit/Muhonia Block 1/575, and land parcel No. Loc.19/Gacharageini/1189, for the two properties held in equal shares between the Plaintiff and the 1st Defendant.
 - c. An injunction be issued against the Plaintiff stopping him, his representatives, heirs, assigns, beneficiaries in title, agents and whomsoever acting on his behalf from interfering with the 1st Defendant's possession of the suit lands known as Land Parcel No. Ngobit/Muhonia Block 1/575, and land parcel No. Loc.19/Gacharageini/1189.
 - d. Costs and interests of the suit.



7 The matter proceeded by way of viva voce evidence. The Plaintiff gave evidence for himself and closed his case and the Defendants too gave evidence by calling one witness – 1st Defendant Elizabeth Wanjiru Macharia

Plaintiff (respondent's) Case

- 8 PW1, Douglas Macharia Waithaka, adopted her witness statement dated 27th May 2020, as his evidence in chief, and produced the documents contained in his list of documents dated 27th May 2020.
- 9 On cross examination, he testified that the 1st Defendant was indeed his wife whom he had married in church. He further testified that the other Defendants were his children. That the 1st Defendant and himself had lived together in Murang'a since 1982, and that he was not chasing them away, but rather he wished that they vacate to another property in Laikipia. That it was the Defendants trying to oust him from the suit property and that is why he decided to give them the land in Laikipia. That he had reported the matter to the relevant authorities.
- 10 Further, that he got married in church and they had not procured a divorce yet. That the Laikipia property was developed and he was living there and the 1st Defendant had planted maize on it. That in particular, his wife was helping him pick tea on the Murang'a Property. That it only after his wife chased him away that he decided to relocate her to Laikipia.

Defendants (appellants) Case

- 11 DW1, Elizabeth Wanjiru Macharia, adopted her witness statement dated 11th January 2021, as her evidence in chief and produced the documents contained in her list of documents dated 7th July 2021, which included her marriage certificate to the Respondent. She testified that she was a farmer working on a shamba on the suit property to pick tea. That her number for purposes of tea collection was No. 32 and her husband's number was No. 13.
- 12 On cross-examination, she testified that the suit property belongs to her husband. That they both live on the suit property, but in separate houses. She further testified that she knew of the house in Laikipia and that it was developed. On re-examination, she stated that the Laikipia property was small.
- 13 After viva voce evidence, the parties filed their written submissions and on 31st August 2021, the trial court entered judgement in favour of the Plaintiff (Respondent) and found that the Defendants (Appellants) failed to prove their claim that the Plaintiff intended to sell the suit property, failed to consider that the suit property was matrimonial property or that the Ngobit property was not developed. Further, the trial court held that the rights of a proprietor under Section 25 of the [Land Registration Act](#), cannot be defeated from all other interested interests and claims. The trial court entered judgment in favour of the Plaintiff (Respondent) and stated as follows;
- “From the foregoing, the Plaintiff has proved his claim on a balance of probabilities, I hereby enter judgement for the Plaintiff against the Defendants. No order as to costs”
- 14 The Appellants herein being dissatisfied with the above determination of the trial Court in Muranga Chief Magistrates ELC Suit No. 23 of 2020 sought to challenge the said Judgment through the Memorandum of Appeal dated 29th September 2021, and sought for orders that;
1. The Judgement of the Learned Senior Principal Magistrate Hon. E. Muriuki in Muranga Chief Magistrates ELC Suit No. 23 of 2020, delivered on 31st August 2021, be set aside and or vacated and the Orders given thereto be substituted with Orders prayed for in the Appellants' Counterclaim dated 7th August 2020.



2. The Costs of this Appeal be borne by the Respondent
3. Any other Orders that the Honourable Court may deem fit to grant.

The grounds of Appeal are;

- a. That the learned Magistrate erred in fact and in law in holding that the Respondent had proved his claim on a balance of probabilities and by entering Judgement for the Respondent against the Appellants;
- b. That the learned Magistrate erred in fact and in law in rendering his judgement without considering the entirety of the evidence adduced by the Appellants, thereby ignoring pertinent matters proved by the Appellants.
- c. That the learned Magistrate erred in fact and in law in failing to consider the appellants' defence and counterclaim.
- d. That the learned Magistrate erred in fact and in law in failing to find that the suit property was matrimonial property.
- e. That the learned Magistrate erred in fact and in law in failing to consider that the 1st Appellant herein, being the wife of the Respondent, had legal and equitable interest in the property;
- f. That the learned Magistrate erred in fact and in law by failing to consider the Appellants submissions, thereby arriving at the wrong conclusion that there was no customary trust in favour of the 2nd and 3rd Appellants.
- g. That the learned Magistrate erred in fact and in law by rendering his Judgment without considering the entirety of the Appellants evidence and written submissions thereby ignoring pertinent matters proved and submitted upon by the Appellants.

15 On 27th July, 2022, the Court directed that the Appeal be canvassed by way of written submissions.

16 The Appellants through the Law Firm of Njoroge Ng'ang'a & Co. Advocates, filed their submissions dated 15th September 2022, in support of the Appeal. It is the Appellants' written submissions that this being a first appeal, the Court ought to subject the evidence on record to a fresh and exhaustive scrutiny, and make its own conclusion about it. The Appellants relied on the case of Moses Odhiambo Muruka & Another v. Stephen Wambembe Kwatenge & Another (2018) eKLR, which quoted the case of *Selle & Another vs Associated Motorboat Co. Ltd & Others* (1968) EA 123, where it was held:

“I accept counsel for the respondent proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put is that this court must reconsider the evidence, evaluate itself and draw its own conclusions, though it should bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”

17 On the issue of whether the suit property was indeed matrimonial property, the Appellants relied on Section 6 of the *Matrimonial Property Act* No. 49 of 2013, which defines matrimonial property as 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, and Section 2 of the *Matrimonial Property Act* No. 49 of 2013, which defines the



matrimonial home or homes; as 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. This section further defines “contribution” to mean monetary and non-monetary contribution, and includes domestic work and management of the matrimonial home; childcare; companionship; management of family business or property; and farm work.

- 18 Further reliance was placed on Section 9 of the *Matrimonial Property Act* No. 49 of 2013, which provides for Acquisition of interest in property by contribution. It states:

“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 the property, equal to the contribution made.”

- 19 The Appellants further submitted that the suit land being land parcel No. Loc.19/Gacharageini/1189, is matrimonial property and urged the Court to treat it as such, based on Section 7 of the *Matrimonial Property Act*, which provides for ownership of matrimonial property and it states:

“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.”

- 20 On whether the 1st Appellant herein had a legal and equitable interest in the said land parcel No. Loc.19/Gacharageini/1189, the 1st Appellant submitted that she had produced uncontroverted evidence of her immense contribution to the development of the said parcel of land. That she had planted tea and was registered as KTDA Farmer No. 32, and that the Respondent and herself shares the said parcel of land in two equal halves and each of them was farming tea. That even the Respondent was registered as KTDA Farmer No.13. She relied on the case of Njoroge v. Ngari (1985) KLR 480, where it was held that if matrimonial property is held in the name of one person, even if that property is registered in the name of that one person, but the other spouse made contribution towards its acquisition, then each spouse has proprietary interest in that property. Further, in the case of PWK v. JKG (2015) eKLR, it was held:

“Where the disputed property is not so registered in the joint names of this 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. However, in cases where each spouse had made a substantial but unascertainable contribution, it may be equitable to apply the maxim of equality is equity, while heeding the caution of Lord Pearson in Gissing versus Gissing (1970) A ALL ER 780 Page 788.”

- 21 It is the contention of the 1st Appellant that she had contributed to the development of land parcel No. Loc.19/Gacharageini/1189, and to the acquisition of Land Parcel No. Ngobit/Muhonia Block 1/575, and this Court ought to be guided to find in her favour by the case of Peter Mburu Echaria Vs Priscilla Njeri Echaria (2007) eKLR, where it was held that:

“It is clear from those cases that when dealing with disputes between husband and wife over property, the court applies the general principles of law applicable in property disputes in all courts between all parties irrespective of the fact that they are married. Those principles as Lord Diplock said in Pettit are those of English law of trusts. the House of Lords



specifically decided so in *Gissing versus Gissing*. according to English law of trusts, it is only through the wives financial contribution, direct or indirect towards the acquisition of the property registered in the name of her husband that entitles her to a beneficial interest in the property.”

22 On the issue that the trial Magistrate erred by failing to consider the Appellants’ submissions and thereby arriving at the wrong conclusion that there was no customary trust in favour of the 2nd and 3rd Appellants, the Appellants relied on the case of *Isack M’Inanga Kiebia v. Isaaya Theuri M’Lintari & Another* (2018) eKLR, where the Supreme Court in considering customary trusts enumerated Some of the elements that would qualify a claimant as a trustee are:

1. The land in question was before registration, family, clan, or group land.
2. The claimant belongs to such family, plan, or group.
3. The relationship of the claimant to such family, clan, or group is not so remote or tenuous as to make his or her claim idle or adventurous.
4. The claimant could have been entitled to be registered as an owner or other beneficiary of the land but for some intervening circumstances.
5. The claim is directed against the registered proprietor who is a member of the family, plan, or group.

23 Based on the foregoing, the Appellants contend that they are entitled to the prayers sought and they urged this Court to allow the appeal as prayed and set aside the Judgment of the trial Court.

24 The Respondent on the other hand through the Law Firm of Mwaniki Warima & Co. Advocates, filed his submissions dated 10th October 2022, in opposing the Appeal. It is the Respondents contention that contrary to the Appellants submission, land parcel No. Loc.19/Gacharageini/1189, is not matrimonial property. He relied on Section 5 of the Matrimonial Act, which states that the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property, and on the case of *SN v. FM* (2019) eKLR, in which it was held that:

“The net effect of the foregoing is that any property acquired during the subsistence of the marriage, including that which is inherited forms part of Matrimonial property. The only time that inherited property is excluded from matrimonial property is if it was acquired before marriage. Property that is inherited during the subsistence of their marriage is not excluded from matrimonial property except if it was acquired before marriage.”

25 It is the Respondent’s contention that land parcel No. Loc.19/Gacharageini/1189, is registered in his name and it is an undisputed fact that he acquired it from his father Samuel Waithaka. That he acquired the suit property in 1978 as a sole proprietor and the same is evidenced by the title document dated 22nd June 1978. That he married the 1st Appellant in 1982, after he had acquired the suit property and therefore it did not form part of matrimonial property. He relied on the case of *T.M.W. v. F.M.C* (2018) eKLR, to support such claim where it was held as:

“... for property to qualify as matrimonial property, it ought to have been acquired during the subsistence of the marriage between the parties unless otherwise agreed between them that such property would not form part of the matrimonial property.”



26 Lastly, on his rights as the sole proprietor, the Respondent relied on Section 25 of the [Land Registration Act](#), which provides for rights of a proprietor, and it states as follows; -

“The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever.”

27 The Respondent based on his submissions urged the Court to dismiss the Appeal as it lacks merit and uphold the Judgment of the trial Court

28 This Court has carefully considered the evidence adduced before the trial Court as well as the submissions thereafter by parties. The Court recognizes that it neither saw nor heard the witnesses, and must therefore give allowance to that. The Court has also carefully considered the findings of the trial Court, and the Submissions of Counsels and finds as follows; -

29 As this is a first Appeal, it is the Court’s duty to analyze and re-assess the evidence on record and reach its own independent decision in the matter as provided by Section 78 of the [Civil Procedure Act](#). See the case of Kenya Ports Authority versus Kusthon (Kenya) Limited (2009) 2EA 212, where the Court of Appeal held inter alia, that:-

“On a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence”

30 Therefore, this Court is under a duty to delve at some length into factual details and revisit the facts as presented before the trial court, analyse the same, evaluate it and arrive at an independent conclusion, but always remembering, and giving allowance for it, as the trial court had the advantage of hearing the parties.

31 In *Ephantus Mwangi and Another vs. Duncan Mwangi Civil Appeal No. 77 of 1982 [1982-1988] 1KAR 278*, the Court of Appeal held that:

“A member of an appellate court is not bound to accept the learned Judge’s findings of fact if it appears either that (a) he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.”

32 Further, as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of *Mbogo vs Shah (1968) EA at Page 93*, where the Court held that:-

“I think it is well settled that this Court will not interfere with the exercise of its discretion by an inferior Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted on



because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

- 33 Before this Court delves into the issues arising, it has noted that the suit land, and more specifically being land parcel No. Loc.19/ Gacharageini/1189, is registered in the name of the Respondent herein, and he was issued with the title on the 2nd June 1978. Further, from the evidence of the parties herein, it is not in doubt that Respondent and the 1st Appellant herein are husband and wife and the 2nd and 3rd Appellants are their children. That the Respondent and the 1st Appellant celebrated their customary marriage sometime in 1982 and they later solemnized their marriage on 19th December 1992, under the Christian Marriage and Divorce Act. In addition, it is not in dispute that the marriage between the 1st Appellant and the Respondent is still subsisting, as a divorce is yet to be procured and that the Appellants and the Respondent have lived together on the suit land for over 30 years.
- 34 The Court notes from the above, that the Claim before it is peculiar in nature as it one where a husband has sued his wife and children seeking and eviction order against them. The trial Court found in favour of the Respondent herein and the effect of that Judgment is to allow the Respondent to evict the Appellants from land parcel No. Loc.19/Gacharageini/1189, and relocate them to another property in Laikipia. It is this Judgment that has led to the instant Appeal.
- 35 The Appellants’ contention is that they have a beneficial interest over land parcel No. Loc.19/ Gacharageini/1189, as the same is a matrimonial property. The Appellants contend that even though the Respondent acquired the suit land prior to his marriage to the 1st Appellant, the 1st Appellant had contributed immensely to the development of land parcel No. Loc.19/Gacharageini/1189, and as a result of her contribution, the suit land was now considered matrimonial property. In addition, the Appellants contend, that since the Respondent acquired the suit land from his father, a customary trust had been created over the suit land in favour of the 2nd and 3rd Appellants and they therefore should not be evicted.
- 36 The Respondent on the other hand contends that land parcel No. Loc.19/Gacharageini/1189, is not matrimonial property as he acquired it in 1978, prior to his marriage to the 1st Appellant which took place in 1982. That as the sole proprietor of land parcel No. Loc.19/Gacharageini/1189, his rights over the suit land were guaranteed under Article 40 of *the Constitution* and Section 25 of the *Land Registration Act*. Further that contrary to the allegations of the Appellants, Land Parcel No Ngobit/ Muhonia Block 1/575, was developed and hence relocating the Appellants was not in bad faith.
- 37 Having now outlined the above, and having read and considered the Record of Appeal, the Grounds of Appeal, the rival written submissions, and the Judgment by the trial Court, the Court finds the issues for determination are:-
- a. Whether this Court has jurisdiction to determine matrimonial property.
 - b. Whether the suit property is matrimonial property?
 - c. Whether the appeal filed is merited?

I. Whether this Court has jurisdiction to determine matrimonial property?

- 38 The Appellants claim is for land parcel No. Loc.19/ Gacharageini/ 1189 and Land Parcel Ngobit/ Muhonia Block 1/575, to be declared matrimonial property and subsequently that the 1st Appellant be registered together with the Respondent as joint owners of the two parcels of land. Article 162(2) (b) of *the Constitution* and Section 13 of the *Environment and Land Court Act*, 2011, give this Court



jurisdiction to determine all disputes relating to the environment and the use and occupation of, and title to land.

39 Section 13(1) and (2) of the Environment and *Land Act* provides as follows:

“ 13. Jurisdiction of the Court

- (1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2)(b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of *the Constitution*, the Court shall have power to hear and determine disputes—
 - (a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - (b) relating to compulsory acquisition of land;
 - (c) relating to land administration and management;
 - (d) relating to public, private and community land and contracts, chose in action or other instruments granting any enforceable interests in land; and
 - (e) any other dispute relating to environment and land.”

40 There is no doubt from the foregoing that this Court has jurisdiction to determine any dispute before it which revolves around title to land. What then begs the answer is whether this Court can determine a dispute over matrimonial property, so long as the dispute is over the use, occupation or title to land? In *Jane Wambui Ngeru v Timothy Mwangi Ngeru* (2015) eKLR, the Court stated as follows:

“ In addition, if rights to matrimonial property are in dispute, Section 17 of the *Matrimonial Property Act* of 2013 provides as follows:

- (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.

41 No particular Court is identified 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.

42 It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to land.”

43 Further, in the case of BWM vs JMC, Murang'a ELC Case No. 379 of 2017 [2018] eKLR, the Court stated as follows:

“For avoidance of doubt, the Court notes that the [matrimonial Property Act](#) does not seem to define the Court that disputes relating to the Matrimonial property disputes should be referred for determination. It is thus the current legal position that concurrent jurisdiction is given to various Courts to hear disputes relating to matrimonial property rights including this Court. The only limitation applicable to this Court is that it can only hear such disputes if they involve or relate to occupation use and title to land. I find nothing to oust the jurisdiction of this Court and I proceed to determine the Preliminary objection”

44 Based on the foregoing and guided by the above precedents, this Court finds and holds that it is properly clothed with Jurisdiction to determine the instant suit. Therefore, the second limb of Jurisdiction over this suit as filed is premature by virtue of Section 7 of the [Matrimonial Property Act](#).

45 Under Section 3 of the [Marriage Act](#), marriage is defined as the voluntary union of a man and a woman, whether in a monogamous or polygamous union and registered in accordance with the Act. It is not in dispute that the 1st Appellant and the Respondent got married under customary law, and later solemnized their marriage under the Christian Marriage and Divorce Act in 1992, and they have lived as husband and wife since 1982. It is also not in doubt that the marriage between the 1st Appellant and the Respondent has not been dissolved or annulled in any Court of law. The question that follows then is whether this Court has the jurisdiction to make a determination on Matrimonial Property during the existence of a marriage.

46 Matrimonial Property is defined under Section 6 of the [Matrimonial Property Act](#) to mean:-

- a) the 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.

47 The matrimonial home is defined under Section 2 of the Act as 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. Under Section 17 of the Married Women's Property Act 1882, which has since been repealed by Section 19 of the [Matrimonial Property Act](#), 2013, which is now the law governing disputes relating to matrimonial property, a party may apply to the High Court by summons in any question between husband and wife as to the title to or possession of property. The Section is not pegged on the status of marriage of the parties. The [Matrimonial Property Act](#) also provides for declaratory orders under its Section 17 which states that:

- “(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 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.”

48 By virtue of Section 17 of the *Matrimonial Property Act*, the Court has jurisdiction to declare the rights of parties in relation to any property which is contested. In the persuasive case of N.C.K vs G.V.K [2015] eKLR, Muchelule J observed thus:

“In England, under the Matrimonial Causes Act 1973, in instances where parties, for religious or other reasons, do not want to divorce, and if a couple chooses not to bring matrimonial proceedings, the Court will resolve any questions about the beneficial entitlement to their property without using the divorce Court’s adjustive power. The Family Law Act 1966 at Section 33(4) provides for declaratory orders which are intended to do no more than declare the nature of the interest that is claimed. In the case of Arif vs Anwar [2015] EWHC 124 (FAM), the parties filed divorce proceedings but the same was yet to be determined. The Court proceeded to declare each party’s beneficial interest in the matrimonial property without severing the same...

49 It would appear to me that a spouse can, under Section 17 of the *Matrimonial Property Act* 2013, either where there is a divorce matter pending, or where, for whatever reason, one can longer live together with the other spouse but is not seeking to divorce, come to Court to resolve any questions about beneficial interest in the matrimonial property without severing the same.”

50 The Court notes that the above case demonstrates that a declaration under Section 17 of the repealed Act is not pegged on the subsistence of a marriage. The effect of this Section is such that the Court can make a declaration with regard to the suit properties known as land parcel No. Loc.19/Gacharageini/1189, and Land Parcel Ngobit/Muhonia Block 1/575, even though the parties are still married. It does not however provide for the sharing of such property.

51 The upshot of the foregoing is that even though the marriage of the 1st Appellant and the Respondent has not broken down, this Court has powers to issue declaration under Section 17 of the *Matrimonial Property Act*.

(ii) Whether the suit property is matrimonial property?

52 This Court wishes to reiterate that in the instant appeal the 1st Appellant and the Respondent are husband and wife, while the 2nd and 3rd Respondents are two out of their 3 children.

53 It is not in doubt that the suit land known as land parcel No. Loc.19/Gacharageini/1189, is duly registered in the name of the Respondent herein. The Appellants however lay claim over the said land on the grounds that the same is matrimonial property. It is the contention of the 1st Appellant that even though the Respondent acquired the suit land prior to their marriage, she had substantively contributed to its development and by virtue of her contribution, it had now become Matrimonial Property. In addition, the Appellants contend that they had lived on the suit land for over 30 years with the 1st Appellant and Respondent living as husband and wife.



54 The rights of a registered owner of property are clearly set out under sections 24, 25 and 26 of the [Land Registration Act](#), 2012. Section 24(a) provides:

“ 24. Subject to this Act

- (a) The registration of a person as proprietor of land shall vest in that person the absolute ownership of that land together with all rights and privileges belonging or appurtenant thereto.”

55 Section 25(1) provides that such a registered owner’s rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the [Land Registration Act](#), as not requiring noting in the register.

56 Section 28 of the [Land Registration Act](#) provides that:

“Unless the contrary is expressed in the register, all registered land shall be subject to the following overriding interests as may for the time being subsist and affect the same, without their being noted on the register—

- (a) spousal rights over matrimonial property;
- (b) trusts including customary trusts;”

57 From the foregoing, it is clear that while the rights of a registered owner are indefeasible, the said rights are subject to overriding interests which include spousal rights over matrimonial property. Matrimonial Property as stated herein above is defined to mean: -

- a) the 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.

58 A perusal of the title document for the suit land being land parcel No. Loc.19/Gacharageini/1189, indicated that the same was issued on 2nd June 1978, to the Respondent herein. PW 1 and DW 1 in their evidence before the trial Court testified that they first got married under customary law in 1982, before they solemnized their marriage under the Christian Marriage and Divorce Act on 19th December, 1992. It is clear from the above that the suit land was acquired prior to the marriage celebrated between the 1st Appellant and the Respondent. However, that is not enough to declare that it is not matrimonial property, as matrimonial property could also be a matrimonial home. The matrimonial home as defined by Section 2 of the [Matrimonial Property Act](#) is any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home. PW1 testified that the Respondent and herself have lived on the suit land for over 30 years since 1982 when they got married. That it was not until 2021, that the Respondent herein filed the instant suit in an attempt to evict her and relocate her to Laikipia.

59 This Court based on the foregoing finds and holds that land parcel No. Loc.19/Gacharageini/1189, is matrimonial property because the Respondent and the 1st Appellant had been utilizing it as their family home despite it being wholly owned and registered in the name of the Respondent.



- 60 Even though this Court were to find that the suit land is not matrimonial property which it will not, the Court notes that the 1st Appellant had made contributions toward the development of the suit property. It was the evidence of PW 1 in the trial Court that he had planted tea on the suit land and 1st Appellant used to help him pick the said tea. DW1 the 1st Appellant herein on the other hand testified that she was utilizing one half of the tea plantation while the Respondent was utilizing the other half. While the 1st Appellant did not produce any evidence to support her claim, the Court notes that this evidence was not controverted or rebutted and in fact, it seemed to align with the evidence of PW1, who stated that indeed the 1st Appellant used to help him tend to the tea plantation and that she had also planted maize.
- 61 From the foregoing, it is safe to conclude that the 1st Appellant had acquired a beneficial interest over the suit land by virtue of Section 9 of the *Matrimonial Property Act*. The said Section 9 states that 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 the property equal to the contribution made.
- 62 The consequence of the foregoing is that land parcel No. Loc.19/Gacharageini/1189, is matrimonial property and the 1st Appellant by virtue of her contributions has acquired a beneficial interest over it.

I. Whether the appeal filed is merited?

- 63 In the instant Appeal, the Appellants covet prayers against the Respondent vacating and/or setting aside the Judgement of the Learned Senior Principal Magistrate Hon. E Muriuki in Muranga Chief Magistrates ELC Suit No. 23 of 2020 delivered on 31st August 2021 and substituting the same with Orders prayed for in the Appellants' Counterclaim dated 7th August 2020. In the said Counterclaim the, Appellants herein pray for orders against the Respondent herein as follows;
- a. A declaration that the parcels of land known as Land Parcel Ngobit/Muhonia Block 1/575 and land parcel No. Loc.19/Gacharageini/1189 are held by the Plaintiff in customary trust on behalf of the 1st Defendant.
 - b. An order that the Land Registrar Murang'a and Laikipia to add Elizabeth Wanjiru Macharia as a proprietor on the Titles of Land Parcel Ngobit/Muhonia Block 1/575 and land parcel No. Loc.19/Gacharageini/1189 for the two properties held in equal shares between the Plaintiff and the 1st Defendant.
 - c. An injunction be issued against the Plaintiff stopping him, his representatives, heirs, assigns, beneficiaries in title, agents and whomsoever acting on his behalf from interfering with the 1st Defendants possession of the suit lands known as Land Parcel Ngobit/Muhonia Block 1/575 and land parcel No. Loc.19/Gacharageini/1189.
- 64 In accordance with the above prayers, it is evident that the Appellants covet orders in respect of Land Parcel Ngobit/Muhonia Block 1/575, and Land Parcel No. Loc.19/Gacharageini/1189. This Court is however reluctant to issue any orders with respect to Land Parcel Ngobit/Muhonia Block 1/575, as it is not well guided through evidence on the ownership of the same. This Court in this regard notes that neither the Appellants nor the Respondent produced any documents either as official search or the copy of title for the said property. In any case it appears that Land Parcel Ngobit/Muhonia Block 1/575, is not the subject of any dispute before this Court.



- 65 With regards to Land parcel No. Loc.19/Gacharageini/1189, the Appellants pray for a declaration of a customary trust in favour of 1st Appellant, and registration in her favour as an equal owner together with the Respondent and an injunction restraining the Respondent from interfering with Appellants possession of the said land.
- 66 In determining the merit of the prayers sought, this Court will begin with the prayer for declaration of a customary trust.
- 67 It is not in doubt that Land parcel No. Loc.19/Gacharageini/1189, is owned and registered in the name of the Respondent herein. Section 25(1) provides that such a registered owner's rights are indefeasible and are held free from all other interests and claims and that the rights can only be defeated in the manner provided under the Act. The rights of a registered owner are however subject to overriding interests declared by section 28 of the [Land Registration Act](#) which include trusts including customary trusts.
- 68 The concept of trust must however be proved. In the case of *Mumo Vs Makau* [2002] 1EA.170, the Court held that;
“trust is a question of fact to be proved by evidence.....”
See also the case of *Gichuki Vs Gichuki* C.A Civil Appeal No. 21 of 1981, where the Court of Appeal held that it is trite law that trust is a question of fact to be proved by evidence.
- 69 In *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] Eklr, the Court dealt with the issue of trust at length. The court held that the onus lies on the party relying on the existence of a trust to prove it through evidence. That is because:
“The law never implies, the Court never presumes a trust, but [only] in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”
- 70 The onus to prove existence of a trust lay squarely on the appellants. Section 107 of the [Evidence Act](#) further provides that:
“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist. (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”
- 71 Section 108 of the [Evidence Act](#) provides as follows:
“The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”
- 72 Section 109 of the aforementioned Act again provides that:
“The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”



- 73 From the above, it is clear that the onus was on the Appellants to prove that there indeed existed a trust between the Respondent and the Appellants relation to Land Parcel No. Loc.19/Gacharageini/1189. This Court notes that save for the Appellants alleging that a customary trust had been established in their favour, they he did not substantiate or corroborate the said allegations.
- 74 Based on the above, this Court finds and holds that the Appellants failed on a balance of probability to discharge the burden of proof.
- 75 The Appellants failed to tender any evidence showing that Land Parcel No. Loc.19/Gacharageini/1189, was held by the Respondent in trust for them. The Appellants only produced in evidence marriage certificate and only proved that she was indeed married to the Respondent, but that was not enough to prove the existence of a trust over the Land parcel No. Loc.19/Gacharageini/1189. Therefore, it follows that the prayer for the declaration of a customary trust in favour of the 1st Appellant must fail, as the same has not been proven to the legally acceptable standard.
- 76 The Second prayer is for an order that the Land Registrar Murang'a add Elizabeth Wanjiru Macharia, as a proprietor on the Title of Land Parcel Loc.19/Gacharageini/1189, to be held in equal shares between the 1st Appellant and the Respondent. This Court has already herein above found that the 1st Appellant has a beneficial interest over the suit land and that Land Parcel Loc.19/Gacharageini/1189, is matrimonial property. Having made the above findings, the prayer sought by the 1st Appellant for addition of her name to the title document as an equal owner is not tenable and the same would amount to the distribution of matrimonial property during the subsistence of the marriage.
- 77 On the third prayer where the Appellants seek an injunction restraining the Respondent from interfering with their possession of Land Parcel Loc.19/Gacharageini/1189, as stated herein above, the Appellants have established before this Court that they have a beneficial interest over the suit land which is worthy of protection. Further this Court has herein declared that the suit property is matrimonial property owing to the contribution of the 1st Appellant has established before this Court. In this regard, it follows that the actions of the Respondent to evict the Appellants from the suit land and relocate them to Land Parcel Ngobit/Muhonia Block 1/575, situated in Laikipia County would amount to an infringement of their right and would be in total disregard of their beneficial interest over Land Parcel Loc.19/Gacharageini/1189. Consequently, the Court finds that the prayer for an injunction is merited and this Court proceeds to grant the same.
- 78 Having analysed the available evidence as above, and the Memorandum of Appeal dated 29th September 2021, the Court finds that the said Appeal succeeds partially as follows;
1. An order be and is hereby issued vacating and/or setting aside the Judgement of the Learned Senior Principal Magistrate Hon. E Muriuki in Murang'a Chief Magistrates ELC Suit No. 23 of 2020 delivered on 31st August 2021.
 2. A declaration be and is hereby made that Land Parcel No. Loc.19/Gacharageini/1189, is matrimonial property.
 3. A declaration be and is hereby made that the 1st Appellant has a beneficial interest worthy of protection over Land Parcel Loc.19/Gacharageini/1189.
 4. An order of injunction be and is hereby issued against the Respondent restraining him, his representatives, heirs, assigns, beneficiaries in title, agents and whomsoever acting on his behalf from interfering with the Appellants possession of the suit land known land parcel No. Loc.19/Gacharageini/1189.



5. Each Party shall bear its own costs.

79 It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 26TH DAY OF
JANUARY, 2023.**

L. GACHERU

JUDGE

Delivered virtually in the presence of;

M/s Nzilani for the Appellants

M/s Waititu H/B Mwaniki for the Respondents

Court Assistant – Joel Njonjo

L. GACHERU

JUDGE

26/1/2023

