



REPUBLIC OF KENYA



**KENYA LAW**  
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**LAO v NMK (Matrimonial Case 4 of 2022)  
[2023] KEHC 18894 (KLR) (31 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 18894 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CASE 4 OF 2022**

**G MUTAI, J**

**MAY 31, 2023**

**BETWEEN**

**LAO ..... APPLICANT**

**AND**

**NMK ..... RESPONDENT**

**JUDGMENT**

1. Vide Originating Summons dated 8<sup>th</sup> April 2022 the applicant sought the following orders:-
  1. That this honourable court be pleased to issue a declaration that the following properties registered jointly in the names of both the applicant and the respondent are solely owned by the Applicant:-
    - a. Apartment No. xxx, Block 4, Floor 3 at Zawadi Apartments, Phase 1 situated at LR No. xxxxx.
  2. That the honourable court be pleased to order that the above-mentioned apartment be transferred to the applicant's name;
  3. That the honourable court be pleased to order that the respondent executes all documents where necessary to transfer the apartment to the applicant's name, and in the absence or in default, the same be executed by the Deputy Registrar, Lands Registrar of the Registrar of titles;
  4. That the respondent be compelled to render a full and frank disclosure to the applicant on all bank statements and financial records and or report of his bank accounts detailing all credits and debit entries in those accounts from the year 2010 to-date pending the hearing and determination of these proceedings;



5. That a temporary injunction be issued restraining the respondent, his servants and or agents from selling transferring, alienating, wasting, damaging and or otherwise adversely interfering with the said apartment pending the hearing and determination of the Originating Summons herein;
  6. That the honourable court be pleased to grant such further or other reliefs orders as may be just in the circumstances;
  7. That the Respondent be condemned to pay costs of this suit.
2. The Originating Summons was grounded on the fact that the applicant and the respondent had been wife and husband respectively, that the property under contestation was acquired during the subsistence of the marriage, that the applicant has been repaying the loan, that the respondent was never interested in the property and that the parties are now divorced.
  3. In support of the suit the applicant swore a Supporting Affidavit in which she deposed to the facts that she relies upon to wit that:-
    1. She got married to the Respondent on 2<sup>nd</sup> January, 2010 at the Holy Ghost Cathedral Mombasa;
    2. They acquired Apartment No xxx, Block 4, Floor 3 at Zawadi Apartments, Phase 1 situated on LR No xxxxx during the subsistence of the marriage. The offer letter was written to her in 2015. She exhibited the said letter of offer;
    3. The property was purchased with a loan given by the I&M Bank and she was currently serving the said loan. She exhibited the credit facility and mortgage schedule;
    4. The property be settled for the benefit of the Applicant otherwise she will suffer irreparable damage; and
    5. That the parties are now divorced. In evidence of that she exhibited a copy of the certificate making Decree Nisi Absolute.
  4. The documents provided show that the subject property was sold to the parties herein in consideration of the sum of Kes.4,000,000.00. The applicant paid a deposit of Kes.400,000.00, with the I&M Bank providing Kes.3,600,000.00 being the balance. Although the loan offer was made to the Applicant only, the loan agreement/credit facility was in the name of the respondent and the applicant jointly, as was the Agreement for Lease with Zawadi Apartment Ltd.
  5. The applicant also attached to her pleadings a breakdown of mortgage and other payments made< which according to her were as follows at the time the claim was filed:-
    1. 10% deposit (made by the applicant) - Kes.400,000.00;
    2. Mortgage payments made by the applicant - Kes.2,819,000.00;
    3. Mortgage payments made by associated companies and individuals Kes.947,280.00;
    4. Mortgage payments made by the respondent - Kes.205,000.00; and
    5. Fees and incidentals (paid by the Applicant) - Kes.257,550.00.
  6. The respondent is opposed to the Originating Summons. On 5<sup>th</sup> May, 2022 he filed a Replying Affidavit in which he averred as follows:-



1. He acknowledged that he was the former husband of the Respondent;
  2. He confirmed that they bought the subject property together;
  3. He denied that the Applicant had been servicing the loan faithfully;
  4. He averred that part of the money used for servicing the loan came from what he said were his companies to wit Ronic International Ltd and Lonic Kenya Ltd. In support of this contention he annexed a copy of the Form CR12 of the former company;
  5. He further averred that he made the applicant a signatory of the Ronic International Ltd.'s account. In evidence of this he attached a bank statement of Ronic International Ltd;
  6. He stated that his father Mr. Donald Mwenga through his company Doanic Enterprises Ltd lent them Kes.2,014,999.00 which was used to finance tenders Ronic International Limited had been awarded by the Kwale and Mombasa County Governments. He averred that the proceeds from the said tenders were used partly to repay the loan. In support of this he provided the bank statement of Ronic International Ltd and Form CR12 of Doanic Enterprises Ltd;
  7. The respondent claimed that having contributed towards its purchase the property shouldn't be settled for the benefit of the applicant alone but ought to be valued and sold with the proceeds being divided amongst the parties or in the alternative the applicant could pay him what he had contributed.
7. The respondent filed a Written Statement and List and Copies of Documents on 1<sup>st</sup> September, 2022. The Written Statement and the Replying Affidavit make the same averments as those I have adverted to above. I need not rehash the same here.
  8. The respondent filed a Notice of Motion dated 6<sup>th</sup> October, 2022 vide which he sought to have I&M Bank Nyali compelled to give him the statement of the mortgage account. The said application was opposed by the Applicant.

### **Evidence of the Applicant**

9. The matter proceed before me on 13<sup>th</sup> February, 2023 when the applicant testified. The applicant produced the documents in her bundle. She stated that the purchase price for the apartment was Kes.4,000,000.00 and that she paid the 10% deposit on 13<sup>th</sup> April, 2015 from her personal account with the said bank. The bank gave them a Kes.3,600,00.00 mortgage which was repayable within 10 years. She testified that so far she had paid Kes.5,391,996.00 (as at 10<sup>th</sup> February, 2023) leaving a balance as at the said date of Kes.2,757,247.18. She further testified that the Respondent had only paid a sum of Kes.205,000.00 which he paid on 4<sup>th</sup> January, 2016 (Kes.55,000.00) 8<sup>th</sup> March 2017 (Kes.50,000.00) and 30<sup>th</sup> May 2017 (Kes.100,000.00).
10. The applicant averred that they were given a loan by the respondent's father. The loan was disbursed to the respondent's company Ronic International Ltd. It was to be used to finance some work in Kwale. She testified that the respondent was unable to complete the said work as a result of which the respondent's said company is now blacklisted in Kwale.
11. On cross examination by Mr. Tolo the applicant insisted that she made the payment of the deposit through her personal account. Regarding payment of fees and incidentals, she stated that she also made these payments. When questioned as to why she hadn't produced the receipts she said that these were with the Bank. She testified that she paid for the loan in cash, by Mpesa and in cheques. In addition



- to these payments it was the testimony of the applicant that she also pays service charge in respect of the said apartment.
12. The applicant defended her tabulation of the payments and said that despite the fact that she isn't an accountant the figures therein were accurate and could be relied upon.
  13. The Applicant testified that Doanic Enterprises Limited advanced to Ronic International Limited a sum of money which had not, to the best of her knowledge been repaid. She admitted that some payments could have been made by Ronic International Limited towards the reduction of the loan although she did not have details.
  14. On re-examination by Mr. Ambwere the Applicant stated that all the payments made in the account, save for the 3 she had admitted to having been made by the respondent, were made by her. She was categorical that the respondent had never paid for service charge. She defended her summary saying that it wasn't necessary to employ an accountant for such a task.

### **Evidence of the Respondent**

15. The respondent testified on 27<sup>th</sup> February 2023. He referred to his witness statement dated 26<sup>th</sup> August, 2022 which he adopted as his evidence-in-chief. The respondent averred that the loan was made to him and the applicant. He denied that the Applicant had been faithfully paying the loan. He stated that his father through his company, Doanic Enterprises Ltd lend them Kes.2,000,000.00 which was wired to his company Ronic International Ltd. The said loan was used to finance a project and to pay part of the loan. It was his evidence that the applicant was a signatory of the Ronic's account and used the money in its account to pay for the projects and also to repay the loan. She relied on exhibit No. 8 (the bank statement) to support his case.
16. The respondent prayed that the house be valued and sold so that the proceeds thereof could be distributed in the ratio in to which the parties had contributed for it.
17. On cross examination by Mr. Ambwere the respondent made the following admissions:-
  1. It was the Applicant who paid the deposit;
  2. He didn't know the outstanding amount as at the date of the appearance in Court as he had stopped paying for the loan in 2018 nor does he know what amount has been paid so far;
  3. He was in rehabilitation sometime in 2018. He has worked for gain at all times save for the said period;
  4. He had only paid Kes.205,000.00 directly towards the loan.
18. The respondent insisted that he had made contribution towards the purchase of the said house and deserved to get a share of the proceeds commensurate to what he had contributed towards its purchase.
19. On re-examination the respondent insisted that he made payments. He lamented that he had not been able to get statements of the loan account so that he could show which of the payments that had been made, were made by him. The respondent insisted that Kwale County had paid at least Kes.1,198,440.00 for the project Ronic had carried out. The businesses that Ronic International Ltd undertook were then managed by the applicant who would withdraw money and make payments for the loan either directly or through her sister Maureen. The respondent stated that the loan they took from their father, through his company Doanic Enterprises Ltd, had not been settled despite the fact that he had asked for it verbally.
20. At the close of the case the parties agreed to file Written Submissions



### Submissions of the Applicant

21. The applicant submitted that she had paid Kes.5,391,996.00 and that the balance due was Kes.2,757,241.28. the Respondent had only paid Kes.205,000.00. She submitted that there was no evidence that he paid anything more.
22. The applicant submitted that she provided evidence in support of her case but that the respondent didn't. She therefore urged the Court to grant her prayers that she had sought in the Originating Summons.
23. I was referred to the case of *Echaria v Echaria* (2007) eKLR, *Francis Njoroge v Virginia Wanjiku Njoroge* Civil Appeal No. 179 of 2009 and *Ogentoto v Ogentoto* Supreme Court Petition No. 11 of 2020 for the proposition that matrimonial property ought to be divided according to the contribution made by each party towards its acquisition.

### Submission of the Respondent

24. The respondent submitted that the subject matter of the suit before the Court was Apartment No. xxx Block 4, Floor 3 and parking space No. xxx and 1 share in the management company. It was submitted that these were acquired during the marriage between the applicant and the respondent. The respondent stated that he wants the property to be valued, and sold and the proceeds of sale to be divided according to each party's contribution.
25. The respondent identified 4 issues to wit:-
  1. Whether the properties identified above are matrimonial properties?
  2. Whether the Respondent made monetary and non-monetary contribution towards the acquisition of the said properties?
  3. What share is the Respondent entitled to?
  4. Who should bear the costs of the suit?
26. On the first question the respondent submitted, relying on the case of *TMW v FMC* [2018] eKLR that it was.
27. As to what contribution the respondent made it was submitted that the applicant was neither employed nor in gainful employment at the time the loan was taken. The respondent submitted that his father's company Doanic Enterprises Ltd gave a loan to Ronic International Ltd which was used to finance the business of the latter and also to pay the loan. The Court was asked to look at and compare the dates when the deposits were made in Ronic's account and when withdrawal would be made by the applicant and payments made to I&M Bank.
28. The respondent relied on *AWM v JGK* [2021]eKLR for the proposition that non monetary contribution is taken into account when dividing property. It was submitted that the respondent "took care of the applicant as his wife and even made her signatory to his business account. The marriage was dissolved after 11 years, the respondent offered the applicant companionship. The respondent's non-monetary contribution is within the meaning of section 2 of the *Matrimonial Property Act*"
29. On the share that should be given to the respondent it was submitted relying on *RGG v MKG* [2018]eKLR that this Court ought to give the Respondent 50% share of the matrimonial property.
30. On costs it was submitted that each party should bear their own costs.



## The Applicable Law

31. What then is the constitutional and legal position? It is important that I set out the relevant provisions of the Constitution and the law as these shall determine the decision that I shall make.
32. Article 45(3) of the Constitution of Kenya 2010 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 the marriage”
33. Section 6 and 7 of the Matrimonial Property Act, Act No 49 of 2013 provide that:-
- “6.
- (1) For the purposes of this Act, matrimonial property means—
    - (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.
  - (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
  - (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
  - (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.
7. 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.”
34. Section 14 of the said 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.”

## Issues to be Determined by the Court

35. I am of the view that there are 4 issues that this Court ought to determine: -



1. Is the suit property matrimonial property?
2. What contributions did the applicant and the respondent make towards its acquisition?
3. What share is due to the applicant? If the respondent is entitled to a share, what percent? Who bears the responsibility where a loan is outstanding?
4. Who bears the costs of this cause?

Is Apartment No 178, Block 4, Floor 3, Parking space No 178 and 1 share in the management company of Zawadi Apartments phase 1 a matrimonial property?

36. The evidence adduced shows that the Applicant and the Respondent purchased the said property in 2015 with a view to using it as their home as they no longer wished to live in rented houses. The letter of offer was made to the Applicant. The subsequent sale agreement and the loan agreement were in their names. The applicant and the respondent got married on 2<sup>nd</sup> January 2010. Their marriage was dissolved on 13<sup>th</sup> April, 202. The purchase of the house took place at a time the marriage was subsisting.

37. In *TMW v FMC* [2018]eKLR the Court said as follows:-

“Firstly, I shall determine whether the suit property falls in the category of matrimonial property. Turning the provisions of the *Matrimonial Property Act*, Section 6 of the *Matrimonial Property Act*, 2013 defines a matrimonial property to include the matrimonial home or homes, any household goods in the home or homes or any other property jointly owned and acquired during the subsistence of the marriage. Basically 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 matrimonial property. In the instant case, the marriage between parties herein commenced 1993 and was officiated through Kikuyu Customary Law in 2001. The property in question was acquired in 2010 and the same was acquired during the subsistence of the marriage between the parties herein. There is also evidence that the suit property was acquired for purposes of building a family home. As a result, there is no doubt whatsoever that the suit property including the Juja farm forms part of matrimonial property as far as the parties herein are concerned.”

38. The property, having been intended the matrimonial home of the Applicant and the Respondent, is indeed so. I therefore find and hold accordingly.

What contribution did the Applicant and the Respondent towards the acquisition of the said property?

39. The applicant and the respondent agree on the following facts:-

1. The applicant made the initial deposit of Kes.400,000.00;
2. The respondent hasn't contributed towards loan repayment since 2018
3. The respondent's father loaned Kes.2,000,000.00 to Ronic International Ltd which was used by it, to finance a contract it had with the Kwale County Government. The Respondent's father has not been repaid to date;
4. The Applicant was a signatory or the Ronic International Act's account and used some of its funds to pay the home loan the applicant and the respondent had with I&M Bank;



5. The respondent paid Kes.205,000.00 towards the reduction of the mortgage.
40. Although there was a contestation as to who paid for the legal and other outgoings it does appear to me that these were paid by the applicant. The respondent was unaware of many facts including the current loan outstanding and does not appear to have made any effort towards paying the loan since 2018. At some point in 2018 the Respondent was admitted into an alcohol rehabilitation centre as he had an alcohol addiction at that point. It is a common ground that during this time he made no payments, having not been in a position to do so.
41. The respondent avers that the respondent was not in gainful employment during the marriage. I am afraid I cannot agree with this. In his own testimony the respondent averred that the applicant managed Ronic International Ltd and that it was for that reason she was made a signatory to its accounts so that she could transact its business. Thus although Ronic International Ltd belongs to the Respondent and the one Aaron Kazungu Ngala it was managed and or operated by the Applicant.
42. Marriages are relationships of trust. Spouses do not keep records in contemplation of the day when they shall be able to use them in matrimonial proceedings. Unravelling contributions made by the parties is therefore exceedingly difficult. It is not a scientific venture that can yield mathematically accurate results. Rather it may be said to be an art.
43. The Supreme Court in *Joseph Ombogi Ongentoto v Martha Bosibori Ogentoto* [2023]eKLR stated, in agreeing with what Tuiyott J (as he then was) said in *UMM v IMM* [2014]eKLR stated as follows:-
- “we find the above opinion and findings persuasive and it is our finding that the stated equity under Article 45(3) means that the Courts are to ensure that at the dissolution of a marriage, each party to a marriage gets a fair share of the matrimonial property based on their contribution. This 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 contributed”.
44. I am bound by the above decision. I must therefore try my best to establish what each party herein contributed. As I do so I acknowledge that both parties made both monetary and non-monetary contributions. My view is based on the definitions or contribution in section 2 of the *Matrimonial Property Act* which is that:-
- “... monetary and non-monetary contribution and includes
- a. domestic work and management of the matrimonial home;
  - b. child care;
  - c. companionship;
  - d. management of family business or property; and
  - e. farm work”
45. “Family business” is defined as “any business which
- a. Is run for the benefit of the family by both spouses or either spouses; and
  - b. Generates income or other resources wholly or part of which are for the benefit of the family”



46. The Court in *AWM v JGK* [2021]eKLR held that

“in respect of non-monetary contribution, I take the view that the Applicant made her contribution in the manner defined under section 2 of the *Matrimonial Property Act*. I have considered the argument by the Respondent that the Applicant had domestic workers and did not do household chores. However, a mother’s contribution to a home cannot be quantified in monetary terms. Even where there is domestic help in most cases it is the duty of the mother to ensure that the home runs smoothly and that all the needs of the children and the husband are catered for. Even where she is gainfully employed as claimed in this matter, her duties once she gets home do not end until all is well at home. This is what the Applicant is claiming. She also provided companionship to the Respondent. The Respondent argues that companionship does not constitute a contribution towards matrimonial property. Section 2 of the *Matrimonial Property Act* defines the contribution to include companionship”.

47. I agree wholeheartedly with the holding above. Thus in this case not only must I consider what each contributed monetarily. I must also bear in mind non-monetary contribution.

#### **What share is the Applicant entitled to?**

48. In this case the applicant has borne the greater burden. She looked for the property, and paid the deposit as well as the legal fees and incidentals. She has been paying the loan singularly since 2018 after the Respondent stopped contributing. She was also the manager of Ronic International Ltd and was responsible for the business it generated thus payments made from its account should be partly attributed to her. In my view, the Applicant is entitled to 80% of the said property given the greater contribution she continues to make. The Respondent is entitled to 20%. This value is to be reckoned upon the valuation of the property and netting off the loan balance outstanding as of 31<sup>st</sup> May, 2023

49. In my view reckoning contribution on the basis of the net value of the property will best protect the interest of the parties given their contributions and also considering the fact that there is presently an outstanding loan that must be paid.

#### **Who should bear costs of the Originating Summons?**

50. Costs ordinarily follow the event in civil matters. Given the nature of this matter however I am not persuaded that an award of costs would be an appropriate remedy. Each party shall therefore bear own costs.

#### **Disposition**

51. In the premises I make the following orders:-

1. A declaration is hereby made that Apartment No. xxx Block 4 Floor 3 at Zawadi Apartments Phase 1 situated at LR No.xxxxx is a matrimonial property and that its net value is held by the applicant and the respondent in 80:20 ratio;
2. Apartment No xxx Block 4 Floor 3 at Zawadi Apartments Phase 1 situated at LR No 17713 be valued within 60 days from the date of this Judgment. The applicant shall pay the respondent the amount of money equivalent to 20% of its net value;



3. Upon the payment of the respondent by the applicant as stated above the respondent shall execute the transfer documents within 14 days failing which the Deputy Registrar of this honourable Court shall do so on his behalf; and
4. Each party shall bear own costs.

Orders accordingly.

**DELIVERED, DATED, AND SIGNED THIS 31<sup>ST</sup> DAY OF MAY, 2023 AT MOMBASA VIA MICROSOFT TEAMS**

.....

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr. Ambwere for the Applicant;

Ms. Iddi holding brief for Mr. Tolo for the Respondent;

Ms. Winnie Migot - Court Assistant.

