



REPUBLIC OF KENYA



POO v RAO (Civil Case E002 of 2021) [2023] KEHC 19786 (KLR) (30 June 2023) (Judgment)

Neutral citation: [2023] KEHC 19786 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL CASE E002 OF 2021
RE ABURILI, J
JUNE 30, 2023**

BETWEEN

POO APPLICANT

AND

RAO RESPONDENT

JUDGMENT

1. The Originating Summons dated 15th February 2021 was brought by the applicant POO pursuant to Section 7 of the [Matrimonial Property Act](#) seeking the following orders:
 - i. That the properties known as Kisumu/Kasule/XXXX, Kisumu/Kasule/XXXX and Kisumu/Kasule/XXXX be severed and thereafter be distributed between the parties hereto in accordance with each parties' contribution to the acquisition of each property.
 - ii. In the alternative the properties known as Kisumu/Kasule/XXXX, Kisumu/Kasule/XXXX and Kisumu/Kasule/XXXX be severed and thereafter be distributed to the parties hereto in accordance with each parties' contribution to the development thereof.
 - iii. Spent
 - iv. Spent
 - v. Spent
 - vi. That the Honourable Court do determine and distribute the applicant's interest in a five-acre plot purchased by the respondent at Kisumu Karateng such purchases having being done during coverture.



- vii. That the Honourable Court do determine and distribute the applicant's interest in a Hardware known as [particulars withheld] located at Kisian Centre set up and run by the respondent during coverture.
 - viii. That upon severance as above, the interests in these properties be distributed in accordance with the law.
 - ix. That in furtherance of the foregoing, the Deputy Registrar be empowered to sign any documents that the respondent may refuse to sign.
 - x. That the respondent be condemned to pay the costs of this application.
2. The summons was anchored on the grounds on its face as well as the supporting affidavit of the applicant.
3. The applicant's case is that he and the respondent got married under Luo customary law in 1990 and separated on the 19th January 2008.
4. It was the applicant's case that during the subsistence of the marriage, he and the respondent acquired and developed the following properties:
 - i. Kisumu/Kasule/XXXX registered in the applicant's name
 - ii. Kisumu/Kasule/XXXX registered in the applicant's name
 - iii. Kisumu/Kasule/XXXX registered in the respondent's name in trust for JOR and DOO
 - iv. Motor Vehicle Registration No. KAT XXXX, a Toyota Corolla registered in the respondent's name
 - v. Motor Vehicle Registration No. KAB XXXX, a Peugeot 504 registered in the applicant's name
5. It was the applicant's assertion that on the aforesaid parcels of land, he built a four bedroomed family house, seven 2 bedroomed residential units and four one bedroomed units.
6. The applicant further stated that in March 2008, the respondent acquired control of rental properties that were matrimonial property for the purposes of maintaining and paying school fees for the children of the marriage and has continued to do so to date notwithstanding that the last of the aforesaid children finished university more than 5 years ago and the children have gone into gainful employment.
7. The applicant averred that the marriage was dissolved on the 6.11.2015 and a decree nisi issued on the 21.2.2016 in Kisumu Chief Magistrates Court Divorce Cause No. XX of 2019 filed by the respondent.
8. It was the applicant's case that having failed to make a claim for maintenance in the divorce proceedings, the respondent was precluded from making such claims by dint of section 82 (1) of the [Marriage Act](#) and thus there was no basis upon which the respondent continued to exclusively receive rental income from matrimonial property and further that the respondent had exclusive usage of motor vehicles bought and registered in their joint names.
9. The applicant further averred that having been receiving rental income from the matrimonial property from 2015 to date, the respondent had not rendered any accounts on the same.



10. It was his case that during the subsistence of the marriage, the respondent acquired and developed property in her own name and thus the court was enjoined to determine the applicant's beneficial interest in the said property.
11. In cross-examination, the applicant stated that he acquired the properties and registered them in his names, his children's names and the respondent's names. He further stated that he single -handily constructed and developed the properties as was evident from the banking slips and receipts of purchase of building materials he had adduced.
12. The applicant further stated that he was present in his children's lives throughout and that they even lived with him in Nairobi. He denied the allegation that one of his sons had a medical condition as he would have been aware and stated that the son usually drinks. He further testified that his first-born son worked with MTN Uganda while the second born one worked with Media Max.
13. In re-examination, the applicant stated that he worked for the Tourism Fund and had worked for them for 33 years. It was his testimony that he always provided for his children since they were born. It was his case that he developed the houses on the property.
14. In response, the respondent swore a replying affidavit on the 29th October 2021 and further testified conceding the applicant's averments of the marriage and subsequent divorce. It was her case that throughout the marriage, she was employed and held different positions till her retirement on the 9th January 2017 and that she earned between Kshs. 24,000 – Kshs. 86,000 as a teacher and later on as a lecturer.
15. It was her defence that she contributed towards the purchase of land parcel number Kisumu/Kasule/XXXX which she bought from one Mr. JAO and later registered in the name of the applicant, whereupon, they constructed the matrimonial home as well as the rental houses.
16. The respondent further deposed that she contributed to the construction of their home at the applicant's ancestral home and also improved on the said home although the land on which the home was constructed was still in the applicant's father's name and further that she repaired and maintained the properties.
17. It was her contention that as a result of her contribution, she incurred loans that were secured by her salary and Sacco contributions and that though by 2015 their children had graduated from college, she continued to collect rent to offset the loans she had taken and further that she had to pay the medical bill for their second child who was battling a condition that required constant medical intervention as he was diagnosed with a mental condition, substance abuse and even lives on the streets as he is unable to maintain employment.
18. The respondent listed their matrimonial property as
 - i. Kisumu/Kasule/XXXX registered in the applicant's name
 - ii. Kamagambo/Kaburo/XXXX registered in the name of Richard Otieno Saria
 - iii. Kisumu/Kasule/XXXX registered in the applicant's name
 - iv. Ngong/Ngong/XXXX registered in the applicant's name
 - v. Motor Vehicle Registration No. KAT XXXX, a Toyota Corolla jointly registered in their joint names.



- vi. Motor Vehicle Registration No. KAB XXXX, a Peugeot 504 registered in the applicant's name
 - vii. Motor Vehicle Registration No. KAB XXXX registered in the applicant's name.
 - viii. Motor Vehicle Registration No. KAC XXXX registered in the applicant's name
 - ix. Motor Vehicle Registration No. KBP XXXX registered in the applicant's name
19. The respondent deposed that the properties Kisumu/Kasule/XXXX and Kisumu/Kasule/XXXX did not form part of matrimonial property as they were registered in the names of the children and she was holding in trust for their sons.
 20. In cross-examination, the respondent stated that she did sketches of their house plans and further supervised the construction. It was her testimony that she took the loan from the Sacco in 1994 and not 1993 as it was in the acknowledgement note she had produced.
 21. The respondent stated that she acquired Kawayu Hardware and Guest House through loans and that the 2 pieces of land she has in Kojolla, she acquired through loans and not through proceeds of rent.
 22. In re-examination, the respondent stated that the rental income was Kshs. 29,000 and that she had to repair and improve the buildings and further that she connected the buildings to Kiwasco. It was her testimony that Kisumu/Ojolla/XXXX and 6327 XXXX

The Applicant's Submissions

23. It was submitted that despite several orders by the Honourable Court for the respondent to avail verifiable statements of accounts, the respondent failed to comply with the said order thus showing that the respondent had failed to account for the rental income she received from 2008, from the rental premises.
24. The applicant further submitted that the aforementioned properties were acquired and developed by the applicant more so land parcel no. Kisumu/Kasule/XXXX where the matrimonial property stands as evidenced by the sale agreements and transfer documents produced as exhibits.
25. It was submitted that the respondent was lying when she claimed to have purchased the said land as is evident from the fact that she cannot produce a sale agreement in support of her claims despite her allegation of having taken out a loan of Kshs. 30,000.
26. The applicant submitted that after gaining access to the rental properties, the respondent was able to acquire various properties of her own being the construction of a palatial home in Karateng and setting up of different business including Kawayu Guest House and Hardware.
27. Regarding the home in Rongo, it was submitted that it sits on ancestral land that is yet to be sub-divided and that once sub-division is undertaken, the home shall be available to the children and thus the only available matrimonial property was Kisumu/Kasule/XXXX.
28. As regards the motor vehicles listed, the applicant submitted that Motor Vehicle Registration No. KAT XXXX was jointly owned and had been abandoned at the Nyamasaria home by the respondent once it was grounded, that KAC 401G, an old model Volvo was also grounded but the applicant retained it for sentimental value, that KBP XXXX was bought for the second family without the involvement



of the respondent and that KAB XXXX had been availed to the respondent as per the order of the children's court.

29. It was submitted that having been granted the order to collect the rental income, the respondent neglected the maintenance of the said rental houses that became dilapidated and further that after the court's order to have the rent deposited in court, the respondent chased away the tenants. The applicant submitted that he had proved that the respondent acquired the properties in Karateng and Ojolla during the coverture and had them registered in her name.
30. The applicant submitted that each party must prove its contribution as was held by the Supreme Court in the case of Joseph Ombongi Ogento v Martha Bosibori [2023] eKLR. The applicant submitted that he had proved that he should keep Kisumu/Kasule/3014.

The Respondent's Submissions

31. The respondent submitted that the following properties were matrimonial properties:
 - i. Kisumu/Kasule/XXXX
 - ii. Kamagambo/Kaburo/XXXX
 - iii. Kisumu/Kasule/XXXX
 - iv. Ngong/Ngong/XXXX
 - v. Motor Vehicle Registration No. KAT XXXX
 - vi. Motor Vehicle Registration No. KAB XXXX
 - vii. Motor Vehicle Registration No. KAC XXXX
 - viii. Motor Vehicle Registration No. KBP XXXX
32. The respondent submitted that the property Kisumu/Kasule/XXXX, that she was holding in trust for the children ought not to form part of the matrimonial property as the intention was to have the same transferred to the children and by claiming them as matrimonial property, the applicant intended to disinherit his children.
33. It was submitted that Kisumu/Ojolla/XXXX and Kisumu/Ojolla/XXXX did not form part of matrimonial property as they were acquired solely by the respondent after the dissolution of the marriage and were thus not subject to distribution.
34. The respondent submitted that she had demonstrated that she took a loan of Kshs. 30,000 and that she solely carried out developments on the matrimonial home situated on Kisumu/Kasule/XXXX and further that she had single handedly raised the children and as such, the court ought to find that the contribution was 80:20 in favour of the respondent against the applicant as was held in the cases of MW v AN [2021] eKLR, FN v VWN [2017] eKLR and that of PNN v ZWN [2017] eKLR.

Analysis and Determination

35. I have carefully considered all the pleadings of both the Applicant and the Respondent, all the evidence adduced both orally and documentary as well as the written submissions and the law applicable as relied on by the parties. From the material placed before this court, it is clear that the parties herein were married and subsequently their marriage broke down and their divorce has since been finalized.



36. Article 45 (3) of *the Constitution* of Kenya, guarantees the rights and entitlements of parties to a marriage before, during and after the marriage as is in the instant case. The Article 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.”

37. These rights as stipulated include the rights as to ownership of matrimonial property between the parties after the marriage has terminated. The *Matrimonial Property Act*, 2013 a statute which breathes life into that Article as was held in *V.W.N v F.N* [2014] eKLR quoted in the case of *Peter Njuguna Njoroge v Zipporah Wangui Njuguna C.A 128 of 2014* extensively provides for the rights and responsibilities of spouses in relation to matrimonial property.

38. The issues for determination herein are firstly, what constitutes the property that was acquired during the pendency of the marriage and the distribution of the aforementioned property.

39. The parties herein are not in agreement as to what constitutes matrimonial property with both of them giving different lists of the same as herein above listed. On what constitutes matrimonial property, Section 6 of the *Matrimonial Property Act* defines matrimonial property as:

- (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.

40. Basically, for property to qualify as matrimonial property, it must meet the definition in Section 6 quoted above.

41. From the evidence on record, it is clear that the applicant and the respondent got married under Luo customary law in 1990 and separated on the 19th January 2008 with the marriage being dissolved on the 6.11.2015 and a decree nisi issued on the 25.2.2016 in Kisumu Chief Magistrates Court Divorce Cause No. XX of 2015, which decree nisi was made absolute on 17th August, 2017 as per DEX1(b).

42. The parties agree that the following properties comprise matrimonial property

- i. Kisumu/Kasule/XXXX
- ii. Kisumu/Kasule/XXXX
- iii. Motor Vehicle Registration No. KAT XXXX,
- iv. Motor Vehicle Registration No. KAB XXXX,
- v. Motor Vehicle Registration No. KAC XXXX

43. The following properties are disputed to be matrimonial properties:

- i. Kamagambo/Kaburo/XXXX
- ii. Ngong/Ngong/XXXX
- iii. Motor Vehicle Registration No. KAB XXXX



- iv. Motor Vehicle Registration No. KBP XXXX
- v. Kisumu/Ojolla/XXXX and Kisumu/Ojolla/XXXX
- vi. Kaway Hardware and Guesthouse

44. I shall consider each of the properties above.
45. From the evidence adduced by the applicant herein, land parcel No. Kamagambo/Kaburo/XXXX is the applicant's ancestral home where the parties herein built an ancestral home. However, the applicant testified and there was no contrary evidence that the said land was not sub-divided and was still registered in his late father's name and that upon sub-division, the land would be devolved to his first born in accordance with Luo customary traditions.
46. It is clear that the said land is not owned by either of the parties and can only devolve to the applicant following succession and as such, the Land Parcel No. Kamagambo/Kaburo/XXXX does not form part of the matrimonial property. Although both parties contributed to the construction of the ancestral house on the said land during coverture, the ancestral house cannot be severed from the land which is communally owned by the applicant's larger family.
47. Regarding Land Parcel No. Ngong/Ngong/XXXX, despite the respondent pleading that it belongs to the applicant, no single document was tendered by the respondent to prove the existence of the said land and the applicant's ownership of the land. It is trite that he who alleges must prove. As there is no proof of who owns that land and as the court cannot assume ownership, I find and hold that Land Parcel No. Ngong/Ngong/XXXX does not form part of matrimonial property in contention herein.
48. In respect of Motor Vehicle Registration No. KAB XXXX, the respondent produced copy of logbook showing that it was registered in the names of the applicant on 20/5/2006 from catering levy trustees as previous owners. Therefore, this property forms part of matrimonial property.
49. Turning to Motor Vehicle Registration No. KBP XXXX, it is evident that the said vehicle is owned by the applicant and as per the Copy of Records produced by the respondent, the applicant ownership was from date of registration on the 10.6.2011 after their separation.
50. In his defence, the applicant stated that he acquired the said vehicle after separating with the respondent and that he acquired it for his second family. From the evidence adduced herein, it is clear that the parties herein separated on the 19th January 2008 more than 3 years prior to the applicant acquiring the said motor vehicle. In the circumstances I find that motor vehicle registration no. KBP XXXX does not form part of matrimonial property.
51. Finally, regarding land parcels Kisumu/Kasele/XXXX, Kisumu/Ojolla/XXXX and Kisumu/Ojolla/XXXX, I note that land parcels Kisumu/Kasele/XXXX was acquired by the applicant during the pendency of the marriage and registered in the name of the respondent to hold in trust for their two sons who were then minors. As to whether the said parcels form part of matrimonial property, it is my opinion that the said land ownership having been registered in trust of the minors, does not form part of matrimonial property. I hasten to add that any questions relating to ownership of that property registered in trust for the minors is in the province of the Environment and Land Court and not this Court.
52. As regards Land Parcel No. Kisumu/Ojolla/XXXX and Kisumu/Ojolla/XXXX, the applicant testified that the said properties were acquired by the respondent during coverture with the rental income from the matrimonial home and thus formed part of matrimonial property. On her part, the respondent testified on oath that the said parcels along with Kaway Hardware and Guesthouse were



acquired after the marriage had ended and thus did not form part of the matrimonial property. Further, that she acquired the said properties with her own earnings as she was gainfully employed.

53. I reiterate that it is trite that he who alleges must prove. The applicant herein has not placed before this court any evidence showing that Kisumu/Ojolla/XXXX and Kisumu/Ojolla/XXXX as well as Kawayu Guest House and Hardware were acquired during the pendency of the marriage and or that the respondent utilized proceeds of rental income from the matrimonial property to acquire the said assets, noting that the respondent too, was working and getting income and nothing prevented her from acquiring assets and developing them or doing business to sustain herself and secure her future. In the absence of such evidence, this court finds that the said properties did not form part of matrimonial property.
54. Taking all the above into consideration, I thus find that the properties amounting to matrimonial property and falling for distribution are as follows:
- i. Kisumu/Kasule/XXXX
 - ii. Kisumu/Kasule/XXXX
 - iii. The Ancestral Home in Rongo
 - iv. Motor Vehicle Registration No. KAT XXXX,
 - v. Motor Vehicle Registration No. KAB XXXX,
 - vi. Motor Vehicle Registration No. KAC XXXX
55. The next question is when and how matrimonial property is to be shared? Section 6(7) of the [Matrimonial Property Act](#) provides that:
- “... 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.”
56. Contribution towards the acquisition of matrimonial property is defined under Section 2 of the [Matrimonial Property Act](#), 2013 in the following terms:
- In this Act, unless the context otherwise requires—
- “contribution” means 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.
57. Further, there is a presumption of law under Section 14 of [Matrimonial Property Act](#) 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 a rebuttable presumption that their beneficial interest in the matrimonial property are equal."

58. The Supreme Court of Kenya in the case of 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) held that Equality under article 45(3) of *the Constitution* meant that during the dissolution of a marriage, each party to a marriage got a fair share of the matrimonial property based on their contribution.
59. How then should this court distribute the property herein found to be matrimonial property?

A) Kisumu/Kasule/XXXX & Kisumu/Kasule/XXXX

60. It was the applicant's case that on the aforesaid parcels of land, he built a four bedroomed family house that was their matrimonial home as well as seven 2 bedroomed residential units and four one bed roomed units. He produced bank slips and receipts in support of his claim as well as a sale agreement with one Joanes Amimo Otula over purchase of the said land.
61. The respondent on her part testified that she contributed towards the purchase of land whereupon they constructed the matrimonial home as well as the rental houses and that she also supervised construction of the said houses and that subsequently, she maintained the rental houses and even brought piped water from KIWASCO.
62. I have considered the evidence and submissions, from the evidence adduced and as admitted by the respondent, the applicant bought the aforementioned parcels. It is also evident that the respondent on her part played a role in the construction of the matrimonial home as well as the rental houses and subsequent maintenance of the property which would otherwise have disintegrated.
63. The applicant alleges that after being awarded rental income from the said houses, the respondent let them fall in a state of disrepair and subsequently chased out the tenants. However, in my view, had been the case, then the respondent would not have continued drawing rental income from the said houses. The respondent filed into court as evidence and produced exhibits in the form of receipts for purchase of materials for repair and payment of workers who renovated and or repaired the said premises from time to time. She also produced in evidence receipts issued to tenants for the rents collected over the period visa vis the maintenance costs. She was also living with the two children of the marriage and there is no evidence that the applicant was contributing to their basic needs over the period of separation with the respondent. The respondent also adduced evidence to show that one of the children of the marriage has medical issues related to alcoholism which the applicant dismissed as being spoilt. I disagree. Alcoholism is a disease that requires treatment and if left unattended, it destroys one's life. The respondent cannot be blamed for spoiling her own son whom she cared for and educated up to University level and continued providing for him on account of his inability to take care of himself as a result of this condition.
64. The concession in his testimony that the applicant did not know of this condition of one of his sons just goes towards proving that the applicant was never involved in the lives of his sons and that he left the burden to the respondent to manage the children. He was literally divorced from their lives the same way he was divorced from the respondent and therefore it mattered not that the children had issues of health requiring material and emotional support. This in my view is the reason the respondent sought for orders to collect rent from the said rental premises so as to take care of some of the needs of her children.



65. It was uncontroverted evidence by the applicant that the respondent had since moved out of the matrimonial home and was living in her palatial home in Karateng.
66. In the circumstances I find that both parties contributed in equal measure to the acquisition and maintenance of the property which I find should be shared equally between the parties herein y in the ratio of 50:50.

B) The Ancestral Home in Rongo

67. It is worth repeating here the status of the Rongo ancestral house for clarity purposes. It was the respondent's case that she contributed in the construction of the home they built at their ancestral home in Rongo. This was not disputed by the applicant whose case was that the same had not been subdivided and that upon subdivision, the same would devolve to their first-born son according to Luo customary Law.
68. The applicant did not prove the existence of customary law before this court and in any case this issue involves distribution of matrimonial property and not inheritance. Contrary to the allegations by the respondent, and unlike in the earlier case, the respondent did not show what contribution she made to the construction of the house on the applicant's ancestral land. I thus find that this home wholly belongs to the applicant as it cannot be severed from the ancestral land which belongs to the applicant's larger family. Furthermore, the land on which that house stands is ancestral and cannot be divided without involving other parties and neither can the house be lifted or sold without affecting rights of other beneficiaries to that estate.

C) Motor Vehicles Registration No. KAT XXXX, KAB XXXX and KAC XXXX

69. It was submitted by the applicant that Motor Vehicle Registration No. KAT XXXX was jointly owned and had been abandoned at the Nyamasaria home by the respondent once it was grounded and as such I grant the respondent Motor Vehicle Registration KAT 662Z wholly.
70. As for motor vehicle registration number KAC 401G, there is the uncontroverted evidence that it was also grounded. The car was registered in the applicant's name and the applicant submitted that it held sentimental value to him. In the absence of evidence to the contrary by the respondent, I award the same to the applicant. I similarly award motor vehicle registration KAB XXXX to the applicant.
71. In respect of the properties Kisumu/Kasule/XXXX & Kisumu/Kasule/XXXX, which this court has found should be distributed equally between the two parties, the parties shall agree on a joint valuation and either sell and share the proceeds equally or one is free to buy out the other. In the case of valuation, they shall share the costs equally.
72. Either of the parties or both are at liberty to file an agreement or consent for settlement of the properties so declared to be matrimonial properties. Decree to issue. Each party to bear their own costs of these proceedings.
73. File closed.

Dated, Signed and Delivered at Kisumu this 30th Day of June, 2023

R.E. ABURILI

JUDGE

