



**JOO v MAC (Family Originating Summons E031 of 2022)
[2025] KEHC 8820 (KLR) (Family) (9 June 2025) (Judgment)**

Neutral citation: [2025] KEHC 8820 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY ORIGINATING SUMMONS E031 OF 2022**

CJ KENDAGOR, J

JUNE 9, 2025

BETWEEN

JOO APPLICANT

AND

MAC RESPONDENT

JUDGMENT

1. The Petitioner/Applicant instituted the instant Originating Summons dated 1st April, 2022, in which he sought the following orders against the Respondent;
 - a. That a determination be made to the effect that the petitioner contributed towards acquisition and development of matrimonial property known as [Particulars Withheld] Apartment L.R. No. 209/20263 registered in the names of the Respondent.
 - b. That a further determination be made with regard to the Petitioner’s contribution towards acquisition of all assorted household furniture and effects more particularly those outlined in the annexed schedule with their estimated value.
 - c. An order do issue declaring that 50% of such other or higher portions of the properties aforesaid, are held by the Defendant in trust and for the beneficial interest of the Plaintiff.
 - d. That the matrimonial property be accordingly sold and the proceeds shared equally.
 - e. The cost of this summons be provided for.
2. The Summons is supported by an affidavit sworn by the Petitioner dated 1st April, 2022. He stated in the affidavit that he cohabited with the Respondent as a husband and wife for a period of more than 10 years beginning February 2010. He stated that during their union they decided to jointly



purchase [Particulars Withheld] Apartment L.R. No 209/20263 through mortgage. He stated that he contributed towards the purchase of the house by giving the Respondent Kshs.360,000/= to offset her then existing loan so that she could register the mortgage in her name. He stated that he also advanced her Kshs.830,000/= towards payment of the deposit, which was 10% of the purchase price.

3. He also stated that he paid Kshs.103,750/= as legal fees for acting for the purchase as well as 330,000/= for stamp duty. He stated that he bought furniture for the newly acquired house at Kshs.127,719.30/= as well as other household effects worth Kshs.175,000/=. He claimed that they were living in the said house as their matrimonial home until April, 2021, when the Respondent evicted him from the house. He claimed that he contributed more than half to the purchase of the said house. Lastly, he stated that his personal effects are still in the house, and this has affected his day-to-day operations.
4. The Respondent entered an appearance and filed a Replying Affidavit sworn by her and dated 24th May, 2023. She admitted that they had a relationship with the Applicant but stated that they never cohabited as a husband and wife, and they were never married. Concerning the [Particulars Withheld] Apartment, L.R. No. 209/20263, she averred that the property is an ongoing purchase made by way of a loan, exclusively repayable by her, and the repayment is regularly deducted from her salary. She stated that she continues to service the loan and that the property in question is strictly a mortgage between her and her financiers. She thus averred that the Applicant has no legal right to the property.
5. The matter was heard, and the Applicant testified. The Respondent did not testify, and the Court directed parties to file submissions.

Applicant's Written Submissions

6. The Applicant submitted that the property should be sold and the proceeds shared equally between them. He argued that his relationship with the Respondent meets the threshold for presumption of marriage, and thus, he is entitled to protections under the *Matrimonial Property Act*. He argued that they had a prolonged cohabitation from February, 2010 to April, 2020 and that it was publicly acknowledged as evidenced by joint financial commitments. He submitted that he has a beneficial interest in [Particulars Withheld] Apartment L.R. No 209/20263 on the grounds that he contributed financially and non-financially to its acquisition and development. He also argued that the Respondent holds 50% or a higher portion of the property and household items in trust for him.

The Respondent's Written Submissions

7. The Respondent submitted that the Originating Summons should be dismissed with costs. She argued that her relationship with the Applicant did not meet the threshold for a presumption of marriage and that the Applicant did not tender evidence to support the allegation of marriage. She argued that it was incumbent upon the Applicant to adduce evidence that would form the basis upon which a presumption of marriage would be made. Concerning [Particulars Withheld] Apartment L.R. No 209/20263, she argued that the Applicant did not contribute to its purchase. She argued that she is still servicing the mortgage and that a part of her salary is deducted monthly towards the loan repayment.

Issues for Determination

8. Having carefully considered the Originating Summons, affidavits, and submissions by the parties, I find that there are two issues for determination;
 - a. Whether there is a presumption of marriage between the Applicant and the Respondent.
 - b. Whether the Applicant has legally recognizable interest in [Particulars Withheld] Apartment L.R. No. 209/20263



9. Before I determine the above identified issues, I shall summarize the evidence produced by the parties and the Applicant’s testimony before this Court.
10. PW1 was the Applicant. He told the Court that he met the Respondent in early 2009 whereby they developed a relationship that ended up with a marriage in 2010. He testified that they were blessed with one child. He stated that they jointly purchased a property in Imara in which he paid Kshs.830,000/= as a deposit for the purchase. He stated that he also advanced the Respondent Kshs.350,000/= so she could offset the loan she was paying, allowing her pay slip to accommodate the mortgage. He told the Court that he also paid Kshs.330,000/= for taxes.
11. He produced several documents to support his claim, which included the letter of offer for the mortgage and bank statements to show the payments. Some of the figures reflected in the said bank statements included Kshs.360,000/=: Kshs.330,000/= for taxes, Kshs.830,000/= for deposit, Kshs.103,000/= for Legal fees, and Kshs.75,000/= to the management company being advance payment of the monthly service charge. He also produced receipts to show that he had purchased furniture for the house from Furniture Palace and Odds and Ends, which are furniture retailers.
12. The Respondent neither testified nor cross-examined the Applicant.
Whether there is a presumption of marriage between the Applicant and the Respondent
13. The parties herein agree that they had a romantic relationship, but they disagree on whether the said relationship was ripe for a presumption of marriage. On the one hand, the Applicant argued that the relationship meets the threshold for a presumption of marriage on the grounds that it spanned a prolonged cohabitation from 2010 to 2020. On the other hand, the Respondent argued that a presumption of marriage cannot arise in the circumstances of the case on the grounds that they never cohabited as a husband and wife. This Court is being invited to determine whether a presumption of marriage can be established between the Applicant and the Respondent.
14. Before determining this issue, I shall restate the guiding authorities on presumption of marriage in Kenya. Presumption of marriage was first applied in Kenya in *Hortensia Wanjiku Yawe v The Public Trustee Nairobi* [1976] eKLR. The rule in *Hortensia Wanjiku* was restated by the Court in *Mary Njoki v John Kinyanjui Muthuru & 3 Others*, [1985] eKLR where Kneller, JA observed as follows:

“

- “ iv. Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
- v. Only cogent evidence to the contrary can rebut the presumption (*Toplin Watson v Tate* [1937] 3 All ER 105)
- vi. If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage.

.....

One of the earliest put it this way. Cohabitation, with habit and repute, in the absence of countervailing proof to the contrary, establish a marriage on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract that relationship.”



15. Nyarangi, JA in the same judgment delivered himself as follows;

“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. ...To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”

16. Similarly, the Court of Appeal in Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR, applied the doctrine of presumption of marriage and held as follows;

“Before presumption of marriage can arise a party a needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed.”

17. Lastly, the Supreme Court of Kenya in MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) [2023] KESC 2 (KLR) gave authoritative guidance on the parameters within which a presumption of marriage can be made. It held as follows;

“64. We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:

1. The parties must have lived together for a long period of time.
2. The parties must have the legal right or capacity to marry.
3. The parties must have intended to marry.
4. There must be consent by both parties.
5. The parties must have held themselves out to the outside world as being a married couple.
6. The onus of proving the presumption is on the party who alleges it.
7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
8. The standard of proof is on a balance of probabilities.”

18. Bearing in mind the above-cited authorities, I shall proceed and determine whether the relationship between the Applicant and the Respondent possesses the constitutive elements of presumption of marriage. I shall relook at the evidence placed before me and assess whether there was long cohabitation and repute of marriage absent cogent evidence to the contrary.



Did the parties have a long continuous cohabitation?

19. On the issue of cohabitation, the Applicant testified that he cohabited with the Respondent from February, 2010 to August, 2020. He maintained this in his supporting affidavit and in his oral testimony in Court. On the other hand, the Respondent denied the fact of cohabitation and this denial was captured in her Replying Affidavit. I note that the Respondent did not challenge the Applicant's oral testimony in Court because she did not cross-examine him on the same.
20. The Respondent was inconsistent on this issue. In one part of her Replying affidavit, especially paragraph 4, she stated that they never cohabited. However, in paragraph 12 and 13, she stated that the Applicant left the house on his own and that he carried away his belongings. She also stated that the Applicant left behind a few clothes, which she was willing and ready to deliver to an address of his choice. In my view, the fact that he walked out of the house and that he left some clothes behind is an admission that the two were cohabiting. I therefore do not believe the Respondent when she states that they never cohabited.
21. In my view, it is more likely than not that the two cohabited for the said duration as alleged by the Applicant. I also had the advantage of seeing the Applicant testify before me and observe his demeanor. I had no reasons to doubt him on this issue. I thus find that the Applicant and the Respondent cohabited from February 2010 to August 2020. This Court is satisfied on a balance of probabilities that the two had a long continuous cohabitation.

Did the Parties have General Repute?

22. The next issue for determination is whether this long continuous cohabitation crystalized into a marriage. This element is satisfied by determining whether the parties held themselves out to the outside world as being a married couple. On this aspect, the Applicant was under an obligation to tender evidence establishing acts showing general repute and to show that the long cohabitation had crystallized into a marriage.
23. In determining whether the Applicant satisfied this second requirement, I find company in the observations of the court in *PKE v SNM (Civil Appeal E003 of 2021) [2023] KEHC 17683 (KLR) (Judgment)*, where the Court guided on how a party can prove 'general repute.' The Court held as follows;

“ 32. For a party to establish the presumption of marriage, two ingredients must be proved, that is,

- a. Long continuous cohabitation between a man and a woman.
- b. General Repute

33 ...The second ingredient is General Repute. The appellant and the respondent are residents of Chogoria and having lived there long enough, the appellant ought to have called evidence to prove that the community regarded him and the respondent as husband and wife. In any case, the appellant never called his parents or siblings to adduce evidence that they considered the two as husband and wife. The burden was on the appellant to proof the presumption of marriage.



24. Similarly, the Court in *P M K v G N & 5 others* [2018] eKLR dropped hints on what a party should prove to establish ‘general reputation’ in the context of presumption of marriage. It observed as follows;

“ 47. From this exposition, a party establishes a presumption of marriage when the party proves two factual predicates:

- a. Quantitative element – namely the length of time the two people have cohabited with each other; and
- b. Qualitative element – namely acts showing general reputation that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative elements include whether the parties had children together; whether the community considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account – and so forth.”

25. Turning to the facts of this case, there is no dispute that the two had a child together. The Applicant stated that they cohabited and lived together for more than 10 years. However, he did not call evidence to prove that the community regarded him and the Respondent as husband and wife. In any case, he never called witnesses to adduce evidence that they considered the two as husband and wife. Additionally, it cannot be readily stated that the parties herein took the mortgage in question jointly. This is because the available documentary evidence shows that the mortgage facility is (or was), at least on paper, in the name of the Respondent.

26. In my view, and based on this factual analysis, I find that the Applicant did not satisfy the second ingredient on ‘General Reputation.’ For that reason, it is unsafe for this Court to presume a marriage in the circumstances of this case. I therefore find that the presumption of marriage does not exist in this case. To the mind of this Court, what the parties had was a long continuous cohabitation that did not crystallize into a marriage.

Whether the Applicant has legally recognizable interest in [Particulars Withheld] Apartment L.R. No 209/20263

27. Having found that the parties herein were mere cohabitants, the next issue for determination is whether the Applicant has legally recognizable interest in [Particulars Withheld] Apartment L.R. No 209/20263.

28. Recently, the Supreme Court in *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae)* [2023] KESC 2 (KLR), observed that Kenya does not have a specific law to guide on division of property acquired during the subsistence of such cohabitation. It held as follows;

“ 82. Kenya, just like many other countries, does not have laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation. However, the issue of cohabiting couples’ property has increasingly become a social problem due to the high number of people resorting to cohabitation and in the process of acquiring properties, upon separation there is no legislation governing the division of property.”



29. The Court however held that Courts can utilize the doctrine of constructive trust to solve division of property disputes amongst unmarried cohabittees. It held as follows;

“Even though the constructive trust was premised on section 38 of the *Land Act*, 2012 and the same had not been applied in solving disputes relating to cohabittees, the common intention of the parties at the time of purchase of the suit property gave rise to a constructive trust between the [cohabittees].”

30. The Court of Appeal in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR, defined constructive trusts in the following words;

“In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit _ (see Halsbury’s Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties’ intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment ...”

31. According to case law, a person desiring to prove a constructive trust in their favor has to show that there was common intention at the time of the purchase. The issue of Common Intention was mentioned by the Supreme Court in *MNK v POM* (Supra), where the Court said as follows;

“85. In England, courts have long recognized that common intention of the parties at the time of purchase is sufficient to give rise to a constructive trust, which can be inferred from conduct other than making financial contributions to cohabittees.”

32. The Proof of the Common Intention in the context of constructive trust was also discussed by the Court of Appeal of England and Wales in *Elayne Marian Teresa Oxley v Allan George Hiscock* [2004] EWCA 546, where the Court held as follows;

“2. The proof of the common intention

- a. Direct evidence, it is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other possible forms of direct evidence of such intention.
- b. Inferred common intention, Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked



to infer such intention, viz contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust.”

33. The above authority from the Court of Appeal of England and Wales was adopted by the Supreme Court of Kenya in *MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021) [2023] KESC 2 (KLR) (27 January 2023) (Judgment)*.

Did the parties have Common Intention?

34. The Supreme Court in *MNK v POM (Supra)*, faced a similar question as the one before this Court. The case was a property dispute between unmarried cohabittees. The Court deliberated on whether the parties had a common intention and observed as follows;

90. Applying the above guidelines we reiterate that common intention of the parties at the time of purchase of the suit property gave rise to a constructive trust between the appellant and the respondent. From the evidence on record that the appellant and respondent had been cohabiting since 1986 and that in 1991 the suit property was bought by the two parties and registered in the name of the appellant. The respondent was present during the drafting and signing of the sale agreement and was in fact a witness. The parties lived in one of the rooms from 1993 and ploughed the proceeds of rent to construct more rental units. In these circumstances, we conclude that there was a common intention for the appellant and respondent to have beneficial interests in the suit property.”

35. I have relooked at the facts of this case to ascertain whether there was common intention of the parties at the time of purchase of the suit property so as to give rise to a constructive trust between the Applicant and the Respondent. From the evidence on record, the subject property was acquired between 2014 and 2015, which was during the subsistence of the said cohabitation.
36. The Applicant also proved that they cooperated and worked together toward the acquisition of the said property. He produced a letter of offer dated 8th November, 2014. I have seen the letter. It was written by the Investment Company addressed to the Applicant and the subject of the letter is the suit property. The letter invited the Applicant to buy the suit property at Kshs.8,300,000/=. The Respondent neither disputed the authenticity of that offer letter nor gave an explanation why the said letter was addressed to the Applicant and not herself. In my view, the fact that the offer letter was addressed to him means that the Applicant was a party to the transaction.
37. The Applicant also produced a bank statement to show that he paid Kshs.830,000/= on 18th December, 2014 as the deposit for the purchase of the suit property. The said amount is the exact figure that the Investment Company had requested as deposit in its letter of offer dated 8th November, 2014. In my view, this is also another pointer that the two parties herein were in unison at the beginning of the purchase process.
38. The Applicant also proved that they both utilized the said suit property as their shared residence after they acquired it. He stated that they lived in that house happily until August, 2020 when the



Respondent evicted him. On her part, the Respondent admitted that the Applicant left the house on his own and took all his belongings with him. She also admitted that the Applicant left behind a few clothes and that she was willing and ready to deliver them to an address of his choice. In my view, the Respondent's acknowledgement that the Applicant left some clothes behind constitutes an admission that the two used the house as their joint residence at some point.

39. In these circumstances, I conclude that there was a common intention for the Applicant and Respondent to have beneficial interests in the suit property. I also find that the common intention was sufficient to give rise to a constructive trust.

The Respective Beneficial Interests

40. Having established that there was a common intention and that both the Applicant and the Respondent should have a beneficial interest in the property, it follows that this Court needs to proceed and quantify the beneficial interest to the parties.
41. The purchase price of the suit property was Kshs.8,300,000/=, as per the offer letter. The Applicant produced documents to show that he made direct financial contribution to the purchase. He produced a bank statement to show that he paid Kshs.830,000/= on 18th December, 2014. He also produced a bank statement coupled with an explanation to that effect he advanced the Respondent Kshs.360,000/= so that she could offset the loan she was paying. He explained that this done so that the Respondent's pay slip could be free to accommodate the mortgage. In addition, he produced a bank statement to show that he paid Kshs.333,000/= as stamp duty.
42. The Respondent did not refute that the Applicant made the above payments. Her response was that the payments made by the Applicants as outlined above are monies she had saved through him or given him to pay. She, however, did not tender any documentary evidence to prove that she had indeed saved the monies through the Applicant or that she had given him to go and pay. I thus dismiss her response as a mere denial of the Applicant's claims.
43. The Respondent argued that she was still servicing the mortgage at the time of filing her response in court in May, 2024. She, however, did not provide this Court with the pay slip for March/April 2024. Instead, she supplied this Court with a pay slip dated 25th March, 2021- which was more than 2 years before she filed the response. In my view, the said pay slip cannot be used as an exhibit to show that she was still servicing the loan as at the time she filed the response in Court on 24th May, 2024. As a result, the Court cannot tell, based on the evidence provided by the Respondent, whether she is still servicing the loan to date or not.
44. The Respondent also claimed that she paid the purchase price by herself. She however, did not provide this Court with documentary evidence to determine with precision her financial contribution. She attached a letter from Co-operative Bank dated 9th June, 2018 confirming the details of the mortgage facility as at that date. The letter was issued at a time when the parties were still cohabiting. It does not tell the Court what the outstanding debt at the Bank was when the parties parted ways in August, 2020. Without such information, this Court cannot determine the exact figure that the Respondent paid by herself.
45. The Respondent's copy of the payslip dated 25th March, 2021, shows that as at that time, her salary was being deducted towards repayment of the mortgage. However, this Court is unable to tell for how long these deductions were done thereafter, because she did not provide later pay slips. In this Court's calculation, and based on the evidence provided by the Respondent, the only time she exclusively paid the loan after the departure of the Applicant was between August, 2020 and March, 2021.



46. In the end, I am of the view that the Applicant did prove his case on a balance of probabilities that the suit property [Particulars Withheld] Apartment L.R NO 209/20263 was acquired and developed through joint efforts and/or contribution of the parties herein. I therefore make a finding that the shares of the parties are apportioned as 25% for the Applicant and 75% for the Respondent, based on their respective contributions.

Disposition

47. I therefore make the following orders:

- a. The sole ownership in respect of [Particulars Withheld] Apartment L.R. No. 209/20263 by the Respondent is hereby severed.
- b. [Particulars Withheld] Apartment L.R NO 209/20263 shall be owned by the Applicant and the Respondent in the ratio of 25% : 75% respectively, being their respective contribution to the purchase and development of the said property.
- c. A reputable valuer to be agreed upon by the parties within 45 days from the date hereof, and failing agreement, such valuer as shall be appointed by the Chairman of the Institution of Surveyors of Kenya shall carry out valuation of the suit property to ascertain its current market value and a reserve price in the event of a forced sale. The valuation costs shall be shared between the Applicant and the Respondent in a ratio of 25%:75%, respectively.
- d. Following such valuation, the Respondent be at liberty to purchase the Applicant's share of contribution on the [Particulars Withheld] Apartment L.R NO. 209/20263. The Respondent shall pay to the Applicant 25% of the assessed market value of the property within 3 months from the date of the valuation.
- e. That if the Respondent cannot purchase the Applicant's share, the Applicant and the Respondent may enter into private equity negotiations with the property chargee, if the property remains charged, to settle the outstanding facility. The proceeds shall thereafter be divided between the Applicant and the Respondent in the ratio of 25%:75%. The property will be sold subject to the reserve price set by the valuer mentioned above.
- f. In the event that any of the parties fails to co-operate in the sale of the suit property should such sale become necessary, the Deputy Registrar of this court shall be at liberty to execute any document that may be necessary to facilitate the sale of [Particulars Withheld] Apartment L.R NO. 209/20263 and the distribution of the proceeds thereof in accordance with the orders made herein.
- g. Each party shall bear its own costs of the suit.

48. It is so ordered.

DATED, DELIVERED AND SIGNED AT NAIROBI THROUGH THE MICROSOFT TEAMS ONLINE PLATFORM ON THIS 9TH JUNE DAY OF, 2025.

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C. KENDAGOR

JUDGE

In the presence of:

Court Assistant: Beryl

