



**CLO v AJM alias AO (Civil Suit E072 of 2022)
[2024] KEHC 12481 (KLR) (Family) (17 October 2024) (Judgment)**

Neutral citation: [2024] KEHC 12481 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT E072 OF 2022
HK CHEMITEI, J
OCTOBER 17, 2024**

BETWEEN

CLO CLAIMANT

AND

AJM ALIAS AO RESPONDENT

JUDGMENT

1. The Claimant and the Respondent were husband and wife having married under Luo customary law in the year 1987 and later solemnized their union on 4th October 1991. They were blessed with two children who are all adults now.
2. They divorced after living together till the year 2010. A decree absolute was issued on 19th October 2021.
3. The Claimant thereafter filed this suit seeking a declaration that the following properties be deemed matrimonial:-
 - a. Avenue Park Phase II, House No. XXX.
 - b. Funguo Estate, House No. XXX.
 - c. LR XXX/1298, House No. XX at Tree Lane Estate; and
 - d. Kabondo/Kowidi/XXX.
4. When this matter came up for directions the court ordered the same to be heard by way of oral evidence. The Claimant testified and did not call any witness. The Respondent on the other hand called one witness after her testimony.



5. The parties were thereafter directed to file their written submissions which they complied.
6. In his claim the Claimant testified and adopted the averments in the supporting affidavit to the originating summons. The issue of their marriage and the two children essentially was not in dispute.
7. On the proof of acquisition of the matrimonial property he testified that he was fully employed by KPLC and the Respondent was employed at ICDC. He said that he solely bought the house at Avenue Park Phase II, House No. XXX on a mortgage obtained through his employer and which he paid back through the check off system. That he added the Respondent as a co – owner to protect her from her in laws in the event of his death and that the family has been living on this property to date.
8. As regards Kabondo/ Kowidi/ XXX he purchased it using part of his salary.
9. The Respondent on the other hand bought Funguo Estate House No. XX, through her employer, and he gave her Kshs 100,000/= to pay for its deposit. The Respondent later sold the Funguo Estate House No. XXX without his consent, for Kshs 9,000,000/= and used its proceeds to purchase LR 330/XXXX, House No. XX, Tree Lane Estate together with a loan secured by Kabondo/Kowidi/ XXX.
10. He testified that during the pendency of their marriage, he solely shouldered the children’s needs and education while the Respondent used her salary to make secret investments.
11. He claimed further that the Respondent collects rent from the properties (servants’ quarter at Avenue Park II, House No. XXX and LR XXX/1298, House No. XXX, Tree Lane Estate) and lives rent free on Avenue Park II, House No. XXX.
12. He accused the Respondent of declining to the division of the properties in the manner he had proposed and therefore this court should accede to his request.
13. The Respondent as well relied on her testimony and the replying affidavit. She testified that they jointly bought Avenue Phase II, House No. XXX Embakassi by paying a deposit of Kshs 640, 000/= from a business they co – owned and a mortgage facility of Kshs 3,560,000/= given to the Claimant on the strength of his and her pay slips leading the property being registered in both their names with her as guarantor to the mortgage facility.
14. She went on to state that since the Claimant left the matrimonial home (Avenue Park II, House No. XXX), she has made extensive improvements and maintenance to the home. She has also cleared a pending water bill of Kshs 570, 000/=.
15. The Claimant has been on the other hand harassing her and threatened to kill her which incidents she reported to the police.
16. She also testified that she contributed Kshs 9,000/= to the Kshs 20,000/= value of the purchase of Kabondo/Kowidi/XXX. Her father provided his professional building contractor services and gave them one of his supervisors. The Claimant however neglected the property and she has since been maintaining it thus incurring monthly salary expenses of between Kshs 8,000/= to Kshs 10,000/=, and household expenses.
17. She said that she had planted close to 30 banana plants and 120 Hass avocados, fenced it, constructed a bathroom and toilet for use by the workers and family members and installed solar lighting for the house and security.
18. That she had also purchased 18 tons of sand, 18 tons of gravel and 1000 bricks for renovation of the house so as to extend it for family use.



19. About Funguo Estate, House No. XX she testified that she bought it through a mortgage facility obtained from her employer and Kshs 180, 000/= which her father lent her to pay as its deposit. She leased out the property at Kshs 32, 000/= per month which amount went towards clearing the loan.
20. She denied that the Claimant gave her Kshs 100,000/= nor contributed in any way towards its purchase.
21. She said that she sold the house at Kshs 9,000,000/= and used this money to pay their son's school fees balance, the outstanding balance on the mortgage facility and partial payment towards purchase of LR 330/XXXX, House No. XXX at Tree Lane Apartments whose purchase price was Kshs 13,500,000/= . She financed the remaining balance on LR 330/XXXX, House No. XXX at Tree Lane Apartments through mortgage.
22. She said that she has rented out the property at Kshs 90,000/= which goes to servicing the loan and paying service charge. She is still servicing the loan for its purchase. She bought the property for their children and it is currently registered in hers and their daughter's name because their son was a minor then.
23. That the property has a charge and the title for Kabondo/ Kowidi/521 was not used to take any loan in this regard. The loan obtained using the title for Kabondo/Kowidi/52 was used to clear school fees for their son in settlement of High Court Appeal No. 19 of 2015, loan which she is still servicing.
24. She testified in regard to the family upkeep and in particular the children's schooling that the Claimant contributed Kshs 650,000/= out of the required Kshs 6,000,000/= after being compelled by the children's court to pay their son's school fees. Essentially it was her who all along has been meeting the children's fees, payment of household utilities among many other bills.
25. She requested the court to order that the matrimonial property namely Avenue Phase II, House No. XXX Embakassi and Kabando/ Kowidi/XXX be divided in the ratio 80:20 in her favour and a declaration be made that the Claimant is not entitled to Property namely Flat No. XXX on LR No. XXX/1298.
26. DW2 Solomon Kyalo Maluki testified on behalf of the Respondent. His testimony was generally confirming that he knew the parties and he had not been in Homa Bay for the last two years.
27. The parties were directed to file written submission which they complied.
28. The Claimant has filed written submissions dated 6th March, 2024 placing reliance on *Uwibaye Console v Nicholas Kamau Ngirici* [HCFOS No. E013 of 2021] and [*JOO v MBO; Federation of Women Lawyers \(FIDA Kenya\) & another \(Amicus Curiae\)*](#) (Petition 11 of 2020) [2023] KESC 4 (KLR).
29. The Respondent has filed submissions dated 9th July, 2024 placing reliance on the following:
 - a. [*MW v AN*](#) [2021] eKLR where the courts stated, "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."
 - b. [*NWM v KNM*](#) [2014] eKLR where the court stated that it must give effect to both monetary and non – monetary contributions, that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property.
 - c. [*PWK v JKG*](#) [2015] eKLR where the court stated as follows: "Where the disputed property is not so registered in the joint names of the 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 has made substantial but unascertainable contribution, it may be equitable to apply the maxim equality is equity while heeding the caution of Lord Pearson in *Gissing v Gissing* [1970] 2All ER 780 Page 788.”

- d. Supreme Court Petition No. 11 of 2020 where the court stated, “We are persuaded by the above reasoning and should only add that the quality provision in Article 45 (3) does not entitle any court to vary existing proprietary rights of parties and take away what belongs to one spouse and award half of it to another spouse that has contributed nothing to its acquisition merely because they were or are married to each other. To do so would mean that Article 40 (1) and (2) of the *Constitution* protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC’s language.”
- e. *Echaria v Echaria* [2007] eKLR where the court stated, “...there is no presumption that any or all property acquired during the subsistence of the marriage must be treated as being jointly owned by the parties. Where disputed property is not registered in the joint names of the spouse but is registered in the name of one spouse, the beneficial share of each would ultimately depend on their proven respective proportions of financial contribution, either direct or indirect towards the acquisition of property.”

Analysis and Determination:

30. I have carefully considered the originating summons, the responses thereto and the rival submissions filed by the parties. The issues to be determined essentially is whether the matrimonial properties as claimed by the Claimant ought to be divided in the manner and style suggested and what was the level of contribution by each party.
31. It is evident that both parties strive to prove contribution in the acquisition of the properties. It is noted that both of them worked and earned a salary.
32. The paper trail however as produced by the Respondent shows that she purchased Funguo Estate House No. XX and LR No. XXX/1298 HouseNo. XXX Tree Lane from loans which she took. If there was any contribution by the Claimant the same may not have been very much in the circumstances.
33. There is evidence for example that the Funguo estate House No. XX was purchased through a loan from ICDC where the Respondent worked.
34. The Claimant stated that he made a contribution of kshs100,000. Although the same was disputed by the Respondent it was however purchased during the coverture.
35. The said Funguo house was sold by the Claimant for a sum of Kshs 9,000,000 which the Respondent claimed to have used part of the money to settle the loan as well as pay fees for their son and the balance towards the purchase of the Tree Line Apartments.
36. She further took a charge over the said Tree Line Apartment with I & M Bank and there was paper trail to that effect. The same is registered in the Respondent’s name jointly with her son.
37. The Kabondo/Kowidi/XXX in my view is what can be termed as a rural home for the parties. I think significant contribution was made towards its purchase by both parties including its improvement.
38. As regards Avenue Phase Ii HouseNo. XXX this court is satisfied that the same was jointly purchased through the proceeds from their company called Bramacha Enterprises Limited.



39. What then is the way forward? It is now well settled that the divisions of the matrimonial property in the middle is no longer good law. Each of the parties must demonstrate what level of contribution they made.

40. The Supreme Court of Kenya in Petition No. 10 of 2020 *Joseph Ombogi Ogentoto v Martha Bosibori Ogentoto* [2023] agreed with Echaria case on the principles applied for distribution of matrimonial property. It stated thus:

“(78) to our minds the finding in Echaria was essentially that a spouse does not acquire any beneficial interest in matrimonial property by fact of being married only and that specific contribution has to be ascertained to entitle such a spouse a share of the property.”

The court went on to emphasize that the spouse seeking a share in the matrimonial property has to prove the extent of his or her contribution to the acquisition or development of the property. It stated:

“[83] the guiding principle should be the apportionment and division of matrimonial property may only be done where parties fulfill their obligation of providing what they are entitled to by way of contribution.”

41. In *NGV v CNV also known as CHM* (Matrimonial Cause 6 of 2021) [2022] KEHC 16645 (KLR) (6 December 2022) (Judgment), at paragraphs 46 and 47, the court quoted with authority the case of *TMW vs FMC* (2018) eKLR where the court adopted the definition under Section 6 of the Matrimonial Disputes *Act No. 49 of 2013* to hold that for property to qualify as matrimonial property, it must have been acquired during the subsistence of marriage unless agreed by both parties that such property will not form part of the matrimonial property. The burden of proof in law lies with the party alleging that such and such property indeed was acquired during the subsistence of the marriage and therefore constitutes matrimonial property.

However, the mere fact that property is acquired during coverture does not automatically entitle each spouse or party a share after dissolution of the marriage. One has to prove contribution whether direct or indirect [Emphasis mine]. The onus of proof, however, is subject to a rebuttable presumption of law under Section 14 of 'Matrimonial Properties Act which provides; '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.'

42. In light of the foregoing and taking into account the contributions made by each of the parties I find and direct that the properties be distributed as follows.

- (a) Kabondo/Kowidi/XXX be shared equally between the Claimant and the Respondent.
- (b) LR No. 330/XXXX House Number XXX Tree Lane to be shared in the ratio of 20% in favour of the Claimant and 80% in favour of the Respondent.
- (c) Avenue Park Phase II to be shared at 20% in favour of the Claimant and 80% in favour of the Respondent.
- (d) The parties are at liberty to value the same and buy off each other in the ratio stated above.
- (e) Costs shall be in the cause.



**DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK ON THE 17TH DAY OF
OCTOBER 2024**

H K CHEMITEI

JUDGE

