



**HSO v DOO (Matrimonial Cause E001 of 2024)
[2024] KEHC 15590 (KLR) (2 December 2024) (Judgment)**

Neutral citation: [2024] KEHC 15590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MATRIMONIAL CAUSE E001 OF 2024
RE ABURILI, J
DECEMBER 2, 2024**

BETWEEN

HSO APPLICANT

AND

DOO RESPONDENT

JUDGMENT

Introduction

1. Vide the Originating Summons dated 29th February 2024 brought under Sections 2, 6 (1), (a),7,12, 14 and 17, of the *Matrimonial Property Act*, the applicant moved this Court seeking various orders against the respondent, her former husband. The orders sought are as follows:
 - a. That a declaration do issue that the properties in Kisumu known as Kisumu/Mun Block xxxx and matrimonial house within Lolwe estate acquired by the joint funds and efforts of the applicant and the respondent during the subsistence of their marriage and registered in the name of and in possession of the respondent are owned jointly by the applicant and the respondent.
 - b. That the said properties be settled for the benefit of the applicant in such a manner and proportions as this honourable court deems fit, just and equitable.
 - c. That the respondent himself, his agents and or servants be restrained from alienating, encumbering or in any other manner interfering/disposing of the said properties until final hearing and determination of this suit.
 - d. That the respondent be condemned to pay the costs of this application and incidentals thereto.



2. The Originating Summons is premised upon grounds set out on the face thereof and the depositions contained in the affidavit in support sworn on 29th February 2024 and the further affidavit dated 24th May 2024 sworn by the applicant.
3. The applicant's case is that she was married to the respondent sometime in 1996 by way of customary marriage ceremony and later began cohabiting as husband and wife with the marriage blessed with three children whom she has legal custody of.
4. The applicant further averred that during the subsistence of their marriage, they jointly purchased property known as Kisumu/Mun Block 1x/xx that that they jointly developed the same by building an apartment block of six- one-bedroom apartments. Further, that they also build their as well as their matrimonial home on an adjacent land which they are yet to receive its title from Lolwe Housing Corporation. She further averred that there is Land Parcel number Kisumu/Mun Block 1x/xx which is registered in the name of the respondent and that she resides in the said premises as their matrimonial home with their children even after the divorce.
5. The applicant averred that the court should order just and equitable distribution of the property which they acquired together during the course of their marriage so that she can use her share for the benefit and upkeep of their minor child currently in her custody.
6. The Originating Summons was canvassed by way of viva voce evidence. The applicant testified as PW1 and stated that the respondent worked in Kisii and would visit every 2 weeks on weekends and so, she was the one who was doing most of the work on the plot during construction and management and maintaining the same. She testified that she contributed to the acquisition and development of the suit property financially and through her time.
7. The respondent filed a replying affidavit in which he deposed admitting that the two were married and had since divorced and that the property named in the Originating Summons was solely his. That he purchased the said property which he registered in his name without the contribution from the respondent who was not in employment. He denied that the property in issue was matrimonial property and urged the Court to dismiss the Originating Summons.
8. The originating Summons was canvassed by way of oral or viva voce evidence. The applicant testified that prior to 2023 October, she was the one managing the rental apartments but that in October 2023, some property agents evicted her and the tenants from managing the houses. She denied being in debt to the respondent and testified that they had a joint account in Chase Bank where the rental income was deposited by tenants.
9. The applicant testified that when she started having issues with the respondent, he stopped supporting her and so she stopped remitting rent into the Bank as she needed money for her upkeep and the children's school fees.
10. The applicant testified that there was a time when the respondent lost his job and so they used to share the rental income equally and further that even after their divorce, she continued providing for the respondent by maintaining him on her staff medical cover.
11. In cross-examination, the applicant testified that they were given a gift of 10,000 Euros by the Teusing Family to build their home. It was her testimony that she purchased Euros for building of the house, that she deposited money in the bank which was accessed by the respondent. The applicant further testified in cross-examination that she is aware that in May 2017, the respondent took a loan and that she even supported him repaying it.



12. It was her testimony that though she was not a member of the Lolwe Housing Society, the respondent was and that he made payments to the society with her help and that she also took some loans from Kenya Finance and Faulu which the respondent helped her to pay.
13. The applicant testified that despite residing in the same premises, she was denied management and rental income from the rental units.
14. PW2, Fam Tuesing Okweh testified that he was around when plot number 14/6 was developed in 2004 – 2005 when the house was constructed. She testified that the applicant constructed on the plot by buying building materials, through her time and her supervision of the project as the respondent was working at a busy bank in Kisii. PW2 testified that the rentals were built when he was in high school.
15. In cross-examination, PW2 testified that he used to stay at home and so, he could see the applicant supervise the construction.
16. In response to the Originating Summons, the respondent filed a replying affidavit dated 18th April 2024 and a further affidavit dated 5th June 2024. The respondent relied on his witness statement dated 5th June 2024 reiterating the relying affidavit as his evidence in chief. It was his testimony that he purchased the property in 2005 which he funded by a loan which he took from Lolwe Sacco, his friends, his employer I & M bank, Kenya Bankers and through the proceeds of sugar cane farming.
17. The respondent testified that he did not receive any support from the applicant and that as such, the instant case ought to be dismissed and the applicant be ordered to pay him the illegal rent she collected from his premises.
18. The respondent testified that he was claiming Kshs. 1,050,000 being rental income collected by the applicant after he had given her notice to stop collecting rent.
19. In cross-examination, the respondent testified that he bought the property while still living with the applicant. He testified that at the time, he worked at ABC Bank while the applicant was not working. He testified that he supervised the development himself and that further, he had a contractor who supervised on his behalf though he could not provide a contract agreement of supervision. The respondent went on to state that whenever he was not in Kisumu, construction would stop. He admitted that the house was their matrimonial home where he lived with the applicant, their children and the applicant's siblings.
20. The respondent testified that it was the applicant who has been collecting rental income from the apartments but that not all the rent collected has been for the purpose of maintaining his family.
21. The parties were given time to file written submissions if any but as at the time writing this judgement, only the respondent had filed the submissions which are summarized below. Nonetheless, as submissions are not evidence, no party can be prejudiced for not filing the same in a matter which proceeded by way of viva voce evidence.

The Respondent's Submissions

22. As to whether the suit properties herein are matrimonial property, the respondent submitted that he acquired the said parcels as private property in terms of sections 27 and 28 of the Registered [Land Act](#) and that therefore he was the absolute registered owner of the said property. Reliance was placed on the case of HAK v POK (Matrimonial Suit E018 of 2022) [2022] KEHC 16052 (KLR) (Family) (2 December 2022) and stated that in that case, the court held that property that was registered in the sole name of the defendant did not form part of matrimonial property.



23. The respondent also relied on the case of *FNM v JAM (Matrimonial Cause 1 of 2022) 2023*] KEHC 26263 (KLR) where the court discussed the need for an applicant proving contribution in claims such as those presented by the applicant herein.
24. The respondent submitted that Article 40 of *the Constitution* guarantees every person the right to acquire and own property which right is separate and distinct from those guaranteed under Article 45 (3) which simply gives equal voice and is meant to actualize the voluntariness of marriage and to hold inviolate the liberty of the marital space.
25. It was submitted that the applicant has failed to prove that the suit properties are matrimonial properties or that she contributed to their acquisition, further, that he is yet to be issued with the title of one of the suit properties consequently, the said parcel of land cannot be subject of distribution by the court as the court cannot deal with property that does not have requisite documentation as was held in *Re Estate of Sananga Okunda (Deceased) [2020] eKLR* and *In re Estate of Alice Chepngetich Kosgei (Deceased) (Succession Cause E021 of 2021) [2024] KEHC 9439 (KLR)*.
26. The respondent submitted that a spouse does not acquire beneficial interest by fact of being married only and specific contribution has to be proven by a party claiming beneficial interest as was held in the case of *EMM v JWG (Matrimonial Cause E016 OF 2021) [2024] KEHC 10390 (KLR)* and *JOO vs MBO (2023) KESC4 (KLR)*.
27. It was submitted that the applicant failed to prove that she operated a joint account with the respondent as alleged as there was no evidence of contribution of monies deposited in the alleged joint accounts.
28. The respondent submitted that although the applicant seeks equitable distribution of the suit properties, she had failed to establish that she is entitled to a share of the suit properties and that the evidence in this case demonstrates that the applicant is not entitled to a share of the suit properties.
29. The respondent submitted that the applicant continues to trespass on his premises located at Kisumu's Lolwe estate and has failed to vacate the said property and further that the applicant unlawfully and illegally collected and misappropriated a total of Kshs. 510,000 rent from his rental apartments located at Kisumu/Mun Block 1x/xx.
30. The respondent submitted that consequently, the applicant is not entitled to the orders sought moreover that prayer no. 3 in the Originating Summons had been overtaken by events.
31. It was further submitted that having failed to prove her case; the applicant should be condemned to bear the costs of this suit.

Analysis & Determination

32. I have considered the pleadings, the evidence adduced by both parties, the exhibits and the respondent's submissions. The issue for determination is whether the applicant proved her claim against the respondent for a share in the properties named and whether the said properties are matrimonial property as defined under the law.
33. From the evidence, it is not in dispute that the parties herein were married and which marriage was dissolved by a competent Court of law.
34. The dispute is over two properties, Kisumu/Mun Block 1x/xx and the adjacent plot where there is a house where the applicant currently resides with her youngest child.



35. This Court will therefore ascertain whether the properties are, in the first instance, matrimonial properties. In the event this Court finds in the affirmative, then it will venture into whether the properties ought to be shared and if so, in what proportion.
36. I will first establish what Matrimonial property is. From the reading of various decisions and legal writings, it appears that the term ‘matrimonial property’ derives meaning depending on the applicable legal regime at hand. The Supreme Court in *JOO vs. 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 the applicable law is determined from when the suit was filed.
37. In this case, the Originating Summons was filed in February 2024. The applicable law is, therefore, the *Matrimonial Property Act*, No. 49 of 2013 (hereinafter referred to as ‘the Act’) which became operational from 16th January, 2014.
38. Section 6 of the Act defines ‘matrimonial property’ as:
6. Meaning of matrimonial property:
- (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. (Emphasis added).
39. From the above provision, this Court adopts the definition of ‘matrimonial property’ for the purposes of this case to mean the matrimonial home or homes, household goods and effects in the matrimonial home or homes; or any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
40. Turning to the main consideration as to whether the Kisumu/Municipality Block 1x/xx and the adjacent plot are the parties’ matrimonial properties, Section 2 of the Act defines a ‘matrimonial home’ to mean: -
- any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.
41. The above provision is relevant in this case in a bid to settle whether the house on the adjacent plot to Kisumu/Mun Block 1x/xx may be regarded as the parties’ matrimonial home.
42. It is in evidence and it is not controverted that the parties herein built a home on the aforementioned adjacent plot where they lived together with their children during the subsistence course of their marriage and where the applicant currently resides with one of their children who is a minor.



43. In such circumstances, this Court finds no difficulty in holding that the adjacent plot to Kisumu/Mun Block 1x/xx is the matrimonial home, whether there is title issued to the parties or not.
44. What about Kisumu/Mun Block 1x/xx which has title in the name of the respondent and which is developed with rental houses? Is it matrimonial property?
45. The evidence on record as adduced by both the applicant and the respondent is that the said property was acquired and developed sometime between 2010 – 2013. The parties herein got married in 1996 having met each other in 1995.
46. The respondent argued that the said property was registered in his name as the sole proprietor, that the title is protected by Article 40 of *the Constitution* and sections 27 and 28 of the *Land Act* and that therefore he solely owns it to the exclusion of the applicant.
47. In *T.M.V. vs F.M.C (2018) eKLR*, Nyakundi J. opined that:
- “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. “
48. It is not in dispute that Kisumu/Mun Block 1x/xx was acquired during the subsistence of the marriage. As such, and legally speaking, whether it was registered in the name of the respondent alone as is the case herein, that property automatically qualifies as a matrimonial property pursuant to Section 6(1) (c) of the Act.
49. In sum, both the Kisumu/Mun Block 1x/xx and the adjacent property where the parties herein built their matrimonial home are matrimonial property.
50. As to whether the aforementioned properties ought to be shared, the longstanding quagmire on how matrimonial property is to be shared in the event spouses can no longer sustain their marriages and are unable to mutually agree on the distribution, has now been settled by the law and the superior Courts.
51. The position is that the distribution depends on the spouses’ individual contributions in the acquisition of the properties. Contribution may be direct monetary contribution or otherwise.
52. Section 7 of the Act provides as follows, as far as ownership is concerned of matrimonial property:
7. Ownership of matrimonial property:
- 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.
53. Section 9 of the Act also provides that:
9. Acquisition of interest in property by contribution:
- Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the other spouse makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.
54. Section 2 of the Act defines ‘contribution’ as follows:
- “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;

55. It is important to note that the non-monetary contribution in law is not limited or exclusive to the five categories listed above, but it is rather inclusive. It therefore means that a Court in determining a party's non-monetary contribution may consider other forms of input or contribution by the other party:

56. Addressing itself to the above issue, the Court of Appeal in PNN vs. ZWN [2017] eKLR examined Article 45(3) of *the Constitution* which provides that "Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage" and expressed itself as follows:

"... Thus, it is that *the Constitution*, thankfully, does not say equal rights 'including half of the property.' And it is no accident that when Parliament enacted the *Matrimonial Property Act*, 2013, it knew better that to simply declare that property shall be shared on a 50-50 basis. Rather it set out in elaborate manner the principle that division of matrimonial property between spouses shall be based on their respective contribution to acquisition."

57. The foregoing was affirmed by the Supreme Court in the JOO vs. MBO case (supra). In the said JOO V MBO case, in interpreting Article 45(3) of *the Constitution*, the Supreme Court variously stated that:

"97. In this regard our view is that, while article 45(3) deals with equality of the fundamental rights of spouses during and after dissolution of marriage, we must reiterate that equality does not mean the re-distribution of proprietary rights at the dissolution of a marriage. Neither does our reading of this provision lead to the assumption that spouses are automatically entitled to a 50% share by fact of being married..."

58. The Apex Court further stated:

"81... the equality 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* which protect the right to property would have no meaning which would not have been the intention of the drafters in Kisaakye, JSC's language."

59. On the aspect of non-monetary contribution, the Supreme Court held as follows:

"It is necessary to state that in a marriage union, which is predicated on trust, no spouse anticipates that one day they will have to prove every contribution that they make to the marriage as that would negate the very essence of trust which is the cornerstone of marriage unions. The learned Judge having appreciated the appellant and the respondent were married for 18 years, and 15 of those years the appellant was in gainful employment; she constantly took loans, having found the only property that was acquired with joint efforts



was the matrimonial home where the appellant was residing; the fact that upon separation the respondent was able to purchase another home where he settled. For those reasons, we agree with counsel for the appellant that by virtue of a long period of occupation as a spouse, the appellant acquired beneficial interests therein; we also find for the same reasons the learned Judge erred by awarding the appellant a share of 30% of the house she has been in occupation and a mere 20% of the rental units which are in the same premises.”

60. Further, the Supreme Court rendered itself on the constitutional principle of equity as follows:

“ 93. Article 45(3) of *the Constitution* underscores the concept of equality as one that ensures that there is equality and fairness to both spouses. Equality and fairness are therefore one and intertwined. Equality also underscores the concept that all parties should have the same rights at the dissolution of a marriage based on their contribution, a finding we have already made and in stating so we recognize that each party’s contribution to the acquisition of matrimonial property may not have been done in an equal basis as a party may have significantly contributed more in acquiring property financially as opposed to the other party.

94. Equity further denotes that the other party, though having not contributed more resources to acquiring the property, may have nonetheless, in one way or another, through their actions or their deeds, provided an environment that enabled the other party to have more resources to acquiring the property. This is what amounts to indirect contribution. Equity therefore advocates for such a party who may seem disadvantaged for failing to have the means to prove direct financial contribution not to be stopped from getting a share of the matrimonial property.”

61. Guided by the above principles and parameters on the monetary and non-monetary contribution to the acquisition of matrimonial property, this Court will now apply such to the case at hand.

62. Since contribution is an issue of fact, it calls for evidence. The conduct of this matter which is civil in nature is guided by various laws. For instance, the *Evidence Act* applies to matters generally relating to evidence. The *Evidence Act* is clear on its application to civil matters and affidavits in Section 2 thereof. The section provides as follows:

1. This Act shall apply to all judicial proceedings in or before any Court other than a Kadhi’s Court, but not to proceedings before an arbitrator.
2. Subject to the provisions of any other Act or of any rules of Court, this Act shall apply to affidavits presented to any Court.

63. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They provide as follows:

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- (1) Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person and

109. Proof of particular fact



The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

64. Therefore, the burden of proof squarely lies on the Applicant. Depending on the nature of the evidence adduced, the evidential burden of proof may shift to the Defendant and vice versa whereas the legal burden of proof remains static upon the Applicant. The standard of proof in this matter is on a balance of probabilities.
65. The applicant herein testified that they jointly purchased Kisumu/Mun Block 1x/xx that they jointly developed by building an apartment block of six one-bedroom apartments as well as their matrimonial home on an adjacent land which they are yet to receive its title from Lolwe Housing Corporation. It was her testimony that she supervised the construction of the houses as the respondent was working in Kisii and would visit every 2 weeks on weekends and so she was the one who was doing most of the work. She testified that she contributed to the acquisition and development of the suit property financially and through her time. It was her testimony that they were given a gift of 10,000 Euros by the Teusing Family to build their home, that she purchased Euros to repay the funds advanced by the Teusing Family for building of the house, that she put money in the bank which was accessed by the respondent.
66. It was her testimony that though she was not a member of the Lolwe Housing Society, the respondent was and that he made payments to the society with her help and that she also took some loans from Kenya Finance and Faulu which the respondent helped her to pay.
67. PW2, the parties' elder child testified that he was old enough when the parties were constructing the rental apartment. She corroborated the applicant's testimony that at the material time, the respondent worked at a busy bank in Kisii and as such, it was the applicant who supervised the construction and that he saw the applicant buying construction materials. The applicant produced bank statements showing purchase of Euros.
68. The respondent denied any contribution from the applicant stating that he acquired the properties solely with monies gotten from loans from banks, friends and from his savings. He denied that the applicant supervised the construction when he was away stating that he had a contractor but still went on to state that construction stopped when he was outside Kisumu.
69. Based on the evidence on record, I am not persuaded that the applicant has presented any evidence on record of direct monetary contribution towards the purchase of the matrimonial properties. Had she done so, nothing prevented her from presenting to this court such evidence.
70. Having found as such, this Court is under a legal duty to satisfy itself as to whether the Applicant made any indirect contribution towards the acquisition and sustenance of the property, and if so, to quantify the same.
71. As stated elsewhere above, Section 2 of the Act describes 'non-monetary contribution' to include any domestic work and management of the matrimonial home, child care, companionship, management of family business or property, farm work among others.
72. There is evidence that the parties herein lived together in their matrimonial home, that when the respondent was away in Kisii, the applicant supervised the construction of the rental apartments, their subsequent management and she took care of their 3 children.
73. Therefore, whereas the Plaintiff did not adduce evidence of direct monetary contribution towards the acquisition of the matrimonial property as established hereinabove, there is credible evidence of her



indirect contribution. There is no doubt that the respondent worked and lived away from Kisumu and that he only came after every two weeks. There is evidence that the applicant lived in Kisumu and next to the apartments which were undergoing construction. The respondent never called any evidence to support his assertion that someone else and not the applicant, was supervising and managing or maintaining the property. Obviously, a contractor could have been the developer but could remain as such, a developer. There is no evidence of an estate or property agent having been hired to manage the construction and maintenance of the suit property. The evidence by the applicant that she was the one who managed the property and even received rent and deposited it in the couple's joint account, which each of them could access was uncontroverted. This was backed by the respondent's evidence that the applicant received rent and did not remit it to the bank hence, his claim for the unremitted amount. Had the applicant not been managing the property; how did she end up receiving the rent? How did the property which has tenants who are not owners been maintained to fetch rent?

74. Additionally, there is evidence that is uncontroverted that the applicant lived with and took care of their three children and she is still taking care of their youngest child who is a minor and in her custody and living in the matrimonial home and house.
75. From the foregoing and balancing the scales of fairness, this Court finds that the Applicant's contribution to the matrimonial home and rental apartments in the unique circumstances of this case, can be fairly quantified at 50%. Accordingly, I find and hold that the matrimonial properties herein shall be equally shared.
76. On whether the respondent himself, his agents and or servants should be restrained from alienating, encumbering or in any other manner interfering/disposing of the said properties, this court having declared the said property as matrimonial property therefore belonging to the parties hereto in equal shares, no party has any power to deal with or interfere with said property until after settlement is done.
77. As regards the respondent's counterclaim for 1,050,000 being rental income collected by the applicant after he had given her notice to stop collecting rent, I find that the same is unsubstantiated, noting that the respondent claimed that the applicant was not working and as his spouse who was also taking care of their children, the applicant cannot be treated as a mere agent or servant of the respondent husband who was also duty bound to provide for her and their three children. I find no evidence that the applicant unlawfully received rental income from the apartments and I proceed to dismiss the claim.
78. Parties are given 60 days of today to agree on how to settle the distribution and in default, any of them may apply to this Court for settlement. Pending such settlement, the rental income from the titled property shall be shared equitably and proportionally, taking into account the maintenance charges, County Government rates and other charges and levies such as taxes, water and electricity due as well as the rights of the minor who is in custody of the applicant to be provided for by both parents sharing the responsibilities.
79. On costs, in view of the family ties between the parties hereto, I order that each party shall bear their own costs of the Originating Summons.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 2ND DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

