



**MOA v JAO (Matrimonial Cause E004 of 2023)
[2024] KEHC 15630 (KLR) (4 December 2024) (Judgment)**

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**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MATRIMONIAL CAUSE E004 OF 2023
RE ABURILI, J
DECEMBER 4, 2024**

BETWEEN

MOA APPLICANT

AND

JAO RESPONDENT

JUDGMENT

1. Pursuant to the Originating Summons dated 18th May 2023, the applicant moved to this court seeking various orders against the respondent, her former husband. The orders sought are as follows;
 - a. That this Honourable Court do declare that the properties acquired by the joint funds and efforts of the Applicant and the Respondent during their marriage and registered in the Respondent’s name and as more specifically shown in the annexed affidavit of the applicant are owned jointly by the applicant and the respondent and that they are matrimonial property.
 - b. That the said properties be shared between the applicant and the respondent and/or the said properties be distributed by the Honourable Court to the applicant and the respondent in accordance with the law and/or in such other manner as the court may deem fit to order.
 - c. That the respondent be restrained from alienating, encumbering or in any other manner disposing of the said properties.
 - d. That this honourable court be pleased to grant such orders or directions as would be just in circumstances.
 - e. That the costs of this summons be borne by the respondent.
2. The application is premised upon grounds set out on the face of it and averments contained in the affidavit in support sworn on 18th May 2023 by the applicant and the further affidavit dated 29th May 2024.



3. It is the applicant's case that she and the respondent solemnized their marriage on the 26th April 1997 under the African Christian Marriage and Divorce Act (now repealed) at a ceremony celebrated at St. Mark's Church Westlands however the said marriage irretrievably broke down and she instituted divorce proceedings against the Respondent vide Kisumu Chief Magistrate's Court Divorce Cause No. E022 of 2023 – Maureen Ochieng Asiko v James Asiko Owiro.
4. The applicant further averred that during the subsistence of their marriage the parties herein acquired the following properties which were all registered in the respondent's name:
 - a. Maisonette Number 4 situate on Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road
 - b. Flat No. 102 B31 on LR No. 2091077 in South End Estate South C
 - c. The share in Kisumu Plot Number 474
 - d. Land Reference Number KisumuMuhoroni927
 - e. Land Reference Number KisumuMuhoroni1270
5. The applicant averred that during the subsistence of the marriage she directly contributed towards the purchase and/or development of the said properties by advancing cash to the respondent since she was employed and had a source of earning and further that she has been making substantial financial contribution to the family expenses such as purchase of food, clothing and other household so as to enable the respondent have an ample time to acquire capital to pay off the financing of some of the properties.
6. The applicant further averred that she had been in charge of taking care of the matrimonial home and the children of the marriage while the respondent was working.
7. The applicant further averred that the respondent in 2022 disposed of the matrimonial home situate on Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road for a sum of Kshs. 37,770,055 without her consent and that he threatens to dispose of the other matrimonial properties being Land Reference Number KisumuMuhoroni927 and Land Reference Number KisumuMuhoroni1270 to her and the family's detriment.
8. The applicant testified in support of her case adopting her witness statement dated 18th May 2023 as her evidence in chief and the exhibits listed in the lists dated 18th May 2023, 29th May 2023 and the supplementary affidavit of 4th April 2024 as P Exh. 1 -6, 7 – 11 and 12 -18.
9. She testified that she was employed with the American Embassy in Nairobi as a Protocol Officer in the Ambassador's office and retired in 2020. She testified that she was also employed as a Air Hostess.
10. The applicant testified that she lives in their Muhoroni home which was given to them by her parents-in-law and that she built it up and set up a restaurant and that it was not their ancestral home as they were originally from Gem, Siaya County.
11. In cross-examination the applicant admitted that the South C house was bought before she married the respondent and that the respondent took a loan and completed paying for it after they got married. She admitted that the respondent and his mother both contributed in setting up the business in Muhoroni. She testified that she instituted the instant proceedings prior to instituting the divorce proceedings but got a decree nisi and decree absolute on 7th October 2023. In re-examination she testified that she filed the petition before the divorce was made as the respondent was selling matrimonial property.



12. In response the respondent filed a replying affidavit sworn on the 24th May 2023 in which he deposed that out of the properties listed by the applicant only 3 were registered in his name and further that the said 3 properties did not form part of Matrimonial Property as they were bought without her contributions. The said properties were: -
 - a. L.R. No. 20930124 – Nairobi
 - b. Flat No. 102 Block B31 in South C
 - c. LR No. MN13087 in Nyali Mombasa
13. The respondents averred that the other properties did not form part of matrimonial properties as they were subject to succession proceedings and were registered in the name of his deceased father, Zephaniah Owiro. The said properties are: -
 - a. Kisumu Plot No. 474
 - b. KisumuMuhoroni927
 - c. KisumuMuhoroni1270
14. The respondent averred that he had no plans of selling off his properties which he wanted to leave to his children. He further deposed that the instant suit was premature as the court had not determined that they jointly own the properties.
15. The respondent testified and adopted his witness statement dated 27th February as his evidence in chief and the list of documents contained in the list dated 27th February 2024 as DW Exh. 1 – 6.
16. The respondent reiterated that the 2 Muhoroni properties were still in the name of his father and that he lived there as he had built a house there from November 2016 – 2017 and that the applicant did not help him.
17. In cross-examination, the respondent testified that other than the Muhoroni properties all the other properties were in his name. He testified that only the property in Mombasa was acquired during their marriage. He testified that the process of transfer of the Muhoroni properties was not complete as the transfers had been halted. He admitted that the applicant must have contributed to the care and maintenance of the family.

The Applicant's Submissions

18. The applicant submitted that during the subsistence of their marriage, she directly and indirectly contributed towards the purchase and developmentimprovement of the said matrimonial properties by advancing cash to the Defendant since she was in employment hence earning a salary and that she has been making substantial contribution to the family expenses such as the purchase of food, clothing and purchase of other household items so as to ease off the burden on the Defendant and allow him ample time to acquire capital to pay of the financing of some of the properties listed and to carry out his work in a conducive environment.
19. It was submitted that she also financiallydirectly contributed to the day to day running of the matrimonial home. She directly contributed towards the acquisition, furnishing and development of the matrimonial properties hereinabove mentioned.



The Respondent's Submissions

20. The respondent submitted that the applicant never contributed towards purchase of properties and that the court should find so. The respondent further submitted that land parcels KisumuMuhoroni1270 and 927 were ancestral lands where he and his brothers had built their homes and thus the same do not belong to him but are registered in the name of his late father thus do not form part of matrimonial property.
21. The respondent urged this court to dismiss the suit with costs.

Analysis & Determination

22. I have considered the pleadings, the evidence adduced, the exhibits and submissions filed by both parties. From the evidence, it is not in dispute that the parties herein were married and which marriage was dissolved by the Court.
23. The applicant listed the following properties as being matrimonial property:
 - a. Maisonette Number 4 situate on Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road
 - b. Flat No. 102 B31 on LR No. 2091077 in South End Estate South C
 - c. The share in Kisumu Plot Number 474
 - d. Land Reference Number KisumuMuhoroni927
 - e. Land Reference Number KisumuMuhoroni1270
24. In her testimony, the applicant revealed that the respondent had sold Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road and received Kshs. 37,770,055 as proceeds the balance of which should be surrendered to her.
25. The testimony of the applicant further revealed that the applicant also had a restaurant at their Muhoroni home named Jane's Jiko that she avers she built after her retirement with contribution from both the respondent and the applicant's mother – in – law.
26. The respondent in his testimony revealed the existence of LR No. MN13087 in Nyali Mombasa which the applicant had initially not listed.
27. As such, this Court will 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.
28. What is matrimonial property? 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. On the choice of the applicable legal regime, the Supreme Court of Kenya 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.
29. Section 6 of the Act defines 'matrimonial property' as follows:
 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).
30. From the above provisions, 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.
31. Turning onto the main consideration as to whether the KisumuMuhoroni1270 and 927, Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road and Flat No. 102 B31 on LR No. 2091077 in South End Estate South C 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.
32. The uncontroverted evidence on record is that the parties herein lived together during the course of the marriage with their children in Flat No. 102 B31 on LR No. 2091077 in South End Estate South C, then moved to Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road and currently both parties herein have their separate houses built on Land Parcel KisumuMuhoroni1270 which is the respondent’s ancestral home.
33. In such circumstances, this Court finds no difficulty in holding that at some point KisumuMuhoroni1270 and 927, Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road and Flat No. 102 B31 on LR No. 2091077 in South End Estate South C were the parties’ matrimonial home. They thus form part of matrimonial property.
34. Regarding Land Parcel Nos. KisumuMuhoroni1270 and 927 which it is undeniable are land parcels registered in the name of the respondent’s father, are shared with the respondent’s siblings and which are subject of succession proceedings, it is the respective houses situated on ancestral land that should be considered matrimonial property by virtue of Sections 2 and 6(1)(a) of the *Matrimonial Property Act* 2013 reproduced herein.
35. The respondent argued that the other listed properties were bought by him and registered solely in his name and as such he solely owns them and further that the applicant did not contribute anything to their acquisition.



36. In *T.M.V. vs F.M.C* (2018) eKLR, Nyakundi J. opined that: -

“...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.”

37. All the properties listed referred to above were acquired during the subsistence of the marriage between the applicant and the respondent and therefore they qualify as matrimonial property pursuant to Section 6(1)(c) of the Act.

38. As to whether the aforementioned properties ought to be shared, and if so, in what proportion, the legal 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.

39. Section 7 of the Act provides that:

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.

40. Section 9 of the Act also provides as under:

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 contributes towards the improvement of the property, the spouse who contributes acquires a beneficial interest in the property equal to the contribution made.

41. 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;

42. It is worth emphasizing 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 in determining a party's non-monetary contribution, a Court may consider other input or contribution which is non-monetary by that party.

43. 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.”

44. The foregoing position was affirmed by the Supreme Court in JOO vs. MBO case (supra). On the interpretation of Article 45(3) of *the Constitution*, the Supreme Court variously stated thus in the JOO V MBO (supra) case:

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....

45. The Apex Court also stated that:

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.

46. On the aspect of non-monetary contribution, the Supreme Court further held that:

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.

47. 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.
48. Based on the foregoing guidance and parameters on the monetary and non-monetary contribution, this Court will now apply such to the case at hand.
49. Since contribution is an issue of fact, it calls for evidence. The conduct of this civil matter 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 provision 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.
50. Sections 107(1), (2) and 109 of the *Evidence Act* are on the burden of proof. They state as follows: -
- 107(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.
51. 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.
52. The applicant herein testified that she had no evidence of contribution in purchase of the properties but that she contributed directly towards the purchase and development/improvement of the said matrimonial properties by advancing cash to the Defendant since she was in employment hence earning a salary and that she has been making substantial contribution to the family expenses such as the purchase of food, clothing and purchase of other household items so as to ease off the burden on the Defendant and allow him ample time to acquire capital to pay of the financing of some of the properties listed and to carry out his work in a conducive environment.
53. The respondent denied any contribution from the applicant stating that he acquired the properties solely with monies got from loans from banks and from his savings.
54. Based on the evidence on record, I am not persuaded that the applicant adduced any evidence on record of any direct monetary contribution towards the purchase of the matrimonial properties.



55. 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 farm, and if so, to quantify the same.
56. 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.
57. There is evidence that the parties herein lived together in their various matrimonial homes at various stages of their marriage, that the applicant contributed to the home management and provision for house needs.
58. It can, hence, be deduced that whereas the applicant did not adduce evidence of direct monetary contribution towards the acquisition of the properties, there is credible evidence of her indirect contribution.
59. Deriving from the foregoing, and in balancing the scales of fairness, this Court finds that the Applicant’s contribution to the matrimonial homes in the unique circumstances of this case, can be fairly quantified at 50%. I say so because there is uncontroverted evidence that the applicant was working and even if she did not contribute in monetary terms, the respondent admitted that she contributed to the family’s home management and maintenance including purchase of furniture among other things.
60. It is also in evidence that the respondent sold Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road for a sum of Kshs. 37,770,055. Accordingly, that property is not available for distribution and in the absence of evidence of where the proceeds of sale are stashed, this court cannot make orders which are incapable of being enforced. However, that Property shall remain the respondent’s share of the matrimonial property.
61. Taking all the above into consideration, I hereby order distribution as follows:
- a. Flat No. 102 B31 on LR No. 2091077 in South End Estate South C and LR No. MN13087 in Nyali Mombasa shall be shared equally between the parties hereto.
 - b. the respondent having sold Land Reference Number 20930124 Nairobi at Bankers Court Green Lane off Ngong Road for a sum of Kshs. 37,770,055, that remains his share and in the place of the applicant’s share in that property which I have found to be matrimonial property, the applicant shall wholly and exclusively retain Jane’s Jiko restaurant.
 - c. Each party to maintain their respective houses on KisumuMuhoroni1270 without interference from either party until succession proceedings are concluded.
 - d. Each party to bear their own costs of the Originating Summons.
 - e. Leave to apply for settlement is granted
62. The file is closed subject to settlement of the distributed properties.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 4TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

