



**JOO v EAO & 6 others (Matrimonial Cause E005 of 2024)
[2026] KEHC 670 (KLR) (30 January 2026) (Judgment)**

Neutral citation: [2026] KEHC 670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT HOMA BAY
MATRIMONIAL CAUSE E005 OF 2024
OA SEWE, J
JANUARY 30, 2026**

BETWEEN

JOO APPLICANT

AND

EAO 1ST RESPONDENT

MOO 2ND RESPONDENT

KEO 3RD RESPONDENT

JOO 4TH RESPONDENT

DOO 5TH RESPONDENT

MAO 6TH RESPONDENT

BOO 7TH RESPONDENT

JUDGMENT

1 This suit was filed by way of Originating Summons pursuant to Order 37 Rules 7 and 14 of the Civil Procedure Rules for the determination of the following questions:

- (a) Whether the applicant, JOO, is the adjudicated owner of land Parcel Nos.23XX, 5XX, 23XX, 5XX, 23XX, 23XX, 5XX,5XX, 5XX, 5XX, 39XX, 6XX, 5XX, 5XX, 22XX, 6XX, 5XX, 7XX, 6XX and 6XX in Waware, Mfangano Adjudication Section and land Parcel No. Kasgunga/Kamreri/XXXX (hereinafter, “the suit property”);
- (b) Whether all the respondents are the beneficiaries of the properties of the applicant and are entitled to shares thereof.



- (c) Whether the applicant can share out the properties to all the beneficiaries by way of a written Will;
- (d) Whether the respondents should pay the costs of the suit.
2. In his Supporting Affidavit, the applicant averred that he is the adjudicated owner of all the parcels of land comprising the suit property. He further deposed that he bought the pieces of land while working as a professor at California State University in the United States of America; that he is married to two wives and is blessed with 5 sons; four with the first wife, EAO (the 1st respondent) and one with his second wife, MAO (the 6th respondent). The applicant pointed out that his relationship with the 1st has deteriorated over time leading to formal separation by order of the court. He annexed to his affidavit copies of the proceedings and judgment in that regard. They were marked Annexures JOO-1.
3. The applicant's cause of action was that, although he is the owner of the suit property, there is resistance from the 1st respondent in that she is opposed to her co-wife and her son having a share. He therefore filed the instant suit to the end that distribution of his property can be effected through court during his lifetime to preempt any subsequent disputes. He prepared a schedule of his property and how intends to have the various parcels of land distributed to all the members of his family, including his second wife and her son, the 7th respondent.
4. The 1st respondent and her sons (the 2nd, 3rd, 4th and 5th respondent) opposed the application. They filed a Notice of Preliminary Objection dated 20th September 2024 contending that the Originating Summons offends the mandatory provisions of the law, such as:
- (a) Order 37 Rule 7 of the Civil Procedure Rules, which provides for adverse possession;
- (b) Section 3(1) of the *Law of Succession Act*, Cap 160 of the Laws of Kenya, which provides that distribution of property in that manner sought by the applicant on the basis of a Will can only be effected upon death;
- (c) Section 3 of the *Marriage Act*, 2014 which provides that parties to a marriage have equal rights and obligations at the time of the marriage and during the marriage;
- (d) Section 6 of the *Matrimonial Property Act* which defines the meaning of matrimonial property;
- (e) Section 7 of the *Matrimonial Property Act* which provides that matrimonial property can only be divided between the spouses upon dissolution of the marriage, either by divorce or otherwise.
5. The 1st to 5th respondents also relied on the Replying Affidavit sworn by the 1st respondent. She explained that she got married to the applicant in a civil marriage ceremony held in Las Vegas, State of Nevada, in the United States of America. She annexed a copy of the Marriage Certificate as Annexure ESOA. She further deposed that all the properties listed by the applicant in the Originating Summons comprise matrimonial property and are therefore not available for distribution on the ground that their marriage is still subsisting. She further deposed that the suit properties were registered in the name of the applicant in trust and therefore he has no capacity to single-handedly determine how the same ought to be distributed.
6. At paragraphs 8 and 20 of the Replying Affidavit, the 1st respondent confirmed that the applicant applied for and obtained an order of separation after he confronted him over his unlawful cohabitation with the 6th respondent. She asserted that the applicant did not have the capacity to contract another marriage with the 6th respondent during the subsistence of their civil marriage. She also reiterated that



- the suit properties were acquired long before 2016 when the applicant purported to have entered into a customary law marriage with the 6th respondent. In her posturing, neither the 6th respondent nor the 7th respondent is entitled to any of the subject parcels of land.
7. The 6th and 7th respondents supported the application. They relied on the Replying Affidavit sworn by the 6th respondent on 8th November 2024. The 6th respondent averred that she lawfully got married to the applicant on 16th June 2016 in accordance with Luo customary law; and that dowry was duly paid by the applicant. She further averred that they have been cohabiting peacefully since then. She also confirmed that the 7th respondent is their son, sired by the applicant; and that she has no objection to the proposed mode of distribution of the family property as proposed in the Schedule of Properties annexed to the applicant's affidavit.
 8. In response to the averments set out in the 1st respondent's Replying Affidavit, the applicant filed what ought to have been a Further Affidavit, but is referred to as a Replying Affidavit. The affidavit was sworn on 20th November 2024 and was filed pursuant to the leave granted on 11th November 2024. He explained that they lived with the 1st respondent as a couple until 2013 when the 1st respondent deserted their matrimonial home in Mfangano and returned to the United States. The applicant confirmed that he stayed alone until the year 2016 when he decided to marry the 6th respondent. He therefore asserted that he is a polygamous husband of two wives and a father of five children. He also deposed that he would like to provide for each of the members of his family during his lifetime to avoid any conflicts in the future in the event of his death.
 9. The matter was disposed of by way of written submissions. The applicant filed written submissions dated 6th February 2025. He essentially reiterated the contents of his Supporting Affidavit and concluded by stating that it is in the interest of peace and justice for his proposal for distribution of the suit properties to be upheld. In similar fashion, the 6th respondent's submissions were brief and to the point, namely that the wishes of the applicant be allowed as prayed; and that she had no objection to the proposed mode of distribution.
 10. On their part, the 1st, 2nd, 3rd, 4th and 5th respondents proposed the following issues for determination in their written submissions dated 30th March 2025:
 - (a) Whether the Originating Summons is competent before the Court and whether the Court has jurisdiction to determine the same;
 - (b) Whether the applicant is the adjudicated owner of the suit properties;
 - (c) Whether all the respondents are the beneficiaries of the properties of the applicant; and whether they are entitled to shares of the said property;
 - (d) Whether the applicant can share out the properties to all the beneficiaries by way of a written Will;
 - (e) Whether the respondents should pay the costs of the suit.
 11. The 1st, 2nd, 3rd, 4th and 5th respondent made submissions in respect of each of the issues and contended that the suit properties, being matrimonial property, do not belong solely to the applicant; and therefore he has no right to dispose of them as he wishes. In their submission, in particular, that the 6th and 7th respondents have no share in the suit properties. They also made reference to the definition "marriage" for purposes of the *Marriage Act* and the meaning of "matrimonial property" as provided for in the *Matrimonial Property Act*. From the standpoint of Section 3(1) of the *Law of Succession Act*,



the respondents submitted that a Will can only be enforced upon death; and therefore the application is incompetent.

12. The 1st, 2nd, 3rd, 4th and 5th respondents relied on *A K M v N N N* [2019] eKLR and *R W W v H W* (Matrimonial Cause E11 of 2023) [2024] KEHC 9454 in support of their submissions. They urged the Court to dismiss the application with costs.
13. I have given careful consideration to the suit and the evidence presented in respect thereof. There is no dispute that the applicant and the 1st respondent got married in a civil ceremony conducted in Las Vegas, Nevada in the United States of America; and that together they had four sons, the 2nd, 3rd, 4th and 5th respondents herein. It is also common ground that, in the course of time, the applicant acquired several pieces of land in Mbita and Mfangano Island in Homa Bay County. Although the applicant contended that he single-handedly purchased the properties, the 1st respondent stated in detail how each of the parcels was acquired as well as the role she played in each case.
14. The parties are also in agreement that, during the subsistence of his marriage with the 1st respondent, the applicant purported to contract another marriage with the 6th respondent. The second marriage was allegedly contracted pursuant to Luo customary law. The 7th respondent is alleged to be the product of the union, although this was disputed by the 1st respondent. The 1st respondent reasoned that, the 7th respondent who is over 17 years old, cannot be the biological son of the applicant, granted that the purported marriage between the applicant and the 6th respondent is only 8 years old.
15. The foregoing facts go to show that the applicant, being apprehensive that a dispute over his property is likely to erupt upon his demise, filed this application for the division of his property. Accordingly, the 1st respondent raised objections to the competence of the suit contending that there is in fact no dispute over matrimonial property; and that distribution of the applicant's property by what he purports to be a Will is premature as this can only be done upon his death. It is therefore imperative for the Court to first determine the preliminary objections raised by the 1st, 2nd, 3rd, 4th and 5th respondents (hereinafter, "the respondents").
16. The first point raised by the respondents was that the Originating Summons offends the provisions of Order 37 Rule 7 of the Civil Procedure Rules. Although they did not expound on this ground, it is plain that the provision is specific to cases of adverse possession for purposes of Section 38 of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya. More importantly, I find the objection untenable because Rule 7 of the Matrimonial Property Rules, 2022, is explicit that:

“Where a claim relating to matrimonial property is made during the subsistence of a marriage by any of the persons specified in rule 4 (b) and (c), the claim shall be made, with the necessary modifications, by way of Originating Summons in Form No. MP1 as set out in the Schedule...”
17. Likewise, although the respondents contended that the application offends the provisions of Section 3(1) of the *Law of Succession Act* which defines a Will as meaning “...the legal declaration by a person of his wishes or intentions regarding the disposition of his property after his death...” they failed to show how that provision was contravened by the applicant. A Will can only be made during one's lifetime and there is nothing intrinsically wrong in the applicant preparing one in expression of his wishes in the event of his demise.



18. The only valid ground of objection, in my considered view, is whether or not the application for division of matrimonial property is premature. In this regard Section 7 of the Matrimonial Property Act is explicit that:

“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.”

19. In addition, Rule 5 of the Matrimonial Property Rules is specific as to when such applications may be made. It provides:

- (1) A spouse or former spouse may apply to a court for the determination or declaration of any right or claim over matrimonial property in accordance with rule 7—
 - a. at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the Marriage Act (Cap. 150)
 - b. as part of the relief sought in a matrimonial cause under section 17 of the Marriage Act (Cap. 150), where the applicant is seeking a declaration of rights to any property that is contested between the applicant and the applicant’s spouse or former spouse; or
 - c. with respect to the persons specified in rule 4(b) and (c), during the subsistence of a marriage.
- (2) An application under paragraph (1)(a) shall be filed within twelve months from the date on which the decree absolute is given.

20. Since the marriage between the applicant and the 1st respondent is yet to be dissolved, it is manifest that the instant application is premature. In this regard, I agree entirely with the position taken in *M A v S A K* [2021] eKLR that:

“The basis for the distribution of matrimonial property is Section 7 of the Matrimonial Property Act...Based on the above provision, I am of the considered view that matrimonial property can only be divided upon the dissolution of marriage...This court has no jurisdiction to entertain division of a matrimonial property in a case where there is no proof of dissolution of marriage.”

21. In the premises, it is my finding that the Originating Summons dated 22nd March 2024 is premature. The same is hereby struck out with no order as to costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT HOMA BAY THIS 30TH DAY OF JANUARY 2026

OLGA SEWE

JUDGE

