



**LAO v WHO (Matrimonial Cause E001 of 2023)
[2025] KEHC 3686 (KLR) (26 March 2025) (Judgment)**

Neutral citation: [2025] KEHC 3686 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUSIA
MATRIMONIAL CAUSE E001 OF 2023
WM MUSYOKA, J
MARCH 26, 2025**

BETWEEN

LAO APPLICANT

AND

WHO RESPONDENT

JUDGMENT

1. These proceedings were initiated at the instance of the applicant, LAO, by way of an originating summons, dated 22nd February 2023, for declarations that Bukhayo/Matayos/xxxx and xxxx, acquired jointly by the parties, largely developed by the applicant during matrimony, and registered in the name of the respondent, be transferred and registered in the sole name of the applicant, for the benefit of the 2 issues of the marriage between the 2 parties, namely SPO and CLO; and the matrimonial property on the respondent’s ancestral land, near Busia Sugar Industries, developed with funds from sale of property jointly acquired by the parties during the marriage, be registered in the sole name of the respondent; such other orders as the court may make; and costs of the proceedings.
2. In the affidavit, sworn by the applicant on 22nd January 2023, a background is given. The parties cohabited as husband and wife, from 1993, and dissolved their union by divorce decree in 2022. They had 2 matrimonial homes, one at [Particulars withheld] Village, and the other at Bukhayo/Matayos/xxxx, both within Matayos Sub-County, of Busia County. It is explained that the Busibwabo property was ancestral land, that the respondent had inherited, and which he developed during the subsistence of the marriage, after he sold one of the assets acquired by them jointly, in Nandi. The other property was said to have had been acquired by the joint efforts of both parties, and developed by the applicant, during subsistence of the marriage, at a time when the respondent had abandoned her.
3. It is averred that the 2 parties begat 2 children, SPO and CLO, both adults. The marriage between the 2 parties was dissolved by divorce decree in Busia CMCDC No. E3 of 2020. It is averred that the applicant did not re-marry thereafter, on account of advanced age, and did not intend to. It is



mentioned that the 2 owned 3 assets, being the 2 mentioned above, and Bukhayo/Bugengi/xxxx. The applicant explains that she was, and still is, in cereals business, based at Kibuye Market, Kisumu, while the respondent runs a business of selling rice and soap. She explains that she was assaulted and locked out of the property on Bukhayo/Matayos/xxxx and was forced to move back to her maiden home, with her children, whenever she visits Busia County. The respondent then secretly mortgaged Bukhayo/Bugengi/xxxx, abandoned re-paying the loan secured with that property, which forced her to repay the same, after Equity Bank put it on sale.

4. No documents are annexed to the affidavit sworn in support of the originating summons, dated 22nd February 2023.
5. The respondent acknowledges the marriage, and the 2 children, but counters that it was the applicant who moved out of the matrimonial home, taking with her assorted movable assets, and a houseboy, who became her husband, but left behind the 2 children. He asserts that there was only 1 matrimonial home, at Matayos, and that there was no home at Busibwabo. He states that he bought property at Bukhayo/Bugengi/xxxx, without the knowledge of the applicant, using money made from a business he was conducting at Kisumu, when the applicant was a housewife. He thereafter developed that property. He states further that the applicant left with 5 motorcycles, that he used to run a boda boda business. He further states that he had no land near the Busia Sugar Industries, nor in Nandi. He states that it was him who was paying for the educational needs of the 2 children of the marriage, right from nursery school to college. He states further that he was the one who opened a business for the applicant at Kisumu, which still operates under his business name. He asserts that he never mortgaged Bukhayo/Bugengi/xxxx, and no bank ever put it up for sale.
6. The respondent has attached several documents to his affidavit. There is a copy of police occurrence book, OBx, of 19th July 2021, where it was reported that the applicant had left the matrimonial home at Nangoma Village, and that she had carted away assorted movables, listed in the report, allegedly valued at Kshs. 460,000.00. There is a copy of the sale agreement for the Bugengi property, executed on 29th January 2002, between the respondent and Salim Hassan Kabwere. There are copies of title deeds for Bukhayo/Matayos/xxxx and Bukhayo/Bugengi/xxxx, both registered in the name of the respondent. There are copies of documents relating to properties at Bukhayo/Matayos/xxxx and Bukhayo/Bugengi/xxxx, concerning surveying, and another for Bukhayo/Bugengi/xxxx being drawings for proposed development, all in the name of the respondent. There are copies of bank slips, in respect of which the respondent avers were moneys given to the applicant for purchase of motorcycles. Lastly, there is a bundle of copies of receipts and related documents, in relation to the education of the 2 children.
7. The matter was canvassed by way of affidavit evidence, based on a consent to proceed that way, which the parties recorded before me on 28th February 2024. The applicant filed 2 affidavits as her evidence, some sworn by her on 20th February 2024 and 17th July 2024. 2 affidavits, sworn by the 2 children, CLO and PSO, on 21st February 2023, support the plaintiff's case. I have seen only 1 affidavit on the evidence of the respondent, sworn on 4th September 2023.
8. In their separate affidavit, of 21st February 2023, which are replicas of each other, the children, aver that their 2 parents acquired property during the subsistence of their marriage. They mention the Busibwabo property, which they described as inherited from their grandfather, where the respondent put up a home and rental houses. Then there was Bukhayo/Matayos/xxxx, which they described as the second home, occupied by the applicant, and themselves as children. They aver that the same was developed by the applicant, who put up a 3 bedroomed house. Then Bukhayo/Bugengi/xxxx followed, which had been developed, with 3 rental shops and residential houses. They aver that the



respondent took a loan with Barclays Bank, using the title for Bukhayo/Bugengi/xxxx, after which he disappeared, and it was the applicant who redeemed the title. They aver that the plaintiff, with their assistance, worked at Kibuye and Kondele markets, Kisumu, to earn a living. They propose that Bukhayo/Matayos/xxxx and Bukhayo/Bugengi/xxxx should be given to the applicant, while the respondent should have the ancestral land.

9. In the affidavit of 20th February 2024, the applicant avers that upon starting to live together she and the respondent had nothing, until the respondent got employment in Kisumu, where she joined him. She avers that her brothers sponsored her to start businesses, and she began at Manyatta market, before moving to Kondele, where she engaged in cross-border trade, with supplies of assorted items from Uganda and Tanzania. She avers that when the business began to grow, the respondent disappeared for 9 years. She avers that she was the one who encouraged the respondent to acquire land. They started with Bukhayo/Matayos/xxxx, where both contributed ½ of the purchase price, where they then established a matrimonial home, in which she made the major contributions. Bukhayo/Bugengi/xxxx followed, where she also contributed ½ of the purchase price, and almost the total cost of the development on it.
10. She states that all of them were registered in the name of the respondent, going by the thinking at that time. She avers that the Busibwabo ancestral home also had several developments, but she had been excluded from them. She asserts that she had never been a housewife, when they moved to Kisumu. She all along took and repaid loans that the respondent took secretly but failed to pay. She mentions Barclays Bank, in that respect. She mentions that although they acquired the assets together, the respondent did not feature much when it came to construction. She states that she also borrowed money from Equity Bank to pay school fees and for development. She asserts that although all the assets were registered in his name, the respondent knew that they were matrimonial property.
11. She has attached, to the affidavit, copies of a bank statement from Equity Bank, of an account in her name, a certificate making decree nisi absolute issued in Busia CMCDC No. E003 of 2020. A picture of the rentals standing on the ancestral land at Busibwabo.
12. In her further affidavit, of 17th July 2024, she avers that the respondent caused Bukhayo/Bugengi/xxxx to be mortgaged, with Barclays Bank, for Kshs. 540,000.00, which later ballooned to Kshs. 1,000,000.00, due to accumulated interest, after the respondent failed to service the loan, forcing her to step in. She avers that she did not know what the borrowed money was spent on, but the respondent deserted home at about that time. She repaid the whole loan and redeemed the property. She also acquired motorcycles, on her own, through mortgage arrangements. She proposes that the respondent retains the ancestral land, Bukhayo/Matayos/xxxx be sold and the proceeds shared, and Bukhayo/Bugengi/xxxx be given to her, for redeeming it after the respondent took a loan on it.
13. She has attached customer transaction vouchers for money deposited into a Barclays Bank account, operated by the respondent. There is also a bundle of documents relating to the acquisition of several motorcycles.
14. In his affidavit on evidence, the respondent avers that he has no home at Busibwabo, as the loan that he took he used to purchase a piece of land at Kisumu, being Kisumu/Kasule/xxxx. He asserts that he repaid the loan, and the applicant did not participate in that. He asserts that the applicant never paid school fees for the children. He has attached copies of documents relating to the purchase of Kisumu/Kasule/xxxx. There are also copies of documents relating to the Barclays Bank account, showing that he made a deposit of Kshs. 450,000.00 across the counter, and there is a letter addressed to him advising him that the loan had been cleared after he made some payment. There is also a copy of documents



- showing a bursary from the County Government of Busia to the account of the college fees for 1 of the children.
15. The parties also filed written submissions and cited judicial precedents. I have read through the written submissions, and noted the arguments made.
 16. The applicant identified 3 issues for determination; around whether the suit properties were matrimonial property, whether the applicant contributed towards acquisition and development of the assets, and the rights of the parties to the assets, under section 12 of the *Matrimonial Property Act*, Cap 152, Laws of Kenya.
 17. On the first issue, on acquisition of the 3 assets, the applicant cites section 6(1) of the *Matrimonial Property Act* and submits that all 3 were acquired during coverture. On contribution towards the acquisition, she cites sections 2 and 6(1) of the *Matrimonial Property Act*, to submit that the property was acquired during the joint efforts of both parties, asserting that the contribution of the applicant was both monetary and non-monetary.
 18. On the second issue, the applicant cites section 7 of the *Matrimonial Property Act*, to submit that the 3 assets should be considered jointly owned, for both parties contributed towards their acquisition and development. She submits that she had produced documents that she deposited money into bank accounts to pay a loan taken by the respondent, and other documents to show how she had developed some of the assets. She also points out that the respondent disappeared from home for 9 years, leaving her to take care of the children on her own. She asserts that the development of Bukhayo/Matayos/xxxx was largely done by her. She further argues that the non-monetary contributions, through managing household affairs and supporting family well-being should also be considered.
 19. On the last issue, she submits that the 3 assets were acquired with the intention of joint ownership and use, and the joint ownership presumption in section 7 of the *Matrimonial Property Act* ought to be invoked. She also submits that, under section 12(1) of the *Matrimonial Property Act*, no part of matrimonial property should be alienated without the consent of either spouse. She asserts that the provision was violated when the respondent took a loan on the Bugengi property, without involving her.
 20. She proposes that the final orders should be that the ancestral property be given to the respondent, Bukhayo/Matayos/xxxx be sold and the proceeds of sale shared, and Bukhayo/Bugengi/xxxx be given to her, for she redeemed it, after the respondent had mortgaged and abandoned it.
 21. The respondent identifies 2 issues: which assets are to be considered as matrimonial property, and what was the contribution of the applicant to the purchase of the property, and how it should be shared. Although framed as 2 issues, they are 3 in number.
 22. On the first issue, the respondent cites section 6 of the *Matrimonial Property Act*, to assert that the following assets make up the matrimonial property: Bukhayo/Matayos/xxxx, Bukhayo/Bugengi/xxxx, 4 motorcycles, assorted household goods and business. The respondent asserts that the applicant left the matrimonial home with 4 motorcycles and assorted household goods. On the Kisumu/Kasule/xxxx property, he submits that the same has never been matrimonial property. He submits that Bukhayo/Matayos/xxxx was inherited property and the homestead was set there, and that was where he and the children, who are now married, call home. On Bukhayo/Bugengi/xxxx, he asserts that he bought it alone, and cannot share it with the plaintiff, for she contributed nothing to it. He submits that the applicant did not produce any document as evidence that she owned anything to warrant getting a share in any of the assets. He asserts that all the assets were registered in his sole name, and the applicant had not demonstrated that she contributed to their acquisition.



23. On contribution, he submits that Article 45(3) of *the Constitution* does not impose a 50:50 sharing of assets acquired during marriage. He cites section 7 of the *Matrimonial Property Act*, for the point that ownership is determined by contribution. He also cites section 2 of the Act, on what contribution entails. He submits that the applicant did not provide any concrete evidence of her contribution. He cites AW vs. MVCMAWM [2018] eKLR and CWM vs. JPM [2017] eKLR, on assessment of what the applicant could be entitled to. He asserts that, as Bukhayo/Matayos/xxxx is inherited from his parents, it does not form a part of the matrimonial property, by virtue of section 6(2) of the *Matrimonial Property Act*. He submits that the applicant should get nothing, and her suit ought to be dismissed with costs.
24. There is only 1 issue for determination, division of the property as between the applicant and the respondent.
25. The most recent decision on these matters is that in JOO vs. MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) [2023] KESC 4 (KLR)(Mwilu, Ibrahim, Wanjala, Ndung'u & Lenaola, SCJJ), where several principles were stated: that the equality principle in Article 45(3) of *the Constitution* did not empower the court to vary existing proprietary rights of the parties, and the other party is not entitled to a share in such property merely on account of marriage; that the guiding principle in apportionment and division of matrimonial property is that the same could only be done on the basis of what each party contributed to the acquisition of the property; among others. See also TKM vs. SMW [2020] eKLR (Ouko P, Musinga & Gatembu, JJA). I shall bear these principles in mind as I determine the issues that arise herein.
26. For the purposes of discussion, I would align myself with the issues identified by the applicant: which of the assets make up the matrimonial property, what was the contribution of the parties to their acquisition, and how should they be shared between the 2.
27. Let me start with the first issue, identification of the assets which make up the matrimonial property that should be subjected to distribution. The applicant has identified 3, the respondent claims that they are more than that.
28. What constitutes matrimonial property is defined in section 6(1) of the *Matrimonial Property Act*, 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. It excludes property held under trust, according to section 6(2). Section 5 makes some exclusions, so that property acquired or inherited before marriage is excluded from the definition of matrimonial property. Section 9, however, provides that property acquired prior to marriage, including that which is inherited, could become matrimonial property, upon the other spouse making a contribution upon its improvement. The definition of matrimonial home in section 2 could also be relevant, to mean property occupied or utilized by spouses as their family home, including homes owned or leased by one or both spouses.
29. So, which of the assets alleged by both sides to be matrimonial property is in fact so.
30. I will start with what the applicant lists as matrimonial property. She mentions 3.
31. There is the ancestral land at Busibwabo, which is said to be inherited from the father of the respondent. The applicant claims that that was where either the initial matrimonial home was, or that she developed that land to some extent, and, therefore, acquired a stake in it, in accordance with section 9 of the *Matrimonial Property Act*. She did not provide any proof of the alleged developments. But first things first. Is this property matrimonial? Is it inherited?



32. Section 5 of the Act eliminates land inherited prior to marriage from the schedule of matrimonial property. It would be property exclusively belonging to the inheritor, unless after the marriage the other spouse develops the same in some way. Was the property inherited by the respondent? Inheritance could happen in 2 ways, through succession or inter vivos gifting. None of the parties mentioned whether the father of the respondent died, and succession proceedings were conducted, where the land in question was devolved to the respondent, and he holds a title to it. No documents on succession by the respondent to that land were produced. Similarly, none of them talked of the father of the deceased being alive, or during his lifetime gifting to the respondent his share of the family land inter vivos, and conveyed it to him, so that the respondent holds a title deed to it. No documents relating to such inter vivos transfer were produced.
33. The registration particulars of the land in question were not even disclosed. I cannot tell, therefore, whether this property exists at all. Without proof of its existence, no evaluation can be done as to whether the same is ancestral property, and, if it is, whether the applicant made any improvements to it, to make it qualify as matrimonial property. There is no proof, therefore, that the so-called ancestral land is matrimonial property.
34. The second property is Bukhayo/Matayos/xxxx. The applicant says that the same was acquired during matrimony, and that was where they set up their home, away from the family home in the Busibwabo land. She describes it as their village home. The respondent concedes that this property was bought during the period that he and the applicant were married, for he alleges that she was a housewife then. He further avers that that was where their home was, the one she deserted, according to him, and got married, and then sought divorce. Bukhayo/Matayos/xxxx is, undoubtedly, matrimonial property.
35. The third property is Bukhayo/Bugengi/xxxx. The applicant avers that it was acquired during matrimony. The respondent concedes that the property was acquired during matrimony, for he asserts that the same was bought while the applicant was a housewife.
36. In his replying affidavit, the respondent does not assert that there were other matrimonial assets, save for the averment that when the applicant left the matrimonial home in 2019, she carted away some assets, which he cited as all the household goods, sofa sets, cupboards, all beddings, jembes, 4 goats, 5 cows, 40 chickens and 5 motorcycles. The extract from the police occurrence book put the value of the items taken at Kshs. 460,000.00. I see, however, in the written submissions that 4 motorcycles, assorted household goods and business are listed. The respondent did not present documents relating to the motorcycles, but I see, from the documents attached to the affidavits of the applicant, that they were bought in 2017/2018. The applicant asserts that she bought them herself from loans that she took. They were commercial tools, and there was no evidence that they were part of a family business. The assorted household goods are not broken down into what they constitute, and no documents have been attached to demonstrate who bought them and when. I find and hold that no foundation has been laid, for declaring the motorcycles and the assorted household goods to be matrimonial property.
37. The last item is business. There is no indication of which business this is. In his affidavit, the respondent refers to Ziko, and says that it was his business name, under which the applicant was still trading or running a business that he had set up for her. However, in his affidavit, sworn on 13th April 2023, he does not claim the business, what he would like is for her to stop using the business name. The applicant avers that there is no such business name, although she was still running her business. According to her, she set up her business with the help of her brothers, and not with help from the respondent. It is the respondent claiming that the business should be shared. The burden is on him, to establish that the same was family business, in terms of it being set up with family funds and running as a family enterprise. I have not seen any evidence in that direction. There is no evidence that he contributed to



- the initiation of the business or its running. There is no evidence that it was a family business. There is no evidence of what the business was all about, in terms of where it was based, its accounts, its stock. No documents of any nature relating to it have been produced. There would be no basis for sharing that alleged undefined business.
38. There was mention of Kisumu/Kasule/xxxx, by the respondent, as property that he bought in 2006. The applicant has not listed this property in her papers and has not called for its sharing. There is correspondence about the sale, and documents to evidence payment, but I have not seen a single document of title, to establish that the sale was completed, to make it a property of the respondent, capable of being considered for the purposes of distribution as matrimonial property.
 39. From the discussion above, what should emerge is that only 2 assets have been established as being capable of classification as matrimonial property, being Bukhayo/Matayos/xxxx and Bukhayo/Bugengi/xxxx.
 40. Having disposed of the question, as to which assets make up matrimonial property for the purposes of this case, let me now turn to the second issue, what was the contribution of either of the 2 parties to its acquisition?
 41. Both assets are in the name of the respondent. In such a scenario, the applicable law would be section 14 of the *Matrimonial Property Act*, which makes a rebuttable presumption on property acquired in the name of 1 spouse during the currency of the marriage, that the property is held in trust for the other spouse. As the assets herein are in the name of the respondent, and were acquired during his marriage to the applicant, a rebuttable presumption arises that the respondent holds them in trust for the applicant. It would be up to the respondent to rebut that presumption, as it is him claiming that he acquired the property by his sole efforts, with zero contribution from the applicant. The burden on the applicant is to establish that the property was acquired during matrimony, and once she discharges that burden, it would shift to the respondent to rebut the presumption.
 42. Section 14 should be read together with section 7, which establishes that ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition. Where the spouse, in whose name the property is registered, places material before the court, to assert that the property is not matrimonial, but separate property solely belonging to him, in terms of section 13 of the *Matrimonial Property Act*, then the spouse asserting it to be matrimonial property must lead evidence to establish that, although the property was registered in the name of that other, he or she either contributed, one way or other, to its acquisition or to its improvement. I will be guided by these provisions.
 43. I will start with Bukhayo/Matayos/xxxx. It is common ground that the property is registered in the sole name of the respondent. There is a copy of a title deed for it, attached to the affidavit of the respondent, of 13th April 2023, dated 31st March 1999, which indicates that it was registered in the name of the respondent on even date. Title deeds can be misleading, as proof of ownership, for they do not usually bear the latest information on ownership status. I am writing this judgement in 2025, the title deed placed before me is dated 31st March 1999, some 25 years ago. I have no idea whether the status of ownership of the property is as in 1999. The most appropriate way, to get up to date information, on registered property is by way of a certificate of official search. The applicant should have obtained one before she came to court. The title deed was availed by the respondent, but it is no guarantee that the property is still in his name. It could be that I am being invited to share property which has since changed hands.
 44. Be that as it may. The information in the title deed should raise a presumption that the property was acquired during matrimony, and that the sole registered proprietor, the respondent herein, holds it in



- trust for the applicant. In his papers, the respondent has asserted that he acquired the asset without any contribution from the applicant, and that he regarded it as separate property, which means he is seeking to rebut the presumption that it was matrimonial property.
45. The applicant claims that she contributed to the acquisition of the property, but it was registered in the name of the respondent. She cites the prevailing cultural environment at that time, where the husband held all the family property. She then goes on to state that after the property was acquired, she heavily invested in it. She has not provided any documentary evidence to support the claim that she contributed to the acquisition of Bukhayo/Matayos/xxxx, and that she heavily invested in it by way of development. She avers that she considered that to be their matrimonial village home. She avers to have had been forced out of this home by the respondent, which, I suppose, is what eventually led to the dissolution of their marriage.
46. It is also common ground that Bukhayo/Bugengi/xxxx is registered in the name of the respondent. There is a copy of a purported sale agreement, dated 29th January 2002, between the respondent and the seller. There is also a copy of the title deed for it, dated 11th November 2002, which indicates that the property was registered in the name of the respondent on even date. I will reiterate what I said above about title deeds, they do not always tell a true story of the current ownership of the property in question. The title deed presented here was issued on 11th November 2002, some 23 years prior. Ownership may have changed hands since, and the applicant should have sought a certificate of official search before she filed suit, as evidence of current ownership of the property.
47. Anyhow. The material in the title deed should be sufficient proof that the property was acquired during the period when the parties were married, and should raise a presumption that it was matrimonial property, which the respondent holds in trust for the applicant. Of course, in his papers, the respondent has sought to discount that, by way of rebuttal of the presumption, through asserting that he bought the property with his own money, with no assistance from the applicant, and that he solely developed it without any help from the applicant.
48. The applicant alleges that the property was acquired through their joint efforts. She has provided no documentary proof of the same. She also alleges that the respondent mortgaged the property, for a loan, and disappeared, without servicing that loan, and she was forced to step in to redeem or salvage the property from being foreclosed by the bank. She has provided banking slips or deposit vouchers, which evidence that she deposited amounts of money to an account that the respondent was operating at Barclays Bank, where the property had allegedly been mortgaged. However, there is no evidence that the property was under threat of sale by the bank. I do note though that the respondent claims to be the one who cleared that loan, and relies on a letter from the bank, dated 22nd September 2015, upon payment of a sum of Kshs. 60,000.00. However, the customer transaction vouchers, presented by the applicant, indicate that she made a deposit of Kshs. 60,000.00 on 21st September 2015, into that account, giving credence to her claim that she was the one who settled that loan. Indeed, it would appear that the letter, the respondent is relying on, dated 22nd September 2015, as evidence that he was the one who cleared the loan, was written after the applicant made that payment on 21st September 2015, that is to say that that letter was written just a day after the applicant made that deposit. There is more than adequate proof that funds moved from the hands of the applicant into the bank account of the respondent, but not vice versa.
49. Did the respondent acquire these assets solely? Other than the fact that the title deeds show him as the sole registered proprietor, the respondent did not provide proof that the money utilized to purchase the 2 assets came from him. He has also not provided any proof that he was engaged in an activity from which he could raise money enough to acquire the property in question. He claims to have been in



business, but he has not attached a single document as proof of the business he was engaged in. He has equally not provided any accounts for any business he was engaged in, nor a bank account that he operated at about the time the said assets were being acquired. The only documents that he has attached are a sale agreement, title deeds, receipts from surveyors, and building plans. These would not demonstrate that he was the sole purchaser of the property, nor that he was the sole source of the purchase price.

50. The applicant has not provided documentary proof of her hustle at about the time the 2 assets were acquired. She has, however, attached bank statements, which show that she had a regular source of income, and had acquired loans, which would have enabled her to make the developments that she alleges. I note that the respondent is accused of having disappeared from the family for 9 years, during which period the applicant was left taking care of the family and the assets. The respondent has not contested that allegation.
51. The applicant also alleges that she contributed indirectly to the acquisition of the assets, through home management and taking care of the children. The respondent claimed that he was a housewife, which is a sort of acknowledgement that she took care of the family and the home. Evidence points to the fact that she was also in business. She also claims she paid school fees for the 2 children of the marriage. She has not attached documentary proof. The respondent counters that he was the one who catered for the educational needs of the children. He has attached receipts relating to school fees. As noted above, there is the claim that the respondent disappeared on the family for 9 years, which he has not contested. Secondly, school receipts, such as those presented by the respondent, are usually in the name of the student, and not the payer or parent. On the face of it, therefore, a school fees receipt does not disclose who provided the school fees. In this case, it could be that the respondent paid the fees, because he is the one who has presented the receipts. It could be that fees were paid by the applicant, and the respondent only has possession of the receipts because he found them somewhere within their residence. Some of these issues could have been properly addressed had the matter gone for hearing *viva voce*.
52. From the material above, I am persuaded that the applicant did contribute to the acquisition of the assets in question, both directly and indirectly. Directly from the evidence that she had income from which she could improve the property in the manner that she alleges, and, for Bukhayo/Bugengi/xxxx, through paying off a loan taken by the respondent, secured with that property, and thereby saved it. Indirectly, through domestic work and home management. I find that she was the one who was solely responsible for the education of the children, as the respondent was away from the family for 9 years.
53. That should take me to the next consideration, about how the said assets are to be shared out. The actual or exact or approximate contribution of either side is indeterminate, for both sides provided no evidence of what each contributed to the purchase of the property, or its development or improvement. Both, however, appear to have contributed one way or another. Based on that, my finding and holding is that both contributed equally.
54. The applicant has asked that the assets be transferred to and registered in her name, jointly with the 2 children of the dissolved marriage. Division of matrimonial property is about matrimony. Matrimony is a contract between the spouses, and their children would really have no role at all in it. Strictly speaking, children have no rights, under marriage law, so far as the marriage contract is concerned. No rights accrue to them from the marriage contract, which they can enforce against the parties to the marriage. Children are not privy to the marriage contract. The rights of children are independent of marriage. Children relate to the marriage partners as their parents, not as parties to a marriage. Disputes, arising from the marriage contract, should, therefore, be resolved between the parties to the marriage, without dragging the children into them, for their neutrality should be preserved as much as possible, for their mental and emotional well-being. The contest herein is between the applicant and



the respondent, who were the parties to the dissolved marriage. The children were products of that marriage, but that did not make them parties to it. No orders should be made in their favour.

55. The final orders are:

- a. That I declare that Bukhayo/Matayos/xxxx and Bukhayo/Bugengi/xxxx are matrimonial property, having been acquired during marriage, and the respondent holds the same in trust for the applicant;
- b. That I declare that the parties hereto contributed equally to the acquisition and improvement of the said assets;
- c. That the same shall be shared equally between the 2 parties, with each party having liberty to buy out the share of the other;
- d. That each party shall sign the relevant transfer or registration documents to facilitate (c) above; and
- e. That each party shall bear their own costs.

DELIVERED VIA EMAIL, DATED AND SIGNED IN CHAMBERS, AT BUSIA, THIS 26TH DAY OF MARCH 2025.

W MUSYOKA

JUDGE

Mr. Arthur Etyang, Court Assistant.

Advocates

Mr. Tony Omeri, instructed by Omeri & Company, Advocates for the applicant.

Mr. Barasa Ouma, instructed by BM Ouma & Company, Advocates for the respondent.

