



**RAO v NAO (Matrimonial Cause E001 of 2021)
[2024] KEHC 6187 (KLR) (30 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6187 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MATRIMONIAL CAUSE E001 OF 2021**

RE ABURILI, J

MAY 30, 2024

BETWEEN

RAO PLAINTIFF

AND

NAO DEFENDANT

JUDGMENT

1. This is a matrimonial cause by way of Originating Summons dated 8th February 2021 relating to distribution of matrimonial property. The applicant is seeking the following prayers;
 - a. That a declaration does issue that the immovable property known as KISUMU/BORDER/4140 bought by the applicant single handily and registered in the applicant’s name but occupied by the respondent is solely owned by the applicant.
 - b. That it be declared that property known as KISUMU/WANGAYA I/6475 which was bought by financial contribution of both parties herein and registered in the joint name of the applicant and respondent is property of marriage jointly owned by the applicant and the respondent and the same should be shared equally.
 - c. That it be declared that the respondent also had other properties known as KISUMU/WANGAYA I/5018 and KISUMU/WANGAYA I/5019 which he acquired in his own and are registered in his own name properties which the applicant is not interested in.
 - d. That the respondent be restrained from alienating, encumbering, disposing or in any way interfering with the said properties.



- e. That the respondent be ordered to vacate property known as KISUMU/BORDER/4140 which orders should be enforced by the OCS AWASI POLICE STATION.
 - f. That the respondent do account for the proceeds of any of the aforementioned properties that he may have disposed off without the applicant's knowledge.
 - g. That in the alternative the property known as KISUMU/WANGAY I/6475 be sold and the proceeds he shared between the parties herein equally and the property known as KISUMU/BORDER/4140 be left to the applicant.
2. The Originating Summon was founded on the Supporting Affidavit dated 8th February 2021, sworn by the applicant, Rose Atieno Odhiambo.
 3. It was the applicant's case that she and the respondent cohabited as husband and wife from 1997 to November 2015 and that the respondent obtained a decree absolute dissolving the said marriage from Nyando Senior Principal Magistrate's Court Divorce No. 8 of 2018.
 4. The applicant averred that during the subsistence of the said marriage, the union was blessed with three issues, Faith Mercy Achieng 20 years, John Cannigham Ongola 19 years and George Hempstone Odhiambo 17 years.
 5. It was her case that she contributed immensely towards the purchase of the properties during the subsistence of the said marriage and further that they had both been staying in one of the said properties until when the respondent without any reasonable cause kicked her out of the said property.
 6. The applicant averred that the respondent has denied her access to the said properties both physically and from any income.
 7. The applicant averred that she single handedly purchased the property known as KISUMU/BORDER/4140 from her own savings whereas the property known as KISUMU/WANGAY I/6475 belonged to both parties jointly.
 8. In support of her case, the applicant called one Joseph Ochele Ojango who testified that he sold the property known as KISUMU/BORDER/3990 to the applicant which property was sub-divided to carve out the applicant's portion resulting in property known as KISUMU/BORDER/4140.
 9. The applicant's suit was undefended despite service on the respondent by the applicant that notwithstanding, it was upon the applicant to prove her averments to enable the court find in her favour.
 10. The applicant filed written submissions dated 3rd April, 2024 and framed two issues for determination. The issues are:
 - a. Whether KISUMU/WANGAYA I/ 6475 constitutes matrimonial property.
 - b. Whether KISUMU/BORDER/4140 does not constitute matrimonial property
 11. The applicant submitted reiterating her testimony that she single-handedly purchased the property in issue during the subsistence of her marriage to the respondent, which marriage was dissolved hence the said property is available for distribution and that she is therefore the sole beneficiary of the said property. She quoted the relevant provisions of the law.



DETERMINATION

12. Having considered the application herein and the testimony by the applicant, the following issues are for determination:
- i. Whether the suit properties KISUMU/BORDER/4140, KISUMU/WANGAYA I/6475, KISUMU/WANGAYA I/5018 and KISUMU/WANGAYA I/5019 constitute matrimonial properties;
 - ii. Whether the applicant contributed towards the acquisition and development of the matrimonial properties and What share the applicant is entitled to.

On Whether the suit properties KISUMU/BORDER/4140, KISUMU/WANGAYA I/6475, KISUMU/WANGAYA I/5018 and KISUMU/WANGAYA I/5019 constitute matrimonial properties

13. For a property to qualify as a matrimonial property, it must meet the definition in section 6 of the Matrimonial Property Act. Section 6 of the Matrimonial Property Act which defines matrimonial property as:
- (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.
14. From the evidence adduced before this court, it is not in dispute that parties herein cohabited as husband and wife from 1997 to November 2015. It is also not in dispute that sometime in October 2020 the parties herein finalized their divorce. Finally, it is not in dispute that all the suit properties herein were acquired during the pendency of the now dissolved marriage.
15. Property number KISUMU/BORDER/4140 is registered in the name of the applicant only, KISUMU/WANGAYA I/6475 jointly registered in the name of the parties herein and KISUMU/WANGAYA I/5018 and KISUMU/WANGAYA I/5019 registered in the name of the respondent.
16. Section 14 of the Matrimonial Property Act provides two rebuttable presumptions as to property acquired during marriage: where property is acquired
- (a) in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse; and
 - (b) in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.
17. Be that as it may, as already stated herein, all these properties were acquired during the pendency of the marriage and thus constitute matrimonial property.
- Whether the applicant contributed towards the acquisition and development of the matrimonial properties and What share the applicant is entitled to



18. Contribution towards the acquisition of matrimonial property is defined under section 2 of the Matrimonial Property Act, 2013 in the following terms:

“In this Act, unless the context otherwise requires— “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.”

19. The Court of Appeal had this in mind in *TKM v SMW* [2020] eKLR where it is stated as follows:

“We bear in mind the edict in *Muthembwa vs Muthembwa* (2002) 1 EA 186, and many other decisions reminding the courts that in assessing the contribution of spouses in acquisition of matrimonial property, each case must be dealt with on the basis of its peculiar facts and circumstances but bearing in mind the principle of fairness.”

20. The evidence led before this court by the applicant is that the applicant single handedly purchased the property known as KISUMU/BORDER/4140 from her own savings. This was corroborated by PW2 who testified that she sold the said property to the applicant.

21. In the absence of evidence to counter the applicant’s case, I thus find that the property known as KISUMU/BORDER/4140 belongs to the applicant exclusively and solely.

22. As regards the properties KISUMU/WANGAYA I/5018 and KISUMU/WANGAYA I/5019 registered in the name of the respondent, the applicant renounced her claim to the said parcels and I thus find that the same belong to the respondent wholly.

23. The only property in contention is Number KISUMU/WANGAYA I/6475 which is jointly registered in the name of the parties herein.

24. Section 7 of the Matrimonial Properties Act deals with what constitutes ownership and contribution towards matrimonial property as:

“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.”

25. Although the applicant did not shade much light as to how much the land was paid for and the cost of development, there is a presumption in law that when spouses are jointly registered owners of property, they are deemed to be joint owners in equal shares. This was the position held in the case of *Kivuitu v Kivuitu* in 1991 eKLR 248 where the court observed:

“The fact that the property is registered in the joint names means that each party owns an undivided equal share therein. – Because of the conveyance of the property to be held by



them as joint tenants, there was a presumption at the time, that the interest of the parties was to hold the matrimonial home as joint tenants, provided that if one of them died, the other would take the whole ownership.”

26. A similar position was held in the case of *Kamore v Kamore* (2000) EA 81, where the court held that:

“Where property is acquired during the course of coverture and is registered in the joint names of both spouses, the court in normal circumstances must take it that such property being a family asset is acquired in equal shares.”

27. I therefore find that the parties herein are entitled to equal shares of property number KISUMU/WANGAYA I/6475. The said property shall be valued and sold and the proceeds shared equally. However, should any one of the parties wish to buy out the other, they are free to do so.

28. On whether the respondent should be enjoined from alienating the property No. KISUMU/BORDER/4140, this court having declared the said property as belonging to the applicant/ plaintiff herein exclusively, any other dispute arising therefrom, including the issue of occupation can only be ventilated before the court that has jurisdiction to determine that dispute namely, the Environment and Land Court.

29. Similarly, this court cannot issue eviction orders against the respondent to vacate the plaintiff/ applicant’s parcel of land KISUMU/BORDER/4140, as that exercise is the preserve of the Environment and Land Court. To do otherwise would be overstepping the mandate of this court. The prayer is therefore declined.

30. Prayer (f) is speculative as the applicant/ plaintiff has the capacity to establish whether the respondent has sold any of the properties and seek appropriate compensation, this court having declared the said property as matrimonial property, which fact the respondent ought to have known. It is declined.

31. The upshot of the above is that the applicant’s Originating Summons dated 8th February 2021 is merited and the same is allowed to the extent stated in this judgment.

32. Any of the parties hereto are at liberty to apply for settlement.

33. Each party to bear their own costs of this suit.

34. The file is closed.

Dated, Signed and Delivered at Kisumu this 30th Day of May, 2024

R.E. ABURILI

JUDGE

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