



REPUBLIC OF KENYA



KENYA LAW
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**Simiyu v Waswa (Environment and Land Appeal E021 of 2023)
[2025] KEELC 3370 (KLR) (24 April 2025) (Judgment)**

Neutral citation: [2025] KEELC 3370 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL E021 OF 2023**

CK YANO, J

APRIL 24, 2025

BETWEEN

SARAH NASIPONDWI SIMIYU APPELLANT

AND

FESTUS NAFWOGO WASWA RESPONDENT

((Being an Appeal against the Judgment of Hon. R. Odenyo, Senior Principal Magistrate delivered on 22nd June, 2023 and pursuant to the leave out of time issued on 19th October, 2023 in Eldoret CMCC No. 118 of 2019))

JUDGMENT

1. The Appellant herein filed suit against the Respondent being Eldoret Chief Magistrate's Court Civil Suit No. 118 of 2019, seeking an order of eviction and costs and interests of the suit. The Appellant's case at trial was that she is the rightful and legal owner of Eldoret Municipality 17/95 Plot 10 (the suit property herein) having purchased it from one Valentine J. Yator on 4th October, 2006. She constructed houses thereon, some of which she rented out and one she resided in until 20th June, 2015 when she moved to stay at Mwanzo estate within Eldoret town.
2. The Respondent allegedly moved into her house in July, 2015 and started to collect rent from the other tenants which he remitted to her. According to the Appellant, the Respondent continued remitting the rent to her until November, 2015 when he stopped remitting his rent and that of the other tenants to her. Any effort to demand for the rent was met with threats and actual violence, and she thus moved to court to seek his eviction from the suit property.
3. The Respondent filed a defence denying the allegations in the Plaintiff. According to him, the suit property was acquired during the subsistence of his marriage to the Appellant and is not therefore her property. He alleged that he had been away on official duties and asked the Appellant to handle the transaction relating to the suit property. He explained that he personally sourced for the



building materials from his ancestral home and built the rental properties on the land, as well as the three bedroomed matrimonial house where they lived together with their two daughters. It was the Respondent's case that in 2015, the Appellant left the matrimonial home with all the household goods and left him in the house to raise their children.

4. He denied any obligation to remit the rental money to the Appellant and explained that the said money is what he used to care for all the needs of the children, as the Appellant did not contribute in any way. The remainder was sent to the Appellant's mother, but due to an increase in the children's needs, he was unable to do so and he explained the same to the Children's grandmother. It was also alleged that it is the Appellant who had been threatening violence to remove the Respondent from the land and demanding rent from the tenants without a court order.
5. The trial court delivered its judgment on 22nd June, 2023 and found that the Appellant had not made a proper case for grant of the orders sought. Being dissatisfied with the said judgment, the Appellant preferred an appeal against it vide Memorandum of Appeal dated 9th November, 2023 which contained four (4) grounds of appeal. These are:-
 - a. THAT the learned trial magistrate erred in law and fact in holding that the Appellant did not make a proper case for orders of eviction against the Respondent despite the overwhelming evidence on record.
 - b. THAT the learned trial magistrate erred in law and fact in dismissing the Appellant's case even after holding that the Appellant was the registered owner.
 - c. THAT the learned trial magistrate erred in law and fact in ignoring the Appellant's evidence hence arriving at an erroneous decision.
 - d. THAT the learned trial magistrate erred in law and fact and misdirected himself by failing to analyse the facts and the applicable law.
6. The Appellant prayed that the judgment be set aside and be substituted with an order allowing her suit with costs.
7. The Appeal herein came up for directions on the 24th October, 2024. On that date, the court directed that the Appeal would be disposed of by way of written submissions. The parties complied, with the Appellant filing her submissions dated 28th November, 2024 while the Respondent's submissions are dated 28th February, 2025.

Appellants' Submissions.

8. In the Appellant's submissions, Counsel gave a brief summary of the testimonies tendered in the trial court, after which he crafted two issues for determination. The first issue was whether the Appellant is the owner of the suit property. On this, Counsel for the Appellant submitted that the trial court already determined that the Appellant is the registered owner of the suit property.
9. The Second issue raised by the Appellant is whether the court should give an order of eviction. On this front, the Appellant's advocate submitted that having determined that the Appellant is the registered owner of the property, then the Respondent is illegally occupying the suit property. That the court should thus order the eviction of the Respondent from the Appellant's property. Counsel urged the court to set aside the decision of the trial court delivered on 22nd June, 2023 and substitute it with a judgment allowing the Appellant's suit with costs.



Respondent's Submissions.

10. Counsel for the Respondent argued in his submissions that the Appellant did not make a case for his eviction from the suit land. Counsel pointed out that the parties were once married, and the Respondent stays with the children and caters to them. Counsel cited Article 53(2) of *the Constitution* which provides that a child's best interests are of paramount importance in every matter concerning the child. Counsel opined that the trial magistrate was alive to this principle and asked this court to honour it by upholding the decision of the trial court.
11. Counsel contended that the suit property does not belong to the Appellant, which is why she could not follow the procedure regarding evictions. Counsel explained that the 3 months' statutory eviction notice required under Section 152(E) & (G) of the Land Laws Amendment *Act No. 28 of 2016* was not issued. He relied on Nairobi ELC Cause No. E066 of 2023 Kenya Assemblies of God Trustees & Another vs Obuya & Others 4368 (KLR) (sic). Counsel further submitted that the Appellant had only sought an order of eviction in the Plaint, thus the court discharged its duty in making a finding on that issue and not on ownership.
12. Counsel submitted that an agreement for sale is not proof of ownership, and neither did the letter of allotment produced in evidence, which in any case indicated one Valentine K. Yator was the owner and not the Appellant. Further, that the alleged source of money, being the loan, was also not exclusive evidence. Counsel cited Section 26(1) of the *Land Registration Act* that a certificate of title is prima facie evidence of ownership, and pointed out that no such document was tabled before the trial court. Counsel relied on Wangui & 2 Others vs Wangui and Another (Nairobi Environment and Land Appeal No. 3 of 2021) (2022) KEELC 3755 (KLR).
13. Counsel submitted that the trial magistrate discussed all the evidence produced, and also considered and discussed all issues of law and fact before it. He asked this court to uphold the trial court's judgment in its entirety.

Analysis and Determination.

14. I have considered the grounds of appeal and the submissions by learned counsel for both the Appellant and the Respondent. The issues for determination in this appeal are:-
SUBPARA i.
Whether the Trial Court was right in finding that the Appellant is the owner of the suit property
SUBPARA ii.
Whether the trial court was right in refusing to grant the eviction orders against the Respondent
SUBPARA iii.
Who shall bear the costs of this Appeal?
15. This being a first appeal, it is the duty of the Court to review the evidence adduced before the trial court and satisfy itself that the decision was well-founded. In *Selle & Another vs Associated Motor Boat Co. Ltd & Others* (1968) EA 123, this principle was enunciated thus:

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in



mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

Whether the Trial Court was right in finding that the Appellant is the owner of the suit property

16. When land is registered, Section 26(1) of the [Land Registration Act](#) comes into play, providing that a certificate of title is prima facie proof that the person named therein is the absolute and indefeasible owner. In this case, I have seen no allegation that the land is registered land, and even the Appellant has only claimed to be a legal owner of the land and not a registered owner.

17. In cases such as this one where the land is yet to be registered, proof of ownership must depend on other factors aside from title. In the case of *Danson Kimani Gacina & another vs Embakasi Ranching Company Ltd (2014) eKLR*, the court explained that:

“The law on unregistered land, unlike on registered land, is slightly unclear. Proof of ownership in the case of the former is found in documentary evidence which leads to the root of title. There must be shown an unbroken chain of documents showing the true owner. Once proof of ownership is tendered then the holder of the documents is entitled to the protection of the law. There is no doubt that such proof will be on a balance of probabilities but the court must be left in no doubt that the holder of the documents proved is the one entitled to the property.”

18. Furthermore, in *Caroline Awinja Ochieng & Another vs Jane Anne Mbithe Gitau & 2 others (2015) eKLR*, J. L. Onguto, J, in determining the ownership of an unregistered parcel of land stated thus:

“In determining the above issue it would perhaps be appropriate to first state that tracing ownership of unregistered land is dependent on tracing the root of title. Unlike registered land where ownership is domiciled and founded in the register of titles, ownership of unregistered land and the ascertainment or confirmation thereof involves the intricate journey of wading through documentary history. The simple reason is that unregistered titles exist only in the form of chains of documentary records. The court has to perform the delicate task of ascertaining that the documents availed by the parties are not only genuine but also lead to a good root of title minus any break in the chain. It is the delivery of deeds or documents which assist in proving not only dominion of unregistered land but also ownership. The deeds must establish an unbroken chain that leads to a good root of title or title paramount. A good compilation of the documents or deeds relating to the property and concerning the claimant as well as any previous owners leading to the title certainly proves ownership. It is such documents which are basically ‘the essential indicia of title to unregistered land’”: per Nourse LJ in *Sen v Headley [1991] Ch 425 at 437*.

The documents in my view are limitless. It could be one, they could be several. They must however establish the claimant’s beneficial interest in the property. Examples of the deed or documents include, at least in the Kenyan context: sale agreements, Plot cards, Lease agreements, allotment letters, payment receipts for outgoings, confirmations by the title paramount, notices, et al.”

19. The Appellant produced in evidence a copy of the Agreement for Sale of the suit property made between herself and one Valentine Jeptoo Yator. It is worth noting that the Respondent admitted that he was not named in the agreement for sale. I have also seen the Letter of Allotment dated 11th December, 1995 with respect to Residential Plot No. 17/95/329 A Plot 10 and which was issued to Valentine J. Yator.



20. During the trial, the Appellant testified that she got employed by Moi Teaching and Referral Hospital (MTRH) in 2005 and took out a loan at KCB Bank to buy the property. The Respondent opposed this allegation, alleging instead that the Appellant did not have a permanent job, thus she could not have obtained a loan, and in fact that she had not produced any documents to show that she took a loan. He told the trial court that he was unaware that the Appellant took a loan from KCB.
21. Contrary to this however, the Respondent's own witness, one Felix Kosgei, who is the Principal Human Resource Officer at MTRH testified as DW4 and corroborated the Appellant's evidence on this front. DW4 testified that the Appellant was employed on 26th June, 2006 having previously worked at the same institution as a casual labourer. He testified that she later took out a loan of KShs. 160,000/- from KCB on 4th October, 2006, the same day the agreement for sale of the suit land was made.
22. In the Appellant's further list of documents is a bank Debit Advice dated 4th October, 2006 for withdrawal of Kshs. 160,000/-. The Appellant also included a Receipt No. 2311 from Buluma & Company Advocates dated 4th October, 2006 for payment of Agreement Fees.
23. The Respondent on his part claimed that he is the one who sourced for money to pay for the suit property since he used to work for Pan Paper Mills at the time. He averred that he gave the money to the Appellant to pay for the land since he was away on duty. The only document the Respondent produced is a copy of the Letter of Allotment. There is nothing to show how he transferred the money to the Appellant to enable her pay for the suit land.
24. The Respondent claims that he fell blue gum trees from his home in Turbo and used the wood plus other materials he bought to build the matrimonial home and the 10 rental houses on the suit property. There is no proof of the permit allowing him to fell any blue gum trees. He also failed to produce any receipts to show what he purchased towards construction of the houses.
25. From the above analysis, there can be no other finding than to uphold the trial court's determination that the Appellant herein is the owner of the suit land. That ownership extends to the rental houses currently standing on the suit land.

b. Whether the trial court was right in refusing to grant the eviction orders against the Respondent;

26. Having determined the ownership of the suit land, the next step is to determine whether the Appellant was entitled to the eviction orders sought.
27. Ideally, the finding of ownership in favour of the Appellant would have been sufficient to entitle her to the eviction orders. However, it would appear that the trial magistrate refused to issue the order of eviction owing to the fact that the Respondent is, from the evidence, the one raising the children of the union on the suit property. At page 6 of the trial court's judgment, the learned Trial Magistrate said:

“ Finally, I considered that the defendant is educating the Plaintiff's own children out of the rents collected from the suit land. To order the defendant to vacate the suit premises may compromise the welfare of the children.”
28. From the testimonies adduced herein, it is clear that the Appellant and the Respondent lived together on the suit property upto 2015. DW2, a neighbour to the Respondent acknowledged the Respondent as the landlord on the suit property. The Respondent denied that he had any obligation to remit the rental income to the Appellant.
29. Notably, the Appellant in her pleadings did not explain why she moved out of her house and allowed the Respondent to move in and start collecting the rent in her stead. If that is indeed the case, there



must have been a sort of agreement or understanding to that effect, which she chose not to reveal to the court.

30. What the Appellant instead told the trial court is that the Respondent was a tenant on the suit land. No tenancy agreement was produced in court as proof of that. I have also seen no evidence that the Respondent initially paid rent over the 3-bedroomed house or remitted the rent from the other tenants to the Appellant as alleged in the Plaint.
31. I am constrained to believe the Respondent, that they lived together in the same house as husband and wife, which the Appellant for unknown reasons opted to vacate, and that the Respondent has always received rent from the tenants in the rental houses.
32. It has not escaped my mind that the Respondent also alleged that the suit property herein is matrimonial property. This contention was denied vehemently by the Appellant, who explained that she bought the land prior to the marriage.
33. In her evidence-in-chief, the Appellant admitted that the Respondent is her former husband whom she married in January 2007. She however explained that at the time she bought the property, they were not married. She also testified that she and the Respondent went to live on the plot after he failed to pay rent. On cross examination, the Appellant testified that her first child was born on 6th July, 2007 and the second child on 4th April, 2009.
34. I also note that all the witnesses, apart from PW2, the Appellant's mother agreed that the Appellant and Respondent are estranged spouses. The trial court, however, chose to disregard the evidence of PW2 since she had not been truthful, which decision I am in agreement with.
35. In his Amended Witness Statement, the Respondent stated that he met the Appellant in 2003 after which they started a relationship. He explained that they started living together as husband and wife in the year 2005. However, during cross-examination, he admitted that he started a relationship with the Appellant in the year 2005.
36. The Respondent testified as DW1 that he married the Appellant in 2007 and they have two children. He told the trial court that he uses the rental income from the suit property to take care of the said minors. The Respondent produced copies of birth Certificates for two children codenamed, "TMW" and "IVW" as well as school fees structures and receipts for their school fees, uniforms and other educational related needs.
37. There is no doubt that the dispute herein involves the parcel of land known as Eldoret Municipality 17/95 Plot 10. However, despite the fact that the Environment and Land Court has jurisdiction to hear and determine disputes relating to land and the environment, not all disputes that touch on land can automatically be heard in the ELC. This suit is a perfect example of such land disputes for which the ELC ought not entertain.
38. From the forgoing discourse, there is a clear distinction that can be made from the facts in this suit that sets it apart from a normal land ownership and/or land use dispute. Firstly, the Appellant and the Respondent have conceded that they are estranged spouses. Their union has been blessed with two children whose birth certificates were produced in court.
39. From the plaint filed in the trial court and the evidence produced, I am convinced that this is not just a dispute on land ownership, but a matrimonial property dispute. It is unfortunate that the Appellant was not very forthcoming in the Plaint, as she laid out her claim in a manner that described the Respondent as an intruder instead of her spouse. Maybe, if she had not been very economical with the truth, as the trial magistrate put it, they would have been pointed in the right direction.



40. Be that as it may, and without prejudice to the earlier finding that the Appellant owns the suit land herein, it goes without saying that if indeed the land is matrimonial property, then this is not the proper court to determine who should remain in possession thereof. It also goes without saying that the court is also not in a position to determine whether the Respondent should vacate it for that matter.
41. But to determine whether the suit land is indeed matrimonial property, the court would need to delve into when the marriage was conducted. It would also need to consider if the property was bought during the subsistence of the marriage or not, as well as the circumstances under which it was acquired, and if that makes it matrimonial property.
42. Jurisdiction to determine matrimonial property disputes is enshrined under Section 17 of the *Matrimonial Property Act*, 2013 which is now the law governing disputes relating to matrimonial property, and which provides that: -
- “(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
- (2) An application under subsection (1)-
- (a) shall be made in accordance with such procedure as may be prescribed;
- (b) may be made as part of a petition in a matrimonial cause; and
- (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.”
43. I have no doubt that the court referred to under Section 17 of the *Matrimonial Property Act*, is in fact the High Court and subordinate courts under it, and not the ELC.
44. The Appellant sought an eviction of the Respondent from the suit land, therefore, to allow this Appeal would mean issuing the orders of eviction against the Respondent. The Appellant has submitted that since she is the registered owner of the property, then the Respondent is illegally occupying the suit property, and that the court should thus order the eviction of the Respondent from her property.
45. That is however not the case. Section 12(3) of the *Matrimonial Property Act* further provides with relation to matrimonial property that:-
- A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.
46. None of the parties herein have come out to tell this court in no uncertain terms that they are divorced. The Appellant and Respondent appear to be still married to each other, though estranged and living separately. To that end, it is not the place of this court to tell either that one of the parties herein has more of a right than the other to possess or occupy the suit property if it is indeed their matrimonial home.
47. Moreover, since the suit Was filed in the trial court was an ordinary civil suit and not a matrimonial property dispute under the *Matrimonial Property Act*, then in that regard, the trial magistrate also could not evict the Respondent from the suit land.
48. This is because, if the suit property is matrimonial property, then despite the fact that it is owned by the Appellant, the Respondent would also have a claim to the home, either because he financially



contributed to its acquisition or indirectly contributed to the same. But that dispute should be submitted to the proper forum for determination.

49. Should the appropriate court make a determination that the suit land is not matrimonial property, the Appellant shall be at liberty to pursue eviction of the Respondent from the suit property.

SUBPARA c.

Who shall bear the costs of this Appeal?

50. On costs, Section 27(1) of the [Civil Procedure Act](#) provides: -

27 (1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and give all the necessary directions for the purposes aforesaid; and the fact that the court has no jurisdiction to try the suit shall be no bar to the exercise of those powers;

Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise direct.

51. Ideally therefore, costs normally follow the event, and the successful party is always awarded costs. The award of costs however relies on the discretion of the court, as is well explained by the Halsbury's Laws of England; 4th Edition (Re-issue), {2010}, Vol.10. para 16 as follows:-

“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not to award them. This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice.”

52. The proviso to Section 27, however, is to the effect that a court may for good reason refuse to award costs to the successful party. There is no definition of what the term “good reason” is that would justify departure from the general rule that costs follow the event. However the Supreme Court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others* (2014) eKLR observed that:-

“In the classic common law style, the courts have to proceed on a case by case basis, to identify “good reasons” for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs...”

53. It must be noted that the list given in the above case is inclusive and not exclusive.

54. The Appellant herein has not succeeded in her instant Appeal. Ideally, the Court would have awarded the Respondent costs of the Appeal. However, I note that the parties herein though estranged, are still married. Further, they may still have to remain in the court corridors for long as they seek a determination of their matrimonial property rights over the suit property herein, and that will require them to spend further resources to achieve.



55. I also note that the Respondent is still in possession of the suit property and is the one still receiving rental income therefrom to the exclusion of the Appellant. For that reason, and so as to foster future good relations, if at all that will be possible, this court will not award the Respondent any costs.

Orders.

56. As a result, the Appellant's Appeal herein lacks merit and the same is dismissed with no orders as to costs.

57. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET ON THIS 24TH DAY OF APRIL, 2025 VIDE MICROSOFT TEAMS.

HON. C. K. YANO

JUDGE

