



**Kuntai v Polong & another (Environment & Land Case
922 of 2017) [2022] KEELC 107 (KLR) (20 April 2022) (Ruling)**

Neutral citation: [2022] KEELC 107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 922 OF 2017
MN GICHERU, J
APRIL 20, 2022**

BETWEEN

ANKOI ENE KUNTAI PLAINTIFF

AND

KUNTAI OLE POLONG 1ST DEFENDANT

RAPHAEL PARSITAU KUMOIN 2ND DEFENDANT

RULING

1. Ankoi Ene Kuntai referred to as the Plaintiff in this Judgment seeks the following reliefs against Kuntai Ole Polong, the first Defendant and Raphael Parsitau Kumoin, referred to as the second Defendant;
2.
 - (d) Title of the second Defendant to land parcel number Kajiado/dalalekutuk/6190 was improperly procured and the same is hereby cancelled.
 - (e) A permanent injunction restraining the first Defendant, his agents, servants, or any person acting on his behalf from dealing, selling, and or transferring land reference Kajiado/dalalekutuk/6190 measuring 24.33 hectares without the consent of the Plaintiff.
 - (f) Costs of the suit.The above is per the amended plaint dated 10th July, 2018.
3. The Plaintiff's case is as follows. She is married to the first Defendant under Maasai Customary Law and they have four children together.
4. The first Defendant forced the Plaintiff to leave her matrimonial home. She now lives at Inkinyie Trading Centre where she ekes a living buying and selling milk, selling tea to sand harvesters and engaging in any available menial jobs.



5. The Plaintiff supports her children single handedly from her meagre earnings because the first Defendant abandoned his responsibilities towards the family. He sold the family livestock to support his habitual drinking.
6. Over the years, the Plaintiff has done everything she could to compel the first Defendant to support the family and also to dissuade him from squandering family wealth especially land.
To this end, she has engaged the elders, the local administration and even the Law Courts. She filed Children Case No. 1/2005 at Kajiado Subordinate Court.
7. When the Plaintiff learnt that the second Defendant intended to buy her matrimonial land from the first Defendant, she visited him and pleaded with him not to buy the land.
He was not persuaded and he proceeded to acquire 35 acres and not even the 25 acres that she had been made to believe.
8. Since the Plaintiff is the spouse of the first Defendant, she expected to be consulted so as to give her consent. The transfer occurred on 9th December, 2013. Earlier on 7th August 2012, she had cautioned L.R.No. Kajiado/dalalekutuk/852.
Further she had filed Civil Suit No. 257/2013 before the Lower Court and obtained an injunction against the transfer of the land.
9. The Plaintiff appointed her current advocate who discovered that the caution had been withdrawn vide a Court Order in Miscellaneous Case No. 3 of 2013. This case proceeded ex-parte and had been filed by the first Defendant.
Ultimately, L.R. No. 852 was subdivided into two parcels with the first Defendant being registered as the proprietor of L.R. 6189 and the second defendant owning 6190.
It is for the above reasons that the Plaintiff seeks the cancellation of the transfer to the second Defendant.

In support of her case, the Plaintiff filed the following;

- (a) Amended witness statement dated 10/7/2018.
- (b) Copy of letter by DO Central to the chief of Elikonka location dated 9/9/2004.
- (c) Copy of letter by the assistant chief of Orinie Sub location to the Land Registrar Kajiado dated 7/8/2012.
- (d) Copy of application for caution dated 7/8/2012.
- (e) Copy of application for official search which is undated.
- (f) Copy of letter by the Plaintiff's counsel to the Land Registrar Kajiado dated 8/1/2014.
- (g) Copy of green card for LR 852 issued on 17/3/2004.
- (h) Copy of notice of motion in miscellaneous case number 3 of 2013 dated 20/3/2013.
- (i) Copy of green card for L/R. No. 6189 opened on 12/8/2012.
- (j) Copy of green card for L/R. No. 6190 opened on 12/8/2012.
- (k) Copy of order dated 23/4/2013 issued in Miscellaneous Case number 3 of 2013.
- (l) Copy of agreement dated 2/5/2001.



(m) Copy of proceedings in children case no. 1/2015.

(n) Mutation form for Kajiado/dalalekutuk/852.

In addition to her own witness statement the plaintiff filed two (2) other statements by Kotoine Ole Polong Lolpiran Kashi and Karariet Maren. Both are dated 19th January, 2015.

10. The Defendants filed a written statement of defence and counterclaim dated 30th October, 2019.

In the defence they aver that the Plaintiff's claim discloses no reasonable cause of action against them. They add that the second Defendant's purchase of L.R. 6190 was procedural and that even the Plaintiff consented to the sale and the transfer.

In the Counterclaim, the second Defendant prays that he be declared as the absolute registered owner of L.R.6190 and for the dismissal of the Plaintiff's suit with costs.

11. In support of their defence, the Defendants filed the following documents;

(a) Letter of Land Control Board Consent dated 8/5/2013.

(b) Copy of application for Land Control Board Consent.

(c) Copy of transfer of land duly executed by the two Defendants.

(d) Copy of Green Card for L.R 6189 opened on 12/8/2012.

(e) Copy of agreement for sale of land between the Defendants dated 7/8/2020.

(f) Copy of letter dated 31/7/2020 written and thumb printed by the Plaintiff.

12. At the trial, the Plaintiff adopted her witness statement and documents. She said that she has been separated from her husband the first Defendant for 23 years. She also called her two witnesses who corroborated her evidence.

13. On the part of the first Defendant, he was allowed to testify in chief even though he had not filed any witness statement. His defence is that the Plaintiff is his former wife who left him in the year 2000 with four children. The first born was 20 years old then while the last born was 9 years old. She has never gone back to the land since the year 2000.

14. As regards the land no. 852 the first Defendant said that he acquired it from Enkorika Group Ranch of which he was a member. The Plaintiff did not contribute to the acquisition of the land.

15. The Plaintiff opposed the first Defendant's intended sale of the suit land to the second Defendant but she later withdrew the objection and wrote a letter dated 31/7/2000.

The land was later sold to the second Defendant who paid the full purchase price and occupied the land in the year 2000. The first Defendant's land number 6189 measures 24.33 hectares (60) acres while the one sold to the second Defendant measures 14.19 hectares or 35 acres.

The first Defendant concluded by saying that he obtained a Court Order for the removal of the caution filed by the Plaintiff and that the Plaintiff has never appealed against that decision. His two daughters are married, his two sons are working and none of them has sued him.

16. The second Defendant also testified even though he had not recorded a witness statement. His defence is that he bought the suit land from the first Defendant in the year 2000. He occupied it and fenced it. The Plaintiff does not reside on the land and the first Defendant owns 60 acres.



He denied having been approached by the Plaintiff over the purchase of the land. He paid both cash and livestock for the land.

Finally, the second Defendant said that he complied with all the requisite procedures in acquiring the land.

17. Counsel for the parties filed written submissions on 10th December, 2021 and 12th January, 2021 respectively with the Plaintiff's counsel filing first.

The Plaintiff's counsel raised two issues namely;

- (i) What are customary land rights? Are there rights extinguished upon first registration?
- (ii) Whether the transfer of L.R. 6190 was procedural without the Plaintiff's consent?

In urging that the Plaintiff's Customary Land Rights override the title as per the finding of the Supreme Court of Kenya in the case of *Isack M'Inanga Kiebia -vs- Isaaya Theuri M'Lintari and another* 2018 eKLR, the Plaintiff's Counsel urged that the 1st Defendant's rights over land parcel no. 852 and the resultant parcels 6189 and 6190 are subject to customary trusts under Section 28(b) of the [Land Registration Act](#).

18. Regarding the second issue of transfer of the parcel 6190 without spousal consent, counsel urged that the same offended Section 6(2) of the [Matrimonial Property Act](#) and Section 28(b) of the [Land Registration Act](#). Both require spousal consent before the transfer of matrimonial property. In the absence of the Plaintiff's consent, then the transfer is null and void.

19. The Defendants raised three issues and also submitted on the four (4) prayers by the Plaintiff in her plaint dated 10th July, 2018.

The issues are;

- (i) Plaintiff's lack of locus standi.
- (ii) This not being a suit for determination of matrimonial rights and
- (iii) The suit property not being matrimonial property.

On Locus, counsel urges that the Plaintiff is not seeking any declaration of right over the suit property. Without seeking such a declaration, she then has no right to bring this action or to appear in Court over property to which she has no legal standing.

It is urged that Section 17 of the [Matrimonial Property Act](#) stands in the Plaintiff's way because it requires that a person contesting another's property under this law seeks a declaration of her rights to that property.

On the second issue, counsel urges that the suit property is not matrimonial property because it fails the threshold in Section 6 of the [Matrimonial Property Act](#), 2013.

Secondly, that Act having commenced on 16/1/2014, cannot apply retrospectively to transactions that had taken place before it came into force.

Finally counsel urges that the property cannot be matrimonial property because the Plaintiff does not live therein and has not done so since the year 2000.

Other issues raised by the counsel for the Defendants touch on the second Defendant's acquisition of the land, the plaintiff's own letter dated 31/7/2000 in which she consented to the sale of the land, the effect of Section 80 of the [Land Registration Act](#) which provides that registration may not be cancelled



or amended to affect a purchase in possession if he paid valuable consideration and there is no fraud or mistake in acquiring such registration, costs, unpleaded Trusts and Customary Land Rights and the applicability of the Supreme Court decision in *Isaack M' Inanga Kiebia* (*supra*) to this case.

20. I have carefully considered the evidence adduced by the parties, the submissions by the Learned Counsel for the parties and the jurisprudence contained therein. I find that the issues raised by both counsel would settle the dispute.

21. On the first issue of customary land rights, I find that they are not extinguished upon first registration. These are recognized by statutory law to not only exist but to also override the register.

This means that they exist irrespective of whether they are noted in the register.

The more pertinent question to ask is whether the Plaintiff in this case enjoys those rights. My finding is that she does not. This is because she does not live on the land and has not done so for over 20 years. The second reason is that she has not proved to be the first Defendant's wife. If she has not lived with the first Defendant for all this time, how is she his wife? The burden was on her to prove that she is the wife of the first Defendant and more so because in his evidence he said that he divorced her.

The case of *Isaack M' Inanga Kiebia* (*Supra*) is clearly distinguishable from this case because in that case the party in whose favour the High Court and the Supreme Court found were in possession of the land continuously for many years. In this case the Plaintiff is not in possession.

There is a further difference between this case and that of *M'Inanga Kiebia*. In this case a big portion of the land remains in the name of the first Defendant. In the case of *M'Inanga*, the claim was for the whole land.

In other words, the party claiming the land by way of customary trust stood to lose everything if he lost the case. Not so in this case where a huge chunk is available to the family members of the first Defendant.

Finally on this point, the children of the first Defendant have not joined in this case. They have stayed put. Yet they are all grown up. It was incumbent upon the Plaintiff to prove that under Maasai Customary Law, a divorced wife is entitled to a share of her former husband's estate. This was neither pleaded nor proved.

On the second issue raised by the Plaintiff about spousal consent, I find that the first thing to prove was that she was a spouse first. She did not prove this and so the issue of her consent does not arise.

22. Regarding the Plaintiff's lack of *locus standi*, I cannot say that she lacks it because no evidence was adduced on the rights of a divorced spouse under Maasai Customary Law.

I agree with the submissions by counsel for the Defendants that this is not a suit for determination of matrimonial rights under statutory law but it could be under customary law.

Having decided on the above issues, I find that it is not necessary to delve into the other issues because the verdict is clear from the above.

I find that the Plaintiff's case is not proved on a balance of probabilities. I dismiss it in its entirety.

There will be no order as to costs because the Defendants have given good reasons why they do not claim them.

Order accordingly.

Right of appeal 30 days.



DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF APRIL, 2022.

M.N. GICHERU

JUDGE

