



REPUBLIC OF KENYA



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**Kuso v Kionga & 2 others (Environment & Land Case 64 of 2018)
[2022] KEELC 13549 (KLR) (18 October 2022) (Judgment)**

Neutral citation: [2022] KEELC 13549 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 64 OF 2018
MN GICHERU, J
OCTOBER 18, 2022**

BETWEEN

SIRINTAI POLONET KUSO PLAINTIFF

AND

PAYIATON KIONGA 1ST DEFENDANT

LEKAYIA KIONGA 2ND DEFENDANT

KIONGA RAURAU KAMUORO 3RD DEFENDANT

JUDGMENT

1. Sirintai Ene Polonet Kuso, the Plaintiff, seeks the following reliefs against Payiaton Kionga (first Defendant), Lekayia Kionga (second Defendant) and Kionga Raurau Kamuoro (third Defendant).
 - a. A declaration that the Defendants' acquisition of the property known as Kajiado/Dalalekutuk/2965 (suit land).
 - b. An order that the Defendants do execute a transfer of the said property in favour of the Plaintiff.
 - c. A permanent injunction restraining the Defendants, its agents, servants, and or persons acting under it or for it from interfering with the Plaintiff's quiet possession and enjoyment of the suit land.
 - d. Costs of this suit.
 - e. Any other remedy that the court deems just and fair to grant.
2. The Plaintiff's case is as follows. During the dissolution of Sajiloni Group Ranch, one Kirotie Ole Raurau Kamuoro, was allocated land parcel 521 situated at Black Tank Trading Centre. Unfortunately, the said Kirotie died before title deeds were issued for the land at Sajiloni Group Ranch.



The late Kirotie was not married at all. He did not leave behind any heir because he was also childless. According to Maasai customs, the third Defendant who was a brother to the deceased was the one to inherit all his property including land parcel number 521.

The third Defendant approached the Plaintiff and offered to sell to her part of the deceased's land. They knew one another because they were neighbours at Oloontulugum area which is far from Kajiado town.

To this end, the Plaintiff and the third Defendant entered into an agreement for sale of land. Initially, the Plaintiff was to pay cash and indeed paid a deposit of Kshs. 16,000/-, but the third Defendant changed his mind and proposed that the Plaintiff gives him 50 (fifty) acres at Oloontulugum area in exchange for the ten (10) acres at Black Tank Trading Centre.

Part of the agreement was that the Plaintiff and the third Defendant were to await the registration of the land in the area before transferring the land to each other. In the meantime, the third Defendant took the Plaintiff to the land at Black Tank Trading Centre and she occupied it and developed it.

3. The first Defendant filed a Succession Cause in which she purported to be the wife of the late Kirotie Ole Kamuoro. She and the second Defendant ended up being fraudulently registered as the owners of the suit land to the exclusion of the Plaintiff who is the bona fide purchaser. The third Defendant did not do anything to stop this fraud even though he had already entered into an agreement with the Plaintiff.
4. In support of her case, the Plaintiff filed a witness statement dated June 5, 2014. She had also filed some documents while seeking an injunction against the Defendants.

They included the following:-

- a. Copy of agreement for sale of land parcel No. 521 of Sajiloni Group Ranch.
 - b. Copy of proceedings in Succession Cause No. 26 of 2006.
 - c. Copy of green card for L.R. Dalalekutuk 2965.
 - d. Some black and white photographs of some structures.
5. The first and second Defendants filed a written statement of defence dated July 4, 2014 in which they deny privity of contract with Plaintiff. They also aver that the Plaintiff unsuccessfully tried to revoke the grant issued to the first Defendant in succession cause No. 1075 of 2011 at Machakos.

She filed this case instead of filing an appeal against the dismissal of the application for revocation of grant.

6. The defence by the first and second Defendants is that they are wife and son of the late Kiroti Ole Kamuoro who owned the suit land.

Unfortunately, Kiroti died before he got the title deed. The first and second Defendants are now the registered owners of the suit land after they filed Succession Cause No. 1075 of 2011, at Machakos High Court. The Plaintiff unsuccessfully tried to revoke the grant of representation issued to the two.

It is also their case that they have never entered into any agreement for sale of the suit land with the Plaintiff.

7. In support of their case, the first and second Defendants filed the following evidence.
 - i. Witness statements both dated 17/9/2020.



- ii. Certificate of death for Kiroti Ole Kamuoro.
- iii. Copy of letter by the Chief Sajiloni Location dated May 4, 2010 which says that the first Defendant was the wife and the second Defendant the son of the deceased.
- iv. Copy of grant of letters of Administration Intestate dated April 18, 2007, issued by Senior Resident Magistrates Court at Kajiado.
- v. Copy of letter dated 2/6/2010, written by the first Defendant's counsel to the Land Registrar, Kajiado complaining against the third Defendant's attempt to be registered as proprietor of the suit land.
- vi. Copy of certificate of confirmation of grant dated March 3, 2011 issued to the first Defendant.
- vii. Copy of title deed for the suit land dated July 14, 2011 in the name of the first Defendant.
- viii. Copy of ruling in Succession Cause No. 1075 of 2011 at Machakos.

8. The third Defendant filed a written statement of defence dated September 12, 2014, in which he denies having entered into any agreement with the Plaintiff.

He adds that since he was never the registered owner, he could not sell that which he never owned.

In support of his case, the third Defendant filed a witness statement dated September 17, 2020 in which he says that the first Defendant was married to his late brother Kiroti Ole Kamuoro and they were blessed with four children who include, Lekayia Kionga the second Defendant.

9. Counsel for the parties were to file submissions by August 20, 2022. None of them complied with this timeline. I have therefore written this judgment without the benefit of counsel's submissions.

10. I have carefully considered all the evidence adduced in this case by both sides including the testimony in court, the witness statements and the documents.

I have also borne in mind that the burden is on the Plaintiff to preponderate her case on a balance of probabilities.

I find that the following issues arise.

- i. Who between the first and third Defendants owns the suit land?
- ii. Does the Plaintiff's long occupation of the suit land create any right recognizable by law?
- iii. Is the agreement between the Plaintiff and the third Defendant enforceable?
- iv. What remedy is available to the Plaintiff?

11. On the first issue, I find that it is the first Defendant and not the third Defendant who owns the suit land.

Firstly, she is the registered owner and the Plaintiff has not been able to prove any fraud on the first Defendant's part in obtaining such registration.

In fact, when she challenged the registration in the Machakos High Court Succession Cause, her application for revocation of the grant was dismissed.

Secondly, the third Defendant himself has said in his defence that he does not own the suit land. The plaintiff has not been able to prove otherwise.



Finally on this issue, the Plaintiff has not been able to prove a brother has a superior right over a wife when it comes to inheritance.

The evidence from the chief of Sajiloni together with the decision in the Machakos High Court, Succession Cause No. 1075 of 2011, are sufficient proof that the first Defendant was a wife of the deceased.

She therefore has a superior claim under Section 35 of the law of Succession. Under Section 3(1) (b) of the *Judicature Act* (Chapter 8), written laws rank higher than customary law in the hierarchy of norms.

12. On the second issue, I find that the Plaintiff's long occupation of the suit land does not create any right recognized by law. It would have been different if she had occupied the land with the authority of the late Kiroti Ole Kamuoro or that of the first Defendant.

A constructive trust and the doctrine of proprietary estoppel would have applied.

13. On the third issue, I find that the agreement between the Plaintiff and the third Defendant is not enforceable because the Plaintiff herself said that the 50 acres that she was to exchange with the suit land is still in her name.

14. On the fourth and final issue, I find that the Plaintiff has lost nothing because her 50 acres that she was to exchange with the third Defendant are intact and the third Defendant is not claiming them.

She can go back to her land.

15. For the above stated reasons, I dismiss the Plaintiff's suit with costs to the Defendants.

DATED SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF OCTOBER, 2022.

M.N. GICHERU

JUDGE

