



**SAO v SOO (Environment & Land Petition 7 of 2021)  
[2022] KEELC 14794 (KLR) (17 November 2022) (Judgment)**

Neutral citation: [2022] KEELC 14794 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY  
ENVIRONMENT & LAND PETITION 7 OF 2021**

**GMA ONGONDO, J**

**NOVEMBER 17, 2022**

**IN THE MATTER OF ARTICLES 19(2) AND (3B);20;22(1);23 (3);  
27(3,4 AND 5)28;40 45;57 (C &D); AND 60(1A), B AND C) OF  
THE CONSTITUTION OF KENYA,2010;**

**AND**

**IN THE MATTER OF SECTIONS 28 (A&B) &93 (2 & 3) OF THE LAND  
REGISTRATION ACT NO. 3 OF 2012; AND SECTION 2 OF THE  
MATRIMONIAL PROPERTY ACT, NO. 49 OF 2013; AND THE LAND  
ACT, 2012;**

**BETWEEN**

**SAO ..... PETITIONER**

**AND**

**SOO ..... RESPONDENT**

**JUDGMENT**

1. In an amended petition dated November 5, 2021 and lodged in court on November 8, 2021, the petitioner namely SAO through the firm of Quinter Adoyo and Company Advocates, prays for the orders infra;
  - a. A declaration that the respondent has violated the petitioner’s rights under articles 27(3; 4 and 5); 28; 40; 45(3); 57 (c and d) and 60(1) of the *Constitution of Kenya, 2010*.
  - b. A declaration that the petitioner is an owner in common with the respondent, of land parcel number Kamdar/Kodondo/xxxx. (The suit property herein) and that the same is matrimonial property over which the petitioner has an overriding and unregistered interest which must be



recognized in all cases as though it were registered, and therefore the petitioner is entitled, just like the respondent, to continue living peacefully and deriving a livelihood from the same.

- c. A declaration that the land parcel number Kamdar/Kodondo/xxxx be equally divided among the wives of the respondent herein per house so that the petitioner is not prejudiced.
  - d. A declaration that the 1<sup>st</sup> wife, having been retained in that position and who co-owned the suit property with the respondent for a period of over 30 years before the other wives of the respondent came, she is entitled to a bigger portion of the suit property.
  - e. A declaration that the purported sub-division and assignment of the various portions of the suit property to the sons of the respondent is null and void for want of consent of the Petitioner, who is an owner in common with the respondent.
  - f. General and punitive damages for violation of the rights of the petitioner.
  - g. Costs.
2. The petitioner laments, *inter alia*, that;
- a. The petitioner got married to the respondent in the month of November, 1963 and has remained so married until now, which comes to about 58 years in sum.
  - b. At the time of marriage, the petitioner and respondent, together with the family of the respondent, lived and derived their living out of their ancestral property, which was then not adjudicated.
  - c. In August, 1973, the petitioner's father in law, the biological father to the respondent herein, led the petitioner and the respondent into establishing their matrimonial home on the suit property, in accordance to Luo customary law. The property then became a home, matrimonial home to which both the petitioner and the respondent were equally entitled.
  - d. The petitioner was and is still childless, and therefor her husband married two other ladies who became her co-wives, and with whom they shared the man and the property, but the petitioner effectively retained her rightful position as the 1<sup>st</sup> wife.
  - e. The petitioner's co-wives were lucky to beget sons and daughters with the petitioner, a fact that instead of being a blessing, compounded the problems of the petitioner as she had to withstand ridicule, violence, mockery, abuse and open discrimination.
3. The petitioner further laments in part that;
- a. The property, Kamdar/Kodondo/xxxx, being their matrimonial property, the petitioner acquired overriding interest and unregistered interests, which entitles her to remain in the property, to consent to any dealing and/or disposition, and to ownership in common with the respondent.
  - b. The most recent episode was an attack and shameless assault of the petitioner by the co-wife and son with the approval of the respondent, for tethering and grazing her animals in her compound within the suit property. This culminated into a criminal case that is ongoing at Ndhiwa Law Courts, and which the respondent, despite not being a witness to and/or complainant, has made attempts to frustrate and interfere with Ndhiwa SRMC Criminal Case No E090 of 2021.



- c. That because of the most recent hostilities, attacks and acts of discrimination, the petitioner has been forced to leave her matrimonial home and is now staying with her brothers at her parent's home.
4. The respondent, SOO was duly served as demonstrated by an affidavit of service sworn on July 26, 2022 and filed herein on July 21, 2022. Thus, he was made aware of this petition and he had the option to respond to the same; see *Ogada-vs-Mollin* (2009) KLR 620.
5. Interestingly, the respondent failed to respond or react to the petition.
6. Initially, the petition was filed at Migori and Environment and Land Court. On October 6, 2021, the same was transferred to this court, upon its establishment, for hearing and determination in the spirit of articles 6 (3) and 48 of the *Constitution of Kenya, 2010*.
7. The petition was heard by way of written submissions further to the petitioner's request and this court's orders and directions of October 28, 2021.
8. Accordingly, learned counsel for the petitioner filed submissions dated July 20, 2022 on filed on July 21, 2022. Counsel made reference to the petition, the orders sought therein and submitted that the petitioner aged 72 years has been forced to leave the matrimonial home on the suit property to her brother and parents' home owing to the hostilities and attacks perpetrated on her by her co-wife and son with the approval of the respondent. Counsel identified twin issues for determination namely whether the petition has merit and costs of the petition.
9. In analyzing the issues in favour of the petition, counsel cited articles 21, 23, 27, 162 and others of the *Constitution of Kenya, 2010* upon which the petition is mounted. Further, counsel relied on authorities including *John Harun Mwau-vs-IEBC and another* (2013) KLR and *MWK-vs-SKK and 5 others* (2018) eKLR, in support of the submissions herein.
10. I have carefully considered the entire petition and the petitioner's submissions. So, the following issues emerge for determination;
  - a. Is the petition meritorious?
  - b. Depending on the outcome of issue (a) hereinabove, is the petitioner entitled to all the prayers in the petition?
11. The petitioner stated the respondent has violated her fundamental rights as enshrined under articles 10, 23, 28 and 40 (1) of the *Constitution of Kenya, 2010*, among other provisions of the same. At paragraph 19 of the petition, she has set out the particulars at of violations committed by the respondent and they include;
  - a. Subjecting the petitioner to ridicule, mockery and open discrimination on account of her childlessness contrary to article 27 of the *Constitution of Kenya*.
  - b. Sub-dividing and assigning the whole of land parcel number Kamdar/Kodondo/xxxx to his sons without leaving anything for the petitioner.
  - c. Failing to seek the petitioner's consent and /or indulge the petitioner during the sub-division and assigning of the lands to his sons.
12. It is the assertion of the petitioner that she is entitled to the suit property by virtue of section 25 (1) (b) of the *Land Registration Act, 2016* (2012). That she has overriding rights in the form of customary rights over the suit property as provided for under section 28 (b) of the said Act.



13. As regards trust, in the case of *Isaack M’Inanga Kiebia-vs-Isaaya Theuri M’Lintari and another* (2018) eKLR, it was held that rights and interest previously vested in a group, family or individual under African customary law are not extinguished upon registration of trust land. Further, that some of the elements that would qualify a claimant as a trustee include;
  - a. The land in question was before registration family, clan or group land’
  - b. The claimant belonged to such family, clan or group and ‘
  - c. The claim was directed against a registered proprietor who is a member of that family, clan or group.
14. The petitioner claims to be a tenant in common of the suit property. I take into account the meaning of “co-tenancy” and “tenancy in common” under section 2 of the *Land Act, 2016* (2012).
15. It is discerned in the petition that the respondent has violated the fundamental rights of the petitioner in respect of the suit property. Undoubtedly, the petition is entitled to, *inter alia*, fundamental right to non-discrimination, dignity and family as captured under articles 10, 27, 28 and 45 of the *Constitution of Kenya, 2010*.
16. This court is aware of the burden of proof as noted in the case of *Kinyanjui Njogu-vs-Daniel Kimani Maingi* (2000) eKLR.
17. The instant petition is well presented and unchallenged. The same is firm and cogent.
18. *A fortiori*, it is the finding of this court that the petitioner has proved her claim to the requisite standards. I proceed to grant orders in the petition and as stated in paragraph 1 (a) to (e) hereinabove.
19. In respect of damages sought in the petition, I am guided by the Court of Appeal decision in the case of *Eric Adome and another-vs-Pauline Kasumba Osebe* (2014) eKLR. The award of the said damages is within the discretion of the court. The petitioner and the respondent are wife and husband respectively. Therefore, the petitioner is not entitled to even minimum amount in respect of the claim.
20. Given the nature and circumstances of this matter, each party to bear their own costs of the petition; see also *Samwel Kamau Macharia-vs- Kenya Commercial Bank Ltd and another* (2013) eKLR.
21. It is so ordered.

**DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 17<sup>TH</sup> DAY OF NOVEMBER, 2022.**

**G.M.A ONG’ONDO**

**JUDGE**

Present

1. Mr. Achillah T. holding brief for Quinter Adoyo, learned counsel for the petitioner
2. Angela and Fiona, Court assistants

