



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KERICHO**

**ELC NO. 20 OF 2017 (O.S.)**

**LUCY JEBET KIPTOO.....PLAINTIFF/APPLICANT**

**VERSUS**

**KIPTOO KIRUI.....DEFENDANT/RESPONDENT**

**JUDGEMENT**

1. By an Originating Summons dated 18<sup>th</sup> February 2017, and pursuant to the provisions of Order 37 rule 8, and 14 of the Civil Procedure Rules 2010, Section 67 and 9 of the Matrimonial Property Act, 2013, Section 93 and 107 of the Land Registration Act No. 3 of 2012, the Plaintiff herein seeks for determination of the following questions:

- i. Whether or not the Defendant can apportion, sub-divide and/or sale LR Kericho/Kapsaos/175 **without consulting the Plaintiff?**
- ii. Whether or not the Defendant being the sole and heir to the estate of the late Kipsoi Kirui is in a position to dispose, apportion, and/or sub-divide LR Kericho/Kapsaos/175 without following the succession process?
- iii. Whether the Defendant can locate or apportion land in LR Kericho/Kapsaos/175 to one Josephine Chepkoech Soy Yegon without the consent of the Plaintiff?.
- iv. Whether Josephine Chepkoech Soy Yegon be evicted from the portion of land allocated to her by the Defendant in LR Kericho/Kapsaos/175, and the Defendant her children, the more especially (sic) her son Wilson Kipkoech Rotich be compelled to source for her alternative accommodation?.
- v. Whether LR Kericho/Kapsaos/175 can be declared to be owned jointly between the Plaintiff and the Defendant upon completion of the succession process?
- vi. Whether LR Kericho/Kapsaos/175 and be declared to be matrimonial property?
- vii. Whether all such purchases of various portions in LR Kericho/Kapsaos/175 purchased without my consent and after the issuance of the caution on 25<sup>th</sup> July 2016 be annulled and/or revoked and an order of eviction be issued against the said purchasers?.
- viii. Whether the honorable court will compel the Land Registrar of Kericho County or the district lands adjudication and settlement office upon completion of succession process to register the parcels LR Kericho/Kapsaos/175 jointly in the name of the Plaintiff and the Defendant?
- ix. Whether the Plaintiffs are entitled to costs of the suit from the Defendant?

2. The Originating Summons is premised on the supporting *Affidavit* of Lucy Jebet Kiptoo the Plaintiff/Applicant herein.

3. Via a replying affidavit sworn on 21<sup>st</sup> March 2018, the Defendant deponed that the current suit was vexatious and driven by malice and vendetta. That the issues raised herein could only be addressed and determined by a Family Court in a succession proceeding. That the orders sought in the Originating Summons cannot issue as the suit property being LR Kericho/Kapsaos/175 is not registered to him but in the name of a deceased person, Kipsoi Kirui, and such orders can only be determined after the succession process has been concluded and the land registered in the names of the beneficiaries.

4. On the 15<sup>th</sup> July 2018, directions to the Originating Summons were taken and the matter proceeded for viva voice hearing on the 14<sup>th</sup> March 2019 wherein the Plaintiff Lucy Chebet Kiptoo testifies as PW1 to the effect that;

5. She lived in Uasin Gishu and was a housewife cum farmer. That she had recorded an affidavit as part of her Originating Summons which she wished to be adopted as her evidence in chief, and the list of documents filed in February 2017 containing 6 documents be produced as her Pf exhibits 1-6.

6. She further testified that the Defendant was her husband to whom she got married to in 1969 under Kipsigis Customary law wherein he paid dowry and later solemnized their marriage in church in 1984. That soon after their marriage, the Defendant built a house for her in Kapsaos on land parcel No. Kericho/Kapsaos/175 wherein she lived up to the year 1972. That their marriage was blessed with 7 children and 15 grandchildren.

7. That when Josephine Chepkoech Soi got married to the Defendant, her husband in the year 2015, she (Josephine) had her own five children. That the Defendant rented a house for her for a short time before they moved to the land at Kapsaos in 2016 by which time both her (Plaintiff's) house and her son's house at Kapsaos had been demolished, an act which she suspected to have been committed by the Defendant.

8. That the Defendant had been selling portions of the land at Kapsaos without her consent whereby he had not shared with her the proceeds of the sale. That after the demolition of Wilson's, her son's (Wilson), house at Kapsaos, he had been sent away from the land parcel No. Kericho/Kapsaos/175 which had been inherited from the Defendant's father.

9. That she, as the first wife, was interested in the land at Kapsaos and expected her children to inherit the said land. That the land in Uasin Gishu known as Olainguse/Olainguse Block 1 (Olainguse/18) measured 5.347 ha and was not adequate for her and her children as the same had been subdivided and most of it sold. What now remained was less than 3 acres and where she lived was known as Kondoo Farm No. 582 measuring about 4 ½ acres. That as a first wife, she was entitled to stay in her husband's ancestral home as that was where she considered to be her matrimonial home.

10. The Plaintiff testified that she was unhappy with the manner in which the Defendant had apportioned his land between herself and his second wife Josephine as per annexure KK 8(a) of her replying affidavit. That she was not consulted and that was the reason she filed suit. She sought for the court to assist her to get a share of the land at Kapsaos and for the persons who bought portions of the Kapsaos land without her consent to be evicted from the land.

11. On being cross-examined, she confirmed that she got married to the Defendant in 1969. That their first matrimonial home was on land parcel No. Kericho/Kapsaos/175 upon where the Defendant built a house for her.

12. That Land parcel No. Olainguse/Olainguse measured about 14 acres and was registered in the name of the Defendant and so was the land at Kondoo Farm. That the Defendant had built a house for her on the land at Kondoo farm in 1972 where she had since been living.

13. She did confirm that she had been charged with a criminal offence in the year 1990 when the Defendant alleged that she had assaulted him. She also confirmed that she had 8 children and gave their names and status as follows;

- i. Evelyne Chepkoech (deceased)
- ii. Wilson Kipkoech – Std 8 drop out
- iii. Mary Chelengat (educated upto form 4 married)
- iv. Jane Chepchirhir – Standard 8 drop out married
- v. Josephine Cherop – Form 4 dropout married
- vi. Caroline Chepngetich – standard 8 drop out widow
- vii. Agnes Chemutai – Form 4 drop out single
- viii. Richard Cheruiyot – Standard 7 drop out

14. She also confirmed that the Defendant had been employed as a driver and that he married Josephine as a second wife in March 2015, who had come with her own children. That she had been summoned to Chagaik Police Station in 2016 on allegations that she had assaulted Josephine.

15. That further, the Defendant had sold a portion of the Olainguse Farm wherein there were persons cultivating the same. That she had placed a caution on the land at Kapsaos and had paid Kshs. 500/= to register the caution.

16. When she was referred to her exhibits, she confirmed that the caution had not been signed by the Land Registrar and neither did the search certificate indicate that she had placed a caution on land parcel No. Kericho/Kapsaos/175. That further title was registered in the name of Kipsoi Kirui.

17. The Plaintiff confirmed that she did not have a problem with the fact that the Defendant had married Josephine as a second wife and neither did she know who demolished her house at Kapsaos but stated that all she wanted was for the Kapsaos property to be declared as matrimonial property

18. That the Defendant lived on Kondoo farm from 1972-2015. That her mother in law died 2007 after which the Kapsaos land was leased out to some people before her son Wilson moved there. She did not agree with the notion that Josephine be given the land at Kapsaos.
19. On re-examination, the Plaintiff reiterated that it was not true that she had assaulted the Defendant in 1990. She instead stated that she had been suffering from cerebral malaria, was charged in Eldoret Court but the Defendant withdrew the case.
20. She also confirmed that the Defendant had only sold one acre of land in order to educate one of their daughters and that the land at Kondoo Farm and Olainguse were registered in the Defendant's name. That the land in Kondoo farm had been given to the Defendant because he was a squatter, while she had contributed to the purchase the land at Olainguse through the proceeds of the sale of maize and cows
21. The second witness PW2, Wilson Kipkoech Rotich, testified that he lived at Kapsaos within Kericho County. He sought to adopt his witness statement recorded on the 18<sup>th</sup> February 2017 as his evidence in chief. That he was born in 1972 on land parcel No. Kericho/Kapsaos/175 which initially belonged to his paternal grandfather, Kipsoi Kirui and where he had lived for many years. That at the time he attended Primary School in Kericho and was circumcised in 1989 at Tendwet, he lived at Kapsaos at which time his grandmother was still alive. That he only moved to Olainguse in 1994.
22. That after he married in 1994, he set up a home at Olainguse but still continued farming on the Kapsaos land. Later he went back to Kapsaos in 2014 with his wife and 7 children and stayed with his grandmother at Kapsaos most of my early life. Later his grandmother moved to Olainguse from where she passed on but he remained on the land at Kapsaos where he was engaged in the business of buying and selling maize as well as running a shop and hotel, up to the year 2015.
23. That the first time he met Josephine was when she was hawking tea leave along the road at Kapsoit. That she later got married to his father (Defendant) and moved into his house at Kapsaos. That thereafter in March 2015 the Defendant told him to go to Olainguse but since he was settled at Kapsaos he refused to move. On 21<sup>st</sup> January 2017, he came back home from a business trip only to find his house and shop had been demolished and the Defendant and his stepmother were burning his and his children's clothes. That although he reported the matter to Chagaik Patrol Base, there was no action taken by the police.
24. That after his house had been demolished, he had moved to his neighbor's house at Tendwet where he had been living to date, that the Defendant then started selling the land, the Plaintiff's house was also demolished at the same house as his house where the household goods that were therein were taken to his step-mother's house.
25. That it was true that his father the Defendant had given him some land at Olainguse measures 3 acres where he had built a brick house and was using about one acre for farming but that the land was currently being occupied by his son. That he had decided to stay at Kapsao because that was where he grew up and it was convenient to conduct his business. He sought from the court to grant his mother, the Plaintiff, a share of the Kapsaos land once the succession had been done and for persons who had bought their land at Kapsaos to be evicted.
26. During cross examination, the witness stated that he was 47 years old and was engaged in casual jobs. That he respected his father and had thought of buying his own land but had no means. That if his father advised him to stay on a particular parcel of land he would comply. That he wished to have a share of a piece of his father's land. He confirmed that he had one brother who lived in Olainguse with his unmarried sisters.
27. That when he got married, he had built a house for his wife at Olainguse while he continued to carry on business a Kapsaos, where he had built his house in 2012 with his father's consent. That he had found the Defendant at his house soon after it had been demolished but that he had not seen him demolish it. That in the year 1990, he was 18 years. That he had heard that his father had been assaulted by his mother and that one of his father's houses at Olainguse had been demolished but he did not know who had demolished it.
28. He also testified that after the Defendant married Josephine in 2015, they never went to live at Olainguse. That the Defendant took her to Kondoo farm in 2016 by which time the Defendant was no longer employed. He also testified that they had stayed there for a short while but that he was not aware that Josephine had been sent away his mother.
29. That the land at Olainguse had been sub-divided and people had constructed their houses on portions of it. That he did not know how big the remaining land at Olainguse or Kondoo farm measured, but confirmed that the land at Kapsaos was registered to his grandfather's name. That his father did not involve his mother when he decided that they should move to Olainguse. His evidence was that Josephine had incited his father to send him away from Kapsaos. That she had come with five children who were hostile to him.
30. He also stated that the Defendant and stepmother had reported to the police at Chagaik that he and his mother had attacked them. The case had never been pursued to its conclusion. That the report he had made on the 1<sup>st</sup> January 2017 had been in relation to the demolition of his house.
31. He opined that once the succession proceedings were finalized that the land at Kapsaos to be registered in the joint names of his father and mother and not Josephine as she was not part of their family.
32. The Witness further confirmed that his father had not yet taken out letters of administration in respect of his grandfather's estate. That he had a right to build a house on his late grandfather's land and that Olainguse land had a dispute wherein persons had occupied portions of the same and a report had been lodged to Chagaik police base on the 21<sup>st</sup> January 2017. The Plaintiff thus closed its case.

**Defence case.**

33. The Defence case was supported by the Defendant Kiptoo Kirui who testified as DW1 to the effect that he lived at Tendwet in Kericho County. That he was farmer and had recorded his statement on 18<sup>th</sup> July 2018 to which he wished for the court to adopt as his testimony in chief. That he had also filed a list of documents on 18<sup>th</sup> July 2018.

34. The documents were marked as follows.

- i. The title deed in respect of Olaingue/Olainguse Block 1 (Olainguse) 18, defence exhibit 1
- ii. A receipt of purchase of Kondoo Farm No. 582, defence exhibit 2
- iii. A bundle of 8 photographs, defence exhibit 3(a-h).
- iv. Summons to the Plaintiff dated 23<sup>rd</sup> July 2016, defense exhibit 4.
- v. The letter dated 18<sup>th</sup> July 2016, defence exhibit 6.
- vi. The letter dated 20<sup>th</sup> July 2016, as defense exhibit 7.
- vii. The 5 birth certificates, DMFI 8(a-e).

35. The Defendant proceeded to testify that the Plaintiff herein was his first wife and that they got married in September 1969 at Kericho. That by then he was employed by the Central Agricultural Farm in Eldoret. That soon after the wedding, the Plaintiff went back to live with her uncles at Ndanai in Bomet county up to 1970. That she later joined him in Uasin Gishu in March 1970. That between the years of 1988-1990 the Plaintiff had tried to transfer the title for L.R No. Olainguse Block (Olainguse) into her name without success.

36. Upon her return home, she had been very hostile towards him with the result that she had inflicted a cut his head with a panga wherein she had been arrested and detained for two weeks. That it had been after their children had prevailed upon him to have her released, that he had withdrawn the case and had forgiven her.

37. That the two had continued to stay together on Kondoo farm but since their relationship was sour he had decided to marry a second wife in 2014. In December, 2015, the Plaintiff had demolished their house wherein he had been forced to rent a house where he stayed with his second wife.

38. He confirmed the evidence that he had married Josphine his second wife when she already had five children (2 daughters and 3 sons) of her own. That he had been blessed with 8 children with the Plaintiff wherein one of them had died. He also confirmed the fact that he had demolished PW2's house at Tendwet in the year 2018 because he had built it without his permission and after he had told him to go and live on the land he had given him at Olainguse farm, land which measured 3 acres at Olainguse Farm. That PW2 had now constructed a brick house therein.

39. That the said PW2 had married 4 wives, the first wife was sent away, the second wife died in 2012, the third wife had only stayed for 6 months after which she was sent away in 2014 whereas the 4<sup>th</sup> wife stayed briefly at Olainguse then at Tendwet before she was also sent away.

40. He testified that the Plaintiff's children all went to school and that PW2 dropped out of school at standard 8, whereas the third born was a graduate and that he had never failed to pay fees for his children.

41. That the land at Tendwet which was also known as Kericho/Kapsaos/175 is registered in his late father's name. That the Plaintiff filed suit against him because she wanted land yet he had given her a share of his land at Kondoo farm No. 582 where he had built for her a permanent house and where she now lived.

42. In cross-examination the Defendant confirmed that after he had married the Plaintiff, she had gone to stay with her uncles before she joined him at Kondoo farm. That she had never stayed with his parents at Tendwet and that it was not true that he had demolished her house at Tendwet. That although the Plaintiff had tried to transfer his title deeds into her name, he did not have any documents to support this assertion and neither did he have any document to prove that the Plaintiff was charged with assault.

43. He also confirmed that although he did not understand the adoption procedure yet he had the original birth certificates for his second wife's children. That it was not wrong for him to bring up his second wife's children on his matrimonial home. That when he married Josephine, she had five children and he loved her together with her children.

44. That they had held a family meeting to agree on how to divide the family property but did not reach an agreement. He conceded to having demolished his son's house because he refused to heed to his advice to go and settle at Kondoo farm. He however denied burning his son's property.

45. He also conceded to having subdivided and sold portions of the Tendwet land as well as having sold a portion of Olainguse farm but it had been with the Plaintiff's knowledge. His evidence was that he had not sold any portion of Kondoo farm.

46. That he sold portions of Olainguse farm for fees and Tendwet farm to pay legal fees for this case and he did not see any problems with

selling the Tendwet land without having applied for succession. That he was not aware that he needed the Plaintiff's consent in order to sell land and that he appreciated the fact that both his wives were entitled to his property.

47. That he had held a discussion with his family and clan before he divided his property. That although the Plaintiff did not agree with the way he had proposed to divide his properties, yet he was not ready to give her a portion of the Tendwet property and neither was he willing to evict the persons who bought the land at therein. That he did not want the Plaintiff to get any portion of the Tendwet land as his late father was opposed to her coming to Tendwet after she had assaulted him (Defendant) and demolished his second wife's house at Olainguse.

48. The Defendant was re-examined wherein he reiterated that he had first sold 3 acres of the Olainguse farm in 1990 wherein the Plaintiff had given consent to the sale. In 1996 he had sold one acre of the Olainguse farm so as to finance PW2's business. Later in the same year, he had sold a portion measuring 1 ½ acres to pay fees for his daughter who had been called to a teacher's college. That the Olainguse farm was originally 14 acres but after the survey, it reduced to 13 acres. He had sold all of it save for 3 acres which he had given to his son PW2.

49. That the Tendwet land was about 7 acres of which he had so far sold 3 ½ acres since he needed to build a house for his second house and pay legal fees. That the Kondo farm measured 6.8 acres to which he gave the Plaintiff although he had not yet transferred it to her name. That he had bought Olainguse farm in 1975 and Kondoo farm before he married the Plaintiff. That he had never chased the Plaintiff from any of his properties.

50. He proceeded to testify that in the year 2015, they had held a family meeting at the chief's office in order to agree on how to divide their land wherein the Plaintiff disagreed on the mode of distributions because she did not want her co-wife to get any property.

51. That he had provided for all his children. That he had two sons with the Plaintiff who have land each at Olainguse and Kondo farm respectively. That he had also given his unmarried daughter one acre of land at Kondo farm.

52. After the matter was adjourned for further hearing, on the 3<sup>rd</sup> March 2021 by consent parties agreed for the same to proceed from where it had stopped.

53. The next Defence witness was Samuel Kibet Mibei who testified as DW2 to the effect that he lived at Tendwet location within Kericho County and that he was a village elder. That he knew Kiptoo Kirui the Defendant herein as a neighbor since the time when he entered in his father's land.

54. He adopted his statement of 18<sup>th</sup> July 2018 as his testimony in chief and proceeded to testify that apart from his father's land, the Defendant had another land in Nandi which he bought. That he had lived in the land in Nandi with his elder wife at the time he was employed with the SBI (road contractors).

55. That while the Defendant was in Nandi, his father was on the land in Tendwet. That although he could not remember when the Defendant left Nandi, yet when his mother died, he came to take care of his father's land.

56. That the Defendant's elder wife had wanted the land in Tendwet wherein she had been informed that it was the Defendant's father's land. He also testified that the Defendant had lived in Tendwet with his younger wife called Josephine with whom they had had a traditional marriage. That since the Plaintiff had wanted the land in Tendwet, there had been a meeting before him, the chief and both the Defendant's wives wherein it had been decided that 1<sup>st</sup> wife (Plaintiff) lives in Nandi while the younger wife lives in the Tendwet land. (the suit land)

57. On cross examination, the defence witness confirmed that it had been agreed at the chief's sitting on how the wives would live. That the minutes of the meeting were with the Defendant. He also confirmed, after he was referred to paragraph 2 of his statement that the Plaintiff had attempted to kill the Defendant. That it had been at the meeting with the chief when the allegation of attempted murder had been recorded.

58. He also confirmed that he neither attended the traditional wedding nor witnessed the same. The defence thus closed its case and parties filed their respective written submissions.

#### **Plaintiff's submissions.**

59. The Plaintiff's submission while placing reliance on the evidence adduced in court was to the effect that the suit land parcel No. Kericho/Kapsaos/175 was inherited by the Defendant from his late father Mr. Kipsoi Kurui now deceased. That to date the Defendant was yet to commence succession proceedings to obtain a grant the confirmation of grant so as to register the said parcel of land in his name as the administrator. That both the Defendant the Plaintiff had established their matrimonial home on the suit land but have been blessed with other properties outside the jurisdiction of the court namely Olainguse/Olainguse/block 1(Olainguse) 18 and Kondoo farm No. 582 amongst others.

60. The Plaintiff's submission was to the effect that having contributed to the development of their matrimonial home on the suit land herein and as per the provisions of Section 93(2) of the Land Registration Act, the Defendant had obtained customary certificate to the suit land therein by virtue of inheritance from his late father. To this effect, she too had acquired interest to the suit land in the nature of ownership in common.

61. That both the Defendant the Plaintiff having solemnized their marriage and having established their matrimonial home on the suit land, the court was sufficiently clothed with jurisdiction to make a declaration that the said suit land was matrimonial property as per the provisions of Sections 6(1) and 12(1) of the Matrimonial Property Act and Section 13(7) of the Environment and Land Court Act.

62. That due to the Defendant's unlawful acts of sub dividing and selling portions of the suit land, the Plaintiff being pro-active in the interest

of her seven children placed a caution on the same on the 2<sup>nd</sup> March 2016 so as to forestall the disposition and sale of the suit land. This did not deter the Defendant, who proceeded to sell portions of land and used the proceeds of his sale for his and his second wife's personal use. That the Defendant further demolished their matrimonial and that of their eldest son and proceeded to chase them away from the suit land.

63. That the illegal acts of sub dividing and disposing the suit land without consent of the Plaintiff or their children was voidable as the same contravened the provisions of Section 45 of the Law of Succession Act. The Plaintiff sought that there be a notice of eviction against the various purchasers of portions of the suit land, since they did not carry out due diligence despite there being the presence of a caution on the same.

64. That to secure the interest of the family, the suit land be registered in the joint names of the Plaintiff and the Defendant and there be an annulment and/or revocation of the sale of the land transactions conducted by the Defendant without consent, involvement or consultation by the Plaintiff.

#### **Defendant's submission.**

65. The Defendant's submission was that there was no dispute that the suit parcel of land No. Kericho/Kapsaos/175 was registered to the name of the Defendant's deceased father. That it was also not in dispute that the Plaintiff and the Defendant got married in 1969. That subsequently the Defendant bought Kondoo farm No. 582 measuring 6.8 acres in 1971 and Olainguse/Olainguse/block 1(Olainguse) 18 measuring 5.347 hectares in 1972. That they then moved to Kondoo farm No. 582 in 1972 and established their matrimonial home therein where the Plaintiff occupied and utilized both Olainguse/Olainguse/block 1(Olainguse) 18 and Kondoo farm No. 582 as the Defendant's parents resided on the suit land herein.

66. That it was also not in contention that due to the differences between the Plaintiff and the Defendant, the Defendant fled to his parents' home on the suit land wherein after he married a second wife, Josephine Chepkoech, with whom they established their matrimonial home on parcel No. Kericho/Kapsaos/175 the suit land herein.

67. That the Plaintiff's suit was an emotional one actuated by malice, bitterness and greed over the Defendant's marriage to his second wife. That the Plaintiff had not established any cause of action against the Defendant over the suit property as such cause of action would only rise after a title is registered in the name of the Defendant.

68. The Defendant herein being the sole heir to parcel No. Kericho/Kapsaos/175, was entitled to its use and occupation. The Defendant could therefore be restrained from living on the portion of land with his second wife or from determining which member of his family occupies which of his many properties, as this was the prerogative of the Defendant.

69. That the Plaintiff had not been rendered homeless by the Defendant's allocation of the suit property to the second wife as she is in possession and occupied both Olainguse/Olainguse/block 1(Olainguse) 18 and Kondoo farm No. 582. That the Plaintiff's allegation of the Defendant's disposition, subdivision, and/or transfer of the suit land to the exclusion of his family can only be determined by a succession court.

70. That since the Defendant was not the registered proprietor of the suit land, the Plaintiff had not acquired any overriding interest as a spouse thereon and therefore she could not seek eviction orders to issue against persons in occupation of the suit property as purchasers for value, as she had no interest.

71. The Defendant further submitted that the suit property No. Kericho/Kapsaos/175 was registered to his deceased father's name, there had been no succession proceedings over the same and therefore it was not the parties' matrimonial property.

72. Lastly, the Defendant submitted that the Plaintiff's case was misplaced and had not established any cause of action against him, that the same lacked merit and should be dismissed with costs to them.

#### **Determination.**

73. The Plaintiff has instituted the present Originating Summons in which she has sought from the **Court** a determination of the above captioned questions. I have considered with a lot of anxiety the Plaintiffs suit, I have also considered the evidence tendered herein, the defence as well as Counsel's submissions therein after.

74. It is not in contention from the evidence adduced and the submissions therein after filed that the parties herein are husband and wife and the subject of the suit herein is parcel No. Kericho/Kapsaos/175, to which the Plaintiff seeks that the same be declared as matrimonial property and thereafter it be registered jointly in the name of the Plaintiff and the Defendant

75. The Plaintiff further seeks that upon registration of the suit land jointly in their names, an order of eviction be issued against all purchases of various portions purchased without her consent, and after the issuance of the caution on 25<sup>th</sup> July 2016.

76. The evidence on record is to the effect that both the Plaintiff and the Defendant were husband and wife having married in 1969 under Kipsigis Customary law wherein dowry was paid and they later solemnized their marriage in church in 1984. It is also in record that during the subsistence of their marriage, there arose a dispute to which the Defendant married a second wife and settled with her on the disputed suit land whilst the Plaintiff was settled in Kondoo farm No. 582.

77. There was further clear and cogent evidence that the suit land being parcel No. Kericho/Kapsaos/175 was registered in the Defendants deceased's fathers name Mr. Kipsoi Kirui.

78. Having found as above, I now frame the issues for determination as follows;

i. **Whether the court has jurisdiction to entertain this suit**

ii. **Whether the suit should be dismissed.**

79. Vide an Originating Summons under **Order 37** Rule 8 & 14 of the **Civil Procedure Rules, Section 6, 7 and 9** of the **Matrimonial Property Act, 2013**, and Sections 93 and 107 of the Land Registration Act, the Plaintiff, filed a suit claiming ownership of various properties which she alleged were acquired, developed and improved during the subsistence of her marriage to the Defendant and sought determination as to whether No. Kericho/Kapsaos/175 was matrimonial property.

80. This court's jurisdiction is provided for under **Article 162** of the **Constitution**. To give effect to **Article 162 (3)**, parliament further legislated the court's jurisdiction under **Section 13** of the **Environment and Land Court Act** as follows:

*(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of the Constitution and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.*

*(2) In exercise of its jurisdiction under Article 162(2) (b) of the Constitution, the Court shall have power to hear and determine disputes—*

*(a) relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;*

*(b) relating to compulsory acquisition of land;*

*(c) relating to land administration and management;*

*(d) relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and*

*(e) any other dispute relating to environment and land.*

*(3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to, rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of the Constitution.*

81. Thus, the court has jurisdiction in matters to do with the environment and the use and occupation of, and title to land as well as in matters concerning redress of a denial or infringement or threat to rights or fundamental freedom relating to a clean and healthy environment under **Articles 42, 69 and 70** of the **Constitution**. The court also has wider jurisdiction when dealing with disputes involving environment and land, to resolve claims concerning breaches of other fundamental rights related to environment and land. (See **Daniel N Mugendi v Kenyatta University & 3 others [2013] eKLR**)

82. A reading of **Article 162 (3)** and **Section 13** of the **Environment and Land Court Act, 2011** does not yield any provision that allows this court deal with matrimonial disputes instead **Section 17 of the Matrimonial Property Act** provides as follows;

**(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.**

83. It is therefore quite clear that by virtue of **section 17(1) of the Matrimonial Property Act** this court has no jurisdiction to handle the suit but rather the Family Division court which is part of the High Court and which is clothed with the requisite jurisdiction to hear and determine matters concerning the division of matrimonial property.

84. The Defendant has also raised a weighty issue on the Plaintiff's claim over the suit land which was not registered to the Defendant and there having not been a succession cause filed, and although the same was not raised independently as a preliminary objection, yet it attacks the jurisdiction of the Court. To me this is a cardinal ground which ought to be dealt with in the first instance as an issue for determination as its outcome will determine the outcome of the suit and/or any other grounds therein.

85. I find that it is not in contestation that the suit the suit property herein being No. Kericho/Kapsaos/175 was registered to the deceased person Mr. Kipsoi Kirui on the 29<sup>th</sup> July 1996 who was the Defendant's father.

86. That although the Plaintiff has sued the Defendant in his personal capacity over the deceased's estate yet she has not demonstrated that the Defendant was the legal representative of the estate of Mr. Kipsoi Kirui (deceased).

87. The Plaintiff has not produced any document to show that the ownership of the suit land had been transmitted to the Defendant herein, the effect to which the person who ought to have been sued should have been the legal representative of the estate of Mr. Kipsoi Kirui (deceased)

88. There is further no evidence that the Plaintiff had taken out any citation proceedings related to the estate of Mr. Kipsoi Kirui (deceased). To this end, I find that the Defendant herein was non-suited to the Plaintiff's claim since he did not have any locus standi to be sued.

89. The Court of Appeal has authoritatively delivered itself on the issue of locus standi in the cases in **Virginia Edith Wamboi Otieno vs Joash Ochieng Ougo & Another [1987] eKLR, Morjaria v Abdalla [1984] KLR 490** that *Locus standi* is a primary point of law almost similar to that of jurisdiction since the lack of capacity to sue or be sued renders the suit incompetent.

90. In **Alfred Njau & Others v City Council of Nairobi [1982-88] 1 KAR 229** the Court of Appeal gave meaning to the term locus-standi by stating:

*“.....to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.”*

91. The Defendant has been sued, wherein the cause of action relates to the deceased's parcel of land No Kericho/Kapsaos/175 and where no grant of representation has been applied for and/or obtained. The issue of *locus standi* is so cardinal in a civil matter since it runs through to the heart of the case. Simply put, a party without *locus standi* in a civil suit lacks the right to institute and/or maintain that suit even where a valid cause of action subsists. The impact of a party in a suit without *locus standi* can be equated to that of a Court acting without jurisdiction since it all amounts to *null and void* proceedings. The issue of *locus standi* becomes even more serious in a case like this one where the matter involves the estate of a deceased person which involves several other beneficiaries and/or interested parties.

92. In the end I find that the Defendant in this matter lacked the requisite *locus standi* to be sued and therefore the proceedings herein are a nullity as they lack the legal leg to stand on. Having found that the issue of *locus standi* is a point of law which goes to the root of any suit and where its absence renders a suit fatally defective.

93. In summary and while placing reliance on the holding in the case of **The Owners of the Motor Vessel “Lilian S” –vs- Caltex (Kenya) Ltd [1989] KLR 1**, where the Court stated as follows:-

*“...Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”*

94. I find that the Plaintiff's suit was dead on arrival and cannot be remedied. I proceed to dismiss it with costs to the Defendant.

It is herein ordered

**DATED AND DELIVERED AT KERICHO VIA MICROSOFT TEAMS THIS 28TH DAY OF OCTOBER 2021.**

**M.C. OUNDO**

**ENVIRONMENT & LAND – JUDGE**