



REPUBLIC OF KENYA



**KENYA LAW**  
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**Keya v Niala (Environment and Land Appeal E002 of 2023)  
[2025] KEELC 6173 (KLR) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6173 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL E002 OF 2023  
SO OKONG'O, J  
SEPTEMBER 22, 2025**

**BETWEEN**

**JANE ATIENO KEYA ..... APPELLANT**

**AND**

**JOSHUA KIDIGA ISAYA NIALA ..... RESPONDENT**

*(Being an appeal from the judgment of Hon. E.A.Obina PM.  
delivered in Kisumu CMCELC No. 137 of 2021 on 30th August 2022)*

**JUDGMENT**

1. This appeal challenges the judgment delivered by Hon. E.A. Obina on 30<sup>th</sup> August 2022 in Kisumu CMCELC No. 137 of 2021(hereinafter referred to as “the trial court”). The Appellant brought a suit against the Respondent at the trial court through a plaint dated 12<sup>th</sup> October 2021. The Appellant averred that at all material times, she was the second wife to the Respondent, who was the registered owner of all that parcel of land known as Title No. Kisumu/Kasule/8535 (hereinafter referred to as “the suit property”). The Appellant averred that the suit property was the Respondent’s ancestral land. The Appellant averred that the Respondent’s first wife, Mary Akeyo Kidiga was given a land parcel, Title No. Kisumu/Kasule/5156 by the Respondent, and her home was on the said land. The Appellant averred that the Respondent gave her a portion of the suit property, and the other portion was given to the Respondent’s first wife. The Appellant averred that the Respondent and his first wife sold part of the portion of the suit property which was given to the first wife and were trying to encroach on the Appellant’s portion of the suit property without her express consent, permission and/or authority as the legitimate and/ or beneficial owner of the said portion of the suit property. The Appellant averred that the Respondent and his first wife were depriving her of peaceful and quiet enjoyment of her portion of the suit property.
2. The Appellant prayed for judgment against the Respondent for;



- a. A permanent injunction restraining the Respondent, his servants and/or agents from interfering with the Appellant's peaceful enjoyment of the suit property and/or selling and/or disposing of the Appellant's portion of the suit property.
  - b. An order directing the executive officer to execute the subdivision and transfer documents of the said portion of the suit property in favour of the Appellant on behalf of the Respondent.
  - c. An order directing the Respondent to transfer the said portion of the suit property to the Appellant.
  - d. Costs of the suit.
3. The Respondent filed a statement of defence at the trial court on 28<sup>th</sup> January 2022. Save for the description of the parties, the Respondent denied all the allegations in the plaint. The Respondent averred that the Appellant had no right to demand the transfer of an ancestral land to her name. The Respondent prayed that the suit be dismissed with costs.
  4. The trial court heard the matter and delivered a judgment on 30<sup>th</sup> August 2022. The trial court made a finding that the dispute before the court was over the division of matrimonial property which the court had no jurisdiction to determine. The trial court held that it had no jurisdiction to take away property from one spouse and give it to the other spouse particularly land. The court held further that it could not restrain the Respondent from accessing or legally dealing with his land. The trial court found that the Appellant had failed to prove her case against the Respondent on a balance of probabilities and dismissed the suit with each party bearing its own costs.
  5. The Appellant was aggrieved by the trial court's decision and filed the present appeal. In her Memorandum of Appeal dated 1<sup>st</sup> February 2023, the Appellant challenged the trial court's judgment on the following grounds;
    1. That the Learned Magistrate misunderstood the evidence before him, wrongly analysed the same, and as a result dismissed the Appellant's suit.
    2. That the Learned Magistrate erred in law and fact by failing to appreciate the evidence tabled before him and the submissions made on behalf of the Appellant, thus reaching a conclusion that was contrary to the evidence before him.
    3. That the Learned Magistrate erred in law and fact in failing to find that the Appellant's life was in danger.
    4. That the Learned Magistrate erred in law and fact in failing to follow the law as established through judicial precedent.
    5. That Learned Magistrate erred in law and fact in considering frivolous, extraneous and unsupported facts.
    6. That the Learned Magistrate totally misunderstood the evidence before him and therefore arrived at a wrong conclusion.
  6. The Appellant prayed that the appeal be allowed and the judgment /decree of the trial court dated 30<sup>th</sup> August 2022 and all consequential orders therefrom be set aside. The Appellant prayed further that judgment be entered in her favour as prayed in the plaint dated 12<sup>th</sup> October 2021. The Appellant also prayed for the costs of the appeal and the costs of the lower court suit.



7. The appeal was heard by way of written submissions. Only the Appellant filed submissions dated 26<sup>th</sup> April 2025. The Appellant cited Sections 2 and 6 of the *Matrimonial Property Act*, Section 93(2) and 28(a) of the *Land Registration Act* 2012 and submitted that even if she was not registered as the proprietor of the suit property, she had a spousal right in the property which was an overriding interest and which the Respondent's interest was subject to. The Appellant submitted that the suit property was, at all material times, ancestral land, and as such, the Appellant, the Respondent, and their children were entitled to it. The Appellant urged the court to find that the trial court erred in law and fact by failing to consider that since the Appellant and Respondent were married and had children, the continued subdivision and sale of the matrimonial property without consent from the Appellant was unlawful and that it was necessary for the safety of the Appellant's share in the suit property for the same to be registered in the name of the Appellant. The Appellant urged the court to allow the appeal with costs.

### **Analysis and Determination**

8. I have considered the pleadings and the proceedings of the lower court, the judgment of the court, the grounds of appeal filed by the Appellant and the submissions by the Appellant's advocates. This being a first appeal, this court has to reconsider and re-evaluate the evidence on record and draw its conclusions on the issues that were raised for determination before the lower court. In *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212, the Court of Appeal stated that:

“On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence.” See also, *Verani t/a Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd* [2004] 2 KLR 269, *Selle v Associated Motor Boat Co. Ltd.* [1968] E.A 123 and *Abok James Odera t/a Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR on the duty of the first appellate court.”

9. It is also settled that the first appellate court will not interfere with the findings of fact by the trial court unless they were not based on evidence at all or they were based on a misapprehension of the evidence, or where it is demonstrated that the court acted on wrong principles in reaching its conclusion. See, *Peter v Sunday Post Ltd.* [1958] E.A 424 and *Makube v Nyamuro*[1983] KLR 403.
10. In my view, the Appellant's six grounds of appeal raise only one issue for determination by this court, namely, whether the trial court erred in its finding that the Appellant had not proved her case on a balance of probabilities.
11. In *Kurshed Begum Mirza v Jackson Kaibunga* [2017] eKLR, the court stated as follows:

“(16) Turning to the second issue; according to section 107 of the *Evidence Act*, the burden of proof in any case lies with the party who desires any court to give judgment as to any legal right or liability. It is for that party to show that the facts which he alleges his case depends upon exist. This is known as the legal burden.”



12. In Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 17, at paras 13 and 14, the authors have stated as follows on the burden of proof:
- “ 13. The legal burden is the burden of proof which remains constant throughout a trial; it is the burden of establishing the facts and contentions which will support a party's case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose.
14. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied. In respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is an essential of his case. There may therefore be separate burdens in a case with separate issues.”
13. The Appellant contended before the trial court that she had her matrimonial home on the suit property and as such the property was a matrimonial property which the Respondent and his first wife could not deal with without her consent. The Appellant sought an order that the portion of the suit property that had been given to her by the Respondent be transferred to her.
14. In Section 2 of the [Land Registration Act](#) 2012, a matrimonial home is defined as follows:  
matrimonial home" means any interest in land that is owned or leased by one or both spouses and occupied by the spouses as their family home.  
In Section 2 of the [Matrimonial Property Act](#) 2013, a matrimonial home is defined as follows:  
matrimonial home" means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.
15. In the same section of the [Matrimonial Property Act](#) 2013, matrimonial property is defined as follows:
- (1) For the purposes of this Act, matrimonial property means—
- (a) the matrimonial home or homes;
- (b) household goods and effects in the matrimonial home or homes; or
- (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
16. Section 12 of the [Matrimonial Property Act](#) 2013 provides as follows;
- (1) An estate or interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.
- (2) A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.
- (3) 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.



- (4) Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—
  - (a) on the sale of any estate or interest in the matrimonial home in execution of a decree;
  - (b) by a trustee in bankruptcy; or
  - (c) by a mortgagee or chargee in exercise of a power of sale or other remedy given under any law.
- (5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.

Rule 6 of the Matrimonial Property Rules 22 provides as follows:

- (1) An application to enforce a claim relating to matrimonial property may be made in any proceedings under the Act—
  - (a) to the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate's court; or
  - (b) to a magistrate's court having civil jurisdiction to adjudicate matters within the court's pecuniary jurisdiction.
- (2) Where the spouses profess the Muslim faith, the court to which an application is made may, on the request of the parties, be guided by Muslim law.

17. It is common ground that the suit property was registered in the name of the Respondent. From the evidence on record, I am satisfied that the suit property was matrimonial property. It follows that the Appellant had an interest in the suit property, which was protected by law. What was disputed was whether the Appellant had established that her interest in the property was threatened and that she was entitled to the relief that she had sought before the trial court. I disagree with the finding of the trial court that it lacked jurisdiction to deal with disputes over matrimonial property. I, however, agree with its final finding that the Appellant had failed to prove her case against the Respondent to the required standard and as such she was not entitled to the orders sought. The Appellant did not place any evidence before the court in proof of her claim that the Respondent intended to sell the portion of the suit property which the Respondent had given to the Appellant and on which the Appellant had her home. The issue of the Respondent selling the said portion of the suit property without the Appellant's consent could not therefore, arise. As correctly found by the trial court, the Respondent, as the registered owner of the suit property, had not only a right to use but also a right to sell the suit property, provided that he obtained the consent of his two wives. The court could not, therefore, issue an unqualified permanent injunction restraining the Respondent from using or selling the suit property. The Appellant's suit was not for the division of the matrimonial property but for the preservation of the same. The Appellant and the Respondent were still married as at the time the suit was filed. They were not separated or divorced. There were also no proceedings pending for the said purposes. Furthermore, the Respondent's first wife was not a party to the suit. In the circumstances, there was no basis for the Appellant's prayer that the suit property be subdivided and the portion thereof that was given to her by the Respondent be transferred to her name.



## **Conclusion**

18. In conclusion, I find no merit in the Appellant's appeal. The appeal is dismissed. Each party shall bear its own costs.

**DELIVERED AND SIGNED AT KISUMU ON THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2025.**

**S. OKONG'O**

**JUDGE**

Judgment delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Mr. Matete for the Appellant

N/A for the Respondent

Ms. J.Omondi-Court Assistant

