

REPUBLIC OF KENYA
ENVIRONMENT AND LAND COURT
AT KILGORIS

ELC (LA) E039 OF 2025

KINANGARE OLE SANTITO.....
.....APPELLANT

VERSUS

SANTITO TITUS LESIAMON.....1ST
RESPONDENT

ISAAC LETEIPA SANTITO.....2ND
RESPONDENT

SANTITO NAMUNYAK MARY.....3RD
RESPONDENT

KILGORIS LAND REGISTRAR.....4TH
RESPONDENT

JUDGMENT

1. Being dissatisfied by the Ruling and Order of the Honourable Mary Immaculate Gwaro Chief Magistrate delivered on 18th of June 2025 in Kilgoris CMELC No. E012 of 2025, the Appellant Kinangare Ole Santito vide the Memorandum of Appeal dated 20th of August 2025 filed by Messrs Makallah and Associates Advocates penned 10 grounds of Appeal and sought for the following reliefs.
 - (i) The Ruling and order of the trial court delivered on 18th June 2025 be set aside in its entirety.
 - (ii) The suit be reinstated and remitted for full hearing on merit before a competent court.
 - (iii) The costs of this appeal be awarded to the Appellant and
 - (iv) Such other and further orders be made as the Honourable court may deem just.
2. The grounds of Appeal penned by the Appellant are as follows; -
 - (i) That the Learned Magistrate erred in law by striking out the plaintiff's suit on the basis of lack of locus standi without first determining through evidence whether the plaintiff had a beneficial or equitable interest in the suit property pursuant to

Articles 40 and 45(3) of the constitution and section 6, 7 and 12 of the matrimonial property Act, 2013.

- (ii) That the Learned Magistrate erred in law by making determination on substantive and contested factual issues including allegations of fraud, the alleged intention to gift, the mental capacity of the interested party and the character of the suit land at the Preliminary Objection stage contrary to established principles that require such matters to be determined upon hearing viva vole evidence. Such issues cannot be determined without the benefit of witness testimony, cross-examination and the production of documentary evidence.
- (iii) That the Learned Magistrate's approach effectively denied the parties an opportunity to be heard on merits, thereby violating the principles of Articles 50(1) of the constitution on the right to a fair hearing.
- (iv) That the Honourable court erred in law by determining the interested party's capacity to transfer the suit land without requiring his appearance in court or subjecting him to cross-examination, thereby violating the plaintiff's constitutional right to fair hearing under Article 50(1) of the constitution.
- (v) That the Learned Magistrate erred in law by holding that the plaintiff's claim could only lie under the matrimonial property Act, thereby failing to consider the plaintiff's pleaded claim based on beneficial interest, Equitable trust and overriding interests as recognised in common law and the Land Registration Act.
- (vi) That the Learned Magistrate erred in law by failing to consider and apply section 28 of the Land Registration Act, which recognises overriding interests including rights of a spouse in actual occupation as capable of subsisting without being noted on the title.

- (vii) That the Trial Magistrate erred in law in dismissing a claim involving allegations of fraud illegality, and collusion with a public office, summarily and without trial, thereby denying the plaintiff the opportunity to formally prove her claims through oral and documentary evidence.
- (viii) That the Honourable court erred in law by holding that the plaintiff had not demonstrated any interest in the land despite evidence of marriage, occupation and registered cautions on the suit parcels contrary to Article 45(3) of the constitution and the Matrimonial property Act which afford protection to spouses with an interest in Matrimonial property.
- (ix) That the Learned Magistrate erred in law and principle by misdirecting herself on the nature and application of the doctrine of gift inter vivos. The Learned Magistrate introduced and relied upon the doctrine of gift inter vivos even though this was neither pleaded by the parties nor framed as an issue for trial.
- (x) That, the Learned Magistrate failed to consider Articles 22, 48, 159(2) (d) of the constitution which broaden the right of access to justice and permit persons to institute proceedings for the protection of their own rights and the rights of others.
- (xi) Upon admission of the Appeal directions were issued for the Appeal to be canvassed by way of written submissions, which the parties filed and are summarised as herefollows; -

Appellant's submissions

3. On 09.02.2026 the court observed that both parties had not filed their submissions and extended time for them to file submissions on or before the 26th of March 2026, with a rider that any submission filed later would not be considered. The Appellant did not meet the timelines and actually did not file any submissions on the CTS or physically that the time the court retired to write this Judgment. Hence no submissions by the Appellants were considered.

1st to 3rd Respondents submissions

4. The 1st to 3rd Respondents framed and submitted on 3 issues for determination.

(a) Whether or not the Appeal herein is competent?

Under this issue, the 1st to 3rd Respondents submit that in so far as the Appeal is contesting the Ruling dated 30th of April 2025 which Ruling was delivered with respect to a Notice of Preliminary Objection, then the Appellant needed to seek leave to Appeal in line with Section 75 of the Civil Procedure Act as read together with order 43 Rule 1 of the Civil Procedure Act, and thus since leave to appeal was not obtained there was thus no Appeal before court and reliance was placed on the decisions in the cases of Kaikuta Maimai Hamisi Vs. Peris Pesi, Tobiko and 2 Others as well as Issac Mbugua Ngiraehu Vs. Stephen Gichobi Kaara (2021) KEHC 8022 KLR, and Peter Nyaga Muvake Vs. Joseph Mutunga 2015 (eKLR) KECA 475.

(b) On issue No. 2, the 1st to 3rd Respondents submit that the Learned Trial Magistrate was right in finding that the Appellant had not locus standi to institute the suit and placed reliance in the decision in Rugiri Vs. Kinuthia and 3 Others as well as Alfred Njau and 3 Others Vs. City Council of Nairobi.

5. Further reliance was placed on section 24 of the Land Registration Act, which it was argued places absolute rights over the registered owner.

6. On costs the 1st to 3rd Respondent submit for costs to follow the event, and urge court to dismiss the Appeal

7. The 4th Respondents, Kilgoris Land Registrar and the interested party did not take part in the proceedings and did not file submissions.

Issues for determination

8. Arising from the record of Appeal, the submissions of the parties, the court frames the following as issues for determination; -

- (i) Whether or not there is a competent Appeal before court?
- (ii) Whether the Appeal is merited.
- (iii) What reliefs ought to issue.
- (iv) Who bears the costs of the Appeal.

Analysis and Determination

9. On issue number 1, whether there is a competent Appeal before court. This court has reviewed the record of Appeal as is required of it under the duties espoused of a first Appellate court in *Selle and Another Vs. Association Motor Boat Limited*.
10. In the Plaintiff dated 7th of February 2025 appearing at pages 21 to 23 of the record of Appeal, the Appellant as plaintiff pleaded at paragraphs 6 to 11 the cause of action and specifically at paragraph 8 pleaded that “the plaintiff contends that her husband the interested party had been allocated land Reg. No. 1159/Olomismis being a legitimate member of the former Olomismis Group Ranch and a title issued to him for a total of 21.4 Ha, and the interested party had previously disposed 7 acres out of the 21.4 Ha which she (the Plaintiff) was aware about and consented to.

“paragraph 9...

Paragraph 10. The Plaintiff aver that on diverse dates between 2020 and 2024, the 1st to 3rd Defendants while exploiting her illiteracy and lack of information as regards the original title (as well as that of their father(illegally conspired with unscrupulous officers at the 4th Defendants office in Kilgoris, subdivided the family land and appropriated it among themselves.”

11. In their joint defence the 1st to 3rd Defendants denied that the plaintiff was a legitimate wife of Samuel Lemiso Ole Kuuu, having remarried to someone else and hence lacked legal right over the suit properties, as the suit property had been allocated to the interested party after the plaintiff had remarried.

12. The 1st to 3rd Defendants pleaded that the suit against them was frivolous, vexatious and an abuse of the court process, and pleaded a counterclaim seeking removal of the caveats registered as the plaintiff.
13. The Plaintiff had filed an application simultaneously with the Plaintiff seeking injunctive prayers against the 1st to 3rd Defendants the application was dated 07.02.2025.
14. The record of Appeal does not contain the Response filed in respect of the said application, and the court notes that the Record of Appeal was not only poorly drafted but also fell short of the required standards. It did not have the 10 line indent and did not easen the court's work.
15. However, in the Ruling dated 18.06.2025 which gives rise to this Appeal it is alluded that a Replying affidavit was sworn by the 1st Defendant together with preliminary Objection dated 05.03.2025 on grounds that the plaintiff lacked locus standi to institute the suit rendering the suit fatally defective.
16. Although it was not expressly stated, the Ruling related to both the applications and the Preliminary Objection as captured at paged 10 of the record of Appeal. The 10 line indent was not done, but on the first paragraph under the Analysis and Determine.
17. Indeed, the lower court record confirms that the Preliminary Objection and the application were heard simultaneously hence the impugned Ruling in holding that the Plaintiff had not locus standi upheld the Preliminary Objection.
18. The record of Appeal reveals further that at the time of delivery of the Ruling, Ms Mwangi for the Plaintiff was present and she sought for a stay of the orders, which was opposed by Ms. Opondo, as the orders were negative in nature and the trial court concurred with the submissions of Ms. Opondo.

19. No leave to appeal against the Ruling was sought before the trial court and before this court either. Was leave to appeal required as was submitted by Mr. Otieno?
20. Section 75(1) of the Civil Procedure Act provides for an automatic right of Appeal in respect of decisions from certain orders, which are specified in Order 43 Rule 1. Whereas the application for temporary injunction was based on Order 40 Rule (1) and there was an automatic right of Appeal. The Ruling dated 18.06.2025, found that the Applicant had no locus standi, which issue had been raised in the Preliminary Objection dated 05.03.2025; it follows that it is the Preliminary Objection that was being argued simultaneously, with the application, that was upheld.
21. The Learned Magistrate would have greatly assisted the court had she stated that categorically.
22. But having found that the plaintiff lacked locus standi which issue was raised in the Preliminary Objection, it must be deemed that it was the Preliminary Objection that was upheld, which thus required leave to appeal to be issued before this Appeal could be filed.
23. In reaching the above I am guided by various dictas of the courts including the decision in the case of JAS Kumenda and Another Vs. Governor County Government of Kisii and 5 Others (2018) eKLR, which decision dealt with the above provisions and the court observed as follows;
- “.....In the present matter the ruling/order sought to be appealed arose from a Preliminary Objection raised by the Respondents that the court dismissed. The dismissal of a Preliminary Objection does not constitute an order falling under Section 75(1) of the Act against which an appeal would lie as of right and neither would it fall under the orders which an Appeal would lie as a right under order 43(1) of the Civil Procedure Rules...”***

24. Having not sought for leave to Appeal, it follows that there is no competent Appeal before the court, and the court lacks jurisdiction to hear the Appeal on its merits and shall not consider the merits, as the fate of the Appeal is that the same is struck out with costs.

25. Orders accordingly.

Dated at Kilgoris this 11th day of May 2026

Hon. M.N. Mwanyale
Judge

In the presence of

CA - Sylvia/Clara

Ms. Opondo for 1st to 3rd Respondent

Ms. Leleta h/b for Mr. Makallah for Appellant.