



**Lomatong v Kosiae & another (Environment and Land Case  
107 of 2017) [2025] KEELC 5877 (KLR) (23 July 2025) (Judgment)**

Neutral citation: [2025] KEELC 5877 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND CASE 107 OF 2017  
FO NYAGAKA, J  
JULY 23, 2025**

**BETWEEN**

**MARGARET NABUIN LOMATONG ..... PLAINTIFF**

**AND**

**SYLVIA ABEI KOSIAE ..... 1<sup>ST</sup> DEFENDANT**

**JACKSON EKIRU KOSIA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

**Introduction**

1. The Plaintiff commenced this suit vide an amended plaint dated 19<sup>th</sup> June, 2017, seeking the following orders:
  - a. A declaration that the Plaintiff is the sole owner of the land comprised in Lomatong family land measuring 20 hectares within Lodwar and further that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and who have proprietary interest whatsoever in the said land be ordered to move out therefrom and failing which the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and anyone else claiming under them be forcefully evicted therefrom.
  - b. An order that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants do move out of the land comprised in Lomatong family land measuring 20 hectares within Lodwar and failure to which they be forcefully evicted therefrom.
  - c. A temporary and permanent injunction.
  - d. Costs.
  - e. Interest.



2. The 1<sup>st</sup> and 2<sup>nd</sup> Defendants filed their Statement of Defence dated 20<sup>th</sup> March, 2028 wherein they denied the allegations in the Plaint.
3. The Defendants did not participate during hearing of the case. Only the Plaintiff testified. Even then, in terms of Section 107 of the Evidence Act, Chapter 80 Laws of Kenya, the person who alleges must prove the case unless the law specifically removes the burden from him and places it on another. Thus, notwithstanding the fact that the Defendants did not testify, the Plaintiff had the onus of adducing evidence to the required standard to prove her case.

### **The Plaintiff's Case**

4. Margaret Nabuin Lomatong testified as PW1. She testified that the 1<sup>st</sup> Defendant was her neighbor while the 2<sup>nd</sup> Defendant was her son. It was her testimony that the suit land belonged to her deceased husband. She added that the husband died 7 years ago at his 2<sup>nd</sup> wife's house. PW1 testified further that she had divorced her deceased husband, Lomatong Emase.
5. She testified again that she lived with her children on the land since 1965. The land was not registered yet because it was community land. She further testified that the Defendants wanted or intended to sell the land. She added that the 1<sup>st</sup> Defendant has a separate plot of 20 acres, but she had since invaded her 20 acres and sold it to two people.
6. She added that one of the buyers, had since vacated the land while the other one was still on it.
7. She testified further that she wrote to the Land Administrator vide an undated letter which she produced it as P.Exhibit 3. The land Administrator consequently summoned them and they ordered that each remain in their own portion, that is to say, each person to occupy their respective parcels. The 1<sup>st</sup> Defendant never vacated, after which PW1 came to court. She produced the reply by the Land Administrator as P.Exhibit 2. She testified that her children did not have any other place to live since they were never given any other inheritance by her late husband. At that point, PW1 was stood down.
8. She was later recalled and adopted her written witness statement dated 19<sup>th</sup> June, 2017 as her evidence in chief. She also produced a List of Documents to which were attached a number of copies of documents. She testified further that she had a letter dated 3<sup>rd</sup> May, 2019, from the Ministry of Lands confirming her ownership. She produced it as P.Exhibit 1. She added that the dispute between her and the 1<sup>st</sup> Defendant went on for a while until she lodged a complaint against her at the Lands Department. She produced the letter of complaint as P.Exhibit 3. PW1 also testified that on 7<sup>th</sup> February, 2017, she wrote to the land Administrator and she got a reply. She produced the letter as P.EXhibit 2. She testified that she owned that land and added that when they went to the Land Administrator, the 1<sup>st</sup> Defendant was ordered to vacate her land.
9. Upon cross-examination by Pukah, she stated that she was not certain of the time her husband passed on. She also confirmed that she had not done succession on the land, which was about 50 acres. She admitted that there were no title deeds or allotment letters issued in the area she claimed. PW1 stated that Henry Nalipan wrote the letter dated 3<sup>rd</sup> May, 2019. She stated that she went to the Lands office, where she was given the letter from the Land Survey Office. She further stated that a survey had not been done on the land. She added that she did not have her house on the land but her workers stayed on the land parcel of land.
10. Upon re-examination, PW1 stated that the allotments to the parcels of land were not there or did not exist since the survey and allotment had been stopped in the entire Turkana County in 1992. She stated that the land was family land and that was how they owned it. She also stated that in Turkana County



then, as long as one came onto a parcel of land to graze and resided thereon and there was no one on it, he or she would own it.

11. She explained that land in Turkana County was owned when one occupied the land and used it as their own. She added that it was known as “ere” in mother tongue which meant where one resided.
12. She confirmed that in Turkana County, survey and allotment for land were suspended in 1992. Since then, no allotments have been given or issued. She stated that she had not carried out Succession for her husband’s land because, in Turkana culture, they “do not follow the tradition of ‘Following’ the dead.” She admitted that the Defendants have been on their land since 1974. She stated that they came onto the Plaintiff’s land when she reported the matter at lands office between 2017 and 2019. She denied being a grabber and added that the Defendants never complained
13. The Plaintiff called her son, one Ekaato Augustus who testified as PW2. He stated that the Plaintiff was his biological mother. It was his testimony that the land belonged to his grandmother, who brought his father (Alfred Lomatong) onto it to reside there. Upon the death of the grandmother, his parents inherited it.
14. He testified that his father divorced his mother and when he died he was buried at the second wife’s place. He further testified that the 1<sup>st</sup> Defendant began selling the land in 2015. He added that two individuals, Ediakara and Namgodia, had bought and fenced two portions of their land, the portions they bought measuring 50ft x 100ft for Namgodia and ¾ acres for Ediakara.
15. He also testified that Ediakara refused to move out until the 1<sup>st</sup> Defendant removed him. He testified that after they went to the Lands Office and agreed with the 1<sup>st</sup> Defendant that each party resides on their side, the 1<sup>st</sup> Defendant continued selling, which led to her arrest at Lodwar Police Cells. He testified that the 1<sup>st</sup> Defendant then refunded the buyer. He urged the court to have the land returned to them.
16. Samuel Eloto Emathe testified as PW2. He adopted as his evidence in chief his witness statement dated 4<sup>th</sup> November 2021. In it, he stated that the land belonged to the Plaintiff’s family since time immemorial.
17. Upon cross-examination, he confirmed that he did not reside on the disputed land. He also confirmed that the Plaintiff herself did not reside on the land. He stated that it was the children of their Aunt who resided on the land. He also stated that the Defendants also did not reside on the suit land.
18. Upon re-examination, he stated that the Defendants destroyed the Plaintiff’s house. He stated that the Plaintiff’s children did not reside on the land but have since fenced it.
19. Lorice Nakwe Abongon testified as PW3. He adopted as his evidence in chief his written witness statement dated 4<sup>th</sup> November, 2021. He testified that the Plaintiff was his brother’s wife. He added that he had been living on the suit land together with the Plaintiff. He further testified that the 1<sup>st</sup> Defendant did not live on the land.
20. Upon cross-examination, he stated that the Plaintiff was his stepbrother’s wife. He added that his brother had only one wife and that they were not aware that he had separated with the Plaintiff before he died. He stated that he did not know where the Plaintiff’s husband was buried since he was residing far when he died. Also, he did not know whether his father and mother ever lived on the suit land.
21. He admitted that the suit land did not have a title deed. He also admitted that he did not know the existence of a map of the area. He stated that Nabulon was a vast area which stretched all the way to the river, and with many people who resided on it, but they were not the residents of the area. He added



- that the people did not own the land. He stated that he was not certain if the County Government had given them permission to reside on the suit land.
22. Upon re-examination, he stated that the land was not fenced. He clarified to the court that he did not know if the land was community land. He added that they lived on the land since time immemorial. He also stated that the land had not been adjudicated upon by government.
  23. Alfred Ekitela Lokadeli the Land Administrator, Turkana County, testified as PW4. He testified that land in Turkana County was community land, held in trust by the County Government. Further, there were no identification documents or title deeds to land. He testified that the issuance of allotment letters was suspended from 2013.
  24. PW4 explained that while the community was pastoralist, they had original places where they referred to as home, known as "Eree" which signified where one resided, and land was identified using natural features such as trees, streams, hills, or specified features known by community elders.
  25. He testified that the Lomatong farm, or suit land, was the "Eree" for the Lomatong family. He further testified that he went and identified the land after a court order was issued. He added that he also became aware of the land during a separate land dispute in 2020 which involved the 2<sup>nd</sup> Defendant, Jackson Ekiru Kosiae, and his cousin Ekakai, regarding an adjacent piece of land. During the said dispute, he was shown the suit land which was surrounded by neighbors but not occupied. He testified that he saw an animal shed that belonged to the Plaintiff and marks of a previous structure, which were indicators of prior occupation and claim to the land.
  26. Upon cross-examination, PW4 clarified that he never handled any dispute as a Land Administrator, nor was it subjected to the Alternative Justice System (AJS) under his direct purview. He, however, confirmed that a dispute had been lodged by the Plaintiff in the Lands Office in 2017 as shown by PExhibit 2 and 3. His office acknowledged receipt and gave directions, but the parties never sat to resolve it.
  27. He stated that while demarcation could be personally initiated, leading to a land sketch map for the County Land Registry, no allotment letters had been issued since 2013. He confirmed the continued reliance on an old elder's system of identification of land. He stated that the court could refer matters to AJS. He admitted to have visited the land alone and with an independent person. He stated that he never met any of the conflicting parties during this independent visit.
  28. He stated he couldn't conduct an AJS himself so as to avoid bias. He, however, stated that if the matter had been brought to his office as a Land Administrator, he would have followed it. He stated that he had not engaged the area chief or their committee of elders for input during his investigation. He stated that he could not ascertain if specific villages mentioned by PW3. He also stated that Natengerengor qualified as "Eree" for the Plaintiff. He confirmed that the land belonged to the Lomatong family.
  29. Upon re-examination, he defended his independent investigation, where he stated that it was unnecessary to involve the area chief and that the evidence about the Lomatong farm was a result of his own investigations. He confirmed the informer was not related to either party. He emphasized that even in the absence of formal documents, the land belonged to the one who owned it by way of "Eree".
  30. He concluded his testimony by stating that the land belonged to the family of Lomatong and, given that there was no demarcation in the suit land area, AJS would have been the best place to inform the court whose land the suit land was. He stated that the AJS process was voluntary and guided by Turkana Customary Laws.
  31. That marked the close of the Plaintiff's case.



## Submissions

32. Counsel for the Plaintiff filed his submissions dated 28<sup>th</sup> April, 2025, where he submits that the Land Administrator, PW4 confirmed that the lands in Lodwar were communal lands held in trust by the county government with no title. He submits that all the witnesses who testified unanimously testified that the suit land belonged to the Plaintiff.
33. He submits that the Defendants did not testify or avail any witness in court and thus the Plaintiff's case remained un rebutted. He submits that the Plaintiff proved her case to the required standard and urged the court to enter judgment in her favour.

## Analysis and Determination

34. Having considered the pleadings, evidence on record and submissions, the sole issue for determination is whether the Plaintiff's claim is merited.
35. It is not in contention that the suit land is neither surveyed nor registered. It also came out from the evidence of the parties that the land was community land. Further, from the evidence, the said land falls under the category of ancestral land where it is held communally. Thus, as per the [Community Land Act](#), 2016, no one has title to it as an individual but each clan or family occupies a specific, identifiable area which they claim as their own. This is, as was testified by PW1 and PW4, family land which, according to the Community, was known as "Eree".
36. Article 63 (2) (d) of the [Constitution](#) of Kenya defines Community Land as follows;  
"Land that is: -
  - i. lawfully held, managed or used by specific communities as community forests, grazing areas and shrines;
  - ii. ancestral lands and land traditionally occupied by hunter-gatherer communities; or
  - iii. lawfully held trust land by the County Governments."
37. Further, Section 12 of the [Community Land Act](#) No. 27 of 2016 defines Community Land as follows;  
"Community land may be held;
  - (a) As communal land
  - (b) As family or clan land,
  - (c) As reserve land, or
  - (d) In any other category of land recognized under this [Act](#) or other written law."
38. It was the Plaintiff's case that the suit land, the Lomatong Eree, measuring 20 acres belonged to her late husband, Lomatong Emase, who had inherited from his parents. She testified that she had lived on the land since 1965 with her 10 children.
39. She contended that the Defendants have since invaded her 20 acres with the intention to sell to third parties. She testified that she complained to the Land Office, where the Land Administrator summoned



the Defendants and ordered each party to remain on their own portion, only one of the two buyers left but the 2<sup>nd</sup> Defendant did not. She produced the letter as P.Exhibit 2.

40. PW3, the Plaintiff's brother-in-law, testified that the suit land belonged to them and denied that it was owned by the Defendants. PW4, the Land Administrator, Turkana County, confirmed that Turkana County was community land, held in trust by the County Government. He confirmed that he had visited the suit land where he found an animal shed that belonged to the Plaintiff. He confirmed that the said land belonged to the Plaintiff.
41. The Defendants filed their Statement of Defence but did not tender any evidence in court. It is this court's view that in as much as the Defendants filed their statement of defence, they failed to call any witness or adduce any evidence for the same to be tested.
42. In terms of the law, a pleading that is filed by any party who does not testify to support it remains a mere allegation. Whatever it purports to 'speak' to or allege remains nothing more than unsubstantiated allegations. Thus, in this case, the Defence was a mere allegation which the Court cannot rely on as a Defence to the Plaintiff's suit.
43. Be that as it may, it is not in dispute that the Plaintiff adduced oral and documentary evidence which remained uncontroverted. It does not follow that if the Plaintiff's evidence is uncontroverted, her claim has to be allowed as prayed. The evidence adduced must measure to the required standard of proof to sustain the merits of the allegations in the claim. In addition, failure by a party to adduce evidence in support of their allegations does not shift the burden of proof of the party's case to the other, as the Defendant in the instant matter. The Plaintiff still has that burden on a balance of probabilities.
44. Sections 107 and 108 of the *Evidence Act* provide that: -

“ 107. Burden of proof

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

108. Incidence of burden

The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.”

45. In the case of *Babola Mkalindi Rhigo & 9 others v Michael Seth Kaseme & 3 Others* (2016) eKLR, the court held as follows;

“ 86 For as long as Trust Land remained unadjudicated and unregistered, it belonged to the local tribes, groups, families and individuals of the area”

46. It is clear from the evidence that the suit property does not have a title deed since adjudication had not been done. It is also undisputed that the land has not been surveyed. It is common ground that the suit land can only be defined by the natural features surrounding it and the homesteads thereon. This was the evidence of all the witnesses, but more particularly, PW1 and PW4 the Land Administrator. It is this court's view that going by the Plaintiff's uncontroverted evidence that the suit land having been inherited by the deceased from his parents, and the Plaintiff was his divorced wife whose children reside



on it. It follows that the suit land then belongs to the Kanamkemer clan where the said Lomatong family occupy and live, and both the Community herein identified as the Kanamkemer clan of the Turkana tribe in Lodwar know it as such. It is the “Eree” of the Lomatong family and not for an individual member thereof.

47. It is this court’s view that in line with Article 63(2)(d)(i) and (ii) of the *Constitution*, the suit property remains community land and no specific individual can claim better rights over community land for and on his/her own behalf to the exclusion of the entire community. The land has, though, been identified as belonging, through the Community system of owning land, to the Lomatong family.

48. It is therefore my opinion that the suit property is thus held in trust by the Kanamkemer clan on behalf of its communities for which it is held and to that extent, the Defendants are therefore not permitted to interfere with the suit property until when adjudication is finalized.

49. Further, Section 27(3) of the *Community Land Act* provides that:

“An individual entitlement under subsection (1) shall not be superior to community title in any way.”

50. Notably, the Plaintiff in her Complaint sought for orders that she be declared as the sole owner of the suit property. However, this court having established that the suit property is communal land, the same cannot be held privately.

51. Parties are bound by their pleadings. In the case of *Odinga & another v Independent Electoral and Boundaries Commission & 2 others* (Presidential Election Petition 1 of 2017) [2017] KESC 33 (KLR) the court held that:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings...”

52. It is the Plaintiff’s claim that she be declared the sole owner of the land. It fails only to the extent that the Plaintiff prays that the land be declared hers solely. It is community land held by the Lomatong Family and can only remain to be as such to the extent that the Community as a whole recognizes it to be so and until it ceases to be community land, in accordance with the laid down legal procedures. Thus, to the extent that the Defendants have not adduced any evidence to show that they have any greater communal rights over the suit land over and above those of the Lomatong family, they have no right to remain on it since the community has not recognized it to be theirs. Additionally, the 2<sup>nd</sup> Defendant, being a son of the family, is not directed to vacate the portion that the family recognizes to belong to their family, but he has no right to sell any part thereof since the land is communal. Furthermore, any dealings by the individuals, such as selling it or allocating it to any other individual as a person or private owners, is void and illegal. Community land cannot be sold by anyone as an individual to the exclusion of the community’s input. That input cannot assume to confer individual rights to deal with the land as private.



53. The upshot of the foregoing is that the Plaintiff's case is dismissed. But the party ordered to vacate the suit land to do so accordingly. Each party to bear its own costs.

54. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED VIRTUALLY VIA THE TEAMS PLATFORM  
THIS 23<sup>RD</sup> DAY OF JULY, 2025.**

**HON. DR. *IUR* F. NYAGAKA**

**JUDGE**

In the presence of:

Ms. Mufutu Advocate holding brief for Mr. Oduor for the Plaintiff.

Mr. Ekusii Lore Advocate for the Defendants

