



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E&L NO. 795 OF 2012**

*Formerly 224/2011*

**CONSOLIDATED WITH**

**E&L 975 OF 2012**

*Formerly HCC 44 of 2012*

**H T.....PLAINTIFF**

**VS**

**J T M.....1ST DEFENDANT**

**J K T.....2ND DEFENDANT**

**AND**

**J K T.....PLAINTIFF**

**VS**

**H T.....DEFENDANT**

*(Suit seeking orders of eviction; parallel suit claiming that land is held in trust by virtue of a woman to woman customary marriage; whether such marriage existed; no witness to such marriage ceremony; no proof of such marriage on a balance of probabilities; claimant declared trespasser and order of eviction issued)*

**JUDGMENT**

**A. INTRODUCTION AND PLEADINGS**

1. This matter is a consolidation of two suits. The first suit, was originally Eldoret HCCC No. 224 of 2011 which was re-titled Eldoret E & L No. 795 of 2012. The second suit, was originally filed as Eldoret HCCC No. 44 of 2012 and later re-titled Eldoret E & L No. 975 of 2012.

2. In the case E & L No. 795 of 2012, H T is the plaintiff whereas J T M and J K are the defendants. She has pleaded that in the year 1987, T married her, in a woman to woman marriage, under the Nandi customary law. She averred that out of the union, they had 15 children, 12 of whom are still alive. She stated that they have all along been residing in the land parcel [particulars withheld] (also described

herein as the suit land), which land parcel she averred was inherited by T, from her (T) late husband K arap M.

3. It is her case that the land is therefore family land, slated to be inherited by the family members, and not to be sold. H has further pleaded that T filed a suit against her, being Eldoret HCCC No. 25 of 2005, in which T alleged that H was not a wife, and that she was illegally squatting in the suit land, and sought her eviction. She has averred that while the suit was pending, T transferred the suit land to J KT, the second defendant in her suit. This she says was done fraudulently, and she pleaded the following particulars of fraud. :-

(a) *Misleading the Land Registrar that there was a valid court order ordering the restriction against the title No. [particulars withheld] to be removed.*

(b) *Causing the said parcel of land [particulars withheld] to be transferred on 3/3/2010 whilst the said case was still pending in court.*

(c) *Causing a transfer to be registered when there was no valid consent from the Land Control Board to back the said transfer.*

(d) *Transferring the said land knowing that the land was a family land which was being held by the 1st defendant in trust for the plaintiff and the children of the marriage.*

4. In her suit, H asked for the following orders :-

(a) *A declaration that the transfer of parcel No. [particulars withheld] from the first defendant (T) to the second defendant (J) was fraudulent and unlawful in view of the fact that HCCC No. 25 is still pending in court for disposal.*

(b) *That an order of cancellation do issue cancelling the transfer of parcel No. [particulars withheld] on 3/3/2010 to the second defendant (J) and have the registration of the land revert back to the 1st defendant (T).*

(c) *Damages.*

(d) *Costs of this action*

(e) *Interest.*

(f) *Further or other relief as this Honorable Court may deem fit.*

5. T filed a defence in which she denied the existence of any marriage between herself and H T. She also denied any connection or relationship with the children alluded to by H. She pleaded that the said children were gotten out of a marriage between H T and her (H) husband, one B L alias R. She averred that in the year 1987, she permitted the plaintiff, then a mother of 6 children, to reside on the suit land as licensee which licence was withdrawn in the year 2001, but that H and her children have refused to move out. She also pleaded that the matters in the suit were *res judicata*.

6. The second suit, E & L No. 975 of 2012 was filed by J K Too, as the plaintiff, and he named H T as defendant. In that case, J pleaded that he is the registered proprietor of the land parcel [particulars withheld]. It was his case that he had given notice to H T to vacate the said land but that she had declined. In the suit, J sought the following orders :-

(a) *A declaration that the defendant is a trespasser on the land parcel [particulars withheld].*

(b) *An order of eviction.*

*(c) General Damages for trespass and unlawful encroachment onto the plaintiff's parcel of land [particulars withheld].*

*(d) Costs of the suit plus interest.*

7. H T filed a defence and counterclaim which was pleaded in similar terms to her plaint in the suit E & L No. 795 of 2012.

8. It will be discerned that the contest surrounds the ownership of the land parcel [particulars withheld] , which land measures 8.5 hectares and is situated in Nandi District. Having regard to the pleadings in the two suits, I ordered the two suits to be consolidated and be heard together, since to me, the matters raised by the parties were similar, and the suits could not be heard separately. I gave directions that the two consolidated suits do proceed with T and J as plaintiffs, and H T as defendant holding a counterclaim.

## **B. THE EVIDENCE OF THE PARTIES**

### **(i) The plaintiffs' evidence**

9. T testified as the first witness. She is an old lady whose age I estimated to be above 90 years. She was physically frail and was making use of a wheelchair to move around. That said, she had a sharp mind and was fairly eloquent in her native Nandi language. She testified that she lives in [particulars withheld] area but not on the suit land. She knew J as her relative and she testified that she transferred the suit land to J out of her own free will as a gift. She no longer has any interest in the land.

10. She described H T as her former worker who was brought to her by one Andrea. She had a co-wife called S, and H T was initially meant to work for S, but since S already had another worker, H was referred to her. She thus stated that H came into her home as a worker. She testified that H had children when she came to work for her. She had initially left the children but she later brought them. She firmly denied ever having any engagement to m H and denied that H sired any children for her. She knew some of H children and denied that she gave any of them names, or participated in the circumcision ceremonies of any of the boy children. She was aware of three daughters of H, who came to her home while still young, but who had since grown up and gotten married. She denied ever having been involved in their marriage ceremonies. She stated that H was married to B L who is also known as R. H came to know R while she was at T home. She denied ever having chosen Roosevelt to be the husband of H.

11. In cross-examination, T testified that she was married to K a M, who was from the "Kaborok" clan. When he died, the land that he had was sub-divided between T and S (her co-wife). She stated that J is married to her niece, the daughter of one a C who are from the "Kapkessio" clan. She testified that there was nothing wrong in Nandi custom from a person of one clan getting land from the other. She agreed that S, her co-wife, took a woman under a woman to woman marriage. S wife bore some children who were given the family name.

12. She was aware that H came from Ngeria area but she denied having gone to Ngeria in order to take H as a wife. She testified that only one of the boy children of H were circumcised in Kapsoen (where the suit land is situated), the rest having been initiated in Ngeria. She did not attend any of the ceremonies. She also denied that the engagement ceremonies of the girls was done in Kapsoen.

13. She denied ever having sold some land to one Peter Ngetich (who later testified as DW-2) but only leased it out to pay the hospital bill of one of H children who was sick and latter died. She did not know where the child was buried as at that time she had gone to her original home in Kilibwoni. She did not attend the funeral.

14. She described the Nandi woman to woman marriage. She stated that it is conducted when a married woman has no children of her own to keep the lineage of the husband. The new woman is expected to have a "male friend" so as to sire children. The children will not belong to the "male friend" but to the home where the woman is married. She reiterated that H was never married to her but was only a worker.

But she never paid her a salary. She also complained that H sold all her cows. She denied having chosen R to sire children for her and asserted that they found each other by themselves. She emphatically stated that H does not deserve a share of the suit land.

15. PW- 2 was J K T (J). He is married to a niece of T. He testified that T gave her the suit land as a gift, probably because, he has been assisting her with medication, upkeep and general maintenance. As far as he was concerned, all due process was followed, including obtaining consent of the Land Control Board. He became registered as proprietor on 6 March 2010. He denied that there was any restriction or encumbrance that would have hindered the transfer of the suit land into his name. He was however aware of a pending suit between H and T over the suit land. In his view, the transfer was done in accordance with the law and there is no reason for his title to be cancelled. He asked that H be evicted from the land and for damages.

16. In cross-examination, J stated that he first met T around the year 2005 when he was courting his wife to be. He became aware of the case between H and T, around the year 2006 but he never bothered with it. He got married to his current wife in the year 2009. At that time T was living in her brother's home, one C. C is father to J wife. He was not sure who was living in the suit land as he never visited the area. The first time he visited the land was when he issued an eviction notice to H in the year 2011. He was unable to access the land as H confronted him with a panga and chased him away, an act that caught him by surprise, as he was the registered owner of the land. He insisted that due process was followed in obtaining title to the land. He reiterated that consent of the Land Control Board was obtained and there was no restriction to any transaction. There had been an initial restriction, pending hearing of the suit Eldoret HCCC No. 25 of 2005, but the same was removed by a subsequent entry. He was aware that the suit land was T share of her ancestral land. He saw nothing wrong in the land being transferred to him.

17. PW- 3 was C K K. He is brother to J wife, thus a nephew to T. He testified that H and R live together as husband and wife and that they have children together. He stated that T has been living with them since early 2000, because H failed to take good care of her, and even threatened to kill her. He further testified that he was aware that at some point, H leased part of the suit land without the permission of T. When T moved into their home, she left some cows, all of which, he stated, had been sold by H. He was aware that T had transferred the suit land to J of which their family had no objection. He was aware that one of H children had died the previous year, but none of their family attended the burial, and neither did T. He also testified that T has never attended any of the circumcision ceremonies of the boy children of H. He stated that he has also never attended any marriage ceremony of the daughters of H and neither has T.

18. In cross-examination, he testified that their family is the "Kapkesio" family, whereas the family name of where T was married is called "Kapjwang". He agreed that when it came to ceremonies it is the family where the person came from, who would arrange such ceremony, and invite the other family. He was not aware of any marriage between Hand T, and as far as he was aware, H was merely a worker. He was aware that T had only one child, a girl, who died a while ago.

With the above evidence the plaintiffs closed their respective cases.

## **(ii) Evidence of the defence**

19. H testified as the first defence witness. She testified that she previously lived in Ngeria with her parents, before moving to the suit land in Kapsoen in the year 1987, to live with T. She stated that she was approached by A, as there was an old lady (T), who did not have children and who wanted a person to go and sire children on her behalf. She agreed, and in the month of February 1987, she went with A to meet T. T agreed to marry her and accepted that she could stay within the home and sire children for her. She stated that later they involved their respective families.

20. She testified that T family came to her home in August of 1987. She stated that T came to their home in Ngeria with S, her co-wife, and several neighbours whom she named, and some people from the "Kaborok" family. They came for the "Koito", which is an engagement ceremony. In the ceremony, she stated that her parents gave her out to T so that she can be her wife. She stated that there was an

agreement on dowry, which was put down in writing, but of which she was not privy to the details. After the ceremony, they travelled back the same day to Kapsoen and she settled in the home. There was a time her father came to Kapsoen, and T gave him one bull.

21. Before she got married to T, she had 4 children, 2 boys and 2 girls. She moved with these children, save for one boy, to T home, and T accepted them as children of the home. She stated that since the year 1987, she has been living in Kapsoen and that she got more children, 10 in number, 6 girls and 4 boys. Three are now deceased, ( 1 boy and 2 girls), one of whom ( a girl) died at birth. She stated that one of the girls, Stella, died in the year 1991 and was buried on the suit land, with T being present. The other child, G, died in the year 2003, and was buried on the suit land. At that time T had left to live with her brother, C. The one who died at birth, died in the year 2002, and was also buried in the suit land with T being present. She testified that prior to his death, G had been admitted in hospital in Eldoret, and that it was T who paid the hospital bill after selling one acre of the land to Peter Ngetich. Prior to going to T home, she was not married and has not got married to anybody since moving to live with T.

22. She denied that A took her to T home to be a worker. She stated that T married her under a woman to woman marriage so as "to light her fire" i.e to sire children for her. She stated that the children belong to the home where the woman is married and that they considered Kapsoen as their home. She testified that one of her children lives in the USA and comes home to Kapsoen. Another daughter who was married, differed with her husband and came back to Kapsoen. She testified that two of her boys were circumcised in Kapsoen, and that T was present, and that she even gave them the name "a M" which was the name of T husband.

23. Of her daughters, she performed the "Koito" ceremony for two of them in K and T was present. So too the family of "Kapjwang" and also T brother, C, was present. One of her deceased girls had been married informally, and "Koito" was done before she was buried by her husband in the year 2012. She testified that if one is employed as a worker, she cannot be allowed to circumcise her sons at her place of work, and neither can a worker be allowed to perform "Koito" for her daughters, at her place of work, but at her home.

24. She testified that she lived in harmony with T until the year 2005. T had gone to her home and then decided to evict her from the land. That is when the case Eldoret HCCC No. 25 of 2005 was filed. She testified that she does not have a good relationship with PW-3 or their family. She stated that she is married to the "Kaborok" family, of which she has no problem with, and that they recognize her as the wife of the home. She denied being married to R.

25. She testified that while the case Eldoret HCCC No. 25 of 2005 was proceeding, a restriction was placed to stop dispositions on the suit land until the conclusion of the case. When she got a demand from J to move out of the land, she visited the lands office at Kapsabet, only to find that the restriction had been removed, and the land transferred to J. It is then that she filed the current suit. She stated that J cannot own the land because he is from another family and that the land is rightfully her's.

26. In cross-examination, H testified that she first came to know A in January 1987 when he approached her. They had no relationship. A came back in February to fetch her to take her to T. She denied that she was taken to S home. She testified that she went to T home to be married as T had only one child who died. At that time, she had 5 children sired by two different fathers. She denied that in Nandi custom, the children are regarded as children of the father.

27. She stated that her marriage ceremony was in August and that they went to Ngeria using the vehicle of one L, which had been hired by T, and decorated for the ceremony. She stated that this was the first time for T to visit her home and see her family. No other ceremony was performed save for this one. She was pressed that in Nandi custom, the woman is picked from her home, and does not go together with her husband for such ceremony but she answered that T insisted that they go together. She testified that Raphael, the brother to S, conducted the ceremony on their behalf.

28. She agreed that she had about 9 children with R, but denied that she was married to him. R comes

from the "Kaptabendo" family which has no relation with the "Kaborok" family. Put to her that in Nandi custom it has to be a person from the family to sire such children, H stated that it was the choice of T that she should sire children with R.

29. The vehicle used to travel to the ceremony was owned by the father of R. Roosevelt and two of his brothers were also present in the ceremony. Of the dowry, her father came for one cow and T gave him a bull, but the full dowry has not been satisfied yet. She testified that she has married daughters and that she received the dowry paid for them because T was away. T left in April 2004.

30. She testified that it is at the "Koito" ceremony that a woman is given away and dowry agreed. There can be an optional wedding ceremony. The wedding ceremony is "Tumto", but after the "Koito", a man and woman can live together and have children. She also stated that there is another ceremony called "Bamwai" where the parents of the bride and parents of the groom exchange some oil. The oil is applied to the parents of the groom. She stated that the "Bamwai" ceremony is done at the same time as the "Koito" and that it was done in her ceremony, but no oil was applied as it is not mandatory. She stated that there was no "busaa" at her ceremony, as these days it is not necessary. No "segutik", a ring of grass, was given. Neither was "sinendet", a type of grass, placed around the neck. These she said, were optional. She stated that T only visited her home once during the "Koito" ceremony. She stated that she has never asked for a divorce. She denied having leased out any land to R and stated that it was T who did so, and also leased land to a brother of R for which there was a written agreement.

31. DW- 2 was P KN. He stated that in the year 1991, T sold to him an acre of land as they needed to pay a hospital bill for one of H children. The land was sub-divided and he got title to the one acre. What remained to T was renamed after sub-division and it is the suit land. He testified that the relationship between H and T looked good and that they lived as a family. In 2002, T called him as she wanted to sell another acre to cater for the hospital bill of G, another of H sons. They agreed at a price, and he paid part of it directly to the hospital. The second acre, has however not been transferred to him. He is related to T as his mother calls T aunty.

32. In cross-examination, he stated that he was familiar with the traditional "Koito" ceremony, which he explained is performed at the home of the bride, and that elders from both homes need to be present. It is at this ceremony that dowry is agreed. Usually it is in the form of cows or goats, but money, called "asoa" may also be included. He also stated that oil from the milk of a cow is applied among the parents of bride and groom, and thereafter, the parents call each other "bamwai". The oil is applied during the "Koito" ceremony. A marriage ceremony may then be held later. This he called the "Katunisiet" ceremony which is done at the home of the groom. He was not certain whether in a woman to woman marriage the "Katunisiet" ceremony is performed. He stated that he himself did not go to any "Koito" ceremony between Hand T.

33. He was not too familiar with the rites of a woman to woman marriage although he knew that it is done to have children for the family. He has never attended one. He stated that traditionally, the woman had to sire children with a man from the clan, not a "tiondo" (a person outside his clan), or one selected by the head woman, although the rule is not strict.

34. He testified that it is normal for an elderly person to get a "cheplakwa", who is a maid or househelp. He stated that a "cheplakwa" can come with her children. He denied that H was a "cheplakwa", since they went with her to the Land Control Board when he was seeking transfer of the one acre that he purchased, and that this was not normal for a "cheplakwa". He denied that R was husband to H but agreed that he has sired children with her. He denied that he was assisting H in the case, so that he can get title to the other extra one acre that he later bought.

35. DW-3 was one Thomas Tenai, a village elder in Kapsoen, aged about 80 years. He stated that he came to know H in 1987 when T introduced her to him, and informed him that she (H) was her wife. He testified that since 1987, T has been living on the suit land. He was also aware that in 1991, T sold to DW-2 an acre of land to pay for the hospital bill of one of the children of H. In 2002, T sold more land to DW-2 as another child of H had fallen sick. In cross-examination, he testified that the process of marrying

in a woman to woman marriage was similar to the usual marriage between a man and a woman. He stated that he has however not been to one. He himself did not attend the "Koito" of H as he was never informed. He however stated that he heard that one was done. He stated that he was the one who recorded the agreement between T and DW-2 in 1991, and was also present in 2002, when the other acre was sold.

36. He was familiar with payment of dowry in Nandi custom, and he testified that dowry is negotiated and is usually in cows. The first cow could be a heifer called "chemwai" or a bull. He had never been called to resolve any conflict between H and T.

With the above evidence, the defendant closed her case.

### C. SUBMISSIONS OF COUNSEL

37. Mr. P.K. Birech, learned counsel for the defendant, submitted that the land was not properly transferred to J, as there was a restriction in existence. He submitted that the transfer was meant to "embarrass" the proceedings in Eldoret HCCC No. 25 of 2005, and that having the transfer stand, would be an injustice and would rob the defendant from ventilating her case. He submitted that the title should be cancelled so that the parties can go back to have the case Eldoret HCCC No. 25 of 2005 heard on merits.

38. He further submitted that H had demonstrated that there was a husband and wife relationship created between her and T. He questioned why T would do so much for H if indeed H was merely a worker. He further submitted (without pointing to any specific provision of the law) that the current constitutional provisions protected the rights of spouses in the property, and that the Land Registration Act, also puts "onerous conditions on registered owners of property to take into account the wishes of the spouses." He submitted that J could not legitimately take the suit land without considering the position of H as wife of the seller, T. He submitted that T title had become extinguished by the provisions of S. 7 the Limitation of Actions Act.

39. He submitted that S.28 and S. 30 of the Registered Land Act (CAP 300) provided for overriding interests including prescriptive rights (S. 30 (f)) and the rights of persons in possession (S. 30 (g)). He submitted that these provisions protected the rights of spouses. He also relied on S. 24, 25, 27 and 28 (a) and (b) of the Land Registration Act, 2012.

He relied on *Mukangu v Mbui (2004) 2 KLR 256*, *Kanyora v Kinyanjui (2005) 1 KLR 29*, *Kimani v Kimani (2006) KLR 292* and *E. Cotran, Restatement of African Law, Volume 1*.

40. On the other hand, Mr. R.M. Wafula, learned counsel for the plaintiffs, submitted that there was no bar to T disposing of the suit land. He referred to a ruling of 7 December 2011 in the suit Eldoret HCCC No. 25 of 2005. He submitted that the ruling was in respect of an application seeking to summon T to explain how an order of injunction that was issued on 31 March 2005 was raised. Mr. Wafula submitted that in the ruling, the said application was dismissed. He submitted that there was never an order restraining T from disposing of the land. He submitted that there was no appeal preferred against the ruling and that H has raised similar issues in this suit, which would then offend the *res judicata* rule. He submitted that in a ruling delivered on 2nd December 2009, an application by H to amend her Defence to include a counterclaim was denied. He submitted that the claim that H has raised in this suit, is more or less what was raised in the suit Eldoret HCCC No. 25 of 2005, and that this suit is therefore *res judicata*. He further submitted that in dismissing the application to amend, the court in essence ruled that H did not have a claim against T over the suit land.

41. Mr. Wafula was also of the view that the transfer of the suit land to J was done above board. He submitted that T was the absolute proprietor of the suit land and had unlimited powers over the land including the right to sell the land. He submitted that T could transfer the land as a gift *inter vivos*, and since T does not wish to have the land any more, there was no basis for reversing the transfer. He submitted that H has failed to prove that the transfer was done fraudulently. He submitted that even if H was a wife, T had no obligation to seek her consent before transferring the suit land. He relied on the

decision in the case of *Jacinta Wanjiku Kamau v Issac Kamau Mwangi & Another, Civil Appeal No. 59 of 2001*. He also relied on the case of *Marigi v Muriuki & 2 Others (2008) 1 KLR*. He further submitted that customary law rights cannot override statutory rights and relied on the case of *Esiroyo v Esiroyo (1973) EA 388* and *Obiero v Opiyo (1972) EA 227*. He submitted that H cannot rely on the present Constitution, nor any provisions of the Land Registration Act to assert her claims, as she cannot benefit by retrospective action. He distinguished the case of *Mukangu v Mbui* as being one between father and son and submitted that *Kanyora v Kinyanjui* and *Kimani v Kimani* dealt with marriages between a man and a woman.

42. He further submitted that there had been no proof of any woman to woman marriage by H and he relied on *Cotran, Restatement of African Law*, Vol 1 at p19. He submitted that a stranger in the name of A could not have been involved in looking for a wife, and that H, given that she had children, was not suitable for a woman to woman marriage. Relying on *Cotran*, he submitted that according to custom, it was a man from the woman's husband's clan who is to have sexual intercourse with the girl for purposes of having children in a woman to woman marriage. He submitted that T could not have chosen R to sire children with H, and at the same time lease land to him. He further submitted that when T moved away from the home, he cut all links with H showing that their relationship was lost and only that of employer/employee. He submitted that a common law marriage could not be presumed in the circumstances, and that long cohabitation only existed between H and R.

#### **D. DECISION**

It with the above pleadings, evidence, and submissions of counsel that I need to determine this suit.

43. I have already set out in Part A, the prayers sought by both plaintiffs and defendant and I need not reiterate them here. But briefly, what H T asserts is that the transfer of the suit land to J was done fraudulently, whereas what J wants, is an affirmation that he is the registered proprietor of the suit land and wants H T evicted therefrom. It is H position that the transfer of the suit land to the name of J was fraudulent, and I had also in Part A, set out the particulars of alleged fraud.

44. No issues were agreed by the parties and indeed only Mr. Wafula drew some issues for determination. Mr. Wafula drew 22 issues which in my view were too open ended and repetitive and are not helpful at all. In my view, this suit can be well determined by resolving the following issues :-

(1) *Whether this suit is res judicata.*

(2) *Whether the transfer of the suit land from T to J was fraudulent on the reasons given by H T.*

(3) *Whether the title of J is liable to be cancelled and whether the title should revert back to the name of T.*

(4) *Whether H T has any rights over the suit land or whether she should be declared a trespasser on the suit land.*

(5) *Whether any party is entitled to damages.*

#### **Issue 1: Is this suit res judicata**

45. It was the argument of Mr. Wafula that this suit is *res judicata* as the issues herein were either resolved in the suit Eldoret HCCC No. 25 of 2005 or are pending in the said suit.

46. Two rulings in the suit Eldoret HCCC No. 25 of 2005 were referred to, and annexed, by Mr. Wafula in his submissions. The first ruling is that delivered on 2 December 2009. It is a ruling in respect of an application by H T to amend her Statement of Defence to include a counterclaim for quiet possession and the right to occupy the suit land by virtue of being wife to the plaintiff in the suit (T). That application for amendment was refused by Mwilu J (as she then was) for various reasons. The second ruling is that

delivered on 7 December 2011. That ruling was in respect of an application filed by H T, dated 16th August 2011, seeking the following orders :-

(a) *That the plaintiff be summoned to court to explain how the court orders of injunction issued on 31st March 2005 were raised.*

(b) *That a Commission to examine J K on how he acquired the suit land be issued.*

(c) *That the court does investigate or commission an investigation of how the Court Orders registered on 3 February 2010, were obtained and registered.*

(d) *That the court restores the suit title to the plaintiff and the orders pre-existing before 3rd February 2010 be re-registered.*

(e) *That the plaintiff be compelled to provide for the 1st defendant and her children.*

(f) *Costs.*

47. The application was heard by Azangalala J (as he then was) and he dismissed it. He held that the applicant, (H), had not demonstrated that there was any order issued in the proceedings restraining T from dealing with the suit land, and on his part, he detected none. It was his firm opinion that there was no order issued by the court which directed the Land Registrar to register a restriction. He held that there was no impediment to the transfer of the suit land by T to J.

48. The question that I need to address is whether in light of the above rulings and the existence of the suit Eldoret HCCC No. 25 of 2005, the claim by H T herein is *res judicata*.

49. *Res judicata* is a legal principle in which a party is barred from re-litigating an issue which has either been decided before in previous proceedings or is pending determination. In our law, the principle of *res judicata* is captured by the provisions of Section 6 and 7 of the Civil Procedure Act. They provide as follows :-

*S. 6 No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*

*S. 7 No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.*

*Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.*

*Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.*

*Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.*

*Explanation.(4)—Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.*

*Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.*

*Explanation. (6)—Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.*

50. Mr. Wafula's argument is that the prayers being sought by H T in her case were determined by both Mwilu J (as she then was) and Azangalala J (as he then was) in the two rulings of 2 December 2009 and 7 December 2011. Mr. Birech unfortunately did not make any submissions on this important point that was raised by Mr. Wafula.

51. It will be discerned that the pleadings of H T make reference to the transfer of the suit land to J as being fraudulent for the reason that there was a restriction when the transfer was made. In my view, this matter was conclusively dealt with by Azangalala J in his ruling of 2 December 2009. Azangalala J decided that there was no proper restriction that was registered in the title and that there was nothing to bar the transfer of the suit land from T to J. That ruling stands, and if H T was aggrieved by it, then the avenue that she had was to appeal against it, but not to file a new suit so that the issue can be re-litigated.

52. In the case of ***Kenya Commercial Bank Ltd vs Muiri Coffee Estates Ltd & 3 Others, Civil Appeal No. 100 of 2010***, consolidated with ***Bidii Kenya Ltd vs Muiri Coffee Estates Ltd & 3 Others, Civil Appeal No. 106 of 2010***, the Court of Appeal stated as follows :-

*"If a court of competent jurisdiction has adjudicated over a matter between parties or parties whom they claim and determined the issues raised in such matters then the same parties or others litigating though they are barred from re-litigating the same issues before any other court. Such determination inevitably includes judgments or orders issued following by consent of the litigating parties."*

53. There can therefore be no second suit aimed at relitigating an issue that has been previously decided. I am barred by Section 7 of the Civil Procedure Act from revisiting the question whether the transfer of the suit land from T to J was done when there was in existence a restriction barring such a transfer.

54. The only issue that I think was not litigated in the application was whether T could transfer the said land to J by reason that the said land is family land. I think this issue is fresh and has not been decided in the former suit. Neither could it have been a ground of attack in that suit because J, the new registered owner of the suit land, is not a party to the suit Eldoret HCCC No. 25 of 2005. I will now deal with it under the second issue.

***Issue 2 : Whether the transfer of the suit land from T to J was fraudulent on the reasons given by H T.***

55. I have already held that the only matter that I can deal with, and which is not *res judicata*, as regards the transfer of the suit land to J, is whether the transfer to J, can be said to be fraudulent on the reason that the land is family land.

56. It is the case of H T, that she is a wife of T through a woman to woman marriage performed under Nandi customary law. It is her case that by virtue of being a spouse to T, T could not transfer the suit land as the same is family land, and instead she needed to be involved in the sale. The position of T is that she never took in H as a wife under Nandi custom, but instead, H was her worker, and that she allowed her to stay on the suit land by virtue of a licence.

57. It is trite law that the burden of proof is on the party asserting the existence of any question of fact. In this case, the question of fact is whether or not there existed a woman to woman marriage between H T and T. The burden of proving such marriage is certainly on H T, as it is her who asserted that such marriage exists. DW-2 and DW-3 testified that the process of a woman to woman marriage is more or less similar to that of a traditional marriage between a man and a woman. A ceremony, known as the "Koito" ceremony has to be performed. This was said to be an engagement ceremony, although it appeared to me

that in all respects, after such ceremony, the persons are to be considered as man and wife. Dowry is indeed negotiated at this ceremony and can thereafter be paid either wholly or in installments. An optional formal marriage ceremony which was variously termed as "tumto" or "katunisiet", could be held, but this did not seem to affect the fact that the two persons are in every sense man and wife after the "Koito" ceremony.

58. It was the assertion of HT that a "Koito" ceremony was held. She testified that they went to her home together with T and that dowry was agreed. She testified that she was accompanied by several persons for the ceremony. On the other hand, Ti categorically denied having gone to H home in Ngeria. As I earlier stated, the burden of proving that such ceremony was indeed held rested on H. Apart from her own oral evidence, no other proof was tendered to prove that such ceremony was ever held.

59. No person who is said to have participated in such a ceremony was called as a witness. If such ceremony was ever held, there would have been nothing easier than to call the person who presided over such ceremony so that he can state categorically, that he indeed presided over it, or to at least call the witnesses who were said to have been present in such ceremony. None was called by H. Neither were the parents of H called to confirm that they indeed gave out H to T under the woman to woman marriage. Neither was A, the person who is said to have connected H to T, called as a witness. He would no doubt have shed light as to whether he introduced H to T for purposes of H being a worker, or for purposes of H being taken in as a wife under the Nandi custom of woman to woman marriage. In the absence of such evidence, which I consider to be crucial and as going the root of the determination of whether or not a "Koito" was indeed held, I am of the view that H T has, in the face of the denial by T, failed to prove on a balance of probabilities that there was ever such ceremony. In the absence of such proof, I am unable to hold that H was taken by T as a wife under Nandi customary law.

60. To be fair to H, there was a belated attempt to include more witnesses at the defence stage. Vide a ruling dated 27 January 2014, I held that this attempt, coming so late in the day, was unfair to the plaintiffs and in contravention of the Civil Procedure Rules, 2010. To my knowledge, there has been no appeal to that ruling.

61. I am aware that evidence was led that H was resident at the home of T for a considerable duration of time, that T took care of H children as her own, and that some of the children were married or buried at the home of T. But these alone are not conclusive of there having been a woman to woman marriage under Nandi custom. The mere taking care of another woman's children, or allowing such children to use the premises as their home, is not adequate to prove a woman to woman marriage under Nandi customary law. It could very well be that H was a "Cheplakwa", who from the evidence, was said to be a worker who is permitted to live with her family at the home of the person that she works for.

62. I have also found it curious that H sired children with R, who is not from the clan of T former husband. In **Cotran, Restatement of African Law, Vol 1 page 117** it is stated as follows on a woman to woman marriage.

*" A woman past the age of child-bearing and who has no sons, may enter into a form of marriage with another woman. This may be done during the lifetime of her husband, but is more usual after his death. Marriage consideration is paid, as in regular marriage, and a man from the woman's husband's clan has sexual intercourse with the girl in respect of whom marriage consideration has been paid. Any children born to the girl are regarded as the children of the woman who paid marriage consideration and her husband."*

63. It will be seen from the above that it is a man from the woman's husband's clan who is to sire the children. That said, I am also alive to the fact that customs do change, and it could very well be that the above position has been modified over time. I am aware that the witnesses stated that it is not a must for the person to be from the husband's clan so long as she is chosen by the woman husband. It was admitted by H, that she sired children with R, while she was resident at the home of T. She stated that R was chosen by T to be the one to sire children on her behalf. R was of course not called as a witness in this case to confirm this. I think that it was necessary for R to testify so that he may confirm that he indeed

sired children for T given that he was not from the clan of T husband.

64. The upshot of the above is that I am not convinced from the evidence on record, that T married H under the Nandi woman to woman customary law. The children sired by H cannot be considered to be the children of T, unless T voluntarily accepts them to be her own, which of course she has not. It follows therefore that H T cannot claim that she is part of the family of T. Since she is not part of the family of T, I do not see how she can claim any interest in the suit land nor have the locus to challenge the transfer of the suit land from T to J. She can also not benefit from any alleged overriding interest arising from a trust for none exists.

65. I am therefore unable to disturb the transfer of the suit land from T to J. In the same vein, it is unnecessary for me to consider the wealth of authorities tabled which touch on customary or family trust, for in this instance, I have already held that H, has failed, on a balance of probabilities, to prove that she was part and parcel of the family of T. In absence of proof that she was family, the question of overriding interest does not arise. There was an attempt to bring forth Section 7 of the Limitation of Actions Act, CAP 22, but H case is not one of adverse possession, and even if it were, her position in the suit land was that of licensee under which no claim for adverse possession can be entertained. The provisions of Section 7 of the Limitation of Actions Act, therefore cannot assist H.

I turn to the third issue.

***Issue 3 : Whether the title of J is liable to be cancelled and whether the title should revert back to the name of T.***

66. I have already held that in so far as the challenge of H touches on the argument that there was a restriction, that argument is already *res judicata*. I have also held that there is no evidence that H was wife of T under the Nandi woman to woman customary marriage. I cannot therefore cancel J title on the foregoing reasons. There was an additional pleading that the title of J is liable to be cancelled for want of consent of the Land Control Board, as required by the Land Control Act, CAP 302, Laws of Kenya. However, the plaintiffs tendered evidence that the transaction between T and J received the approval of the Land Control Board and a consent to transfer was duly issued. The same was produced as an exhibit. H T, apart from pleading that the consent of the Board was not issued, did not call any evidence to demonstrate that the consent of the Land Control Board, which was tabled in court, was not validly issued. I have nothing before me that would lead me to the conclusion that the consent of the Land Control Board was not issued in line with the Land Control Act, CAP 302 , Laws of Kenya. The argument that the transfer was fraudulent for want of consent of the Land Control Board is therefore unsupported by evidence.

I now turn to issues 4 and 5 which I can combine.

***Issue 4 : Whether H T has any rights over the suit land or whether she should be declared a trespasser on the suit land and Issue 5: Whether any party is entitled to damages.***

67. Again I have already held that there was nothing fraudulent about the transfer of the suit land from T to J. I have also held that it cannot be said that the suit land is being held in trust for H, since H has not proved that she is a wife of T. The upshot of my holdings on these issues is that I have found that H T has no enforceable rights over the suit land.

J is therefore the proper registered owner of the suit land. As proprietor, he is entitled to all proprietary rights including the right of exclusive possession. These rights are set out in Section 25 of the Land Registration Act, Act No. 3 of 2012 which provides as follows :-

*S. 25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject—*

*(a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and*

*(b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register.*

*(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.*

68. I have already held that H has no rights over the suit land and therefore J cannot be said to be holding the land subject to any trust in favour of H. Her occupation of the suit land appears to me to be one based on a licence which can be terminated at any time, and which was indeed terminated, when J sent her a demand letter asking her to vacate the suit land. H therefore no longer holds a licence to be on the suit land, and she is therefore a trespasser on the suit land. J is therefore entitled to a declaration that H T is a trespasser on the suit land and is also entitled to have her evicted from the suit land.

69. J also made a claim for damages. However, no evidence was led as to the extent of loss that J may have suffered because of the continued occupation of the suit land by H T. I will therefore only award a token Kshs. 50,000/= as damages in recognition of the fact that his rights as proprietor were infringed by the continued occupation by H of the suit land, despite being given notice to vacate.

## **E. CONCLUSION AND FINAL ORDERS**

70. I have dealt conclusively with the claims of both H T, T M and J K T. In brief, the case of H fails and the case of J succeeds. The only issue I am left with is costs. Costs are in the discretion of the court and ordinarily follow the event. I see no reason why costs should not follow the event in this case and I award the costs of the consolidated suits to both T and J.

I now issue the following final orders :-

**(1) I declare that the transfer of the land parcel [particulars withheld] from J T M to J K T was not fraudulent but was in accordance with the law.**

**(2) I declare J K T to be the lawful and absolute proprietor of the land parcel [particulars withheld] vis a vis H T.**

**(3) I declare that H T has no interest in the land parcel [particulars withheld] but only occupied the land as a licensee.**

**(4) I declare that H T is a trespasser on the land parcel [particulars withheld] her licence having been revoked by the registered proprietor.**

**(5) I hereby award J KT, general damages for trespass as against H T for the sum of Kshs. 50,000/=.**

**(6) I hereby order H T to vacate the suit land forthwith and no later than 3 months from the date hereof and if she fails to do so within the stipulated time, J KT may apply for an order of her eviction and H T will bear the costs of such eviction.**

**(7) H T shall bear the costs of the consolidated suits.**

It is so declared and ordered.

**DATED AND DELIVERED AT ELDORET THIS 30TH DAY OF JUNE 2014**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT AND LAND COURT AT ELDORET**

*Delivered in the presence of:*

*Mr. R.M. Wafula for the plaintiffs.*

*Mr. P.K. Birech for the defendant.*