



REPUBLIC OF KENYA



KENYA LAW
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**Muntarin v Mamo & another (Environment and Land Appeal
E043 of 2022) [2025] KEELC 223 (KLR) (30 January 2025) (Judgment)**

Neutral citation: [2025] KEELC 223 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL E043 OF 2022
LC KOMINGOI, J
JANUARY 30, 2025**

BETWEEN

YIASI MUNTARIN APPELLANT

AND

ALI KEROW MAMO 1ST RESPONDENT

MASIAYA OLE MUNTARIN 2ND RESPONDENT

*(Being an Appeal from the Judgement of Hon. B. Cheloti in Kajiado Chief
Magistrate's Court Case No.E 117 of 2021 delivered on 30th August 2022)*

JUDGMENT

1. In her judgment dated and delivered on 30th August 2022 in CM Case No. 117 of 2021, the learned Hon. B. Cheloti held:

... This leaves the Court with the question as to whether or not the suit property comprised of matrimonial property and thus required spousal consent before it was sold to the Plaintiff. Determination of matrimonial property falls within the ambit of the High Court rendering this Court incompetent as it lacks jurisdiction to entertain this suit. The suit and counterclaim are struck out with no orders as to costs..."

2. Aggrieved by the said Judgement, the Appellant filed this Appeal seeking the setting aside of the judgement and that her Counterclaim in the Lower Court be allowed on grounds that:
 1. The learned trial Magistrate erred in law in dismissing the Appellant's suit against the weight of evidence before court.
 2. The learned trial Magistrate erred in law and in fact by not considering the evidence tendered by the Appellant whose testimony remains uncontroverted.



3. The learned trial Magistrate erred in law and in fact by finding that the matter is a matrimonial matter and not an environment and land matter.
4. The learned trial Magistrate erred in law and in fact by finding that the Appellant failed to prove liability against the Respondent against the weight of evidence presented.
3. The Respondents who were duly served did not participate in this appeal.
4. This appeal was canvassed by way of written submissions.

The Appellant's submissions

5. On whether the suit property constitutes matrimonial property, Counsel submitted that the learned Trial Magistrate erred in dismissing the Appellant's counterclaim because the Appellant and the 2nd Respondent were married under Maasai Customary Law and lived together on the suit property for over 20 years. Sometime in 2020, she realised that the 2nd Respondent intended to dispose of the property without her consent she placed a caution to prevent any transactions. However, on 11th December 2021, the 1st Respondent hired goons who destroyed the suit property thereby causing the Appellant's eviction. She then discovered that the caution had been lifted and a transfer effected in favour of the 1st respondent and a letter of allotment issued on 7th December 2021. Therefore, the sale of the matrimonial property as defined under Section 2 of the Matrimonial Causes Act, Section 6(1) of the *Matrimonial Property Act* and in the *Land Act* was undertaken without her consent. Counsel further submitted that the Appellant and the 2nd Respondent had lived together on the suit property and were raising their children thereon and was thus matrimonial property as provided under Section 93 of the *Land Registration Act*. It is further submitted that the marriage was not dissolved. As such, this being matrimonial property, spousal consent was required before its disposal as espoused by Section 12(1) and (5) of the *Matrimonial Property Act*. He put forward the case of E.K.N Vs A.S. & 2 others [2019] eKLR. The 1st Respondent was not a bonafide purchaser for value and this Appeal should be allowed.

The Respondents' submissions

6. The Respondents did not participate in this Appeal despite being served.

Analysis and Determination

7. I have considered the grounds of Appeal, the written submissions, the record of Appeal and the authorities cited. I find that the issue for determination is:
 - i. Whether the Learned trial Magistrate erred in finding that she did not have jurisdiction to determine the suit since the issue for determination was whether the suit property was matrimonial property and thus within the High Court's jurisdiction.
 - ii. Whether this Appeal is merited;
 - iii. What orders should issue;
 - iv. Who should bear costs of this Appeal?.
8. This being a first appeal, it behoves this court to re-evaluate, re-assess and re-analyze the evidence on record and then determine whether the conclusions reached by the Learned Trial Magistrate should hold.



In Kenya Ports Authority Vs. Kuston (Kenya) Ltd (2009) 2EA 212 the Court of Appeal espoused this mandate or duty as follows;

“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 introduce extraneous matters not dealt with by the parties in the evidence. See *Selle Vs. Associated Motor Boat Company Limited* (1968) EA 123 and also *Abok James Odera T/ a A.J. Odera & Associates Vs. John Patrick Machira t/a Machira & Co. Advocates* (2013) eKLR”.

9. In the Plaint dated 13th December 2021, the 1st Respondent sought a permanent injunction against the Appellant from interfering with the use of plot No. B45 Namanga Trading Centre and his sanctity of title be protected on grounds that he was the lawful owner of the property having purchased it from one Masiaya Ole Muntari (the 2nd respondent) through a sale agreement dated 29th December 2020. He claimed that he legally purchased the property and while effecting a transfer, he discovered that the Appellant had placed a caution against it claiming interest as the sellers’ wife. He claims that he approached the Kajiado County Alternative Dispute Resolution Committee and meetings were held to determine the dispute although the Appellant did not attend. At the meeting, the seller one Masiaya confirmed that the Appellant was his ex-wife and at the time of the sale, they had separated. The Kajiado County Alternative Dispute Resolution Committee then resolved that the 1st Respondent had rightfully purchased the property and ordered the a lifting of the caution. The transfer was then effected but when he began to develop the property, the Appellant interfered and caused his workers to be arrested.
10. The Appellant in her Amended Statement of Defence and Counterclaim dated 12th April 2022 contested this claim stating that she and the vendor, Masiaya were married and had lived on the suit property for over 20 years. It was her case that, the sale and transfer of this property was undertaken without a spousal consent. She went on to claim that the decision of the Kajiado County Alternative Dispute Resolution Committee to lift the caution placed and transfer the property to the 1st Respondent was erroneously arrived at because she was not accorded an opportunity to be heard. She also claimed that she reported this trespass and interference with the suit property at Namanga Police Station. She sought that the suit be dismissed with costs and that a permanent injunction be issued against the 1st Respondent’s use of the property. She also sought that an order cancelling the transfer to the Appellant together with General damages for trespass of Kshs. 1,855,000.
11. At the hearing the said Masiaya confirmed that the Appellant was his wife, but at the time of the sale she had deserted her matrimonial home and was therefore not present when the suit property was sold. He stated that they had separated four (4) years prior to this hearing. Other witnesses also confirmed that the two had separated.
12. The Appellant in her testimony stated that she was still married to Masiaya Ole Muntari although they do not live together. She added that she had never been asked to sign any documents to dispose of the suit property.
13. The learned Magistrate then rendered her judgement dated 30th August 2022 where she held:

“...I find the issues for determination are whether or not the remedies sought are merited. I am of the opinion that the Defendant’s counterclaim has raised triable issues which are beyond



the purview of this court. The Defendant herein has averred she is married to PW2 having never separated. It is trite law that a customary marriage ought to be dissolved customarily meaning that the rites and practices of a particular community ought to be conducted before a marriage is dissolved. In this instant, PW2 alleged that the Defendant had deserted their matrimonial home and as such their marriage had been dissolved. However, he failed to present this court with evidence proving that the marriage had indeed been dissolved as per the Maasai customs and practices. This leaves the Court with the question as to whether or not the suit property comprised of matrimonial property and thus required spousal consent before it was sold to the Plaintiff. Determination of matrimonial property falls within the ambit of the High Court rendering this Court incompetent as it lacks jurisdiction to entertain this suit. The suit and counterclaim are struck out with no orders as to costs...”

14. The issue for determination is whether the learned Trial Magistrate erred in finding that she did not have jurisdiction to determine the question of matrimonial property.
15. It is not in contention and has been submitted at length by the Appellant that the suit property was matrimonial property. She has stated that she had been married to the vendor Masiaya Ole Muntari for over 20 years and was residing on the suit property prior to the sale and was thus matrimonial property.
16. The 1st Respondent claimed that he acquired legal and lawful ownership of the suit property arguing that he did not require spousal consent because the 2nd Respondent and the Appellant had separated and/or divorced. It was his case that the suit property was not part of matrimonial property since it was a business premises.
17. It is on record that at the time of this purchase there was a caution placed against the suit property and this matter was addressed by the Kajiado County Alternative Dispute Resolution Committee where they agreed that the caution be lifted and the transfer effected in favour of the 1st Respondent. From the minutes of the meeting, it is noted that the issue of marriage and divorce was also discussed. However, this allegation of separation and divorce was not proved as rightly held by the learned Magistrate. Section 107(1) of the *Evidence Act* provides that: 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... It was therefore upon the 1st Respondent to prove to the court that the marriage between the 2nd Respondent and the Appellant no longer existed having been dissolved customarily.
18. It is not in dispute that the Appellant is the wife of the 2nd Respondent. The Appellant and the 2nd Respondent have been married under Maasai Customary law for more than 20 years. They have lived together with their four children, the first being born in 2003 and the last in 2013, on the suit property and have established their matrimonial home thereon.
19. Section 93 of the *Land Registration Act* provides as follows:

“Subject to any written law to the contrary, if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the *Matrimonial Property Act*”.
20. I agree with the Appellant’s submissions that she and the 2nd Respondent occupied the suit property as their home together with their children thus falling under the purview of Matrimonial Property.
21. As stated earlier the Appellant did not give consent for the suit property to be sold.



In the case of E.K.N. Vs. A.S. & 2 others (2019) eKLR the court held as follows;

“I have set out the whole of Section 12, to put it into context, but it will be seen that only Section 12 (1) is relevant, in determining the question whether a spouse must give consent for the sale of matrimonial property. However, the same only makes provision for a monogamous union, and in such instance, there needs to be consent of both spouses for matrimonial property to be alienated including an alienation by way of sale.”

22. I find that the 2nd Respondent, required the Appellant’s consent to sell the suit property. I therefore find that the Learned trial magistrate erred in finding that she did not have jurisdiction to deal with the issues raised especially the validity of the sale and transfer to the 1st Respondent.
23. I therefore find merit in the Appeal and the same is allowed.
24. Accordingly,
 - a. The Judgement of the lower court dated 30th August 2022 is hereby set aside in its entirety.
 - b. The matter is hereby referred back to the lower court for re-trial before another magistrate other than Honourable B. Cheloti.
 - c. That the costs of this Appeal be borne by the Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY IN KAJIADO THIS 30TH DAY OF JANUARY 2025.

L. KOMINGOI

JUDGE.

In The Presence Of:

Ms. Gitonga for the Appellant.

N/A for the Respondents.

Court Assistant – Mutisya.

