



**Maloiy v Maloiy & 5 others (Environment and Land Case Civil Suit
104 of 2019) [2024] KEELC 13979 (KLR) (19 December 2024) (Judgment)**

Neutral citation: [2024] KEELC 13979 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND CASE CIVIL SUIT 104 OF 2019
MN GICHERU, J
DECEMBER 19, 2024**

BETWEEN

JOSEPHINE MORIASO MALOY APPLICANT

AND

GEOFFREY MORIASO MALOY 1ST RESPONDENT

HANNAH W MACHARIA 2ND RESPONDENT

LAND REGISTRAR, KAJIADO NORTH 3RD RESPONDENT

**THE CHIEF LAND REGISTRAR, MINISTRY OF LAND, HOUSING AND
URBAN DEVELOPMENT 4TH RESPONDENT**

**PRINCIPAL SECRETARY, MINISTRY OF LANDS HOUSING AND URBAN
DEVELOPMENT 5TH RESPONDENT**

ATTORNEY GENERAL 6TH RESPONDENT

JUDGMENT

1. The plaintiff seeks the following reliefs against the defendants.
 - a. A declaration that the transfer and registration of lease No. Ngong/Township/Block/2/121 in the 2nd defendant's name was illegal, fraudulent and therefore null and void.
 - b. An order directing the 3rd defendant, his agents, employees, servants and/or whosoever is acting for him to cancel the transfer of the suit land to the 2nd defendant and the same to be registered in the joint names of plaintiff and the 1st defendant at the 3rd, 4th and 5th defendants' own costs.
 - c. An order of permanent injunction restraining the 1st and 3rd defendants, their agents, employees or servants or whomsoever from in any way dealing with the suit property without the express consent, authority and/or permission of the plaintiff and the 1st defendant.



- d. An order directing the defendants to pay the costs of this suit.
 - e. Any other relief that the court may deem just to grant.
2. The plaintiff's case is as follows. She is the wife of the 1st defendant. She is the only legal wife of the 1st defendant. Until 27/8/2019, the 1st defendant was the registered owner of L.R. No. Ngong/Township/Block/121, suit property, which was acquired during her marriage to the 1st defendant. Secondly, on 27/8/2019, without notice, consent or permission of the plaintiff, the 1st defendant sold and transferred the suit property to the 2nd defendant. Thirdly, the 1st defendant did not share the proceeds of the sale of the suit property with the plaintiff. Fifthly, in May 2019, it is the plaintiff who paid large sums of money to the Government as rates for the suit property from her own personal resources when she was informed that the 1st defendant had refused to pay the said rates. Sixthly, in the year 1988 the plaintiff secured a loan from Barclays Bank of Kenya on the security of the suit property and failed to repay the loan. The plaintiff single handedly repaid the loan in full. Finally, this is not the only matrimonial property that the plaintiff has sold without the knowledge, permission or consent of the plaintiff. He previously sold property in Gilgil and Nyali in Mombasa in circumstances similar to the ones in this case. For the above and other reasons, she prays for the orders as per paragraph (1) above.
3. In support of her case, the plaintiff filed the following evidence.
- i. Her witness statement dated 2/10/2019.
 - ii. Copy of certificate of lease for the suit land.
 - iii. Copy of certificate of marriage dated 2/1/2004.
 - iv. Copy of certificate of official search dated 11/9/2019.
 - v. Copy of loan agreement dated 22/6/1998.
 - vi. Copy of citation on conferment of degree.
 - vii. Copy of intention to sue the 1st and 2nd defendants.
 - viii. Copy of intention to sue the 3rd and 5th defendants.
 - ix. Copy of invoice for rent and land rates dated 1/7/2019.
 - x. Copy of plaintiff's notice to Chief Land Registrar dated 27/9/2019.
 - xi. Copy of 4th defendant's response to the notice dated 27/9/2019.
 - xii. Copy of decree in Miscellaneous No. 19 of 2019 at Kajiado.
 - xiii. Copy of letter requesting for certified copies of transfer document dated 25/11/2019.
4. The first defendant filed a written statement of defence dated 11/6/2021 through his counsel on record. In the defence he generally denies the plaintiff's claim in its entirety. Secondly he avers that the plaintiff is his estranged wife and the couple have not lived together since the year 2001 and that marriage has broken down irretrievably. Thirdly, he acquired the suit land in the year 1972 when it was known as Ngong Town 4480/12 and it is therefore not matrimonial property since their marriage was on 25/11/1989. Fourthly, he acquired the suit property alone without any contribution from the plaintiff. Fifthly, he has been paying the land rates and rent without any assistance from the plaintiff. Finally, he concludes by saying that he has no intentions of disposing his ancestral land where the plaintiff currently resides.



For the above reasons, he prays for the dismissal of the plaintiff's suit.

5. In support of his case, the 1st defendant filed the following evidence.
 - i. Copy of receipt no. 155388 dated 23/3/2010 showing payment of rates to the County Council of Olkejuado.
 - ii. Copy of letter dated 21/8/2019 showing the rent and rates arrears.

6. The 2nd defendant, through counsel on record filed a written statement of defence dated 29/1/2020 in which she avers as follows. Firstly, she denies the plaintiff's claim in its totality. Secondly, it is contended by the 2nd defendant that the sale agreement between her and the plaintiff complied with the law. Thirdly, she complied with the sale agreement between her and the plaintiff and cannot therefore be faulted.

For the above stated reasons, she prays for the dismissal of the plaintiff's suit.

7. In support of her defence, the 2nd defendant filed the following evidence.
 - i. Her witness statement dated 25/5/2021.
 - ii. Copy of sale agreement between her and the 1st defendant dated 7/8/2019.
 - iii. Copy of statutory declaration dated 2/8/2019 by the 1st defendant in which he says he is not married.
 - iv. Copy of transfer form dated 26/8/2019.

8. The 3rd – 6th defendant in a written statement of defence dated 14/1/2020 aver as follows. Firstly, all the allegations in the plaint are denied. Secondly, the transfer of the suit property was done procedurally and with the consent of all the relevant parties. Finally, the matters pleaded by the plaintiff do not touch on the 3rd to 6th defendant and the suit ought to be dismissed with costs. No evidence was filed by the 3rd to 6th defendants in support of their defence.

9. At the trial on 15/11/2021 and 24/4/2023, only the plaintiff and the second defendant testified. They generally adopted their evidence as per their pleadings. None of them would change their script despite the intense cross-examination.

10. Counsel for the parties filed written submissions on 10/4/2024 and 27/5/2024 if what they told the court on 15/4/2024 is anything to go by. The only submissions on the CTS are those by the plaintiff. The issues identified in the submissions dated 15/5/2024 are as follows.

- i. Whether the plaintiff has proved the suit land is matrimonial property.
- ii. Whether the sale of the suit land is tainted with fraud and illegalities.

The 2nd defendant's written submissions cannot be traced on record.

11. I have carefully considered all the evidence adduced in this case by both sides including the witness statements, documents and the testimony of the witnesses at the trial. I find that there are only two issues to be determined in this case. They include the following.

- i. Whether the plaintiff has proved that she contributed to the acquisition of the suit property.
- ii. Whether the suit property is matrimonial property.



12. On the first issue, I find that the plaintiff has not proved that she contributed to the acquisition of the suit property. The 1st defendant in his defence said that he acquired the suit land in 1972 and married the plaintiff in 1989. It was incumbent upon the plaintiff to controvert this averment by filing a reply to defence and adducing evidence to prove that the suit property was acquired during the pendency of their marriage. She did not do so. There is evidence from the plaintiff's own documents, in this case the marriage certificate, to prove that the marriage between her and the 1st defendant was on 25/11/1989. If it is true that the suit plot was acquired in 1972, and it is quite probable, in the absence of concrete evidence by the plaintiff to the contrary, then there is no proof that she contributed to the acquisition of the suit property. The burden of proof on her remains undischarged.
13. On the second issue, I find that the suit property is not matrimonial property. Under Section 2 of the *Matrimonial Property Act*, "matrimonial home means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home and includes any other attached property". Then under Section 6(1) of the same Act, matrimonial property means the following.
 - a. The Matrimonial home or homes,
 - b. Household goods and effects in the matrimonial home; or
 - c. Any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

The plaintiff has not adduced any evidence to prove that she occupies the suit property. No photographs or other evidence showing her occupation of the suit land was filed. It is not even alleged anywhere in the pleadings that the plaintiff occupies the suit property. The first defendant averred that the plaintiff occupies ancestral land and he has no intentions of disposing of the ancestral land. The plaintiff did not rebut this averment by the 1st defendant. It would therefore seem that the plaintiff occupies another property of the 1st defendant. If that is the case, and it could probably be, then that is the matrimonial home and property within the meaning of Sections 2 and 6 of the *Matrimonial Property Act (Act No. 49 of 2013)*.

14. The plaintiff's counsel also raised the issue of fraud in the written submissions. In the pleadings, there is no mention of the word fraud in any of the paragraphs. Under Order 2 rule 10 Civil Procedure Rules, a party pleading fraud must particularize it in the pleadings. In this case fraud was brought up abruptly. Since it did not arise even in the evidence, I think I should not dwell much on it. After all, where fraud is pleaded, it must be proved to a standard higher than the ordinary one in civil cases of proof on a balance of probabilities. See *Ndolo –versus- Ndolo Civil Appeal No. 128 of 1995*.
15. For the above stated reasons, I find no merit in the plaintiff's suit which I dismiss in its entirety. As for the costs, since the main actors in this case are husband and wife even though divorced or separated and it is admitted that the plaintiff is living on the 1st defendant's property, I will order that each party bears its own costs.

It is so ordered.

DATED SIGNED AND DELIVERED AT KAJIADO VIRTUALLY THIS 19TH OF DECEMBER 2024.

M.N. GICHERU

JUDGE

