



**Aseta v Ongwacho & another (Environment & Land Case 409 of 2013)  
[2023] KEELC 20246 (KLR) (27 September 2023) (Judgment)**

Neutral citation: [2023] KEELC 20246 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 409 OF 2013**

**M SILA, J  
SEPTEMBER 27, 2023**

**BETWEEN**

**SABINA RABERA ASETA ..... PLAINTIFF**

**AND**

**ASETA ONGWACHO ..... 1<sup>ST</sup> DEFENDANT**

**KEREMENSIA ASETA ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

(Plaintiff being first wife of 1<sup>st</sup> defendant with 2<sup>nd</sup> defendant being the second wife; plaintiff filing suit claiming various properties in name of 1<sup>st</sup> defendant are held in trust for her; suit settled on all properties save for one plot; plaintiff contending that it wholly belongs to her as she bought it before marriage; 1<sup>st</sup> defendant contending that he is actually the one who bought it and plot card is in his name; oral evidence of plaintiff not sufficient to tilt the balance of probabilities in her favour; 1<sup>st</sup> defendant also demonstrating that he is acting in good faith by distributing all his properties save for this one plot; plaintiff's suit dismissed).

1. The plaintiff is the first wife of the 1<sup>st</sup> defendant whereas the 2<sup>nd</sup> defendant is his second wife. Through a plaint filed on 8 October 2013, the plaintiff contended to be entitled to half share of the properties Wanjare/Bogitaa/1123 measuring 3.4 hectares, Wanjare/Bogitaa/1323 measuring 1.0 Hectares, and Wanjare/Bogitaa/1089, and the whole of the Plot Number 12 Riana Market. She pleaded that she got married to the 1<sup>st</sup> defendant in the year 1961 and that together they acquired the land parcels Wanjare/Bogitaa/1123 and Wanjare/Bogitaa/1323 before the 2<sup>nd</sup> defendant got married to the 1<sup>st</sup> defendant, though the said parcels were registered in the sole name of the 1<sup>st</sup> defendant. The 1<sup>st</sup> defendant transferred the land parcel Wanjare/Bogitaa/1123 to the 2<sup>nd</sup> defendant which the plaintiff claimed to have been in breach of trust. With regard to the land parcel Wanjare/Bogitaa/1089 she pleaded that this is ancestral land and she is entitled to half of it. On the plot No 12, Riana Market, she pleaded



- that this plot was acquired solely by herself, without any contribution from the 1<sup>st</sup> defendant, hence the assertion that she is entitled to the whole of it.
2. On February 22, 2016, the parties recorded a consent over the land parcels Wanjare/Bogitaa/1323 and Wanjare/Bogitaa/1089. It was agreed that these two parcels of land be transferred to the plaintiff. On May 23, 2023, it was also agreed by consent, that the 2<sup>nd</sup> defendant (2<sup>nd</sup> wife of the 1<sup>st</sup> defendant) can retain the land parcel Wanjare/Bogitaa/1123 which was already registered in her name. All attempts to have the parties settle the dispute with regard to the Plot No 12, Riana Market, came to nought, with the parties insisting that the court proceeds to make a decision on it. This judgment is therefore only restricted to the Plot No 12, Riana Market.
  3. As earlier mentioned, it is the pleading of the plaintiff that she solely purchased this plot. She seeks orders for the 1<sup>st</sup> defendant to transfer the plot to her and for the defendants and anyone claiming under them to be evicted from the plot and be permanently restrained from it.
  4. The defendants filed a joint statement of defence. They pleaded that the 1<sup>st</sup> defendant married the plaintiff in 1961 and married the 2<sup>nd</sup> defendant in 1974; that they were both housewives and did not materially contribute to the acquisition of the properties. It is pleaded that out of the 1<sup>st</sup> defendant's own volition, he subdivided his properties, so that the plaintiff keeps the parcels Wanjare/Bogitaa/1323 and 1089; the 2<sup>nd</sup> defendant retains the parcel Wanjare/Bogitaa/1123, and he (1<sup>st</sup> defendant) keeps the Plot No 12, Riana Market. It is pleaded that the 1<sup>st</sup> defendant shared his properties proportionally and that the suit is an abuse of the court process as it is akin to succeeding the properties of the 1<sup>st</sup> defendant while he is still alive.
  5. In her evidence, the plaintiff insisted that the Plot No. 12, Riana Market (the suit plot) belongs to her as she purchased it using funds given to her by her father (now deceased). She testified that her father gave her Kshs 200/= to buy the plot and that she purchased it from one Mogire Ochoki. She stated that upon purchasing the plot she constructed a shop and started a bar business. She testified that she purchased the plot before her husband married the 2<sup>nd</sup> defendant. She stated that dispute arose because her husband would sell alcohol but not share the proceeds with her which led her to close the bar. She averred that her husband requested her to re-open the shop to enable him carry out some business; that she gave him the key on condition that he pays her rent; that he paid only for one month and stopped paying. She testified that he then constructed another structure on the plot without consulting her and started staying on the plot with the 2<sup>nd</sup> defendant. She produced a Plot Card and receipt for land rent. She added that the dispute had been referred to the Land Disputes Tribunal where the 1<sup>st</sup> defendant admitted that she is the one who purchased the plot and awarded it to her.
  6. Cross-examined, she could not remember the date that she purchased the plot. She did not have a sale agreement. She acknowledged that the Plot Card bore the name of the 1<sup>st</sup> defendant which card was issued in 1969. Her explanation was that at that time, it is men who would be registered as owners of land. She affirmed that the receipt she produced as an exhibit was in respect of a caution because the 1<sup>st</sup> defendant wanted to give the plot to her co-wife. She acknowledged that the decision of the Land Disputes Tribunal was quashed by the High Court because the tribunal did not have jurisdiction. On the licence for operation of the bar business, she stated that it is the 1<sup>st</sup> defendant who took out the licence and that he never paid her rent.
  7. With the above evidence, the plaintiff closed her case.
  8. On the other hand, the 1<sup>st</sup> defendant, born in the year 1939, testified that he married the plaintiff in 1961. He denied that it is the plaintiff who purchased the plot. He asserted that he was the one who purchased the plot from one Ochoki in 1960 and his name was inserted in the Plot Card, and thus at



- the time he married the plaintiff he had already bought the plot. He testified that he has distributed his land to his two wives and he has no parcel of land in his name save for the suit plot. He testified that on the plot is a kiosk which he has rented out and that it is him who pays rates.
9. Cross-examined, he testified that no sale agreement was drawn and that he purchased the plot for Kshs 30/=. He testified that he purchased the plot in 1960 but got the plot card in 1969. He denied that at the tribunal he stated that the plot was purchased by the plaintiff and that she never paid rates. He averred that if she paid any rates she would have produced the receipts. He narrated that there was an earlier kiosk on the plot which fell apart while he was still in possession and another was built by the person now in possession. The person currently in possession is son of the 2<sup>nd</sup> defendant. He stated that he pays him rent of Kshs 1,200/=.
  10. With the above evidence the 1<sup>st</sup> defendant closed his case. The 2<sup>nd</sup> defendant did not testify.
  11. I invited counsel to file written submissions, which they did, and I have taken these into consideration before arriving at my decision.
  12. At the outset, I think any dispute that the plaintiff may have had with the 2<sup>nd</sup> defendant was settled and it was indeed mentioned that she was sued over the other properties and not the suit plot. The tussle is therefore between the plaintiff and the 1<sup>st</sup> defendant over this one plot i.e Plot No. 12 Riana Market. The case of the plaintiff is wholly premised on the assertion that it was her who purchased the plot and that the 1<sup>st</sup> defendant's registration as owner was merely as trustee. This suit thus has nothing to do with subdivision of matrimonial property; it is one spouse claiming that she purchased the land before marriage and registration in the name of the husband was as trustee. This being the plaintiff's case, the burden of proof is on her; in essence, she needs to prove that she purchased the suit land with her own resources before being married to the 1<sup>st</sup> defendant.
  13. No sale agreement was produced as it was said that none was prepared. But again, no witness was called by the plaintiff to affirm that indeed she is the one who purchased the plot. The only evidence that the plaintiff availed was her own oral evidence which was completely unsupported. She also claimed to have operated a bar on the premises but there is nothing to support this contention. She alleged that the 1<sup>st</sup> defendant paid her one month's rent but yet again there was no proof of this. She never produced a single receipt demonstrating that she was paying rates or land rent for this plot. There was an attempt to rely on proceedings of the Land Disputes Tribunal but I am unable to place any reliance in those proceedings as they were taken by a body that had no jurisdiction. Everything relating to that suit before the Tribunal is a nullity, including its proceedings.
  14. In light of the fact that the 1<sup>st</sup> defendant refuted all the claims of the plaintiff and insisted that he was the one who had purchased the plot using his own money before marrying the plaintiff, the plaintiff ought to have done more than merely stating that she is the one who had purchased the plot. Her sole oral evidence, weighed against the oral evidence of the 1<sup>st</sup> defendant who has an addition of the Plot Card in his name, fails to tilt the scale to reach to the level of a balance of probabilities. I do not think that the 1<sup>st</sup> defendant is being greedy and that he wants to short-change the plaintiff. If he was, he would never have agreed to distribute his land to his two wives during his lifetime. He has in fact given them all he had, and left himself bare, save for this one plot. He readily handed over to the plaintiff his ancestral land, which he was not bound to. In my view, these acts of the 1<sup>st</sup> defendant demonstrate that he is acting in good faith. It is regretful, that in return, the plaintiff has opted to sue him for this one remaining small plot. She wants to take everything from him even where it is not deserved. Does she want him to live at her mercy? I may be wrong, but I think that the motivation of the plaintiff is jealousy against her co-wife, as the 1<sup>st</sup> defendant has permitted her co-wife's son to use the suit plot.



15. The long and short of it is that I am not persuaded that the plaintiff has placed before me any material to support the allegation that she is the one who purchased the suit plot before being married to the 1<sup>st</sup> defendant and that the 1<sup>st</sup> defendant holds the suit plot in trust for her. Given this position, I proceed to dismiss the plaintiff's suit. I make no orders as to costs as the parties are husband and wife.

16. Judgment accordingly.

**DATED AND DELIVERED AT KISII THIS 27 DAY OF SEPTEMBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

