Kungu v Gitau (Environment and Land Appeal E19 of 2022)
[2023] KEELC 19919 (KLR) (22 September 2023) (Judgment)

Neutral citation: [2023] KEELC 19919 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL E19 OF 2022

FM NJOROGE, J

SEPTEMBER 22, 2023

BETWEEN

HANNAH WANJIKU KUNGU ..... APPELLANT

AND

BENTON KUNGU GITAU ..... RESPONDENT

JUDGMENT

1. The background to the present appeal is that the appellant filed the suit against the respondents in the magistrate's court seeking a declaration that the subdivision of plot no Nakuru/Kivulini/ 47 into two portions is illegal and should be cancelled for the reason that the suit land was matrimonial property which the 1st defendant held in trust for himself and the appellant. She also sought an order that the transfer of one of the resultant subdivisions to the 2nd defendant be cancelled and a mandatory injunction to compel the 2nd defendant to vacate the said portion. The 1st defendant filed a defence denying the claim and so did the 2nd defendant. On 21/9/2021 the trial court dismissed the appellant's suit thus prompting the present appeal.
2. The appellant appealed on the following grounds in her memorandum of appeal dated 12/5/2022:
    1. That the Learned Magistrate erred both in law and in fact in finding that the appellant did not have a beneficial interest in the suit property;
    2. That the Learned Magistrate erred both in law and in fact in failing to consider fraud and misrepresentation as pleaded by the appellant;
    3. That the Learned Magistrate erred both in law and in fact in failing to appreciate that the self-contradicting testimony and evidence tendered in support thereof was incapable of sustaining the dismissal of the appellant's case;

4. That the Learned Magistrate erred both in law and in fact in failing to appreciate the legal position to be considered, specifically the Court of Appeal decision in *Muga Muiru Investments Limited Vs. EWB & 2 others* [2017] eKLR;

5. That the Learned Magistrate erred both in law and in fact in entering judgment in favour of the defendants in spite of the defendants' failure to establish their case.

3. She sought orders that:

a. The judgment of the Honourable E. Nderitu, Chief Magistrate delivered on 21/9/2021 in Environment and Land Court (ELC) Case No. 89 of 2019 at the Chief Magistrate's Court in Molo be set aside and the Appeal be allowed.

b. Costs of the appeal be awarded to the appellant.

4. The sole issue that arises in the present appeal is whether the trial magistrate's decision to dismiss the appellant's case was against the law and the evidence presented by the parties.

5. The plea by the appellant before the trial magistrate was primarily based on the claim that her matrimonial consent was requisite for the subdivision and sale of the suit land. It is noteworthy that the decision of the trial magistrate left intact the plaintiff's possession and claim to at least part of the mother parcel that had not been disposed of by the 1st defendant. She even recommended that the plaintiff should be registered as proprietor of the said portion and this was not a far-fetched conclusion since the 1st respondent had admitted that that portion was meant for her. What the trial magistrate did was to impliedly find that the plaintiff lacked beneficial interest in the rest of the land comprising of 1.5 acres which had been disposed of to the 2nd respondent since, first, the 1st respondent's explanation that the sold portion comprised of the shares meant for the respondent's two other wives and, secondly, the same had been procedurally disposed of to the 2nd respondent. In finding out whether she erred in that regard it is necessary to refer to the evidence that was availed.

6. The 1st respondent's defence was that he merely sold the two shares meant for his two other wives in order to enable him settle them elsewhere, and that he left the appellant's share intact. It would appear that the appellant had claimed the entire mother parcel to the exclusion of the other wives. She claimed to have been married in 1976 under Gikuyu customary law. In this court's view, that customary law marriage was no bar to the 1st respondent's marrying of more wives as it is the position that polygamy is allowed under the Kikuyu customary law. The appellant did not dispute the evidence, and is deemed to have admitted, that the 1st respondent had three wives. The appellant's further evidence is that the government settled her and her family at Kasarani in Nakuru in 1989. It was after that that she moved in with the 1st respondent who had land and a dwelling elsewhere. Later, she returned to the Kasarani plot. Subsequently the Settlement Fund Trustee (SFT) offered the 1st respondent the suit land in 2009 for which he paid. The appellant claims the payment was on behalf of her family and the suit land became matrimonial property. In the same year of payment, the 1st respondent hived off a portion of the suit land for the benefit of the 2nd respondent under a purported lease and the appellant only came to know in 2017 that the purportedly leased land had been sold without her consent.

7. In ascertaining the merits of the claim that the suit land was matrimonial property whose dealings required the appellant's spousal consent, the trial magistrate referred to the Registered *Land Act*, the *Matrimonial Property Act*, the *Married Women's Property Act*, the *Land Act* and the Agriculture Act. Above all she found that the *Matrimonial Property Act* and the *Land Act* were relatively new statutes which provided for spousal consent in dealings with matrimonial property and of which no retrospective application could be presumed whereas under the other statutes no spousal consent was

legislated for. In this I find that the trial magistrate was not in error as the suit land was acquired in 2009 by the plaintiff's own admission and the disposal of 1.5 acres to the 2nd respondent took place the same year while the *Matrimonial Property Act*'s date of commencement was 16th January, 2014 and the *Land Act*'s date of commencement was 2nd May, 2012. Unless there was specific provision, the same could not be retrospectively applied to the present dispute contrary to the provisions of the Section 23 of the *Interpretation and General Provisions Act*. There was no such provision.

8. What about the alleged concealment of the sale by the respondents? Was there any and if so can it be termed as fraudulent? It is trite law that besides the requirement of pleadings that fraud must be specifically pleaded it must also be proved on a standard higher than a balance of probabilities and lower than beyond reasonable doubt.

9. Of this claim, the respondent averred that the respondents disguised the sale as a lease for a period of 8 long years before she discovered that it was in actual fact a sale. That was one of the particulars of fraud pleaded. However, the evidence of the appellant in terms of the letters written at her instance by the local Assistant Chief and the local District Officer on 8/1/2009 and 22/9/2009 respectively suggest that in the year of allocation (2009) the appellant was aware of a transaction between her husband and the 2nd respondent and the claim of concealment cannot stand.

10. The other particulars of fraud levelled against the 1st defendant were to the effect that he failed to obtain the appellant's consent, that the signature on the purported sale agreement can not be the 1st respondents as he is illiterate; that the suit land was obtained for settlement purposes only and sale was therefore illegal.

11. Having dealt with the spousal consent issue this court is not inclined to revisit it while addressing fraud for it must be that if none was required of the appellant then the 1st respondent's failure to obtain it obviously does not amount to fraud. Also, the allegations regarding the signature on the agreements can not hold because the 1st respondent himself directly admitted that he sold the suit land.

12. Regarding the appellant's claim that the land was obtained for settlement purposes only, 4 vital things can be noted: first, that the land was offered in terms of outright purchase to the 1st respondent in his name by the government and not by way of the normal long term SFT charge. In that case it is doubtful that the government retained any restrictions as to the allottee's capacity to dispose of it once the sum demanded was paid. Secondly, the land was subdivided after it was registered; consequently, the burden that lay upon the shoulders of the appellant to demonstrate that the suit land was subdivided and sold while title was still in SFT's name so as to make illegal disposal an issue in this suit was not discharged. Though the contents of the letters written at her instance by the local Assistant Chief and the local District Officer on 8/1/2009 and 22/9/2009 respectively suggest that a register had been opened it can not be assumed that the parcel's register was or was not in the 1st respondent's name at the time and the court was left in the dark as the appellant never led direct evidence as to when the mother parcel Nakuru/Kivulini/ 47 was registered in the 1st respondent's name to assist the trial court arrive at a conclusion, and the respondents also kept quiet about the issue; the court was not therefore well equipped to make a competent determination on the issue; besides, it is also doubtful that the appellant had the locus standi to raise any objection to such irregular disposal of " settlement land" perchance it could have been described as such then. Thirdly, no evidence of any inhibition on title by the government was demonstrated by the appellant. Fourthly, the explanation that the 1st respondent sold the land so as to settle his other spouses was not controverted. The very fact that the portion meant for the appellant was left intact is clear evidence that the land was indeed used for settlement by her. The 1st respondent's evidence that he sold the land in order to avail the other wives' settlements elsewhere, probably for the betterment of family harmony was not controverted.

13. In the circumstances of this case, this court fails to see any proof of fraud or misrepresentation in the evidence of the appellant before the trial court that could have led the trial court to arrive at a decision different from the one it reached in its judgment.

14. The upshot of the foregoing is that the appellant's appeal lacks merit and it must fail and I hereby dismiss it. However, regarding costs, I will leave the order on costs of the lower court proceedings undisturbed. I also order that in respect of this appeal, each party shall bear their own costs on the basis of the same reasoning on costs expressed by the trial magistrate in the trial court below which I find sound.

Dated, signed and **delivered** at **Nakuru via electronic mail** on this **22nd day** of **September, 2023.**

MWANGI NJOROGE

JUDGE, ELC, NAKURU