



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT HOMA BAY

ELC APPEAL NO. 10 OF 2021

(FORMERLY MIGORI ELC APPEAL NO. 33 OF 2020)

PETER ONDITI OTIENOAPPELLANT

VERSUS

JULIANA AKINYI MINYAMA RESPONDENT

(Being consolidated appeals from the judgment of Honourable T.Obutu Principal Magistrate, dated 3rd day of September, 2020 and the ruling of the same Honourable magistrate dated 14th January 2021 in HOMA-BAY Chief Magistrate's Court E.L.C Case No. 76 of 2018).

BETWEEN

JULIANA AKINYI MINYAMAPLAINTIFF

VERSUS

NARKISHO MINYAMA.....1ST DEFENDANT

PETER OTIENO ONDITI.....2ND DEFENDANT

JUDGMENT

1. The instant judgment is in respect of twin appeals as hereunder;
 - a) Homa Bay ELC Appeal No. 33 of 2020 arising from the judgment of the trial court delivered on 3rd September 2020 in Homa Bay Chief Magistrate's Court Environment and Land case number 76 of 2018 (the 1st appeal herein), and
 - b) Homa Bay ELC Appeal No. E007 of 2021 arising from the trial court's ruling rendered on 14th January 2021 concerning the appellant's application by way of a notice of motion dated 10th September 2020 in Homa Bay Chief Magistrate's Court Environment and Land case number 76 of 2018 (the 2nd appeal herein)
2. The twin appeals were consolidated pursuant to this Honourable court's orders dated 23rd May 2021 as captured in the 2nd appeal.
3. The subject matter of the twin appeals is land reference number Kanyada/Kanyadier/5844 measuring an approximate area of one decimal five six hectares (1.56 HA). The same is located in Homa Bay County within the Republic of Kenya.
4. The appellant is represented by learned counsel, Elizabeth Apondi Otieno.
5. The respondent is represented by learned counsel, Mr. H. Obach.
6. The appellant and the respondent in the 1st and 2nd appeals are the same.
7. The appellant was the 2nd defendant before the trial court while the respondent was the plaintiff before the same court.

8. Originally, the twin appeals were lodged at Migori Environment and Land Court. However, with effect from 27th September 2021, they were transferred to this court upon its establishment, for hearing and determination pursuant to **Articles 6 (3) and 48 of the Constitution of Kenya, 2010. (The Constitution herein).**

9. Notably, this court has the mandate to entertain the twin appeals pursuant to sections 13 (1) and 26 (4) of the Environment and Land Court Act, 2015 92011). I also subscribe to the decision in the case of **Peterson-vs-Sunday Post (1958) E A 424 at 429** where Sir Kenneth O'Connor, President remarked;

“The appellate Court has indeed jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon that evidence should stand. But this is a jurisdiction which should be exercised with caution.”

10. On that score, this Honourable court is entitled to reconsider the evidence on record afresh and come to my own conclusions and inferences remembering that I neither saw nor heard the witnesses; see **Kenya Ports Authority-vs-Kuston (K) Ltd (2009) 2 EA 212.**

11. The respondent's claim before the trial court was per her plaint dated 5th September 2018 and contained in pages 21 to 23 of the record of appeal filed herein on 5th August 2021. The respondent stated in part that on or about 25th August 2008, one Narkisho Minyama Okumu, the 1st defendant before the trial court and herself bought a portion of land measuring approximately 47 by 36 passes out of the suit land from the appellant who refused to sub divide the suit land and transfer the portion to them. Therefore, they sought an order directing the sub division and transfer thereof, among other orders.

12. The respondent (PW1) relied on a sale agreement dated 25th August 2008 (PEXhibit 1), an acknowledgment note dated 4th April 2018 (PEXhibit 2) and a certificate of official search dated 7th June 2008 (PEXhibit 3) in her evidence. She called Tobias Mboya Kogo (PW2) and Seth Odhiambo Minyama (PW3) who relied on their respective statements, in support of the respondent's case.

13. The appellant's claim before the trial court was as captured in his statement of defence dated 17th October 2018 and filed in court on 19th October 2018 as revealed in pages 37 to 39 of the record of appeal. The appellant stated, inter alia, that the agreement (PEXhibit 1) was rendered null and void ab initio by another agreement dated 19th February 2018 (2nd DEXhibit 2) and PEXhibit 2. He termed the respondent's suit frivolous, vexatious and an abuse of the process of the court hence prayed that the same be dismissed with costs.

14. The appellant (DW2) testified that he sold the portion of the suit land to DW1 and that the respondent was not aware of the sale. That he did not sign transfer forms in favour of DW1 thereof. He relied on documents (2nd DEXhibits 1 to 7). He also called Eunice Akinyi Onditi (DW3) and Paul Otieno (DW4) who relied on their respective statements. The evidence of DW, DW3 and DW4 affirmed the testimony of DW2.

15. Thus, the trial court's findings were that by PEXhibit 1, the appellant held the portion of the suit land in trust for the respondent and DW1. That constructive trust and equitable estoppel applied in favour of DW1 and the respondent. In the circumstances, the learned trial magistrate entered judgment in favour of the plaintiff against DW1 and the appellant.

16. In an application by way of an amended notice of motion dated 10th September 2020 and duly filed in the trial court on even date, the appellant sought the following principal order;

“3A. that the honourable be pleased to issue an order for stay of further execution pending the hearing and determination of the appeal preferred in this matter that is Migori Environment and Land Court appeal No.33 of 2020.”

17. By a nine paragraphed replying affidavit sworn on 10th September 2020 and filed in the trial court on 14th September 2020, the respondent deposed, inter alia, that she had partially executed the judgment by refunding Kshs. 130,000 to the appellant as revealed in the screen shot of 9th September 2020 marked “JM 1” and annexed to the affidavit following orders of the trial court in the judgment hence the trial court was functus officio. She therefore, urged the court to dismiss the application as the same was a waste of judicial time and resources.

18. In his further affidavit sworn on 29th September 2020 and filed in the trial court on even date, the appellant acknowledged receipt of the sum as stated in paragraph 17 hereinabove. However, he stated that he sent back the amount to the respondent on 16th September 2020 as shown in an extract of the transaction marked “POO-1” and annexed to the affidavit. That thus, the status quo was maintained as he had the right of appeal from the judgment.

19. On 14th January 2021, the trial court allowed the appellant's application and further stated in part;

“.....with a condition that the appellant do deposit Kshs. 300,000/= as security in court within 21 days from that date of the ruling failure which execution to issue.”

20. The 1st appeal was initiated by way of a memorandum of appeal dated 10th September 2020 and lodged herein on 10th September 2020 based on eight grounds;

a) The Learned Trial Magistrate erred in law and fact in failing to appreciate and consider the evidence before him and finding that the plaintiff had proved her case.

b) The Learned Trial magistrate erred in law and fact in applying the provisions of the Matrimonial Property Act and the Land Registration Act 2012 and Constitution of Kenya 2010 to a transaction that occurred before the said statutes were enacted.

c) The Learned Trail Magistrate erred in law and fact in finding that it was solely the duty of the seller that is the appellant to seek for consent from the land Control Board and execution of transfer documents.

d) The Learned Trail Magistrate erred in law and fact in applying the principal of constructive trust when the same was never pleaded by the plaintiff to enable the appellant to address the issue.

e) The Learned Trail Magistrate erred in law and fact in failing to address the issues raised by the defendant in his pleadings and submissions.

f) The Learned Trail Magistrate erred in law and fact in finding that the plaintiff/ respondent had purchased the property jointly with the 1st defendant when the sale agreement only showed the 1st defendant as a buyer.

g) The Learned Trail Magistrate erred in law and fact in enforcing that was already stare and time barred by granting the orders sought in the plaint.

h) The Learned Trail Magistrate erred in law and fact in finding that Land parcel No. EAST KANYADA/KANYADIER/5844 which was registered in the name of the appellant herein constituted matrimonial property of the plaintiff/respondent and that she had an interest therein yet the plaintiff is not married to the appellant herein.

21. Based on the stated grounds, the appellant prays for the following twin orders:

a) That the 1st Appeal be allowed with costs

b) That the judgment of the trial court and consequential orders therefrom be set aside and/or varied accordingly with costs to the Appellant.

22. The 2nd appeal was generated by way of a memorandum of appeal dated 12th February 2021 and filed in court on even date anchored upon the grounds infra;

a) The Learned Trail Magistrate erred in law and fact in ordering the appellant to pay a sum of Kshs 300,000.00 as security for costs as a condition attached to the grant of stay orders.

b) The Learned Trail Magistrate erred in law and fact by failing to consider that in his decree the plaintiff was to refund the appellant herein a sum of Kshs. 130,000.00 together with interests before making the order requiring the appellant to deposit a sum of Kshs. 300,000.00 as security.

c) The Learned Trail Magistrate erred in law and fact by failing to consider the value of the suit property before making the order requiring the appellant to deposit a sum of Kshs. 300,000.00 as security.

d) The Learned Trail Magistrate erred in law and fact by making the order requiring the appellant to deposit a sum of Kshs. 300,000.00 as security which is tantamount to denying the appellant of his right to appeal.

e) The Learned Trial Magistrate erred in law and fact by failing to consider submissions of the appellant before making the order requiring the appellant to deposit a sum of Kshs. 300,000.00 as security.

f) The Learned Trail Magistrate erred in law and fact by not following the law regarding stay orders making the order requiring the appellant to deposit a sum of Kshs. 300,000.00 as security when the respondent never pleaded the same in his response to the application for stay.

23. On that account, the Appellant is seeking the following orders:

a) That the 2nd Appeal be allowed with costs.

b) That the ruling/order of the trial court and consequential orders therefrom be set aside and/or varied accordingly with costs to the Appellant.

24. The 1st appeal was admitted herein on 8th February 2021 while the 2nd appeal was admitted on 22nd March 2021. The twin appeals were heard by way of written submissions further to this Honourable court's orders and directions of 9th November 2021.

25. Accordingly, learned counsel for the appellant filed eight paged submissions dated 20th January 2020 where reference was made to the grounds of the 1st and 2nd appeals and framed six issues the issues for determination including whether the principle of constructive trust which was not pleaded in the suit, was applicable therein and whether it was just for the appellant to be ordered to deposit Kshs. 300,000/= as security for costs in the matter. In analyzing the issues in the negative, counsel cited **sections 2 and 93 (2) of the Matrimonial Property Act, 2013, section 3 (3) of the Law of Contract Act, Gitibu Imanyara and 2 others-vs-Attorney General (2016) eKLR and Raila**

Amolo Odinga and another-vs-IEBC and 2 others (2017) eKLR, among other authorities, to fortify the submissions.

26. On 14th February 2022, the respondent's counsel filed ten paged submissions giving background information of the matter including the eight grounds of the 1st appeal and framed three issues for determination, inter alia, whether there was a valid sale agreement between the 1st and 2nd defendants before the trial court for the second sale of a portion of the suit land measuring 47 by 36 passes and whether consent of the respondent was required in respect of the said transaction. Counsel discussed the issues in the negative and relied on, inter alia, **section 3 (3) of the Law of Contract Act, sections 28 (a) and 93 (3) (b) of the Land Registration Act, 2016 (2012), sections 2, 6 and 93 Matrimonial Property Act, 2013. PWK-vs-JKG (2015) eKLR and Kadzo Mkutano-vs-Mukutano Mwamboje Kadosho and 2 others (2016) eKLR.**

27. In the foregone, it is the considered view of this Honourable court that the issues for determination herein are;

a) grounds 1 to 8 set out on the face of the memorandum of appeal in the 1st appeal boil down to whether the principles of constructive trust and equitable estoppel are applicable in this matter and

b) grounds 1 to 6 in the 2nd appeal are compressed to whether the trial court's finding that the appellant do deposit the amount as stated in paragraph 19 hereinabove, was just and reasonable.

28. Regarding the first issue, the appellant termed PExhibit 1 null and void ab initio in view of PExhibit 2, 2nd DExhibit 2. Further, that DW1 failed to obtain consent of the relevant land control board for the transfer of the portion of the suit land.

29. It is common baseline that PW1 and DW1 were husband and wife at the material time. Indeed, PW1 testified that DW1 was her husband who affirmed the same.

30. In examination in chief, PW1 stated that she was not aware of an agreement between DW1 and DW2. That the former purported to sell the portion of the suit land to the latter at a consideration of KShs. 230,000/= and that she did not witness the sale agreement thereof.

31. During cross examination by Apondi for the appellant, PW1 stated, inter alia;

"...I did not witness the 2nd defendant buying from the 1st defendant. I did not sign the agreement...."

32. Did PW1 contribute to the purchase of the portion of the suit land? During cross examination by Ms Apondi for the appellant, PW1 told the court that;

"...In the agreement of 25/8/2008 I was a witness. I recall that I sold my bull towards the purchase of the land. I have witnesses. I gave my husband 10,000/= and 15,000/=.....It was my husband who gave Onditi the money...."

33. In re-examination, PW1 clarified that they purchased the portion of the suit land from DW1. That she could recall the agreement (PExhibit 1).

34. DW1 told the court that after purchasing the portion of the suit land, he took possession of the same until the year 2018 when problems arose. That he wanted to sell the portion back to DW2 without involving PW1 who refused to endorse the purported transaction.

35. In cross examination by the respondent's counsel, DW1 stated in part;

"...When I purchased the land, my wife was involved. assisted me in purchasing the land. She contributed a bull towards the purchase...."

36. Clearly, the portion of the suit land was matrimonial property as stipulated under **sections 4 and 6 of the Matrimonial Property Act, 2013**. Surprisingly, DW1 purported to sell the same to DW2 without involving the respondent who had interest therein.

37. In examination in chief, DW2 stated that he sold the portion of the suit land to DW1 as per PExhibit1. That he did not sign transfer paper thereof. In cross examination by counsel for the respondent, he stated;

"...I sold the land in 2008. I sold a portion. I was supposed to transfer the same to Minyama. I never did any sub division...."

38. PW2 and PW3 witnessed the sale of the portion of the suit land to DW1 by DW2 as disclosed in PExhibit 1. DW3 and DW4 as well as PW2 and PW3 confirmed the sale of the portion of the suit land by DW2.

39. The learned trial magistrate was of the correct view that is on record that PW1 and her spouse (DW1) purchased from DW2, the portion of the suit land. That later, DW1 purported to sell the same portion back to DW2 who was it's registered proprietor without the knowledge of PW1 yet it was matrimonial property.

40. This court is conscious of the timelines set in section 6 of the Land Control Act Cap 302 Laws of Kenya. The remedy for void transaction is provided for under section 7 of the same Act.

41. In **Kariuki-vs-Kariuki 1983 KLR 227**, it was noted that no general or special damages are recoverable in respect of a transaction which is void for all purposes for want of consent. That the only remedy available to a party to a transaction which has become void under the Land Control Act is that he or she can recover any money or consideration paid in the course of the transaction under section 7 of the said Act.

42. Trusts including constructive trust over registered land are a question of fact to be proved by way of evidence. They are applicable further to section 28 (a) of the Land Registration Act, 2016 (2012).

43. Moreover, **Article 10 (2) (b) of the Constitution** has elevated equity including trust as a principle of justice to a Constitutional principle. In exercising judicial authority under **Article 159 of the Constitution**, the courts are mandated to protect and promote that principle, amongst others; see **Kitilit case (infra)**

44. In the instant matter, the agreement (PExhibit 1) was valid and enforceable by way of constructive trust and equitable estoppel; see **William Kipsoi Sigei-vs-Kipkoech Arusei and another (2019) eKLR** and **Macharua Mwangi Maina and 87 others-vs- Davidson Mwangi Kagiri 2014 KLR**.

45. In the case of **Willy Kimutai Kitilit-vs-Michael Kibet (2018) eKLR**, the Court of Appeal sitting at Eldoret held;

“...the lack of consent of land control Board does not preclude the court from giving effect to equitable principles, in particular the doctrine of constructive trust....”

46. In the plaint, the respondent sought any other relief the court deems just and expedient to grant. Therefore, the learned trial magistrate was correct in granting the prayer in the nature of an order for reimbursement as captured in his judgment.

47. It must also be remembered that in **Odd Jobs-vs-Mubia 1970 EA 476** per Duffus, P, a court may base its decision on un-pleaded issues if it appears from the course followed at the trial that the issues has been left to the court for decision; see also **Transworld Safaris (K) Ltd-vs-Ratemo (2008) eKLR 339 at 346**.

48. Having considered the case in its entirety and in line with **sections 107 to 110 of the Evidence Act Chapter 80 Laws of Kenya**, the learned trial magistrate was correctly applied the principles of the Constitution and the law in his finding that;

“It is my considered finding that the plaintiff has established her case as per the required standards....”

49. As regards the second issue, order for security made by the trial court is a condition provided for under Order 42 (6) (2) (supra).

50. No person including a statutory body is exempted thereby; see **Doshi Iron Mongers Ltd-vs-KRA and another (2020) eKLR**.

51. It is noteworthy that the order as to security is discretionary. The same depends on the nature and circumstances of the case. It has to be fair and reasonable.

52. In the instant case, I am of the considered view that the amount to be deposited as ordered by the trial court was somewhat high considering the nature and circumstances of the case. Further, the appellant had an undoubted right of appeal as enshrined under **Article 48 of the Constitution and as held in Butt-vs-Rent Restriction Tribunal (1979) eKLR**.

53. To that end, I find the 1st appeal unmerited. The 2nd appeal is partially merited hence the order for security is hereby varied from Kshs. 300,000 to Ksh. 50,000/= in the circumstances.

54. A fortiori, the 1st appeal is hereby dismissed.

55. The 2nd appeal is partially allowed in terms of variation as stated in paragraph 53 hereinabove.

56. Given the nature and circumstances of the 1st and 2nd appeals herein, each party to bear own costs of the 1st and 2nd appeals as well as the court below; see also **Samwel Kamau Macharia and another-vs- Kenya Commercial Bank and others (2012) eKLR**.

57. It is so ordered.

Delivered, dated and signed at Homa-Bay this 21st day of February 2022

G.M.A ONG'ONDO

JUDGE

PRESENT;

a) Mr Ogoso holding brief Mr Obach, learned counsel for the respondent

b) Okello, Court Assistant