



Lubia (suing as the Rep. and Admin of the Estate of Joseph Okoth Juma) v Mulongo (Environment & Land Case 39 of 2020) [2022] KEELC 12618 (KLR) (27 September 2022) (Judgment)

Neutral citation: [2022] KEELC 12618 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 39 OF 2020
AA OMOLLO, J
SEPTEMBER 27, 2022**

BETWEEN

GRACE MILDRED NABWIRE LUBIA (SUING AS THE REP. AND ADMIN OF THE ESTATE OF JOSEPH OKOTH JUMA) PLAINTIFF

AND

GODRICK MULONGO DEFENDANT

JUDGMENT

1. The plaintiff Grace Mildred Nabwire brought this suit as the title of the administrator of the estate of Joseph Okoth Juma – deceased vide a plaint dated August 18, 2020. She pleaded that LR No Marachi/ Esikoma/1638 was purchased through the joint effort of herself and her deceased husband. Thereafter, they built their matrimonial home on it. The plaintiff further pleaded that their marriage was on the rocks and in 2015 she realised the deceased wanted to sell the land wherefore she placed a restriction on the title.
2. It is pleaded that in 2017, the deceased informed the plaintiff he had sold a portion of the suit land and left a portion to the family (plaintiff and their children). Consequently, she removed the restriction to allow for sub-division of LR No 1638 into LR No 2564 and 2565. Thereafter, LR No 2565 was transferred to the defendant. The plaintiff impleaded that she later discovered that the deceased later sold the remainder portion 2564 to the defendant. The plaintiff's claims that the second sale to the defendant was fraudulent and listed the particulars of fraud.
 - a) Purchasing land with full knowledge and particulars that on the same is comprised of the plaintiff's matrimonial home.
 - b) Colluding with one Joseph Okoth Juma to clandestinely transfer Land Parcel No Marachi/ Esikoma/2564 to defeat the plaintiff's spousal interest/claim thereof.



- c) Knowingly dealing in land Parcel No Marachi/Esikoma/2564 in a manner that defeats/injures/violates the plaintiff's legal right to spousal consent.
 - d) Colluding with Joseph Okoth Juma to misrepresent, mislead and or cheat the plaintiff.
 - e) Acquiring land through a process that is not due, above board and in compliance with the law pertaining to contract/agreement signing, consent, transfer, payment of stamp duty, and registration.
3. The plaintiff further seeks to be compensated for the value of the destroyed houses that stood on their land LR No 2564. She prayed for judgment in the following terms;
- 1) A declaratory order that land parcel No Marachi/Esikoma/2564 to the extent that on it stood a home comprising of a main house and such other houses and amenities for reason marriage between plaintiff and the now late Joseph Okoth Juma, and the said structure having been constructed during the subsistence of marriage between the plaintiff and the now late Joseph Okoth Juma, the main house and the amenities were for that reason a matrimonial home, and the entire land parcel, a matrimonial property.
 - 2) A declaratory order that land parcel No Marachi/Esikoma/2564 being a matrimonial property, the legal provisions as to spousal consent apply to any processes and transitions resulting in alienation, transfer, sale or such of the said land parcel.
 - 3) A declaratory order that the entire transaction and transfer effecting change of ownership of land parcel No Marachi/Esikoma/2564 to the defendant were illegal, fraudulent and therefore null and void to the extent that the said did not comply with the legal provisions pertaining to spousal consent, and the same is hereby cancelled and the land to revert back names of Joseph Okoth Juma to become part of his estate to be dealt with in accordance with the law of succession.
 - 4) An eviction order against defendant, his servants, authorized agents from interfering with land Marachi/Esikoma/2564 he is occupying.
 - 5) An order of permanent injunction against the defendant and or any of his agents from interference with land parcel No Marachi/Esikoma/2564.
 - 6) An order against the defendant of compensation and or restitution in favour of the plaintiff for the worth of the destroyed houses on the suit land.
 - 7) Costs and interests of this suit.
 - 8) Any other relief the honourable court may deem just and appropriate.
4. The defendant filed a statement of defence on October 8, 2020 denying the claim. He joined issues with paragraphs 6-8 of the plaint. He also denied the particulars of fraud and put the plaintiff to strict proof. The defendant further denied the jurisdiction of the court.
5. The plaintiff called four witnesses to prove her case. She testified as PW1 on December 1, 2021 and adopted her witness statement. She stated that Joseph Okoth – deceased was the registered owner of LR No Marachi/Esikoma/1638 where their home was built. That her late husband was a drunkard, abusive and started threatening her life and the lives of their children which behaviour forced her to move out of the home. Later on receipt of information that her husband wanted to sell the suit land, she proceeded to place a caution on the title.



6. PW1 continued that once the deceased realised he could not sell the land, he called PW1 into a meeting and in the presence of people requested her to allow him sell a portion of their land. That they agreed that he sells the portion they used to cultivate and leave the homestead. It is on the basis of the agreement that PW1 said she lifted the restriction to allow for sub-division of the land. The land was sub-divided into two however, according to PW1, the defendant acting in a clandestine and fraudulent manner and in collusion with the deceased caused LR No 2564 to be transferred to him. That upon obtaining ownership, the defendant immediately flattened their home and cut down their trees and turned it into a ploughed land. She is aggrieved as the action was contrary to their family land rights.
7. In cross-examination by Mr Jumba learned counsel for the defendant, the plaintiff said she has brought this case on her behalf and on behalf of Joseph's estate. She admitted the deceased also committed the fraud. Her divorce case was determined in 2019 and her husband died before the property was shared between them. She was aware the deceased received money from the defendant for the land which money her children were ready to refund before the filing of this suit but the offer of refund is no more after the defendant refused it. She produced the documents in her list as exhibits in support of her case.
8. Albert Juma Oyiera gave evidence as PW2 stating that the deceased was married to the plaintiff and they had 4 children. He confirmed PW1's evidence that they bought the land in question and established their home on it. That he was informed his late son was planning to sell the entire land number 1638 and when he asked him, the deceased became very aggressive. That it was only after his death that he learnt the son had sold the entire land. PW2 added that the defendant demolished the plaintiff's home after he acquired ownership of the land. In cross-examination, PW2 said the deceased was buried on his (PW2) parcel of land. He could not tell if the deceased is the one who demolished the houses.
9. Valentine Juma testified as PW3 stating that Joseph Okoth – deceased was his younger brother. He reiterated the evidence of PW2 – that his brother had 4 children, was registered as owner of LR No 1638, put a home on it, and was a drunkard. He only learnt his brother had sold the land after his brother's death. He also stated that the defendant demolished the plaintiff's home after he acquired ownership of the land.
10. The last plaintiff's witness Walter Oyiera Okoth stated that he is the son to PW1 and the late Joseph Okoth. That he had a semi-permanent house on the suit land. He went home last in 2014. He is aware his father sold the land without involving them. He was not present when the home was demolished. PW4 also remembered that they visited the Busia lands office and later understood the purpose of that visit was to put a restriction. During the funeral of his father, they put up at their uncle's home. According to the witness, the land and homestead were the only things he would have inherited from his father and so he has nowhere to go.
11. The defendant called two witnesses and giving evidence as DW1. He stated that he knew Joseph Okoth Juma – deceased after he bought land from him in the year 2015. He paid the purchase price before buying the remainder portion of ½ acre. DW1 said that when he bought the first 1½ acres, the plaintiff had put a caution which was later removed. According to DW1, the plaintiff knew he was buying the land. That he paid Kshs 155,000 for the first sale and in the second sale, he paid Kshs 85,000 for the land and Kshs 100,000 for the well and the trees. That after the demise of Joseph, the plaintiff called him to refund the money he paid but he demanded a refund of the current price for the land which the plaintiff was not ready to pay.
12. During cross-examination, DW1 stated he bought the land in two phases. That by October 2015, he had already paid the purchase price for the first phase; they had a written agreement and he had done a search and found no encumbrance registered on the title. The caution was placed after the payment, that the reasons why the plaintiff placed the caution was beyond him and it was upon the vendor to



resolve the matter. In October and June 2017, he entered into a second agreement (Pex 7 & 8). DW1 admitted the plaintiff was not a witness to their agreement. That during the 2nd purchase which was for LR 2564, the houses that had been there were no longer on it. In re-examination DW1 stated the agreement was on a willing buyer-willing seller basis. That there was no one living on the 2nd portion and it was bushy.

13. Mathew Frodwa testified as DW2 and stated that he was a close friend to Joseph Okoth – deceased. DW2 knew he sold land to the defendant in the presence of his family. That the defendant took possession of the land he bought. Later the deceased sold another portion which had a house on it. That the deceased pulled down the house and relocated to another portion of land. DW2 was a witness to the agreement.
14. In cross-examination by Mr Makokha learned counsel for the plaintiff, DW2 stated he knew the plaintiff as wife to Joseph. According to DW2 it is the deceased who carried out the demolitions. That he is the one who linked Joseph to the defendant. That Joseph moved out of the disputed land in 2016 before he later sold it to the defendant in 2017. The 2nd agreement was drawn in the new home of the deceased. This brought the defence case to a close.
15. The plaintiff filed her submissions on June 3, 2022 which addressed the question of fraud and misrepresentation committed against the estate of Joseph Okoth Juma – deceased. The submissions reiterated the evidence and analysis of the documents produced. According to the plaintiff, it is on the basis of the compromise, the plaintiff moved to de-register the restriction to enable the deceased sell a portion of the suit land. She has no problem with sale of parcel LR No 2565.
16. The plaintiff stated the agreements are inconsistent in terms of the amount of purchase price paid and the balances and it is not indicated in the agreement for parcel No LR 2564 that it was a further agreement. That it is difficult to discern the intention of the parties from Pex 8 and 9 and that the key elements constituting a valid contract is lacking. She submits that the entire transaction was fraudulent, null and void. They made reference to the Court of Appeal case of *Samuel Kamere Vs Land Registrar* (2015) eKLR where the Court held;

“In order to be considered a bona fide purchaser for value, a person must prove that he had acquired a valid and legal title, secondly that he carried out the necessary due diligence to determine the lawful owner from whom he acquired legitimate title and thirdly that he paid valuable consideration for the purchase of the suit property.”

17. The plaintiff further submitted that the defendant was obligated by the provisions of section 93(2) and (3) of the *Land Registration Act* to inquire if the plaintiff had given consent to the transfer. Given this was not done, the transfer became null and void. The plaintiff referred the court to the case of *Mugo Muiru Investments Ltd Vs EWB & 2 others* (2017) eKLR where the Court of Appeal held thus;

“Elizabeth’s interest in the matrimonial home was an overriding, equitable and unregistered interest. Such interest entitled her to remain in the property. It was an interest in the property. It follows that a purchaser of the matrimonial property even without notice that Elizabeth was in possession would take the property subject to Elizabeth’s interest. The evidence in this appeal shows that the appellant either did not do due diligence, or was unconcerned with the occupation of the property by Elizabeth and her interest in it. The appellant took the property subject to Elizabeth’s overriding interest in it and Elizabeth being a part owner could not be removed from the property. Even before the *Land Registration Act* came into force on May 2nd 2012, the equitable beneficial interest of spouse in a matrimonial home occupied by such spouse was an overriding interest and therefore



transfer of the title to the matrimonial home was subject to such overriding interest. Under common law, overriding interests are interests to which a registered title is subject, even though they do not appear in the register. They are binding both on the registered proprietor and on a person who acquires an interest in the property. In this appeal, the appellant acquired the title registered in the name of S B subject to the interest of Elizabeth. In effect, the appellant neither obtained legal title of the property as notionally it was overridden by Elizabeth's overriding interest nor was the appellant entitled to possession. The transfer to the appellant was subject to Elizabeth's unregistered overriding encumbrance.”

18. The defence submissions filed on June 8, 2022 stated that the plaintiff as the administrator of the estate of Joseph Okoth – deceased could not poke holes on the transaction undertaken by the deceased. That the deceased never complained of any fraudulent transaction. The defence maintains that the twin pronged states of administrator and matrimonial claim cannot be made in the same breath. He urged the court to dismiss the suit.
19. The burden of proof lies on the plaintiff to establish her case and the standard of proof for the allegations of fraud is above the standard of balance of probabilities. There is no dispute that land parcel No Marachi/Esikoma/1638 was registered in the name of the deceased. There was no dispute on the process of sub-division as the same was consented to by the plaintiff in her spousal capacity. The plaintiff further stated she has no qualms on the sale and transfer of LR No Marachi/Esikoma/2565 – one of the resulting numbers from the sub-division of the original number 1638 to the defendant. There is no dispute that the vendor is deceased after he transferred both parcels of land to the defendant.
20. The dispute relates to the sale and transfer of LR No 2564 to the defendant. The defendant stated that when he got into the first transaction with the deceased, the land was free from any encumbrances. However the plaintiff placed a restriction when she heard the deceased was selling the land. Later after discussions with the deceased, she agreed to remove the restriction which enabled the deceased to complete the sale and transfer of the portion numbered 2565 to the defendant. DW2 was one of the witnesses to this sale. From the evidence of the plaintiff and DW2, the home of the plaintiff and deceased remained on the disputed portion LR No 2564. The two were however not living together in this home at the time of the disputed sale.
21. The plaintiff contends that the sale agreement produced as Pex 8 and 9 does not meet the threshold of law of contract. Section 3(3) of the Law of Contract Act cap 23 provides thus;

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless;

(a) The contract upon which it is founded: -

(i) Is in writing

(ii) Is signed by all parties thereto; and

(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party:

Provided that this subsection shall not apply to a contract made in the course of a public auction by an auctioneer within the meaning of the Auctioneers Act (cap 526), nor shall anything in it affect the creation of a resulting, implied or constructive trust.”



22. Both agreements (Pex 8 and 9) are in writing and were signed by the vendor and the purchaser. In Pex 8, the vendor's signature is witnessed by Mathews Frodwa (DW2) and Pex 9, DW2 witnessed the signature of both parties. The plaintiff does not elaborate which component of the law the impugned documents did not meet. The signature of the vendor appearing on the document has not been challenged. The plaintiff went further to challenge the contents of the agreement as not clean bringing out the intention of the parties. The plaintiff brought this suit partly on behalf of Joseph Okoth – deceased. The court has no role in re-writing contracts between parties. As the vendor or his representative thereof, she needed to bring out what the agreement intended to achieve but was not achieved. For instance whether the purchase price was paid or not; whether the whole parcel No 2564 was sold. Instead she is inviting the court to infer which invitation if the court accepts will be contrary to the law of contract.
23. Further, the plaintiff challenged the defendant's title 2564 that it was acquired on misrepresentation. The plaintiff or her witnesses does not say what facts the defendant misrepresented to the deceased or to her. PW2 & 3 stated that they only learnt the deceased had sold the whole land after his death. PW1 refers to a meeting held between the deceased, herself and other family members. No name is given or called as a witness to corroborate the terms of this meeting and if indirectly barred the deceased from selling the remainder parcel No 2564. The plaintiff does not mention or produce evidence that a restriction was also registered on this title soon after sub-division of LR No 1638.
24. Noteworthy is the evidence given by the DW1 who states that at the time of purchasing this land, the deceased had removed all the structures on the land and which evidence is corroborated by DW2. Neither the plaintiff nor her witnesses saw the person who demolished the houses that were on the suit land and when it was done. It is the plaintiff claiming return of her land and compensation for the structures thus the duty to prove that the home was demolished by the defendant. The plaintiff failed to discharge the burden. The plaintiff forgot that she was prosecuting the case as an administrator so she ought to have countered the allegations that it is the deceased she represents her estate that removed their houses from the land.
25. The particulars of fraud was hinged on the claim for spousal rights that were violated. The claim for division of property lies as against the spouse Joseph Okoth Juma – deceased. The plaintiff moved out of the home before any part of this land was sold. She placed a restriction on the title when she learnt of the deceased intention to sell, which she later voluntarily removed. The land is sub-divided and the sold portion gets transferred to the defendant. Meanwhile she does not insist on the remainder portion where her home is to be registered in her name or in their joint names. Be that as it may, section 7 of the *Matrimonial Causes Property Act* cap 49 of 2013 states thus; "subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."
26. Section 14 (a) of cap 49 provides, "where matrimonial property is acquired during marriage, there is a rebuttal presumptions that the property is held in trust for the other spouse."
The later section exempts the plaintiff from providing her contribution in purchasing the suit property. The question however is if the suit property constituted a home within the meaning of the *Matrimonial Property Act*. PW4 in paragraph 8 of his statement stated thus, "that in less than a year, Mzee died and we came to bury him. That is the time I found no homestead to go to. What was our home ... had been turned into a farm planted with trees and cassava."
27. The statement confirms no home existed at the time of death of the deceased on March 8, 2020. PW1 also confirmed that she had moved out by 2015 so they were not living on the land. It is only her



who knew the terms of consent she gave to her husband in the year 2015 to sell. In view of the facts alluded to, the plaintiff can only succeed on nullifying the transaction for want of spousal consent if her evidence of consent for partial sale was corroborated together with evidence that the demolition of the home was undertaken by the defendant. This burden was also not discharged. The case of Mugo Muriu supra cited is distinguishable because in that case, the applicant was in possession however in this case evidence points to no home being in existence when the defendant purchased. Lastly, the plaintiff is standing in the shoes of the person who surrendered the “matrimonial property” to the accused. It is like having your cake and eating it.

28. In conclusion, I find the plaintiff failed to prove her case within the required standards that she has a valid claim. As a consequence the suit is dismissed with each party to bear their costs of the suit.

DATED, SIGNED AND DELIVERED IN BUSIA THIS 27TH DAY OF SEPT, 2022.

A OMOLLO

JUDGE

