REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL APPEAL 44 OF 2003

JOHN CHANGILWA KIDAKE ..... APPELLANT

V E R S U S

MARY WANYAMA CHANGILWA ..... RESPONDENT

(Being an Appeal from the Judgement of the Senior Resident Magistrate's Court at

Mombasa before Hon. F. M. Kadima dated 4th March 2003 in Chief Magistrate Civil Case No. 910 of 1995)

Coram : Before Hon. Justice J. Mwera

Gachiri for Appellant

Respondent in person – present

Court clerk – Kazungu

JUDGEMENT

This appeal arose from the lower court suit the present respondent (plaintiff) filed against the appellant (defendant) on or about 19th January 1994. The respondent pleaded that she was the owner of the house without land which stood on Plot No. 622/45/1 MN, MAWENI KONGOWEA. That the appellant had chased her from the said property and wrongfully taken possession of the same thereby committing a trespass. Even with the plaint dated 19th January 1994, the respondent further pleaded that as from October 1994, the appellant had been collecting rents totaling Kshs. 3,250/- per month and pocketing the same whereupon the respondent suffered loss and damage. That the appellant had continued in the two acts of trespass and wrongful collection of rents and so the respondent asked the lower court to restrain him by injunction and also declare that she was the true owner of the subject premises. That accordingly she should have possession of the premises plus damages and mesne profits at the rate of Kshs. 3,250/- per month until vacant possession was given. M/S Lumatete Muchai & Co. Advocates filed the plaint.

On 19th June 1995 M/S Adembesa & Co. Advocates filed a defence on behalf of the appellant in the following manner: that the respondent who was his legal wife had never owned the house without land on the said plot and that in fact it belonged to him. It was denied that the appellant had ever thrown the respondent out of the said house and taken possession; and that she was infact making secret moves to sell the said house to strangers. The appellant further denied that he was collecting rents from this house, which rents the respondent would have enjoyed and instead he averred that he completed construction of the house in question in 1993, rented it to tenants and put the respondent as his wife in charge of

collecting rents from those tenants. That she did that up to May 1995 when she deserted their matrimonial home. That it was on 21st November 1994 (note: long before the respondent allegedly left the matrimonial home!) that the respondent's lawyers had addressed a letter to those tenants to pay rents into their offices. And so the appellant denied being in wrongful occupation of the subject house or illegally collecting rents from the tenants therein.

Before going far it is imperative to point out at this juncture that the record of appeal was so shabbily compiled that it was near impossible to follow the sequence of proceedings, let alone the placement of the exhibits produced. There appeared to be so many irrelevant documents so that even the judgement appeared before the proceedings and the order of evidence was in dire confusion. The respondent opposed this appeal in person and the court waded through the whole muddle (never mind the sequence of paginating) to see how best to deal with the matter. Suffice it to say that the Learned Trial Magistrate Mr. F. M. Kadima – SRM heard both sides and delivered judgement of 4th November 2002, the subject of this appeal. On 25th November 2002 an "order" following the judgement (it ought to have been styled a decree) was extracted. In paraphrase it said:

> *(1) The plaintiff was the owner of the house on PLOT NO. 622/44/MN, Maweni, Kongowea Mombasa, and since the two litigants were not divorced, they should share rent proceeds equally.*
>
> *(2) That the appellant do refund Kshs. 192,000/- constituting half the rent proceeds which he had collected from the premises since October 1994 to the respondent.*
>
> *(3) That from November 2002 rents be shared equally between the two.*
>
> *(4) There was no order as to costs.*

The appeal had eleven (11) grounds in all and Mr. Gachiri who also represented the appellant in the lower court argued them on 3 broad fronts, abandoning grounds 10 and 11. The first ground (grounds 1, 2, 3 and 9 together) was to the effect that the Learned Trial Magistrate erred in finding that the subject house belonged to the respondent despite the evidence concerning whose building plan was used to put up this house.

The second ground (grounds 4, 5 together) was to the effect that the Learned Trial Magistrate ordered the appellant to refund to the respondent Kshs. 192,000/- constituting half what was claimed to have been rental receipts from tenants in the house since October 1994 disregarding the fact that the appellant had spent some of the rental income to pay fees, buy food etc and maintain the children over the subject period. During submission Mr. Gachiri added that there was no evidence placed before the Learned Trial Magistrate to show that indeed such rent income was received by the appellant and that in fact the respondent occupied three rooms in the house for which she paid no rent.

Thirdly (grounds 6, 7, 8 together) the court heard that the lower court took into regard extraneous marital issues of the litigants to decide as it did and that the Learned Trial Magistrate disregarded the evidence that the appellant solely bought and developed the plot by building the house. And that the Learned Trial Magistrate incorporated in his judgement the aspect of equal rental sharing when the litigants were not divorced as at that time (this court was told that they divorced in July 2004) and that again the lower court fell in error to have regard and apply the Married Women Property Act in these proceedings. Mr. Gachiri told the court that evidence showed that the two were married under Luyia Customary Law. He concluded that the lower court judgement did not accord with O20r4 Civil Procedure Rules (on the contents of a judgement) and so it should be set aside and this court should determine the issue of apportionment of rents to be refunded on such terms as it deems fit. That the court should also make an appropriate order as to costs.

The respondent on her part was satisfied with the lower court judgement saying that it should remain undisturbed and adding that the rents were being paid to an agent from whom she was collecting her half entitlement. That she did not produce before the Learned Trial Magistrate evidence by receipts or accounts of rents collected from the tenants because the appellant had them. She also told the court that of

the eleven (11) rooms in this house, she occupied three (3) with her children while eight (8) were rented earning about Kshs. 5,900/- per month in total.

The court then went over the pleadings and evidence up to the judgement of the lower court, as it were, to evaluate them all on its own before determining the 3 broad points above. Among the points the Learned Trial Magistrate found and which are not in dispute included the aspect that in fact the house stood on PLOT NO. 622/44 Maweni, Kongowea and not on PLOT NO. 622/45/1 MN. It was also a fact that the two litigants were husband and wife married under Bukusu Customary Law (read Luyia) and they had children. Seemingly they were separated but not divorced as at the time of the determination of their cause in the lower court. Without more this court came to the same conclusions. On the divorce the respondent told the court that it had been granted to the two since July 2004. This court is also satisfied that the Learned Trial Magistrate set out three issues for determination, and although the judgement appears not to be coherent grammatically (hopefully the mistake of the typist), he endeavoured to determine them on the evidence he reviewed.

The Learned Trial Magistrate found that it was the respondent who approached Masudi or Masur Khamisi (PW 2), the owner of the land with a proposal that he leases it to them to build the house. She said so and PW2 confirmed it. The respondent told the court that to pay Kshs. 15,000/- the plot owner wanted, she raised it from a water kiosk she had paid for and she showed the lower court receipts (eg Exhibit 1). The plot sale (or was it lease?) agreement was also produced (Exhibit 3). She then told the lower court that she built the house using an approved building plan (Exhibit 4). However regarding where water kiosk money came from to pay for the plot she said in re examination:

> ***"It is true we had a kiosk in 1994. I was the one operating it"***

Nonetheless she maintained that the appellant did not pay for the plot purchase (Exhibit 3). And as to the building of the house the respondent exhibited her own building plan which she submitted to the local council in 1992 to put up four (4) rooms. But it was approved on 31st January 1995. She recognized the appellant's plan also approved on 15th December 1993 – for building the 9 rooms. But still she claimed that although she did not keep the record of how she paid the mason and labourers who put up the house, she guessed that she spent Kshs. 500,000/-. All this is in her re examination. But that the house was completed in 1994. As said above PW2 (Khamis) gave the plot to the respondent to build on. Although the respondent said that she paid him about Kshs. 15,0000/-, Khamis' evidence has Kshs. 150,000/-. Any way Khamis also told the lower court that after the house was complete (with 4 rooms) tenants occupied them and he received rents from those tenants issuing the receipts in the respondent's name up to the time he was testifying – on 15th March 2001. That he also got plot rent (rates) paid. If such rates were paid with money from the appellant, PW2 nonetheless wrote receipts in the name of the respondent.

Still as to who got the plot, the appellant claimed it but of course without a title deed because the house on it is without land anyway. But that he set up the water kiosk business which the respondent operated. That money from it bought or built the plot. This far and from evidence above, this court concludes that it was the respondent who approached Khamis (PW2) to acquire the plot. She paid for it whatever sum of money. But because the two had a kiosk as husband and wife which the respondent operated, this court on the balance of probabilities, has concluded that since the water proceeds paid for this plot, it was money both litigants had earned. Indeed the appellant tendered evidence of eg buying pipes while the respondent produced evidence that she paid the water undertaker. Thus it was a joint family water business and money from it was used to pay for the plot. That should be considered a joint family asset. The court is fortified in this finding further as per the evidence of the plot landlord, Khamis, who told the lower court:

> ***"Even when defendant used to give me money to pay for plot rent it would be in the name of the plaintiff"***

Accordingly the lower court finding that the house belonged to the respondent, except that being husband and wife they should share rents equally, is set aside and varied to be that the two litigants jointly owned the house in question. It was a family asset acquired by the family water business proceeds. As to the half sharing of rent proceeds, that aspect is to be tackled eventually.

The lower court also set out to determine who built this house. The respondents' evidence is that she got her 1992, 4 – room plan approved in 1995. That she got a mason and workers who built the house for about Kshs. 500,000/-. But she had no records of buying the material and paying for the construction. In the jumbled record of proceedings the respondent said on 15th February 2005.

> ***"I have build Kiswahili home (sic) with 9 rooms on the plot I used Kshs. 50,000/- to build the said homes. I used to build in bits. I used different contractors to build. I have no document to show payment to contractors. I finished building home in 1994. Plan was prepared in 1992"***

On this aspect of construction the appellant told the lower court:

> ***"I have also an approved plan for building on said plot. Plan approved by Chief Building Inspector on 15th December 1993 (Exhibit D6). According to plan I build (sic) a home of 10 rooms and a store. I completed building in 1994 and tenants took possession. I hired a contractor called Gulundu. I used a total of Kshs. 856,695/-. I am ready to avail the contractor as a witness to produce his costing schedule. At the moment I have 9 tenants. My family stays in two rooms. My wife too stays in said plot. I receive rent from the tenants and use it to buy food for my family including my wife."***

The wife (the respondent) on her part claimed that the appellant does and did not support her with the children. Sabwa Kulundu (DW2) said that he was given a contract by the appellant to build the house on the Plot No. 622/1/MN. That it was a full contract to provide materials and labour at Kshs. 856,695/- and he used approved plan No. T/4/97/93. That he built 10 rooms. That he stopped the job half way done in 1994 when the two litigants were locked in a dispute over the house. The appellant still owed him money.

On this court's assessment of the evidence above it was the appellant who built 10 rooms on the said plot up to 1994. He said so and his contractor confirmed it. He used the appellant's approved plan of 15th December 1993. It cannot be said that the respondent put up this house using a 4 – roomed plan which was anyway approved on 31st January 1995. One could not build in 1994 and place tenants in the house using a plan that was approved on 21st January 1995. This is not easy to follow. In any case while she claimed that she built a 10 – room house, her plan was for 4 rooms only (JCK 2).

She did not produce evidence of / by the building contractor or of the construction. It is for that reason that this court accepts the evidence of the appellant as to construction of the house. It is consistent and credible. The respondent's evidence made no sense at all. Although the Learned Trial Magistrate set out to determine this issue he concluded that both litigants built the house yet there was no credible evidence from the respondent.

However, he proceeded to determine the other issue as to entitlement to rent proceeds. He ordered that the appellant refund a total of Kshs. 192,000/- being half the sum of rent collected with effect from November 1994. From the evidence above the appellant testified that he had tenants in some 9 rooms while two were occupied by the respondent and the children. The respondent herself told the lower court that she too had put tenants in the rooms and as far as Khamis (PW2) was concerned he was collecting rents from them on her behalf and issuing receipts in her name. From either party, none gave the total sum of rents collected from how many tenants and over what period. So it remains a mystery as to who gave the Learned Trial Magistrate the data and figures that got him to arrive at Kshs. 192,000/- to be paid by the appellant to the respondent as refund of rents received since November 1994. As such this sum was plucked from the air by the Learned Trial Magistrate and imposed on the appellant without basis or evidence. It cannot be left to stand. Even if the Learned Trial Magistrate had such material as to compute that sum, which he did not have, he would have been obliged to incorporate the fact that the respondent had herself collected rents from their tenants and she also occupied two or three rooms in the house. There was no consideration of this state of things and so again that sum of Kshs. 192,000/- had no basis. It should be added that the Learned Trial Magistrate fell in error to appear to incorporate the principles of the Married Women Property Act as he did in his judgement. The marriage between the two litigants which was still subsisting then, was customary and not statutory. So the Learned Trial Magistrate could only have considered customary principles of sharing property for divorced couples. Anyway this couple

was not divorced yet. Be that as it may.

The respondent had asked for vacant possession and mesne profits. The Learned Trial Magistrate did not order the appellant to give up the premises. The lower court found that since they were not divorced they share rents in equal amount. So the appellant has a right sill over the premises. This court has found that it was a joint family asset. It has been stated here that a total of Kshs. 5,900/- collected by the agent is split on 50 – 50 basis by both litigants. The lower court ordered that since November 2002. This court is not dealing with the aspect of this house now that the litigants are said to have been divorced since July 2004. As the divorce court considers the "division" of the subject house, it is fair and proper that the present rent apportionment continue. It shall abide the divorce court orders.

In sum the findings of this court are:

> *(1) The house on Plot 622/44/MN without land, is a joint (family) property of the appellant and respondent.*
>
> *(2) That house was built by the appellant.*
>
> *(3) There was no basis to find and order that the appellant refund Kshs. 192,000/- to the respondent as half rents he received since November 1994. That order is set aside.*
>
> *(4) The 50 – 50 rental proceeds sharing ordered since November 2002 and still in force to apply until the divorce court decides the position of the house. The rents will continue to be paid to the agent.*
>
> *(5) As for costs, this court is inclined to do as the lower court did but expressly say that each party will bear its own costs in the court below and here.*

On the reasons set out above, this appeal is allowed.

Judgement accordingly.

Delivered on 9th September 2005.

J. W. MWERA

JUDGE