



**Ratemo v Bosire & another (Environment & Land Case 138 of 2015)
[2023] KEELC 21401 (KLR) (8 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21401 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 138 OF 2015**

M SILA, J

NOVEMBER 8, 2023

BETWEEN

OLPHER KEMUNTO RATEMO PLAINTIFF

AND

ALFRED RATEMO BOSIRE 1ST DEFENDANT

**MONYENYE ONDARI RATEMO ALIAS OLPHER MONYENYE
RATEMO 2ND DEFENDANT**

JUDGMENT

(Plaintiff being wife of 1st defendant and co-wife of 2nd defendant; plaintiff filing suit over two properties, one in the village and the other in town; plaintiff asserting that her husband subdivided the land in the village without any disregard to her occupation on the ground so that her developments fell on a subdivision transferred to her co-wife; on the land in town, which is in name of her co-wife, plaintiff claiming a half share in it; evidence showing that the land in the village that the plaintiff has sued over has no structural developments save for tea and banana plantations and that the residences of the parties are elsewhere; cannot be the case that the 1st defendant has subdivided the land in such a way as to affect any of the plaintiff's developments; on the land in town, evidence showing that the plaintiff's co-wife was gainfully employed in town and she thus purchased the plot to build her residence; no evidence of any contribution whatsoever from the plaintiff; plaintiff not deserving of any orders regarding this plot; plaintiff's suit dismissed with costs)

A. Introduction And Pleadings

1. There are some cases which come to court and you just wish that the parties would settle the dispute amongst themselves. This is one such case. You would expect a man and his wife, or wives, to sort out how they will live, where they will live, who will live in which place and where, and who will own what. I doubt that any one judge would wish to be put in a situation where he has to decide how a man



lives with his two wives, but that is the sorry and awkward position that I find myself in, as numerous attempts towards having the parties settle this dispute out of court all came to nought. The case had been before the assistant chief, the chief, and the District Officer, around the years 2007/2008, and after devolution, before the Deputy County Commissioner and the County Commissioner, Kisii. It was even taken through the Court Annexed Mediation process in vain. None of the parties could cede an inch to the other, despite their close relation, and they have been relentlessly battling in court for the last eight (8) years.

2. This is the scenario that I have before me :
3. The plaintiff is the first wife of the 1st defendant. The 2nd defendant is his second wife. The plaintiff avers that she got married to the 1st defendant in 1975 and that he settled her in his ancestral home located in the land parcel Nyaribari Masaba/Kiamokama/292 which land, she avers, was given to the 1st defendant by his father. The plaintiff avers that the land got registered in the name of the 1st defendant albeit to hold in trust for the plaintiff and their children. She has pleaded that the 1st defendant subdivided this land parcel Nyaribari Masaba/Kiamokama/292 (hereinafter sometimes simply referred to as parcel No 292 or Kiamokama/292) into two portions, leading to the creation of the land parcels Nyaribari Masaba/Kiamokama/1031 and 1032 (hereinafter sometimes simply referred to as parcels No 1031 and 1032 or Kiamokama/1031 and 1032), which she contends has led into her homestead being split into two, with one portion falling in the former, and the other in the latter subdivision. She claims that as a result, she is now under threat of being evicted from her homestead, since one part falls in land belonging to her co-wife who has no regard to her. She alleges that the subdivision of the original parcel No 292 was calculated to defeat the 1st defendant's obligations towards her. She wants a declaration that the defendants hold the two subdivisions, being land parcels No. 1031 and 1032 in trust for her, wants these titles nullified so as to revert back to the original parcel No. 292, and thereafter that this land parcel No. 292 to be subdivided into two equal portions, taking into account the ground location of her homestead, and one portion be transferred and registered in her name. But the plaintiff's gripe is not just limited to this ancestral land in Kiamokama in the rural area. She is also peeved with the manner in which her husband and her co-wife have dealt with another parcel of land which is located in Kisii Town; this is the land parcel Nyaribari Chache/B/B/Boburia/6300 (hereinafter simply referred to as B/B/ Boburia/6300 or 'the land in town'). She contends that notwithstanding that this land was acquired by her and her husband, the same was transferred and registered in name of her co-wife, the 2nd defendant. She asserts that when this land parcel B/B/Boburia/6300 was acquired, the 2nd defendant had not yet been married, and she therefore made no contribution to its acquisition. She contends that the 1st defendant caused this land to be registered in the name of the 2nd defendant without due regard to her interest and in breach of trust. She wants an order that the 2nd defendant holds the entire land parcel B/B/Boburia/6300 in trust for her, and she wants it subdivided into two and one half to be registered in her name.
4. Specifically, these are the orders that the plaintiff seeks from this court :
 - i. Declaration that the defendants herein hold LR Nos. Nyaribari Masaba/Kiamokama/1031 and 1032, respectively, on trust for the plaintiff. Besides, the 2nd defendant also holds the entire of LR No Nyaribari Chache/B/B/Boburia/6300, on trust for the plaintiff.
 - ii. An order revoking and/or nullifying the register in respect of LR Nos Nyaribari Masaba/Kiamokama/1031 and 1032 respectively and restoration of the original title in respect of LR No Nyaribari Masaba/Kiamokama/292.



- iii. Upon restoration of the title and/or register in respect of LR No Nyaribari Masaba/Kiamokama/292, the said parcel of land be subdivided into two (2) equal portions, taking into account the ground location of the plaintiff's homestead and one (1) portion be transferred and registered in the name of the plaintiff, to hold in trust for herself and children.
 - iv. An order for subdivision over and in respect of LR No Nyaribari Chache/B/B/Boburia/6300 and transfer of a half share thereof and the same be registered in the name of the plaintiff, to hold in trust for herself and children.
 - v. In default, the Deputy Registrar of this Honourable Court be ordered and/or liberty to sign the relevant mutation, consents and transfer documents to facilitate compliance with orders in (iii) and (iv) above.
 - vi. Permanent injunction restraining the defendants either by themselves, agents, servants and/or anyone claiming under the defendants, from evicting, interfering with and/or in any other manner whatsoever, dealing with the plaintiff's share of LR Nos Nyaribari Masaba/Kiamokama/1031 and 1032, hitherto LR No Nyaribari Masaba/Kiamokama/292.
 - vii. Costs of this suit be borne by the defendants.
 - viii. Such further and/or other relief as the honourable court may deem fit and expedient so to grant.
5. The defendants filed a joint statement of defence. They contended that the land parcel Kiamokama/292 was subdivided into two equal portions taking into account the development on the ground between the plaintiff and the 2nd defendant. It is pleaded that the plaintiff refused to sign, or do all acts necessary to transfer the land parcel Kiamokama/1031 into her name whereas the 2nd defendant was willing and ready to sign and do all acts in order to transfer the parcel Kiamokama/1032 from the 1st defendant into her name. As to the parcel B/B/Boburia/6300, it is pleaded that this land was purchased exclusively by the 2nd defendant, from one Oyugi Ngoko, who carved it out of the land parcel Nyaribari Chache/B/B/Boburia/2099 and transferred it to her. The allegations of trust and breach of trust were all denied.
6. A reply to defence was filed, more or less joining issue. The plaintiff denied that the subdivision of Kiamokama/292 took into account the occupation and development activities of the plaintiff and 2nd defendant. The plaintiff denied being aware of the subdivision and denied refusing to execute the requisite transfer instruments. As to the parcel No B/B/Boburia/6300, the plaintiff reiterated her claim that it was purchased by the joint effort of herself and the 1st defendant, and pleaded that the 2nd defendant merely took advantage of the 1st defendant and caused the land to be registered in her name.
7. It is on the basis of the above pleadings that the matter went to trial after all attempts at negotiation and mediation failed.

B. Evidence of The Parties

8. PW-1 was the plaintiff. She testified that after she got married in 1975, the 1st defendant showed her their land which was comprised in the land parcel Kiamokama/292. She stated that this is where she has lived since she got married. As to the parcel B/B/Boburia/6300, she testified that it was purchased by herself and her husband, and that it was registered in her husband's name before later being registered



in name of her co-wife. She suspected that the 2nd defendant registered the land in her name as she worked at the lands office. Back to the Kiamokama land, she testified that she was never involved in its subdivision, and that one portion is registered in her husband's name and the other in the name of the 2nd defendant, while nothing is registered in her name. She asserted that she is entitled to a share of her husband's land and expects her husband to give her land. She stated that she got five children, but two died and were buried on the land, and further, that she has two sons who have their houses on the property. She testified that the 2nd defendant has no house in Kiamokama and lives in the parcel B/B/Boburia/6300. She also claimed that the 1st defendant has not carried out any developments on the Kiamokama land and that she (plaintiff) is the one who built the houses on this land. She denied being given any documents to sign.

9. Cross-examined, she acknowledged that when she got married, her husband had already acquired the Kiamokama land. She stated that when the land was subdivided no boundary marks were put. She contended that her kitchen falls on her co-wife's land and the land she was given excludes the houses of her sons; thus she has a problem with the way the land was divided. She testified that she proposed that she occupies the lower part of this land and the 2nd defendant occupies the upper portion. She testified that her house is on the lower portion and she has also sunk a borehole in this location. The borehole, she averred, falls in her co-wife's land. She stated that one of her sons has built on the upper portion. She asserted her position that she wants the old title restored so that it can be subdivided afresh. She acknowledged that the 2nd defendant is entitled to a share.
10. After she testified, the court (Onyango J), directed the Deputy Registrar to visit the land in Kiamokama with the County Surveyor. They did visit the land and they filed a report. I will get back to this report shortly.
11. It is at this point that I took over the matter as Onyango J, was transferred.
12. PW-2 was Abraham Maosa Orure. He is the Senior Chief of Nyangonda Location, where the land in Kiamokama is located. He testified that he is familiar with the conflict as the parties had approached him in 2007, when he was an Assistant Chief, to have the dispute resolved. It was the 1st defendant who went to his office and informed him that he has a conflict with his two wives. At that time, he stated, the plaintiff was living in Kiamokama whereas the 2nd defendant was living in Kisii Town. He testified that within the land in Kiamokama, each wife has a permanent house which are in situ. The 1st defendant asked him to help him divide his land between his two wives and he claimed that the 1st defendant wished to divide both parcels equally between them. He stated that he, together with a team of elders, visited the land in Kisii Town, where the 1st defendant lived with the 2nd defendant. He testified that the 2nd defendant informed his team that they were going elsewhere and were not willing to do any subdivision. According to him, this is what prompted the dispute, since the plaintiff wished to have a piece of this land in Kisii Town on the basis that she bought the land with her husband. He testified that the 1st defendant worked as a teacher whereas the plaintiff was a farmer back home and that the 1st defendant claimed to have bought the land in town.
13. Cross-examined, he testified that the ancestral home was subdivided into two and there is no problem. He was not aware that there is a complaint regarding this land. He thought that the land was properly subdivided and that both wives have permanent houses on this land. The only issue was that the gate was leading to the house of the 2nd defendant and they advised the plaintiff to put her own entrance. On the land in Kisii Town, he acknowledged that it is fully developed with the residential house of the 2nd defendant and other rental units.
14. With the above evidence, the plaintiff closed her case.



15. DW-1 was the 2nd defendant. She lives in the plot in Kisii town, which is located in Milimani, Kisii residential area. She testified that she got married to the 1st defendant in 1976. The plaintiff had been married a year earlier in 1975. She testified that in 1979, she got employed in the Survey office, Ministry of Lands, and she rented a house in Milimani. In 1982, she purchased the suit plot, which was within the area that she lived, and asserted that she bought it, using her own resources, from one Oyugi Ngoko. She stated that she had difficulty paying the purchase price and her own father assisted her clear the balance. She was categorical that she did not buy the land with any assistance from her husband or the plaintiff. She moved into the land, and built some mud-walled houses. She was not aware of a plot that the plaintiff purchased in Milimani before she got married and stated that she would have no issue with such plot if the plaintiff could show it. Regarding the land in Kiamokama, she testified that it was subdivided into two and she got her title, which is Kiamokama/1032. She stated that the other title, Kiamokama/ 1031, is in name of the 1st defendant, since the plaintiff declined to sign the transfer forms. She stated that the subdivision was done by clan elders but the plaintiff uprooted the boundary marks and this is when the Chief was involved. She testified that the plaintiff not only removed the boundary marks but moved into her portion to harvest her tea and she is doing that to date. She testified that this land has no houses and no developments and is a tea plantation. She elaborated that where the houses are located is in a different parcel of land which would be the land parcels Kiamokama/ 1033 or 1034.
16. Cross-examined, she affirmed that she had not carried the sale agreement for the parcel B/B/ Boburia/6300. She testified that she bought it for Kshs. 12,000/= in 1982 and insisted that her husband made no contribution. She became registered as proprietor in 1999. She was shown an apparent agreement dated 1 January 2007 which she signed whereby the land in Milimani was agreed to be equally divided and she explained that this plot in Milimani, in that document, was for land that her husband purchased with her co-wife (if one existed), and is not her plot. She testified that she owns other plots of land. She testified that she started living in the land in Kisii in 1986 and commenced construction in 1986. She denied being in a meeting of 10 February 2009 and refuted its minutes. On the land in Kiamokama, she testified that she planted tea on it in 1978. She again explained that what is in the disputed land is tea and the residences are in the parcels Kiamokama/1033 and 1034, which is other land. She did not know why the plaintiff did not include them in this suit. She stated that her house is in parcel Kiamokama/1034.
17. DW-2 was the 1st defendant, who it will be recalled is the husband to both plaintiff and 2nd defendant. He was born in 1948. He is certainly now an old man and he indeed testified under great difficulty. He acknowledged that the plaintiff is his first wife and the 2nd defendant is his second wife. He testified that the parcel B/B/Boburia/6300 was bought by the 2nd defendant in 1982 without any contribution from the plaintiff. On the land in Kiamokama, he testified that it was ancestral land, and he subdivided it amongst his two wives. However, the plaintiff decided to cultivate all of it and harvest all the tea by herself including the section of the 2nd defendant. He testified that there is separate land for the tea and the residences. He testified that it was only the ancestral land that was being divided and not any other land. They placed boundary marks but the plaintiff uprooted them. He stated clearly that he cannot accept for the land in Kisii town to be subdivided as it was solely bought by the 2nd defendant and denied ever agreeing that this land should be subdivided.
18. Cross-examined, he elaborated that his first love was the 2nd defendant, but he couldn't marry her as she was still in school, and that is how the plaintiff became his first wife. He affirmed that it was the 2nd defendant who bought the land in Kisii town; that she had money as she was working, though he did assist her by adding her some money. He was categorical that no contribution was made by the plaintiff. He stated that at that time they were already having disagreements with the plaintiff and they were not in good terms. He denied agreeing to subdivision of both the land in the village and the one



in town and refuted signing an agreement dated 1 December 2007. He stated that there is only one plot in Milimani, which is the disputed plot, and it is on a small compound. He testified that in 1982 he was a teacher. He affirmed calling the chief and elders to resolve the dispute at home but denied calling the chief or elders to resolve the dispute over the plot in Milimani and denied ever inviting them to his house in town. He testified that in the village, he built for his two wives permanent houses, and everyone has their compound. This is land that he inherited from his father.

19. DW-3 was Thomas Ongeru Orangi, a surveyor working with the Ministry of Lands at Kisii. He testified that he visited the disputed land in Kiamokama on 17 July 2021 and a report was prepared by the deputy registrar. He testified that the land parcels Kiamokama/1031 and 1032 are covered in tea bushes and bananas, and there is no construction on either parcel. Neither is there a boundary mark between them and they appear as one on the ground. He affirmed that the residences are in other land.
20. With the above evidence, the defendants closed their case.
21. I invited counsel to file written submissions and I have seen the submissions of Ms Ochwal, learned counsel for the plaintiff, and Ms Nyandoro, learned counsel for the defendants.

C. Analysis And Disposition

22. The plaintiff's dispute is over two parcels of land. The first, is the land parcel formerly registered as Kiamokama/292 which has been subdivided into two, that is the parcels Kiamokama/1031 and 1032. It is in the village. The second parcel of land in issue is the plot B/B/Boburia/ 6300 which is in Milimani residential area, Kisii Town.
23. Let me start with this land in the village. The plaintiff's contention is that it was subdivided in a manner that is not conducive to her existence, since it cuts her residence into two, and that her borehole and some of the houses of her sons are now in her co-wife's land. All this is refuted by the defendants. The defendants in fact assert that there are no residences on this land and all that is there is a tea plantation. The fact that the land parcels Kiamokama/1031 and 1032 have no residences in them is supported by the report of the deputy registrar, who visited the land, and also the evidence of the Surveyor, who accompanied the deputy registrar in the visit. That report is categorical that there are no residences on the parcels Kiamokama/1031 and 1032, and that both parcels have tea bushes and small banana plantations, with boundaries marked by napier grass.
24. Now, I don't know if the plaintiff was mistaken, or she simply brought a dispute that has no basis to court. Her pleadings claim that her homestead was established in the parcel Kiamokama/2092, which, owing to the expert evidence, cannot be the case. She pleaded, and indeed testified, that she has a problem with the subdivision of the parcel Kiamokama/2092 because it poorly distributes her developments on the land. However, there are no structural developments on the land. In her prayers, she *inter alia* wishes to have an order to have the subdivisions nullified and the land revert back to the parcel Kiamokama/292 so that the same can be subdivided to take into account the ground location of her homestead. Clearly, there cannot be any basis for this prayer since there is nothing developed on the land. I reiterate that all that is on the land is tea and banana plants.
25. The 1st defendant testified that he subdivided this land with tea into two equal portions. That is in fact confirmed by the certificates of official search produced by the plaintiff. The parcels Kiamokama/1031 and 1032 both measure 0.08 ha, meaning that they are equal. So what is wrong with the 1st defendant dividing his tea plantation equally between his two wives? I see nothing wrong. The plaintiff herself does not claim that she is entitled to the whole of the tea plantation. That is nowhere in her pleadings. Her pleadings aver that she wants the land divided into two which is exactly what her husband has done. The 1st defendant has not refused to transfer one of the subdivisions to her. It is the plaintiff who



has been uncooperative. If she wants title to this land parcel Kiamokama/1031, let her liaise with her husband to transfer it to her. There is no basis for intervention or interference by the court. It is crystal clear that there was nothing to proceed for trial over this land parcel Kiamokama/292 subdivided into the parcels No 1031 and 1032. In her submissions, Ms. Ochwal for the plaintiff referred me to various cases relating to customary trust. I need not analyse them as it cannot be argued that the 1st defendant breached any trust in subdividing his ancestral land, where there is tea, into two portions, so that each wife can have a share of this tea. The plaintiff's case regarding this land parcel Kiamokama/ 292 or its subdivisions being Kiamokama/1031 and 1032, is hereby dismissed.

26. That leaves the land parcel B/B/Boburia/6300 which is in town. The plaintiff alleges that she contributed towards the purchase of this plot. There is no such evidence. What the evidence shows is that the plaintiff lived in the land in the village, which she farmed, whereas her co-wife was gainfully employed as a civil servant and she lived in town. I am not persuaded that the plaintiff contributed to the acquisition of this property so that her husband and co-wife can blissfully live in town. I doubt that she would have any interest in their consortium, especially given the rather testy relationship that she appears to have with her co-wife. It is true that the land parcel B/B/Boburia/6300 was purchased while she was married to the 1st defendant, but that alone, does not qualify to make her have an equal share in it. The evidence presented shows that the 2nd defendant wished to have her own residence while she worked in town, and I have nothing to suggest that it was not her who purchased the land, or if there was any contribution by the husband, the contribution was to enable her, and her alone, have a place that she can call her own. That is why the land is solely registered in her sole name. There is no evidence whatsoever of the land parcel B/B/Boburia/6300 being purchased so that it can be shared between the two wives.
27. In her submissions, Ms Ochwal ventured to submit that the 2nd defendant did not produce a sale agreement. She did not have to. It was the plaintiff who claims that she contributed to purchase of the property, or bought it, so the burden was on her. Has she herself produced a sale agreement ? She has not. And she never said that she was the one who negotiated with Mr. Ngoko to buy the land; she never mentioned any purchase price, or the actual contribution that she made towards settling the purchase price.
28. The above aside, the plaintiff never mentioned that she contributed to the buildings in the plot, and indeed I am of the persuasion that she did not. She never lived in this house. She never collected any rent from the rental units in this house. It has been the residence of the 2nd defendant since it was purchased. Where is the sudden interest in this plot coming from ? I am baffled. There is clearly no evidence of this plot being a joint venture between the plaintiff and the 1st defendant as the plaintiff has pleaded. In fact, if at all this was a joint venture, it was a joint venture between the 1st and 2nd defendants to the exclusion of the plaintiff.
29. To say that the claim of the plaintiff regarding the plot B/B/Boburia/6300 is far fetched, is being polite to her. It is not only ridiculous, but also preposterous, for her to claim any share in this land.
30. Her claim over the land parcel B/B/Boburia/6300 has no basis whatsoever and it is also hereby dismissed.
31. I have dealt with the plaintiff's contention over the suit properties herein and that should be the end of the matter. But before I close, I think it is imperative for this court to impress that for such cases, parties need to go out of their way to settle the matter between themselves and obviate the necessity of a court judgment. It is expected that persons in relationships such as the one that presented itself here, will be rational and fair to each other. If there are issues, then the parties need to attempt, as much as possible, to resolve them. Each family is unique and has its own dynamics and it ought to be their business to



try and sort out their affairs. Of course, the court is available where there can be no settlement, but as I have said, that really should be a last recourse.

32. As it turns out, the plaintiff has presented a pretty frivolous case before this court. If the plaintiff was a decent litigant, acting in good faith, she ought, at least, to have graciously withdrawn her claim over the parcels Kiamokama/1031 and 1032, once the site visit report was filed and upon hearing the evidence of the Surveyor. Why was she still insisting on proceeding when it was made clear that these land parcels Kiamokama/1031 and 1032 have no structural developments in them ? I know that courts do take into consideration the relationship of the parties while making orders as to costs. But whichever way you look at it, this suit was completely uncalled for. I wonder whether the plaintiff merely had an axe to grind with the defendants and thought of irritating them further by presenting this case to court. It was a needless case and the plaintiff will have to pay the costs of it. A message needs to be sent that you cannot take advantage of your close relationship with the parties that you sue, and escape costs, however frivolous your case may be. Whether the defendants will pursue her for settlement thereof is up to them.
33. This suit is thus hereby dismissed with costs to the defendants.
34. Judgment accordingly.

DATED AND DELIVERED AT KISII THIS 8 DAY OF NOVEMBER 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In the presence of:

Mr. Wafula for the plaintiff, instructed by M/S Oguttu Mboya, Ochwal & Partners

Ms. Bosire for the defendants, instructed by M/S Bosire Gichana & Co. Advocates

Court Assistant – Mr. Lawrence Chomba

