



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MERU**

**ELCA NO. 44 OF 2019**

**JULIET GACHERI GIKUNDA.....APPELLANT**

**-VERSUS-**

**DOMINIC KIOGORA.....1<sup>ST</sup> RESPONDENT**

**BENSON GIKUNDA.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

**A. INTRODUCTION AND BACKGROUND**

1. This is an appeal against the judgment and decree of Hon. J. Irura (PM) dated 30<sup>th</sup> January, 2019 in *Nkubu PMCCNo. 70 of 2014 - Dominic S. Kiogora Muriithi v Benson Gikunda and Juliet Gacheri Gikunda*. By the said judgment, the trial court allowed the 1<sup>st</sup> Respondent's suit and also dismissed the Appellant's counterclaim with costs.

2. The material on record indicates that vide a plaint dated 8<sup>th</sup> January, 2013 and amended on 6<sup>th</sup> October, 2015, the 1<sup>st</sup> Respondent sued the Appellant and the 2<sup>nd</sup> Respondent seeking

the following reliefs:

(a) *An order for the removal of the caution placed on land parcel numbers Abogeta/L-Chure/1342 and 1343.*

(b) *Transfer of land parcel number Abogeta/L-Chure/1342 to the Plaintiff.*

(c) *Excision of a portion measuring 0.25 acres from land parcel number Abogeta/L-Chure/1343 and transfer of the same to the Plaintiff.*

(d) *In the alternative, a refund by the 1<sup>st</sup> Defendant of all the monies paid to him vide the agreements dated 25<sup>th</sup> October, 2010 and 6<sup>th</sup> July, 2012 plus interest thereon at 18.5% from the dates of such payment until settlement in full.*

(e) *Any other better relief that the Honourable Court deems fit to grant.*

(f) *Costs and interest at court rates.*

3. The basis of the 1<sup>st</sup> Respondent's claim was that he had bought from the 2<sup>nd</sup> Respondent a portion of ½ acre out of **parcel 1243** and another portion of ¼ acre to be excised out of **parcel 1343** vide by two sale agreements dated 25<sup>th</sup> October, 2010 and 6<sup>th</sup> July, 2012 respectively but the 2<sup>nd</sup> Respondent had failed to transfer those portions to him on account of certain cautions lodged by the Appellant against the concerned titles.

4. The Appellant filed a defence and counterclaim dated 8<sup>th</sup> February, 2013 in which she denied liability for the 1<sup>st</sup> Respondent's claim. She pleaded that she was the wife of the 2<sup>nd</sup> Respondent and that the suit properties constituted matrimonial property. The appellant further pleaded that the 2<sup>nd</sup> Respondent had acquired the suit properties from his father hence they constituted ancestral land which he was holding in trust for her and their children.

5. The Appellant further pleaded that the 1<sup>st</sup> Respondent was trying to illegally and fraudulently acquire the suit properties by manipulating the 2<sup>nd</sup> Respondent whom he considered a drunkard and incapable of managing his affairs. She contended that the suit properties were being sold secretly without her consent hence the reason she cautioned them. The Appellant consequently sought the following reliefs in her counterclaim:

*(a) A declaration that the 1<sup>st</sup> Defendant holds L.R. Abogeta/L-Chure/1342 and 1343 in trust for the 2<sup>nd</sup> Defendant and their three children being ancestral and matrimonial property and an order for the said parcels of land to be registered in the names of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants jointly.*

*(b) A declaration that any purported dealings by the Plaintiff and the 1<sup>st</sup> Defendant over the subject matter L.R. Abogeta/L-Chure/1342 and 1343 was unlawful.*

*(c) Costs and interest.*

6. The 2<sup>nd</sup> Respondent filed a defence to the suit wholly admitting the 1<sup>st</sup> Respondent's claim. He conceded that he had sold two portions of land out of the suit properties and stated that the Appellant was fully aware of the sale and that the proceeds of sale were utilized in paying the Appellant's debts and meeting the financial obligations of the family.

7. In his defence to the counter-claim, the 2<sup>nd</sup> Respondent denied that there was any marriage whether statutory or customary between him and the Appellant. He contended that they were merely cohabiting and that any relationship between them had become extinguished upon cessation of cohabitation. He denied that the suit properties constituted matrimonial property. He also denied that he was holding the suit properties in trust for the Appellant.

8. The record shows that upon a full hearing of the suit the trial court found for the 1<sup>st</sup> Respondent and allowed his claim as prayed in

the plaint. The court also dismissed the Appellant's counterclaim upon finding and holding that the Appellant had failed to prove the same as required by law. In particular, the trial court found that the Appellant had failed to prove the illegality and fraud pleaded in the counterclaim and the alleged trust. The court also held that spousal consent was not a legal requirement at the time of sale and that the lack of consent of the Land control Board did not invalidate the sale.

## **B. THE GROUNDS OF APPEAL**

9. Being aggrieved by the judgment of the trial court, the Appellant filed a memorandum of appeal dated 28<sup>th</sup> February, 2019 raising the following 6 grounds of appeal:

*(a) The learned trial Magistrate erred both in law and fact by dismissing the Defendant's case against the bulky evidence on record in favour of her claim.*

*(b) The learned trial Magistrate misdirected herself on the standard of proof in civil cases i.e on a balance of probability by failing to find that there was a preponderance of evidence on record in favour of the Defendant's claim.*

*(c) The learned trial Magistrate erred both in law and fact by misapprehending the evidence on record by the Appellant and the applicable law thereby arriving at a wholly untenable judgment.*

*(d) The learned trial Magistrate erred in law and fact by off-handedly dismissing the Appellant's claim of there being a trust over the suit land by virtue of the Appellant being the 1<sup>st</sup> Defendant's spouse.*

*(e) The Honourable court erred both in fact and in Law by finding in favour of the Defendant in its counter-claim when clearly there was no evidence on record in support thereof.*

*(f) The Honourable court shut its eyes by failing to see that there was clearly a cover-up in favour of the Defendant and by failing to take note the frustrations the Plaintiff suffered especially when the Plaintiff sought to avail the best evidence to enable court unravel the dispute.*

10. The Appellant consequently sought orders for the appeal to be allowed; The 1<sup>st</sup> Respondent's suit to be dismissed; and for her counter-claim to be allowed. She also sought costs of the litigation.

## **C. DIRECTIONS ON SUBMISSIONS**

11. When the appeal was listed for directions on 25<sup>th</sup> June, 2020 it was directed that the same shall be canvassed through written submissions. The Appellant was given 30 days to file and serve her submissions whereas the Respondents were given 30 days upon service to file and serve theirs. The record shows that the Appellant filed her submissions on 1<sup>st</sup> September, 2020 whereas the Respondents' submissions were not on record by the time of preparation of the judgment.

## **D. APPLICABLE LEGAL PRINCIPLES**

12. The court is aware of its duty as a first appellate court. It has a duty to analyze, reconsider and re-evaluate the entire evidence on record so as to satisfy itself as to the correctness or otherwise of the decision of the trial court. The principles which guide a first appellate court were summarized in the case of **Selle & Another v Associated Motor Boat Co. Ltd & Others [1968] EA. 123 at page 126** as follows:

**“...Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. In particular, this court is not bound necessarily to follow the trial judge’s findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression on the demeanor of a witness is inconsistent with the evidence in the case generally.”**

13. Similarly, in the case of **Peters v Sunday Post Ltd [1958] EA 424 Sir Kenneth O’ Connor, P.** rendered the applicable principles as follows:

**“...It is a strong thing for an appellate court to differ from the finding, on a question of fact, of the judge who tried the case, and who had the advantage of seeing and hearing the witnesses. An appellate court has, indeed, jurisdiction to review the evidence in order to determine whether the conclusion originally reached upon the evidence should stand. But this is a jurisdiction which should be exercised with caution. It is not enough that the appellate court might itself have come to a different conclusion...”**

14. In the same case, **Sir Kenneth O’Connor** quoted **Viscount Simon, L.C in Watt v Thomas [1947] A.C 424 at page 429-430** as follows:

**“My Lords, before entering upon an examination of the testimony at the trial, I desire to make some observations as to the circumstances in which an appellate court may be justified in taking a different view on facts from that of a trial judge. For convenience, I use English terms, but the same principles apply to appeals in Scotland. Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law (for example, on a case stated or on an appeal under the County Courts Acts) an appellate court**

**has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given.”**

#### **E. THE ISSUES FOR DETERMINATION**

15. Although the Appellant raised 6 grounds of appeal in her memorandum of appeal, the court is of the opinion that the appeal may be effectively determined on the basis of the following 3 key issues:

*(a) Whether the trial court erred in fact and in law in allowing the 1<sup>st</sup> Respondent’s suit.*

*(b) Whether the trial court erred in fact and in law in dismissing the Appellant’s counter-claim.*

*(c) Who shall bear costs of the appeal*

#### **F. ANALYSIS AND DETERMINATION**

##### **(a) Whether the trial court erred in fact and in law in allowing the 1<sup>st</sup> Respondent’s claim**

16. The court has considered the material and submissions on record on this issue. The Appellant faulted the trial court on at least 3 grounds. First, it was submitted that the two sale agreements over the suit properties were null and void for want of consent of the Land Control Board under the **Land Control Act (Cap. 302)** hence the trial court erred in not holding that they were invalid. Second, it was submitted that the trial court failed to find and hold that lack of spousal consent on the part of the Appellant was fatal to the sale agreements in issue. Third, it was contended that the trial court erred in failing to notice obvious collusion between the Respondents in the sale transactions.

17. The court has noted from the material on record that the Appellant did not plead in her defence or counter-claim that the two sale agreements in issue were invalid for lack of consent of the Land Control Board. It is trite law that parties are bound by their pleadings and that a court of law is bound to pronounce judgment only on the issues properly arising from the pleadings filed by the parties. It was, therefore, not open for the trial court to consider and determine the issue of consent of the Land Control Board when the same was not pleaded by any of the parties to the litigation.

18. As was held in **Odd Jobs v Mubia [1970] EA 476, Vyas Industries Ltd v Diocese of Meru [1982] KLR 114** and **Galaxy Paints Co.**

**Ltd v Falcon Guards Ltd [2000] 2 EA 385**, a court of law should not base its decision upon an unpleaded issue. In the case of **Galaxy Paints Co. Ltd v Falcon Guards Ltd** (*supra*) the court held *inter alia*, that;

**“It is trite law, and provisions of Order XIV of the Civil Procedure Rules are clear that issues for determination in a suit generally flow from the pleadings and, unless pleadings are amended in accordance with provisions of the Civil Procedure Rules, the trial court by dint of the provisions of Order XX Rule 4 of the aforesaid rules may only pronounce judgement on the issues arising from the pleadings or such issues as the parties framed for the court’s determination.**

**In Gandy Vs Caspair [1956] EACA 139, it was held that unless the pleadings are amended, parties must be confined to their pleadings. Otherwise, to decide against a party on matters which do not come within the issues arising from the dispute clearly amounts to an error on the face of the record...**”

19. The court is of the opinion that the Appellant has no legitimate complaint on the issue of consent. It was not one of the issues which was properly placed before the trial court for determination. The court is further of the opinion that, in any event, the lack of consent of the Land Control Board does not necessarily invalidate an agreement for the sale of agricultural land. It all depends on the circumstances of each particular case and a court of law is empowered to apply equitable principles and imply a trust in appropriate cases. See **Macharia Mwangi Maina & 87 Others v Davidson Mwangi Kagiri [2014] eKLR and Willy Kimutai Kitilit v Michael Kibet [2018] eKLR.**

20. The court has considered the issue of spousal consent which was pleaded by the Appellant and canvassed before the trial court. Whereas the Appellant contended that she was not consulted over the sale and that she did not consent thereto, the Respondents contended that there was no legal requirement for spousal consent in 2010 and 2012 when the sale agreements were entered into. It was contended that spousal consent was introduced in 2014 hence the law could not apply retrospectively.

21. The trial court in its judgment considered this issue and concurred with the Respondents that the legal provisions on spousal consent could not apply retrospectively. The trial court relied upon the case of **Peninah Wambu Mugo v NMK and MMN Nakuru HCC No. 238 of 2014** in which it was held, *inter alia*, that:

**“30...under the now repealed Registered Land Act Cap. 300, spousal consent was not a requirement. Such consent became a requirement with the enactment of the Land Registration Act, 2012 as stated in the case C.A No. 278 of 2006 by Nambuye, Okwengu and Kiagie JJA sitting in Nakuru in Fredrick Chege Ndongo vs Bernard Njoroge Mburua & 2 Others in their judgment of the 16<sup>th</sup> June, 2016”**

22. The court is further aware that the enactment of spousal consent as an overriding interest under **Section 28 of the Land Registration Act, 2012** was repealed vide **Act No. 28 of 2016**. That effectively means that the only legal provision currently dealing with spousal consent over matrimonial property is the **Matrimonial Property Act, 2013** which came into force on 16<sup>th</sup> January, 2014. Consequently, the court finds no fault in the trial court’s finding that no spousal consent was legally required at the material time.

23. The Appellant also faulted the trial court for failing to notice what she considered to be collusion between the Respondents. The material on record indicates that the trial court did not find any fault with the two sale agreements in issue. The trial court did not find them illegal or contrary to public policy. The court is of the view that culpable collusion must involve doing something which is illegal, unlawful or contrary to public policy. If the Respondents’ transaction were lawful, as the trial court found, the existence of collusion would be totally irrelevant to the issues for determination before court.

24. Finally, although the Appellant contended that the suit properties constituted matrimonial property there is no evidence on record to demonstrate that they constituted matrimonial property within the meaning of **Section 6 of the Matrimonial Property Act, 2013**. The evidence on record shows that the portions of the suit property sold to the 1<sup>st</sup> Respondent were vacant and did not include any family home. **Sections 7 of the Matrimonial Property Act** stipulates that:

**“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”.** (Emphasis added).

25. The evidence on record shows that the suit properties were inherited by the 2<sup>nd</sup> Respondent from his father. He did not contribute towards their acquisition and neither did the Appellant contribute to their acquisition. In any event, if the Appellant was entitled to one half out of the suit properties then she would still be able to prove her claim before the proper forum for her share because the 2<sup>nd</sup> Respondent only sold  $\frac{3}{4}$  acre of the 2 acres comprised in the suit properties.

***(b) Whether the trial court erred in fact and in law in dismissing the Appellant’s counter-claim***

26. As indicated before, the Appellant’s counterclaim was based on alleged fraud and illegality. The Appellant listed 5 particulars of fraud against the 1<sup>st</sup> Respondent in paragraph 4 of her defence. The Appellant also relied on the doctrine of trust and pleaded that the 2<sup>nd</sup> Respondent was holding the suit properties in trust for her and their children. The trial court was not satisfied that the Appellant had proved her counter-claim at all hence its dismissal.

27. The court has evaluated the evidence on record on the counterclaim. The court finds no evidence of fraud on the part of the 1<sup>st</sup> Respondent. There was no requirement of spousal consent at the time the transactions in issue took place. It was not demonstrated that the 2<sup>nd</sup> Respondent was a moron as alleged by the Appellant and that he was incapable of managing his own affairs.

28. The court finds no evidence on record to demonstrate that the 2<sup>nd</sup> Respondent was holding the suit properties in trust for the Appellant. The Appellant did not file the counter-claim as a guardian *ad litem* on behalf of her children. She filed it in her own right. The court finds no evidence on record to justify the counter-claim. In particular, the court finds no legal justification for the Appellant's prayer in the counter-claim for the suit properties to be registered jointly in her name and that of the 2<sup>nd</sup> Respondent. Accordingly, the court finds no fault with the trial court's finding

and holding on the counter-claim.

***(c) Who shall bear the costs of the appeal***

29. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See **Hussein Janmohamed & Sons v Twentsche Overseas Trading Co. Ltd [1967] EA 287**. The court is aware that all the parties herein are related. Accordingly, the court is of the opinion that each party should bear his own costs.

**G. CONCLUSION AND DISPOSAL**

30. The upshot of the foregoing is that the court finds no merit in this appeal. Accordingly, the court makes the following orders for disposal thereof:

*(a) The Appellant's appeal be and is hereby dismissed in its entirety.*

*(b) The judgment and decree of the trial court dated 30<sup>th</sup> January, 2019 in Nkubu PMCC No. 70 of 2014 – Dominic S. Kiogora Murithi vs Benson Gikunda & Another is hereby affirmed.*

*(c) Each party shall bear his own costs of the appeal.*

It is so decided.

**Judgment dated and signed** in chambers at **Nyahururu** this **20<sup>th</sup>** day of **May** 2021.

**Y. M. ANGIMA**

**ELC JUDGE**

**Judgment** delivered at **MERU** this **27<sup>th</sup>** day of **May** 2021.

In the presence of:

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**L. N. MBUGUA**

**ELC JUDGE**