



THE REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC APPEAL CASE NO E054 OF 2020

MAUREEN OGOLLA ONG'ANYAPPELLANT

VERSUS

TOM ODAGO OPIYORESPONDENT

(Being An appeal arising from the Judgments and Decree of the Chief Magistrate Court at Milimani Commercial Courts by Hon C Kithinji, Senior Resident Magistrate, delivered on 23/10/2020 and 12/11/2020 in MC ELC No 17 OF 2020.)

JUDGMENT

1. In or about June 2020, the respondent, **Tom Odago Opiyo**, took out an originating summons dated 2/6/2020 in Milimani Chief Magistrate Court, under **Order 37** rules 3 and 11 of the Civil Procedure Rules, seeking a determination of the following four verbatim questions:

- 1) *What is the respective contribution of the applicant and the respondent in the acquisition of the property known as Apartment No. A901 on LR No. 330/1375 Nairobi (Astoria) located in Nairobi.*
- 2) *Whether the respondent has any legal or ownership rights over the property known as Apartment No. A 901 on LR No. 330/1375 Nairobi (Astoria) Located in Nairobi.*
- 3) *Whether the applicant ought to be declared as the sole owner of Apartment No. A901 on LR No. 330/1375 Nairobi (Astoria) located in Nairobi if it is deemed that the respondent does not have any legal or ownership rights.*
- 4) *If so, whether the respondent should be ordered to forthwith vacate Apartment No. A 901 on LR No. 330/1375 Nairobi (Astoria) located in Nairobi.*

2. In addition to seeking the Chief Magistrate Court's determination of the above four questions, the respondent sought the following verbatim orders in the same originating summons taken out under Order 37 rules 3 and 11 of the Civil Procedure Rules:

- 5) *An order that in the event that the respondent does not grant immediate vacant possession, the applicant be at liberty to evict the respondent forthwith with assistance from the Kilimani Police Station where the property known as Apartment No. A 901 on LR No. 330/1375 Nairobi (Astoria) is located.*
- 6) *An order do issue directing that all the documents of ownership, including the Sublease and the Share Certificate in respect of the property known as Apartment No. A901 on LR No. 330/1375 Nairobi (Astoria) located in Nairobi be varied to provide for the sole name of Tom Odago Opiyo as the owner of the property and the deletion of the name of Maureen Agolla Ong'any.*
- 7) *An order for payment of mesne rent against the respondent from January 2020 until date of determination of the suit at the rate of Kshs 80,000 per month inclusive of interest at court rates until payment in full.*

8) *Costs be provided.*

3. The respondent's case was that the appellant and himself were parties to a sale agreement dated 12/11/2019, relating to **Apartment No. A901**, erected on Land Reference **Number 330/1375**, Astoria Court, Mbaazi Road, Thomson Estate, Nairobi (**the suit Property**). He (the respondent) paid the full purchase price of the apartment and all incidental costs. The appellant did not make any contribution to the purchase of the suit property. The two parties did not have a "legal relationship". He further contended that the appellant did not have any legal rights over the suit property.

4. The appellant responded to the originating summons through a replying affidavit she swore on 7/7/2020. Her case was that the

respondent was her partner and the father to her daughter, ZDO [*name withheld*], named after the respondent's mother. They met at G-Pot Restaurant, "struck it off" and started a romantic relationship. The respondent subsequently rented for her a house at Nartie Gardens, Lavington, along Hendred Road. They moved into the house together and the respondent asked her to bear him a daughter whom he would name after his late mother. She was at the beck and call of the respondent, assisting him in various ways. The applicant was elated when he learnt that she was expecting his baby girl. Consequently, the respondent promised to provide living expenses, medical expenses, and a house for her and their daughter as a result of love, affection and sacrifice made towards him.

5. The appellant added that in October 2019, they both appeared before their advocate, Mr. Cliff Oduk, where they were taken through a sale agreement after which they both signed it. They subsequently signed the relevant conveyance documents. The suit property was subsequently acquired in their joint names. She faulted the respondent for lying that she [the appellant] signed the sale agreement and the conveyance instruments merely as a facilitator. She urged the court to reject the originating summons.

6. On 24/8/2020, the trial court issued ex-parte directions allowing disposal of the originating summons through affidavit evidence and written submissions. Eventually, on 23/10/2020, the trial court rendered a judgment in which the learned trial magistrate made the following findings:

- a) *The appellant's claim that her interest in the suit property crystalized as a result of a gift failed because it was never perfected.*
- b) *The sale agreement showed an intention of a joint tenancy.*
- c) *The respondent had confirmed that the appellant did not make any payment towards purchase of the suit property.*
- d) *Possession did not confer rights.*

7. Ultimately, the trial magistrate made the following disposal orders in the judgment rendered on 23/10/2020:

"16. My finding will be that the applicant has not demonstrated that the suit property is not registered solely in his name for the issuance of the declarations and orders sought. He has implied registration and need for revocation and corrections of the records.

17. I direct that the parties address this issue for determination of the court."

8. The learned trial magistrate signed off as follows:

"Court: Judgment delivered. The issue of whether property is registered. Mention on 5/11/2020."

9. Subsequently, the learned trial magistrate convened a subsequent sitting in which she rendered the following verbatim orders:

"Court: In view of the confirmation that there is no registration, I make the following final and determination just to the judgment issued in this matter:

- 1. No contribution was made by the respondent in respect to purchase of the subject property.***
- 2. The respondent has no legal right over the suit property.***
- 3. The applicant is at liberty to initiate proceedings to acquire vacant possession of the suit premises and to pursue registration of the suit land.***
- 4. Mesne profits do not accrue and it appears the applicant allowed the respondent to make use of the property.***
- 5. Each party to bear its own costs."***

10. Dissatisfied with the two judgments of the trial court, the appellant brought this appeal through a Memorandum of Appeal dated 7/12/2020, advancing the following verbatim grounds:

- 1) That the learned trial court erred both in law and in fact in allowing the respondents originating summons dated 2nd June 2020.***
- 2) That the learned court erred in fact and in law in decreeing that the appellant does not have legal right to apartment A901/1375 Nairobi (Astoria).***
- 3) That the learned trial court erred in fact and in law in decreeing that the appellant did not make any contribution.***

11. The appeal was canvassed through written submissions. The appellant filed her submissions dated 5/5/2021, through the firm of *Ojienda & Co. Advocates*. Counsel for the appellant identified the following as the issues falling for determination in the appeal; (i) Whether the trial court erred both in law and in fact in allowing the respondent's originating summons dated 2/6/2020; (ii) Whether the trial court erred both in law and in fact in decreeing that the appellant did not have legal rights to Apartment A901/1375 Nairobi (Astoria); and (iii) Whether the trial court erred in fact and in law in decreeing that the appellant did not make any contribution in the acquisition of the suit property.
12. On whether the trial court erred both in law and in fact in allowing the respondent's originating summons dated 2/6/2020, counsel submitted that there were vital questions of fact which ought to have been subjected to *viva voce* evidence which the magistrate ought to have considered but failed to do so. On whether the learned trial court erred both in law and in fact in decreeing that the appellant did not have legal rights to Apartment A901/1375 Nairobi (Astoria), counsel submitted that parties willfully and legally intended to create a binding legal relationship and the registration was lawful and therefore could be impeached without listening to the parties. He cited the case of *Elijah Makeri Nyangwara v Stephen Mungai Njuguna & Another (2003) eKLR*.
13. On whether the trial court erred in fact and in law in decreeing that the appellant did not make any contribution towards acquisition of the suit property, counsel submitted that the court had a duty to apportion family property taking into account indirect contribution not only to purchase of the suit property but also to the welfare of the family. Counsel cited the case of *M v M (2008)1 KLR 2479(G & F)* and the case of *Burns v Burns (1984) 1ALL ER 244*. Counsel urged the court to allow the appeal and set aside the judgment of the trial court.
14. The respondent filed his written submissions dated 26/6/2021 through the firm of *Kimani & Muriithi Associates*. Counsel identified the following as the key issues falling for determination in this appeal: (i) Whether the trial court erred in law and in fact in allowing the originating summons; (ii) Whether the court erred in fact in decreeing that the appellant did not have legal rights to the suit property; and (iii) Whether the court erred in holding that the appellant did not make any contribution to the purchase of the suit property.
15. On whether the trial court erred both in law and in fact in allowing the respondent's originating summons, counsel submitted that the order to proceed by way of affidavit evidence was made on 24/8/ 2020 and the said order was never challenged. Counsel relied on Order 42 rule 4 of the Civil Procedure Rules and contended that the appellant ought not to be heard on any ground not raised in the Memorandum of Appeal. He cited the case of *Shah v Mbogo & another (1968) E.A 93*.
16. On whether the trial court erred in fact in decreeing that the appellant did not have legal rights to the suit property, counsel submitted that there was no transfer documents produced in court to support the joint registration and accordingly the appellant did not enjoy the benefits of the rights of registration under **Sections 24 and 25** of the Land Registration Act. Counsel stated that the interaction between the appellant and the respondent was not meant to create legal relationship. Counsel cited the case of *Balfor v Balfor (1919) 2KB 571* and the case of *Babubhai Bhagwanji Amba Madhiwani v Maria Burton(2019) eKLR*.
17. It was counsel's further submission that the appellant did not prove any marriage between her and the respondent and in the absence of marriage, the property did not fall within the ambits of the Matrimonial Property Act. Further, counsel urged that there was no enforceable contract between the parties. Counsel cited the case of *George Ngatiri T/A Naivasha Millers 1987 v Naphtalii J M Mureithi & another(2005) eKLR*. Counsel submitted that the appellant's claim that her interest accrued as a result of a gift failed because an incomplete gift could not take effect in law. Counsel cited the case of *Stephen Mkare Mulewa v Linda Newman (2015) eKLR*.
18. On whether the trial court erred in fact and in law in decreeing that the appellant did not make any contribution to the purchase of the property, counsel submitted that the taking of possession by the appellant did not entitle her to ownership without tangible contribution. He cited the case of *Oxley v Hiscock(2005) 3WLR 715*. Counsel urged the court to dismiss the appeal with costs.
19. I have considered the record of appeal in its entirety, including the above verbatim grounds of appeal. I have also considered the parties' respective submissions, and the respective issues they identified in their submissions. Further, I have considered the relevant law and jurisprudence. The key issue in this appeal is whether the trial magistrate made any fatal error of law or fact that would warrant the setting aside of the judgments rendered on 23/10/2020 and 12/11/2020 (the memorandum of appeal reads 13/11/2020 but the typed proceedings read 12/11/2020).
20. My answer to the above issue is in the affirmative. I will proceed to analyze the issue and the basis of the above conclusion. I will start with the element of the two judgments.
21. The trial magistrate made a final finding in the judgment dated 23/10/2020 to the effect that the respondent had not demonstrated that "the suit property is not registered solely in his name for issuance of the declarations and orders sought". She proceeded to direct the parties to "address this issue for a determination of the court". This in my view was a fundamental error of law. This was a highly contested suit. The moment the trial court found that the respondent had not satisfied the threshold of proof, the only disposal order available to the trial court was an order declining the originating summons. There was no provision in law for the learned trial magistrate to direct the parties, through the final judgment of the court, to embark on a second round of trial in the same suit, to procure a second judgment/ determination in the same suit. This fundamental error of law warrants the setting aside of the two judgments dated 23/10/2020 and 12/11/2020 respectively.
22. The second fundamental error of law on part of the trial court relates to the jurisdiction of the magistrate court. The originating summons giving rise to this appeal was taken out under Order 37 rules 3 and 11 of the Civil Procedure Rules. **Order 37** rule 3 provides as follows:

"A vendor or purchaser of immovable property or their representatives respectively may, at any time or times, take out an originating summons returnable before the judge sitting in chambers, for the determination of any question which may arise in respect of any requisitions or objections, or any claim for compensation; or any other question arising out of or connected with the contract of sale (not being a question affecting the existence or validity of the contract)."

23. Order 37 rule 11 provides as follows:

“Summons by persons interested in deeds or wills. 11. Any person claiming to be interested under a deed, will, or other written instrument, may apply in chambers by originating summons for the determination of any question of construction arising under the instrument, and for a declaration of the rights of the person interested.”

24. It is clear from the above framework that an originating summons taken out under Order 37 rule 3 of the Civil Procedure Rules is returnable before a judge. There is no provisions for returning the originating summons before a Senior Resident Magistrate. Our superior courts have been consistent that jurisdiction is donated by either the Constitution or a legislation and that where a court purports to exercise jurisdiction in a dispute in which it does not have jurisdiction, its orders are nullities. The Supreme Court of Kenya rendered itself on the subject of jurisdiction in **Samuel Kamau Macharia & another v Kenya commercial Bank Limited & 2 others [2012] eKLR** as follows:

“A court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a court of law has jurisdiction to entertain a matter before it is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction the court cannot entertain any proceedings.”

25. Thirdly, assuming that the trial court had jurisdiction to entertain the originating summons, it was required at the time of rendering directions, to examine the nature of questions and orders itemized in the originating summons together with the response on record, and give appropriate disposal directions. My examination of the originating summons and the response thereto reveals that what was before court was a highly contentious dispute relating to ownership of the suit property and the appellant’s right to occupy the suit property. This was therefore a dispute to be adjudicated as a substantive ordinary suit in line with the guidelines in **Wakf Commissioners v Mohamed Bin Mwajabu [1984] eKLR** where the Court of Appeal outlined the following principle:-

“When it becomes obvious that the issues raise complex and contentious question of fact and law, a judge should dismiss the summons and leave the parties to pursue their claims by ordinary suit.”

26. Counsel for the respondent contended that this issue should not be raised because it was never raised in the trial court. I do not agree with counsel on that point because the directions to entertain the originating summons were made by the court in the absence of the appellant. It was the duty of the court to appraise itself fully on how to dispose the matter. The trial magistrate failed to do so. In the ultimate, the learned magistrate ended up making pronouncements that were not supported by proper evidence. It is for this same reason that the trial magistrate ended up rendering two judgments in the same suit and ordering the respondent to initiate fresh proceedings to “acquire vacant possession of the suit premises and to pursue registration of the suit land.”

27. Because of the above jurisdictional and legal issues which warrant the setting aside of the two judgments rendered by the trial court, I will not comment on the merits of the parties’ respective cases. I take this view because parties to this appeal are expected to initiate proper ordinary proceedings in a proper court for the proper adjudication of the dispute. It would be inappropriate to comment on the merits of the parties’ respective cases having found that the learned magistrate did not have jurisdiction to entertain the originating summons.

28. In light of the foregoing, the appeal herein is allowed and the two judgments of the trial court dated 23/10/2020 and 12/11/2020, respectively, together with all the consequential orders made thereafter are set aside. Because the errors leading to the setting aside of the two judgments and the consequential orders were made by the trial magistrate, parties shall bear their respective costs in this appeal and in the trial court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON

THIS 3RD DAY OF NOVEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

MR CHARLES AYUGI FOR THE APPELLANT

MR MUREITHI FOR THE RESPONDENT

COURT ASSISTANT: LUCY MUTHONI

NOTE:

This appeal was heard and a Judgment date fixed when I was stationed at Nairobi (Milimani) Environment and Land Court Station. Subsequent to that, I was transferred to Thika Environment and Land Court Station. This is why I have delivered the Judgment virtually at Thika.

B M EBOSO

JUDGE