



REPUBLIC OF KENYA



**Onyango v Ogolla (Civil Appeal E002 of 2023)
[2024] KEHC 8344 (KLR) (11 July 2024) (Judgment)**

Neutral citation: [2024] KEHC 8344 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E002 OF 2023
DO OGEMBO, J
JULY 11, 2024**

BETWEEN

JOSPHINE ACHIENG ONYANGO APPELLANT

AND

PAUL ODEDE OGOLLA RESPONDENT

(Being an appeal from the Judgment of the Principal Magistrate, Hon. J. P. Nandi in Bondo PMCC No. E010 of 2022 delivered on 8/12/2022)

JUDGMENT

1. The appellant herein Josephine Achieng Onyango, sued the defendant Paul Odede Ogolla in the above case by way of plaint dated 2/2/2022. The relevant statements of the claim of the appellant (plaintiff) are at paragraphs 3 and 5. That the plaintiff at all, material times is the legal owner of several butcheries situated in Madiany, Ragegni, Aram, Misori, Manyuanda and WichLum, all designated as “Fresh Butchery.” And that without her knowledge and or consent, the defendant, her friend, registered the butcheries in his name and that the plaintiff has since taken total control and management of the said butcheries and her motor cycle to the exclusion of the plaintiff.
2. In the said plaint, the plaintiff prayed for the following orders:-
 - a. A declaration that the said butcheries in Madiany, Ragegni, Aram, Misori, Manyuanda and W ich Lum markets all designated as Fresh Butchery, belong to the plaintiff.
 - b. An order of permanent injunction restricting the defendant either by himself, his servants, employees, agents and or anyone claiming to derive authority from him or acting on his behalf from interfering with the plaintiff’s peaceful ownership and management of the said butcheries.



- c. An order compelling the defendant to give to the plaintiff the physical possession of several cattle taken away by him from plaintiff and also motor cycle.
3. The plaintiff also urged for the costs of the suit. The defendant duly defended the suit. And in the judgment of the court delivered on 8/12/2022, the court found that the plaintiff had not proved her case on a balance of probabilities. The suit was dismissed with costs to the defendant.
4. Aggrieved by the decision of the court, the appellant (plaintiff) has filed this appeal. In the memorandum of appeal filed herein on 10/1/2023 and dated 9/12/2022, the appellant has listed the following grounds of appeal:-
 1. That the learned trial magistrate erred in law and in fact by failing to consider the appellant's case on its specific merits.
 2. That the learned trial magistrate erred in law and in fact in failing to consider the testimonies of the appellant's witnesses.
 3. That the learned trial magistrate erred in law and fact in failing to find that the Respondent had failed to explain satisfactorily his acquisition and ownership of the suit butchereries.
 4. That the learned trial magistrate erred in law and fact by failing to find that the appellant had proved her case on a balance of probabilities against the Respondent.
 5. That the learned trial magistrate occasioned a travesty of justice by misapprehending the law and facts placed before him.
 6. That the learned trial magistrate erred in law and in fact in failing to consider and address his mind to the entire submissions placed before him by the appellant as to occasion serious travesty of justice.
 7. That the learned trial magistrate erred in law and fact in failing to find the appellant's averment in the plaint remained unchallenged as no statement of defence was filed by the Respondent.
5. The appellant prays that this appeal be allowed with costs, and the impugned judgment be set aside with costs. It is opposed by the Respondent.
6. The jurisdiction of this court as first appellate court is well settled. In the case of *Selle v Associated Motor Boat Co. Ltd & Others* (1968) EA 123, the Court of Appeal held that it is to analyse and re-evaluate the evidence and to come to its conclusions. It is therefore mandatory that this court wholly considers the evidence on record before the trial court and for this court to arrive at its determination.
7. From the record of proceedings, the appellant, Josephine Achieng Onyango was PW1. She adopted her statement as evidence that the Respondent inherited her in 2019. She had then set up and was running butchery business and set up and several branches within Rarieda Constituency, designated "Fresh Butchery." She then let the Respondent run the butchereries and several motor cycles which she owned and the Respondent could take single business permits in his name. She produced the original permits taken out in her name dated 7/2/2020 and 11/2/2020 for Aram and Misori. That she built the said butchereries and purchased the building materials (list of documents produced). That after some time, the Respondent took over total control of the businesses and denied her access to the same. On cross examination, she went on that she met the Respondent in May 2018 and the butchereries were established in July 2019. That she used to work and save money with Equity Bank, Bondo (statement produced), and the Respondent never constructed any of the butchereries. She clarified that though not married, they were in the union for three (3) years.



8. PW2 was Millicent Adhiambo Okiri whose evidence was that she knows both the parties. That before his death, the husband of the appellant and the Respondent used to work at Madiany market, Kopiyo Butchery which butchery later employed her as to replace her husband. That the two started living as husband and wife as per Luo Customary law on inheritance of widows. That on two occasions she accompanied the appellant to Bondo Town where she bought building materials to construct butcheries at Madiany and Ragegni. Her evidence was that appellant subsequently constructed the other butcheries.
9. And Absalom Peter Owak, PW3, testified that the appellant had employed him at Fresh Butchery at Ragegni market and the Respondent would come to collect daily sales and also to take stock. He denied being employed by the Respondent. And DW4 Denis Onyango Okeyo, testified that he witnessed as the appellant constructed the butcheries at Aram and Madiany markets amongst other branches.
10. On the Respondent's side, DW1 the Respondent testified that he is the owner of Fresh Butcheries which he established in 2021. That prior to this, he was a farmer and also worked at Kopiyo's butchery. That he cohabited with appellant till September 2021. In his view, this suit is only meant to coerce him to go back to the relationship. He produced a bundle of documents showing expenditure. PW2 John Odhiambo Angienda only gave a short statement that Respondent is his boss at the butchery in Wich Lum. Similar evidence were given by PW3 Denis Ochieng Owiti, PW4 Janet Atieno Oluoch, DW5 Lidia Atieno Mila, DW6 Movet Achieng Awuor and DW7 Benard Ochieng Otieno.
11. This appeal was canvassed by way of written submissions. The appellant submitted that she built all the butcheries as proved by the receipts and bank statement. That the same prove that the appellant had the financial ability to set up the businesses where as the Respondent exhibited no financial ability at all. That the evidence of the appellant on how she established the butcheries was well corroborated by the other witnesses who refuted that the butcheries were established in 2021. It was further submitted that the Respondent only produced business permits for 2020 and 2021 proving how he forcefully took over control and running of the butcheries in 2020. And that even the Respondent's own witness, DW4 confirmed that she first saw Butchery at Madiany in 2019.
12. And from the Respondent's side, it was submitted that the appellant has failed to discharge the burden of proof as required by Section 107 of *Evidence Act*. That the appellant did not produce any document to show that the butcheries were registered in her name and that the appellate did not prove any infringement of her trade mark.
13. I have considered the evidence on record and the submissions made by the parties to this suit. The issue herein is who between the bona fide owner of the chain of butcheries, christened, fresh butchery and variously located in Madiany, Ragegni, Aram, Misori, Manyuanda and Wich Lum. Whereas it is the case of the appellant that she set up the butcheries with her own funds from 2019, it was the case of the Respondent that he set up the butcheries in 2020 and 2021. It is therefore for this court to determine which of the two sides proved its case on a balance of probabilities.

Section 107 of the *Evidence Act* dictates that he who alleges bears the burden of proof. And the standard of proof required herein is one on a balance of probabilities.
14. The parties herein are agreed that the appellant and the Respondent cohabited and stayed as husband and wife. The only difference on this is that whereas it was the case of the appellant that the Respondent inherited her under Luo Customary Law after the death of her husband, it was the case of the Respondent that the two of them merely cohabited and that the appellant was not married. It was the case of the appellant that after she set up the butcheries and while cohabiting with the Respondent, and out of trust, she let the Respondent take over the running of her businesses on the belief that he



was her husband, only for their relationship to fall apart making the Respondent throw her out of the business which he runs todate to the exclusion of the appellant.

15. The appellant has produced several documents in support of her case. These include:-
- i. A statement of account of her bank account with Equity Bank, Bondo, showing her credits and debits ranging from January 2018 to August 2022. That this proves that all this time she had the financial ability to establish these businesses.
 - ii. Tender of supply to St. Sylvester Girls' School and Payment cheque for the sum of Kshs43,300/=, paid in her name.
 - iii. Several copies of single business permits issued in her name by the County Government of Siaya.
 - iv. Copy of licenses and receipts.
 - v. Receipts for purchase of construction material. Once receipt for Ksh20,000/= from Kenya Uyoma Steel Hardware is dated 21/6/2019.
16. The appellant also called witnesses, PW2 who confirmed that she was present as the appellant bought the construction materials to bring up the butcheries, and PW3 who confirmed that it is the appellant who had employed him at the butchery at Ragegni. And also PW4 who witnesses as the appellant put up the butcheries.
17. The Respondent on the other hand while maintaining that he put up and owns the said butcheries, exhibited several single business permits issued by County Government of Siaya for the years 2020 and 2021. His witnesses DW2, DW3, DW4, DW5, and DW6 all confirmed one thing. That they were employed by the Respondent in 2020 and 2021. One evidence worth noting from these witnesses is the evidence of DW4 that as a resident of Madiany, she has seen fresh butchery, Madiany from 2019. This, to me, materially contradicts the evidence of the Respondent that he set up the butcheries from 2020.
18. Also worth noting is that the Respondent has not exhibited in any way how he put up the butcheries. He has not shown if at all he had any financial means to establish the business. He has not exhibited any bank account records or any proof of purchase of any construction material. All he has exhibited are the single business permits that relate to the period he has been in control of the several butcheries.
19. Considering the above evidence, this court is persuaded that in fact the appellant proved on a balance of probabilities that the butcheries listed in paragraph (a) and (b) of the plaint actually belong the appellant and not the Respondent. In the circumstances therefore, I allow this appeal, set aside the judgment and decree of the trial court and enter judgment in favour of the appellant in terms of prayers (a) and (b) on the plaint dated 2/2/2022.
20. No evidence was led in regard to prayer (c). Same is dismissed.
21. I also award the appellant costs of this appeal and also costs of the suit before the trial court. Orders accordingly.

DATED, SIGNED AND DELIVERED THIS 11TH DAY OF JULY, 2024.

D. O. OGEMBO

JUDGE

11/7/2024

COURT



Judgment read out in Open Court in presence of Mr. Siwolo for Mr. Odongo for Respondent and absence of Mr. Anyumba for appellant.

D. O. OGEMBO

JUDGE

11/7/2024

