



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**CASE NO. 197 OF 2014**

**(FORMERLY BUSIA HCCC NO. 49 OF 1998)**

**MARGARET AKUKU JUMA.....PLAINTIFF**

**= VERSUS =**

**WILLIAM NDINYA OMOLLO**

**MARGARET AKOTH MBUNYA**

**CLARIS ATIENO OKOTH (Suing as the Administrators of the Estate**

**of the Late RAPHAEL OKOTH OMOLLO.....DEFENDANTS**

**J U D G M E N T**

1. This suit was instituted here by the Plaintiff - **MARGARET AKUKU JUMA** - against the Defendant - **RAPHAEL OKOTH OMOLO** - vide a Plaint dated and filed on 29<sup>th</sup> May 1998. The Plaint was amended on 24<sup>th</sup> November 1998 and further amended and styled “2<sup>nd</sup> amended plaint” on 28<sup>th</sup> November 2016. The amendment reflects substitution of the Defendant with his personal representatives - **WILLIAM NDINYA OMOLLO, MARGARET AKOTH MBUNYA and CLARIS ATIENO OKOTH** - following his demise in 2008. The Defence and Counterclaim was filed on 3<sup>rd</sup> June 1998, amended on 2<sup>nd</sup> March 2001 and further amended on 26<sup>th</sup> November 2007.

2. The narrative that emerges from the Plaintiff’s pleadings and evidence is that she was the wife of the registered owner of the land parcel known as LR/BUNYALA/BUKOMA/7. Her late husband, JACOB OUMA OBONGO purchased the property jointly with her sometime in 1989. It was however registered solely in his name. The Plaintiff claims that they settled on the suit property and developed it jointly by building a twin family house consisting of 6 rental rooms, part of which they inhabited. When her husband died, the Defendant approached her tenants and directed them to pay him rent as the new owner of the suit property which development spurred her to make enquiries at the Busia Lands Registry regarding the status of the property. She discovered that there was a transfer registered in favour of the Defendant on 27<sup>th</sup> June 1997 which she deems illegal and fraudulent. The particulars of fraud she enumerated were that the sale was not disclosed to her by the Defendant and her late husband; there was no consent to transfer issued by the Budalangi Land Control Board; there was collusion involving the Land Registrar at the Busia Lands Registry to transfer the property from her late husband to the Defendant without the aforementioned consent; and that the Defendant was using irregular tactics to take possession of the property.

3. In her testimony, the Plaintiff (PW1) claimed that she contributed to the purchase of the suit property and she used to give her late husband her salary to buy materials for their businesses, including the rentals on the suit property. At some point in 1992 during their marriage she disagreed with her husband and placed a caution on the property. She asserted that she never withdrew the caution on 18<sup>th</sup> March 1994 as shown on the register. She later reconciled with her husband, took possession of the original title deed of the property and made copies of the same.

4. PW1 claimed that she initially did not know of the loan her husband took with the property as security until after his death but that before then, she learned that the land would be auctioned and took a loan from her Teachers’ Sacco of Kshs.58,000 to help offset her husband’s.

5. After she discovered the sale of the property sometime in 1998 she investigated and came across the Budalangi Land Control Board Consent to transfer dated 5<sup>th</sup> June 1997 yet the Board minutes of that date which she obtained from Kakamega Archives House did not reflect any entry concerning the suit property. She averred that she did not know of the Defendant’s interest in the suit property before her husband’s demise yet she has been living in one self-contained unit on the property to date. PW1 prayed for cancellation of the transfer

registered in the Defendant's name, a permanent injunction restraining the Defendant or any party acting on his behalf from entering the suit property and interfering with her quiet enjoyment thereof; an order compelling the Defendant to account for all profits he has received from the property; costs of the suit and interest.

6. On cross examination, PW1 revealed that she had a co-wife, one Everlyne Mwalo who declined to join her in this suit. PW1 was challenged with her "Additional Affidavit" filed on 9<sup>th</sup> June 1998 in response to the Defendant's Application for security where at paragraphs 5 and 10 she stated that she was consulted on one FRANCIS NICK ODHIAMBO's loan of Kshs.500,000 guaranteed by her late husband with the suit property as security which action she had reluctantly consented to. These statements were in direct conflict with her assertion that she did not know of any bank loans concerning the property taken by her late husband. She was at pains to explain the discrepancies.

7. WANGA M. ONIANG' testified as PW2. He was a Councillor and Land Control Board member from 1994. He asserted that neither the late JACOB OUMA nor the Defendant appeared before the Board on 5<sup>th</sup> June 1997 as corroborated by the Board minutes. PW3, LUCAS BALERA, also a board member echoed PW2's testimony. The transfer of the suit property was not consented to by the Land Control Board. PW4, JAMES OSODO testified that he was the Plaintiff's tenant between 1993 and 1996. PW5, MUCHANA MOHAMED testified that he was also a tenant of the Plaintiff from 7<sup>th</sup> January 2015 to date. This assertion led to the Plaintiff being recalled. She testified that she was currently in control of the houses on the suit property having taken over and renovated the same after the death of the initial Defendant. She stated that the said Defendants' tenants left after his demise but she did not evict them. The houses were vandalized and she took it upon herself to renovate them for occupation and has been collecting rent since.

8. The Plaintiff produced the following exhibits in support of her case:

- a. Green card for land parcel no. BUNYALA/BUKHOMA/7 – P.Exh 1
- b. Withdrawal forms from Standard Chartered Bank – P.exh 2
- c. Caution dated 4<sup>th</sup> June 1992 - P. Exh 3
- d. Title Deed for BUNYALA/BUKHOMA/7 – P. Exh 4
- e. Loan Application Form, Busia Teachers' SACCO – P. Exh. 5
- f. Children's Department Letter dated 5<sup>th</sup> November 1991 – P.Exh 6
- g. Budalangi District Officer's Letter to Balongo Advocates – P. Exh 7
- h. Budalangi LCB Consent dated 5<sup>th</sup> June 1997 – P. Exh 8
- i. Budalangi LCB Minutes for meeting of 5<sup>th</sup> June 1997 – P. Exh 9
- j. Rent receipt dated 7<sup>th</sup> January 1994 – P. MFI 10
- k. Rent receipts for January to September 2015 – P. Exh 11 (a) to (i)
- l. Photographs of rental units before renovation – P Exh 12(a), (b)
- m. Photographs of rental units after renovation – P. Exh 13(a),(b)
- n. Bundle of receipts for repairs – MFI 14
- o. Application letter and response from KPLC – P. Exh 15(a) and (b)
- p. Pay slips evidencing SACCO repayment – P.Exh 16

9. The Defendant's pleadings and testimony tell a different story. The Defence's stance is that the initial Defendant, RAPHAEL OKOTH OMOLLO was a bona fide purchaser and that the process of purchase and transfer of the suit property was lawful and above board. DW 1, WILLIAM NDINYA OMOLLO stated that the deceased Defendant, RAPHAEL OMOLLO was his brother. He was defending the case in his capacity as an administrator to the estate of the deceased. DW1 testified that the suit property initially belonged to JACOB OUMA who charged it to KENYA COMMERCIAL BANK, SIAYA BRANCH for Kshs.1,000,000. He was however unable to service the loan. Consequently the bank instructed auctioneers to sell it allowing JACOB the option to sell it on his own so as to raise money to clear the loan.

10. Both the deceased Defendant and JACOB were businessmen. They met and came to an agreement according to which JACOB agreed to sell RAPHAEL the land for Kshs.1,550,000 vide the sale agreement dated 18<sup>th</sup> March 1997. It was JACOB's responsibility to secure the Land Control Board's consent to transfer. The title to the suit property in the deceased Defendant's name was issued. He took possession of the property and started collecting rent therefrom as agreed. Issues arose after the vendor's death on 16<sup>th</sup> February 1998. His wives complained that the suit property was sold without their knowledge and consent. In the course of time one wife stopped pursuing the issue

but the other took advantage of the deceased Defendant's illness by taking control over the property. DW1 contended that the property was free from encumbrances as there was no interest of any wife registered against the late seller's title. He denied instances of fraud at the deceased's Defendant's behest. DW1 asked the Court to dismiss the matter with costs or in the alternative, for a refund of the purchase price with interest of the market value of the land at current market prices.

11. Interestingly, one EVERLYNE OUNO MALO, the deceased seller's second wife and a co-wife testified on behalf of the Defendant's as DW 2. She largely corroborated DW 1's version of events, that her late husband had problems relating to a loan he had taken with one FRANCIS who defaulted in paying the loan yet the suit property had been given as security for the said loan. JACOB OUMA then sold the land to the Deceased Defendant and the money was used to pay the loan. She contended that the land was lawfully sold for Kshs.1,550,000 and transferred to the deceased defendant who took possession of the suit property and started collecting rent therefrom. However after JACOB died, the deceased defendant's caretaker informed DW 2 that the Plaintiff had invaded the property, renovated the rental units and was collecting rent from the tenants. She averred that she had no claim against the Defendants.

12. The Defence produced the following evidence in support of their case:

- a. Grant of Letters of Administration – D.Exh 1
- b. Notification of Sale - D. Exh 2 (a)
- c. Advertisement in East African Standard Newspaper – D. Exh 2 (b)
- d. Public Auction Letter dated 17<sup>th</sup> February 1997 – D. Exh 2 (c)
- e. Land Sale Agreement – D. Exh 3 (a)
- f. Receipt, Attestation dated 18<sup>th</sup> March 1997 – D. Exh 3 (b)
- g. Title deed for BUNYALA/BUKHOMA/7 – D. Exh 4
- h. Rent receipts September – November 1997 – D. MFI 5 (a) – (d)

13. Hearing over, parties filed their submissions. The Plaintiff's submissions were filed on 24<sup>th</sup> September 2018. Counsel for the Plaintiff highlighted the Plaintiff's case and hinged the invalidity and irregularity of the transaction between the deceased vendor and buyers on lack of spousal consent; lack of land control board consent; purported irregularities in the sale relating to the genuineness of the deceased seller's signatures; and alleged discrepancies in the timelines of payment of the purchase price. He faulted the sale for having been conducted fraudulently.

14. Counsel relied on the case of **KARANJA Vs KARANJA (1976) KLR 307** to underscore the Plaintiff's contribution and entitlement to the suit property. However, the celebrated case is a locus classicus on division of marital property upon the dissolution of a marriage and is hardly relatable to the present case. The recent legal requirement of spousal consent in transfer of property was formulated as a response to scenarios such as these. However, at the time of the sale, 1997, the current land laws were not in operation. Spousal consent was not a requirement for the sale of immovable property. The law does not operate retrospectively.

15. The Plaintiff has also raised certain issues in her submissions purporting to shift the burden of proof to the Defendants. It is submitted that the Land Control Board consent presented to the Court was a forgery, the signatures on the sale agreements as well as the records of payments were not shown to be that of the deceased seller and no witness was called to verify the same. Further, they alleged that the same were doctored for purposes of this suit. It is trite law that he who alleges must prove. The Evidence Act at section 108 states that **'the burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side.'** The Plaintiff should have been the one to prove the irregularities she raised. Moreover, most of these details were not raised at trial and counsel should not purport to raise them at this stage. If at all the signatures were in question, it was upon the Plaintiff to bring a handwriting expert witness to decipher the same. The Plaintiff has also raised the issue of Limitation of Actions on the Defendant's counterclaim of a refund of the purchase price in the submissions. It was not raised at any time during the proceedings and must therefore fail.

16. The Defendants' submissions were filed on 18<sup>th</sup> October 2018. The first issue raised by the Defendants was the Plaintiff's lack of capacity to sue, or locus standi if you like, as she filed the suit on 29<sup>th</sup> May 1998 without any grant from probate and administration court authorizing her to institute suit as a personal representative of the deceased seller's estate. Indeed this issue was raised vide an orally argued Preliminary Objection on July 1<sup>st</sup> 1998. The Court dismissed the same for being raised prematurely. At the time was not clear in what capacity the Plaintiff was pursuing the claim, as a beneficiary of the deceased's estate or as a contributor. The Preliminary Objection was not dismissed for lacking merit but for being raised before all facts were presented to the Court.

17. From the testimony and evidence presented, in as much as the Plaintiff couches her entitlement as a contributor, the fact that the case hinges on the suit property initially registered in her deceased husband's name is inescapable. Any claim concerning the suit property can only be entertained once the Plaintiff acquires the authority conferred by the appropriate grant to institute and defend the suit. Indeed, it is upon this premise that the Plaintiff acquired the grant after the fact on 4<sup>th</sup> June 2002, brought on Court record vide her Application to further Amend her Plaintiff filed on 1<sup>st</sup> February 2016. I agree with the Defendant that the grant takes effect only from its date of issue. That is in accordance with Section 80(2) of the Law of Succession Act, which makes it a prerequisite of instituting an action. This omission renders the plaint a nullity ab initio. The court would be entitled on this ground alone to down its tools and refuse to entertain the matter further.

18. It is further submitted that the Plaintiff was at no time registered as a co-proprietor of the deceased seller with regard to the suit property. This is confirmed by the green card and title documents given as evidence. The narrative given by the Defendants seems more credible. In the Replying Affidavit of the deceased Defendant filed on 17<sup>th</sup> June 1998, he brought before Court the deceased seller's banking facility letter and statements as well as a fee note for the Bank's costs incurred in the suit property's impending auction as realization of the security. The deceased seller was indeed in default of loan repayment to the tune of the principal sum of Kshs.500,000 as well as accrued interest. The sale agreement attested to by a Judicial Officer bore the purchase price of Kshs. 1,550,000. As pointed out by counsel for the Defendants in cross examination, the Plaintiff was being untruthful about the said loan. Her co-wife corroborated the Defendants' version and documentary evidence. As a logical sequence of events the auction did not take place and the suit property was transferred by way of private treaty showing the use to which the consideration was applied. The deceased Defendant conducted his due diligence and obtained a clean title.

19. The issue of consent of Land Control Board is abit tricky, given that the original parties involved – the alleged seller and purchaser – are deceased. Even then however, it seems apparent to me that the purchaser, who was the deceased Defendant herein, had little or no part to play in its procurement. The sale agreement availed makes it clear that it is the deceased husband of the Plaintiff who would ensure that consent is obtained to facilitate registered ownership of the land by the purchaser. I would be reluctant therefore to attribute any blame relating to the manner of procurement of the consent to the Defendant.

20. In this regard therefore, I find it more appropriate to be guided by the contents of the Register at the lands office rather than alleged minutes of Land Control Board obtained from some archives or evidence of some members of the Land Control Board. And I do this because even if one were to find that irregular things happened, one would still be duty-bound to demonstrate clearly that it is the original Defendant, and not the Plaintiff's late husband, who was responsible for them. And I take this position because it is the Plaintiff's late husband who had the responsibility of obtaining the consent. The Land Register shows the transfer was smooth and/or seamless. This raises a presumption that all was done above-board.

21. Ultimately also, the Plaintiff's case is one based on a shaky premise. The fatal omission to obtain the necessary grant from Probate and Administration court has already been pointed out. But the Plaintiff also pleaded that she had instituted the suit in her own capacity. She contributed to the purchase of the property, she said, and therefore inferred that there was a trust in her favour. Such trust however was not noted in the Land Register. The Defendant cannot therefore be deemed to have been aware of it.

22. The question to ask then is who between the deceased Defendant and her late husband breached the trust. It is important to appreciate that the law does not require a purchaser to go behind what is in the register to find out if there are un-registered interests. If there was any breach therefore, it would be unfair to blame it on the purchaser. It is the Plaintiff's late husband who would be better placed to answer to issue of trust.

23. But even as I point this out, the Plaintiff's suit is faulty for not coming out clearly about the issue of trust. Infact the suit does not mention trust anywhere. It is only inferred from the alleged fact of joint purchase of the land by the Plaintiff and her late husband and/or her averments about contributing money for purchase. The law is clear. If you want to rely on trust as a legal premise, you need to plead it. And you do not just plead it generally; you need also to give the particulars of any alleged breach of such trust and thereafter prove them well during trial. All this was not done here. In this case itself, the court was not told how the deceased Defendant breached the alleged trust.

24. Overall, it is well shown by the defence that the land in dispute would have been sold by the bank because there was a loan whose repayment had ran into arrears. The Plaintiff's late husband opted to sell the land by private treaty and that is how the deceased Defendant came in. If the bank had sold the land, it would have sold it including any alleged trust claimed by the Plaintiff. And the Plaintiff would have done nothing about it. Now that the land was sold through private arrangements to repay the same loan, the Plaintiff turns around to claim the land from the purchaser. This is not right; this is not fair.

25. The upshot, in light of all this, is that the Plaintiff's case is not proved on a balance of probabilities. I hereby dismiss it with costs to the Defendants. I make no finding on the Defendants' counter-claim as the Plaintiff has not won the case.

**Dated, signed and delivered at Busia this 30<sup>th</sup> day of July, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

Defendants: Absent

Counsel of the Plaintiff: Present

Counsel of the Defendants: Absent

Court Assistant: Nelson Odame