



IN THE COURT OF APPEAL

AT ELDORET

(CORAM: GITHINJI, OKWENGU & J. MOHAMMED, J.J.A)

CIVIL APPEAL NO 1 OF 2017

BETWEEN

PO.....APPELLANT

AND

JNK.....RESPONDENT

(An appeal from the judgment of the High Court of Kenya

at Eldoret (Kimondo, J.) dated 5th April 2016

in

H.C.C No 97 of 2004 (OS)

JUDGMENT OF J. MOHAMMED JA

Background

1. This is a first appeal by **PO**, (the appellant), whose originating summons was dismissed in its entirety by the High Court. He approaches us now urging us to do our duty on a first appeal as has been set by this Court in **Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** which stated as follows regarding the duty of first appellate court:-

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine *whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way.*”

2. The background to the dispute between the parties is as follows: the appellant and **JNK** (the respondent), were married under Gusii Customary law in 1956. This marriage was dissolved on 3rd June 2003 in Eldoret. Subsequently, by way of an Originating Summons brought under the Married Women’s Property Act (1882) the appellant sought for various orders relating to division of matrimonial property. The appellant claimed that during the subsistence of their marriage, he and his estranged wife, the respondent herein, acquired various properties including L.R. No. Kaplamai/Sirende Block X/Koitogos/XX (the suit property), Plot No EXXXXB in Dandora, a plot purchased in Umoja Estate in Nairobi, as well as various household goods worth Kshs 90,660.00. He prayed for orders that these properties be declared as jointly owned by the parties and that the properties be shared between the parties in equal parts. He also prayed for an equal sharing of an outstanding loan advanced by the Industrial Commercial Development Corporation (ICDC) that had been utilized towards the parties’ joint business.

3. In response to the application, the respondent filed a replying affidavit in which she averred that when the applicant took a loan facility from ICDC, she and the appellant had already separated and she was living in Kampala. She contended that she could therefore not be held responsible for the payment of the loan. She further stated that the suit property solely belonged to her since she had purchased it out of her own efforts. She further contended that in the alternative, if the appellant did indeed own the suit property, and caused it to be registered in her name, the doctrine of advancement applied in her favour. She denied owning Plot No. EXXXXB in Dandora in Nairobi and further alleged that all the household goods were left in the custody of the appellant once the appellant and the respondent separated. The respondent further contended that during the subsistence of the marriage she had acquired a half acre plot known as Eldoret Municipality/Block X/XXX

in Langas (Langas Property), as well as a plot in Eldoret West known as Eldoret Municipality Block X/XXX in Ndalat (Ndalat property) which were sold by the appellant without her consent.

4. The parties each gave oral evidence in support of their respective positions. The appellant testified that while the suit property was in the name of the respondent, he was the one who had bought it from one Benjamin Kiptel Sang in 1976 for the sum of Kshs 28,000.00. He produced a sale agreement that was in the name of the respondent and stated that it was he who issued a cheque for the purchase of the property. He further stated that he was at the time working as a commission agent under the name and style of Motari Commission Agents; that he enlisted the respondent's help in acquiring the suit property as he was working in Kampala, and he had intended the suit property to be the appellant's and respondent's matrimonial home. He further contended that he had taken a loan of Kshs 110,000.00 from ICDC in 1975 for the purpose of expanding his business and secured it using another property known as Kisii/Mugirango/Bomanono/ XXXX'. At this point, he confirmed that he was limiting his claim to the suit properties and had abandoned his claims with respect to the other properties that he had detailed in his pleadings.

5. On her part, the respondent testified that she was not involved when the appellant took a loan from ICDC and neither was she consulted; that she bought the suit property from Benjamin Sang using money that she acquired from a banana export business that she was conducting while in Kampala. She claimed to have given this money to the appellant who then wrote a cheque in favour of the vendor; that out of the proceeds of her business, she bought the Ndalat property for which she paid through a tenant purchase agreement; and that the appellant chased her away from this property and sold it. Thereafter, she bought the suit property in her name. She stated that the appellant's claim to the suit property was unjustified.

6. In its judgment, the High Court considered whether or not the suit property had been acquired through the joint efforts of the parties. Noting that there was no documentary evidence that the respondent had been engaged in business, the High Court found that if the respondent had been doing business, it beat logic why she would have asked the appellant to draw a cheque from his business account in favour of the vendor as purchase price for the suit property. The learned Judge therefore found that the appellant had paid the entire purchase price in respect of the suit property. In addition, the trial court held that based on this, there was a resulting trust in the appellant's favour and as such the appellant would be entitled to half share of the suit property.

7. The trial court also considered that the appellant had retained or sold, without the concurrence of the respondent, two properties. These were the Langas property and Ndalat property, both of which were registered in the name of the respondent. The trial court held that since the appellant had taken the entire benefit of those properties, he benefitted in excess of his claim of the suit property. Based on this, the trial court held that the respondent was entitled to retain the entire portion of the suit property.

8. Dissatisfied by this decision, the appellant appealed to this court citing fourteen grounds of appeal which culminate in his seeking orders setting aside the judgment of the High Court as well as directing that the suit property be equally distributed between the parties.

Submissions

9. By consent of counsel for the parties, this appeal was canvassed by way of written submissions. When this appeal came up for hearing, Mr. Omboto learned counsel for the appellant informed us that the appellant would only be pursuing the prayer in respect of the suit property, and that the appellant had abandoned all other grounds. On his part, the appellant submitted that the learned Judge erred in law by dismissing the appellant's summons despite finding that the appellant had partially succeeded in his summons, particularly as the learned Judge found that the suit property had been acquired during the subsistence of the marriage and been paid for by the appellant. The appellant contended that once the court found that it was the appellant who paid the entire purchase price, then it ought to have ordered that he gets at least a half share in that property.

10. It was the appellant's further contention that the High Court erred and misdirected itself when it held that the appellant retained or sold the Ndalat property and the Langas property belonging to the respondent, instead of analysing whether these properties were indeed sold or retained by the appellant. To this end, the appellant contended that the Ndalat property was sold by the then Municipal Council of Eldoret after he was unable to keep up payments for the same.

11. The appellant also contended that the trial court erred by accepting the valuation of the suit property and argued that there was no material evidence on record to show that the value of an acre in Trans Nzoia County is Kshs 200,000.00 and ought to have taken judicial notice that an acre in Uasin Gishu County and Trans Nzoia Counties is valued at more than 1,000,000.00.

12. The appellant further submitted that the learned Judge erred in law and fact by failing to find that the Ndalat property and the Langas property were sold through public auction when both the appellant and the respondent were unable to repay the outstanding loan and the chargees exercised their statutory power of sale. The appellant's final submission was that he unequivocally abandoned all the other prayers in the originating summons and only pursued the claim for a portion of the suit property yet the trial Judge erroneously analyzed and gave findings on the abandoned prayers. For these reasons, the appellant urged us to re-analyze the evidence tendered and allow the appeal.

13. The respondent opposed the appeal by way of written submissions in which she submitted that during the subsistence of her marriage to the appellant, she acquired the Langas property. It was the appellant's further submission that the appellant sold the said two properties without her consent; that the appellant had, on his own, secured a loan and used the property known as Kisii/Mugirango/Bomanono/XXXX as security. The respondent contended that since she did not feature in the application for a loan that was advanced to the appellant she could bear no liability in settling it. She submitted further that there were valuation reports in respect of the properties which were admitted and produced in court, and that her assertions on the valuations were not challenged. For these reasons, the respondent contended that the findings reached by the trial Judge were correct and urged us to find that this appeal has no merit and to dismiss it with costs.

Determination

14. Bearing in mind this Court's duty to re-evaluate the evidence tendered, analyse it and reach our own conclusions, I find that the main gravamen in this appeal is whether the trial court was right in finding that the appellant had retained for his own benefit, the Ndalat property and the Langas property, and taking this into consideration in determining whether or not the appellant was entitled to the suit property or a part thereof.

15. As I have stated herein above, it is clear that the appellant's main contention concerns the distribution of the suit property. I agree with the findings of the trial court that the suit property was matrimonial property, and that the appellant was the one who financed its purchase with the assistance of the respondent. From the documents produced in court, it is clear that the purchase price was paid by the appellant even though the sale agreement and subsequent registration was undertaken by the respondent in her name. There was therefore, as stated by the trial court, a resulting trust that the property belonged to the appellant and the respondent, and that as such, the respondent was entitled to a share of the suit property. See: *Karanja v Karanja [1976] KLR 307*.

16. Before the High Court, the respondent claimed that the appellant had sold two of her properties, namely the Ndalat property and the Langas property. She claimed that the appellant sold these two properties for his own benefit and without consulting her. There was evidence by way of a sale agreement with respect to the Langas property. This agreement is between one Gideon Rotich and the appellant. The respondent further produced a copy of a cheque of Kshs 20,000/= being payment of advocate's fees in respect of the purchase of the Ndalat property by the respondent. At any rate, it was not disputed by the appellant that the respondent had bought the Ndalat property and the Langas property out of her own funds. In his testimony, the appellant stated that he lived on the Langas property with his current wife. He also conceded that he was making payments for the Ndalat property but stopped making payments. The respondent stated:-

“Due to financial problems, I stopped paying, Jemimah also stopped paying, the municipality repossessed it. It must be the municipality that sold.”

17. On her part, the respondent testified that it was the appellant who was responsible for the loss of the Ndalat property, which was charged to Savings & Loan Kenya Limited (S&L) and later sold it. This evidence was not controverted and remained unshaken during cross-examination. A valuation report adopted by the parties by consent showed that the Ndalat property and the Langas property were valued at a total of Kshs 6,880,000.00.

18. In the respondent's opinion, the value of the suit property would be pegged on the sum of Kshs 200,000.00 per acre. The appellant did not dispute this, and neither did he seek to bring any documentation to controvert it. On that basis, the trial court did not err in relying on this valuation. On my part, I am satisfied that based on this valuation, and the basis that the suit property, as at the time of the hearing measured 30 acres, then the value of the suit property would amount to Kshs 6,000,000.00.

19. Bearing in mind that the evidence showed that the appellant alienated for his own benefit and without recourse to the respondent the Ndalat property and the Langas property. I find it only fair that this be taken into consideration when determining what portion of the suit property the appellant should be awarded. This leads me to the inescapable conclusion that even if the appellant was entitled to an equal share to the suit property, the fact that he alienated the Ndalat property and the Langas property means that he cannot now claim to be entitled to a share of the suit property. In this regard therefore the appellant's appeal fails.

20. I have considered that the dispute between the parties has been a long-standing one. In view of the fact that the dispute arose out of the termination of their marriage, I find that the order that commends itself is that each party bears their own costs.

Dated and delivered at Nairobi this 3rd day of April, 2020

J. MOHAMMED

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

JUDGMENT OF H. OKWENGU, JA

I have read in draft the Judgment of J. Mohammed, JA and I am entirely in agreement that this appeal has no substance.

In finding that the respondent was entitled to retain the suit property, the learned Judge took into consideration that although the suit property was matrimonial property, the appellant had already converted some other matrimonial properties to his own use by disposing them of without recourse to the respondent.

The appeal is therefore dismissed and each party shall bear their own costs.

This ruling has been delivered in accordance with Rule 32 (3) of the Court Rules as Githinji, JA has since retired

Dated and Delivered at Nairobi this 3rd day of April, 2020

HANNAH OKWENGU

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JUDGE OF APPEAL