



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Watsula v Barasa (Environment and Land Appeal E026 of 2021)
[2024] KEELC 4956 (KLR) (27 June 2024) (Judgment)**

Neutral citation: [2024] KEELC 4956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND APPEAL E026 OF 2021**

DO OHUNGO, J

JUNE 27, 2024

BETWEEN

RUTH ATITWA WATSULA APPELLANT

AND

FERDINAND ODINGA BARASA RESPONDENT

(Being an appeal from the judgment and decree of the Chief Magistrate's Court at Mumias (Hon. T A Odera, Chief Magistrate) delivered on 4th June 2021 in Mumias MCELC No. 67 of 2018)

JUDGMENT

1. Litigation leading to this appeal started in this court when the Appellant filed plaint dated 10th April 2015. The matter was later transferred to the Subordinate Court for hearing and determination.
2. The Appellant averred in the plaint that her son RJO was the registered proprietor of the parcel of land known as North Wanga/Matungu/xxx (the suit property) and that she purchased the suit property on 28th May 1990, and had it registered in the name of her said son who was then a minor to hold it in trust for himself and her. That the Respondent teamed up with one Wellington Taabu who was her estranged husband and purported to purchase the suit property without her consent and her son's consent.
3. The Appellant further averred that the sale and transfer were fraudulent. She therefore prayed for judgment against the Respondent for a declaratory order that the sale and purchase was fraudulent, null and void for want of her consent and her son's consent and for want of consent of the Land Control Board. She also sought a permanent injunction to restrain the Respondent, his agents and servants from ploughing, fencing, constructing on, trespassing on or in any other way interfering with her interest in the suit property. Further, she sought costs of the suit and any other relief that the court deemed fit and just to grant.



4. The Respondent filed a statement of defence through which he averred that upon purchasing the suit property, he gained vacant possession. He further averred that the Appellant did not have locus standi since she was not the registered proprietor of the suit property. He therefore urged the court to dismiss the suit with costs.
5. Upon hearing the case, the Subordinate Court (Hon. T A Odera, Chief Magistrate, as she then was) delivered judgment on 4th June 2021. The Subordinate Court found that the Appellant had not proven her case and therefore dismissed it with costs to the Respondent.
6. Dissatisfied with the outcome, the Appellant filed this appeal, through Memorandum of Appeal dated 1st July 2021. The grounds of appeal, as listed on the face of the memorandum, are that:
 1. The learned magistrate erred in law as to the import of Section 14 of the Matrimonial Property Act on whether it is presumption of the matrimonial property and not definition of the matrimonial property.
 2. The learned magistrate erred in not finding that the definition of matrimonial property is found in Section 6 of the Matrimonial Act and not Section 14 of the matrimonial property.
 3. The learned magistrate erred in not finding that the property N/Wanga/Matungu/xxx is a matrimonial property which could not be disposed of by way of sale without the consent of the spouse.
 4. The learned magistrate erred in belittling the role of the appellant in the purchase and acquisition of the property N/Wanga/Matungu/xxx.
 5. The learned magistrate erred in not finding that the appellant had a direct interest in the property and needed not to express her interest through her son RJO who was a minor at the time of purchase.
 6. The learned magistrate erred in Law in not finding that the said Land parcel N/Wanga/Matungu/xxx was never sold by RJO the appellant's son.
 7. The learned magistrate ought after finding the purported letter by the appellant's son being unsigned and the author unknown would have found the respondent did not prove they legally acquired the property in absence of the power of attorney from the appellant's son RJO.
 8. The learned magistrate judgment was unfair, biased and did not meet the end of justice.
7. The appeal was canvassed through written submissions. The Appellant identified three issues for determination: whether a declaratory order should have issued that the sale was fraudulent, null and void for want of her son's consent and for want of consent of the Land Control Board; whether an injunction ought to have issued; and lastly, what order should be made on costs.
8. On the first issue, the Appellant argued that the power of attorney relied upon by the Respondent was not admissible in evidence since it was not registered as required under Section 19 of the Stamp Duty Act and Sections 4 and 9 of the Registration of Documents Act. That failure to register the power of attorney rendered the sale agreement nugatory. That the learned Magistrate acknowledged in the judgment agreed that the power of attorney was executed in the United States of America and could not therefore be admitted under Section 88 of the Evidence Act without proof of seal, stamp or signature



by way of an affidavit by a Notary Public authenticating it. She relied on the case of Francis Mwangi Mugo v David Kamau Gachago [2017] eKLR where Munyao Sila, J. held:

I do not think capacity is a technicality curable under Article 159 of *the Constitution*. It is either you have it or you do not. You do not gain capacity retrospectively. At the time of filing suit, Francis Mwangi Mugo, in my view did not have capacity because he had not registered the power of attorney. I therefore have no option but to strike out the suit with costs

9. The Appellant went on to argue that there was no indication that the lawyer who witnessed the letter was a notary public and that the alleged power of attorney was registered as required by law. Further, that Wellington Onyango who purportedly sold the suit property to the Respondent testified virtually from Germany but RO who was in prison in Germany was not called to testify. That although the Subordinate Court held that it could not determine whether the agreement between the Respondent and Wellington was authorized by RO who is the registered proprietor, the Subordinate Court went ahead and dismissed her suit, yet the evidence tilted in her favour.
10. On the second issue, as to whether a permanent injunction ought to have issued, the Appellant relied inter alia on the cases of Giella –vs- Cassman Brown & Co Ltd [1973] EA 358, Mrao Ltd v First American Bank of Kenya Ltd & 2 others [2003] eKLR and In re Estate of Kigen Cheboi Kipchorsoi (Deceased) [2021] eKLR and argued that she had satisfied the ingredients of a permanent injunction. In conclusion, she contended that she had established her case and that the appeal ought to be allowed with costs.
11. On his part, the Respondent argued that based on the issues for determination which the Appellant identified in her submissions, she had abandoned her appeal as pleaded in her Memorandum of Appeal. He went ahead and identified issues for determination as being whether the Appellant had locus standi to institute the suit, whether the suit property was matrimonial property, whether the sale of the suit property was valid and who bears costs of this appeal.
12. On the issue of locus, the Respondent contended that the Appellant was attempting to fatten her bull on the market day since she was neither the registered owner of the suit property nor its administrator through any Power of Attorney which would allow her to file a suit on behalf of the registered owner. He argued that “an egg has no business dancing with stones” and that the Appellant is a busy body. He contended that locus standi has always signified the right to be heard and that one must have sufficient interest to sustain their standing to sue in a Court of Law. In that regard, he argued that this appeal is a non-starter and that it should be dismissed with costs on that ground alone.
13. On the issue of whether the suit property was matrimonial property, the Respondent cited Section 6 of the *Matrimonial Property Act* and argued that for the suit property to constitute matrimonial property, it ought to have been acquired during the subsistence of a marriage between the Appellant and registered owner yet in this case, the registered proprietor is the Appellant’s son. That the suit property is not registered in the names of either the Appellant or her husband, Wellington Onyango Taabu and that it would be improper to imply that it is matrimonial property. He contended that the suit property is absolutely the Respondent’s, and no presumption of trust or matrimonial rights can be assumed over it.
14. On whether the sale of the suit property was valid, the Respondent argued that this court can only set aside the sale agreement if the consent was obtained fraudulently, if the agreement was entered into in collusion between the affected parties, where agreement was contrary to policy of court, or where the consent was based on insufficiency of material facts and misapprehension or ignorance of the said facts.



He relied inter alia on *M & E. Consulting Engineers Limited v Lake Basin Development Authority & another* [2015] eKLR and urged this court to dismiss the appeal with costs.

15. This is a first appeal. Consequently, this court's mandate is to re-evaluate, re-assess and re-analyse the record and then determine whether the conclusions reached by the learned trial magistrate are to stand or not and to give reasons either way. I also bear in mind that I have neither seen nor heard the witnesses and I will therefore give due allowance in that respect. I further remind myself that it is the responsibility of this court to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in their pleadings and evidence. See *Abok James Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR and *Selle & Another v Associated Motor Boat Co. Ltd & Others* (1968) EA 123.
16. I have considered the grounds of appeal, the pleadings, the evidence, and the submissions. The issues that arise for determination are whether the Appellant had locus standi, whether the Appellant established trust, whether the suit property was matrimonial property, whether fraud was established and whether the reliefs that the Appellant sought ought to have issued.
17. Locus Standi is a Latin phrase which literally means "the place of standing." In the context of litigation, it refers to the legal right of a person or a group of persons to commence proceedings in a court of law. The term locus standi is defined in *Black's Law Dictionary*, 9th Edition (page 1026) as "the right to bring an action or to be heard in a given forum".
18. It is however important to draw a distinction between locus standi and cause of action. In that regard, some help is readily available from the case of *Alfred Njau & Others v City Council of Nairobi* [1982] KAR 229 where the Court of Appeal stated:

Lack of locus standi and a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; ... To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.
19. The Respondent has argued that the Appellant did not have locus standi since she was neither the registered owner of the suit property nor its administrator through any Power of Attorney which would allow her to file a suit on behalf of the registered owner. I have perused the pleadings. The Appellant did not purport to file the suit on behalf of the registered proprietor. She maintained that the registered proprietor held the suit property in trust for both him and her and that she did not consent to the sale. I do not think that one needs to be a registered proprietor of land to file such a case.
20. In fact, pursuant to Section 28 (b) of the *Land Registration Act*, all registered land is subject to overriding interests including trusts, unless the contrary is expressed in the register. Thus, a litigant alleging trust will invariably not be the registered proprietor of the land in respect of which she brings the litigation. I find that the Appellant had locus standi.
21. The next issue for determination is whether the Appellant established trust. Whether trust exists is a question of fact which must be proven through evidence. The basic tenets of trust were outlined by the Court of Appeal in *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggat Ahmed Al-Heidy & Others* [2015] eKLR as follows:

... according to the *Black's Law Dictionary*, 9th Edition; a trust is defined as "1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds



legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the *Trustee Act*, “...the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...” ...

Trusts are created either expressly (by the parties) or by operation of law. An express trust arises where the trust property, its purpose and beneficiaries have been clearly identified (see. Halsbury’s Laws of England vol 16 Butterworths 1976 at para 1452). In this case, we have a definite property and beneficiary. ...

22. The same Court also stated in *Juletabi African Adventure Limited & another v Christopher Michael Lockley* [2017] eKLR as follows:

It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because:-

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

See *Gichuki vs. Gichuki* [1982] KLR 285 and *Mbothu & 8 Others vs. Waitimu & 11 Others* [1986] KLR 171.

23. From the material that the Appellant produced, it is apparent that ROT (minor) was registered as proprietor of the suit property on 25th June 1990. According to the testimonies of both the Appellant and the Respondent, ROT remained the registered proprietor as of the date of trial. He was then 30 years and was in jail in Germany.
24. Although the Appellant claimed that she purchased the suit property, and had it registered in the name of ROT I note that there is nothing in the sale agreement which supports that claim. On the contrary, PW2 who was the Appellant’s own mother and witness, testified that the suit property was bought for ROT by R’s grandfather. I find that the Appellant did not establish trust.
25. The next issue for determination is whether the suit property was matrimonial property. The phrase “matrimonial property” is defined at Section 6 of the *Matrimonial Property Act*, 2013 to among others mean the matrimonial home or homes. And what does matrimonial home mean? We need not look further than Section 2 of the same statute which defines it to mean any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, including any other attached property. A similar definition of matrimonial home is found at Section 2 of the *Land Registration Act*, 2012.
26. The *Matrimonial Property Act*, 2013 is “An Act of Parliament to provide for the rights and responsibilities of spouses in relation to matrimonial property and for connected purposes.” The Act defines “spouse” at its Section 2 to mean “a husband or a wife.” The suit property is owned by the Appellant’s son and not spouse. It cannot, by any stretch of imagination, be the Appellant’s matrimonial property.
27. Did the Appellant establish her claims of fraud? As the courts have consistently stated, fraud is a serious allegation and the party alleging it must plead it, particularise it, and strictly prove it to standard higher than the usual one in civil cases of proof on a balance of probabilities but lower than the criminal



law standard of proof beyond reasonable doubt. See *Kuria Kiarie & 2 others v Sammy Magera* [2018] eKLR and *John Mbogua Getao v Simon Parkoyiet Mokare & 4 others* [2017] eKLR. In cases where fraud is alleged, it is not enough to simply infer fraud from the facts. See *Kinyanjui Kamau v George Kamau Njoroge* [2015] eKLR.

28. A perusal of paragraph 16 of the Appellant's plaint reveals the particulars on which she grounded her claims of fraud. She seems to have laboured under the notion that the suit property belonged to her. Her case was built on the theory that ROT who was the registered proprietor did not consent to the sale. She did not join ROT to the suit, thereby depriving the court of the opportunity to hear directly from the registered proprietor.
29. I am aware that the Appellant argued that the power of attorney relied upon by the Respondent was not admissible in evidence since it was not registered as required under Section 19 of the *Stamp Duty Act* and Sections 4 and 9 of the *Registration of Documents Act*. It must however be the burden of proof was on the Appellant and not the Respondent. As the party moving the court and raising serious allegations of fraud, the Appellant bore the burden of proving her claims to the required standard. I find that she did not establish fraud.
30. Overall, the Appellant did not prove her case and was not therefore deserving of the reliefs that she sought. The Subordinate Court did not err in dismissing it. This appeal is without merit. I dismiss it with costs to the Respondent.
31. The outcome of this appeal is not a seal of approval on the Respondent's transaction over the suit property. I note that the Respondent testified that he did not have a title and that ROT will process transfer in his favour once he gets out of jail. If he indeed transacted with ROT then he should patiently wait for RO Taabu to regain his freedom and to complete the transaction.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 27TH DAY OF JUNE 2024.

D. O. OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Osango for the Appellant

No appearance for the Respondent

Court Assistant: M Nguayai

