



REPUBLIC OF KENYA



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**Ouma v Okumu (Environment and Land Appeal 10 of 2019)
[2024] KEELC 5881 (KLR) (20 August 2024) (Judgment)**

Neutral citation: [2024] KEELC 5881 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 10 OF 2019
FO NYAGAKA, J
AUGUST 20, 2024**

BETWEEN

ROSEMARY ATIENO OUMA APPELLANT

AND

SEPHANIA OUMA OKUMU RESPONDENT

(Being an appeal from the judgment and decree of Hon P. K. Mtai (Senior Resident Magistrate) delivered in Kitale Chief Magistrate's Court EL Case No. 33 of 2013 on 20th November 2019)

JUDGMENT

1. The Appellant who was the Plaintiff in Kitale CMC EL. Case No. 33 of 2013 sued the Respondent and one other party therein by way of a Plaint dated 25/06/2013 and filed on 03/06/2013. She subsequently amended the Plaint on 28/05/2019 wherein she prayed for the following:
 - a. Orders of a permanent injunction.
 - b. (i)The agreement dated 23/09/2007 is null and void.
(ii) The Defendant and anyone claiming under him be evicted from plot No. 5377 Tuwan Rural Urban Project.
 - c. Costs.
 - d. Any other reliefs this Honorable Court may deem just and fit to grant.
2. The Respondent, who was the 1st defendant, filed his Statement of Defence dated 02/07/2015 on that day. He maintained that the suit was unmerited and ought to have been dismissed with costs. The Appellant had also sued her husband, namely, Naftali Ouma Ojouga as the 2nd Defendant. He entered appearance and filed his Statement of Defence on 03/11/2015.



3. By and large in his defence, the 2nd Defendant agreed with the Appellant, stating that he was willing to refund the Respondent the purchase price because his contract with the Respondent was rescinded. He, however, passed away while the proceedings in the trial court progressed.

Memorandum of Appeal

4. The trial court dismissed the Plaintiff's suit. The decision precipitated the filing of the present appeal. The Appellant filed her Memorandum of Appeal dated 05/12/2019 on 06/12/2019. She raised four (4) grounds impugning the findings of the learned magistrate which can be summarized as follows: that the issue in dispute concerned matrimonial property law; that the parties were amenable to a refund of the consideration; that the evidence adduced was not taken into consideration and as a result, the trial court arrived at an erroneous finding for considering extraneous factors. For those reasons, the Appellant prayed that the appeal be allowed by setting aside the judgment of the trial court with an order that her suit be allowed with costs. Further, she prayed for the costs of the appeal.

Hearing of the Appeal

5. The Appeal was heard on the basis of the parties' rival written submissions. The Appellant's submissions dated 05/12/2023 and filed on 18/12/2023 were that, from the evidence, the Appellant and the Respondent admitted that they were willing to compromise the suit by payment of the consideration sum to the Respondent. That while the record is apparent, the trial court erroneously ignored this material fact and to find that the suit herein was matrimonial property. That the 2nd defendant was the Appellant's husband who had since passed on.
6. The Appellant submitted that the funds used to purchase the property were from her sole effort. That they were obtained from self-help groups where the Appellant was a member. Further, upon getting the funds she gave them to her deceased husband for onward payment to the Respondent in paying for the suit land. That like in any African setting, the husband was recognized as the head of the family in all circumstances. The Appellant submitted, however, that the deceased had no right to sell the suit land without her consent. She submitted that this fact was ignored by the learned magistrate. She urged this court to allow the appeal or in the alternative, order a refund of the consideration sum of Kshs. 45,000.00 since there was no breach clause.
7. On his part, the Respondent relied on his written submissions dated and filed on 12/02/2023. He abridged the facts at trial to submit that the property could not be held out as matrimonial property for the following reasons: there was no marriage certificate to prove the union between herself and the deceased; no evidence was adduced to demonstrate that a customary law marriage subsisted between those two (2) parties. For this reason, and citing Section 43 of the *Marriage Act*, the property could not be described as matrimonial property within the meaning ascribed to the term under Section 6 (1) of the *Matrimonial Property Act*. Secondly, on whether the parties acceded to a refund of the consideration, the Respondent submitted that the said issue was neither pleaded nor proved. For this reason, since the Appellant was bound by her pleadings, she could not benefit from an afterthought. In addition, the Appellant failed to prove that she was the member of any self-help group. Thus, to him, taking all factors into consideration, the Respondent submitted that, the trial court's findings were laudable, bereft of error and ought to be upheld. He prayed that the appeal be dismissed with costs.

Analysis and Determination

8. As a first Appellate court, an appeal is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it and draw its own conclusions although it should always bear in mind that it neither saw nor



heard the witnesses. Thus, it should make due allowances in this respect. For this line of thought this court is guided by the Court of Appeal decision of *Gitobu Imanyara & 2 Others vs. Attorney General* [2016] eKLR.

9. The Court has considered the appeal, examined the parties' rival written submissions, and analyzed the record of appeal, the relevant law and the impugned decision. In order to determine the meritorious nature or otherwise of the appeal, it is important to set out the brief facts of the suit.
10. Accordingly, the facts as set out in record of appeal were that the Appellant alleged to have purchased the suit land, namely, plot No. 5377 Tuwan Rural Urban Project measuring approximately 21 by 7 meters under her deceased's husband name. She contended that she had provided for the deceased person who was her dependent for reason of loss of his source of income years back before his untimely demise. Together with her husband, they were blessed with six (6) issues.
11. In 2003, the Appellant took out a loan from K-REP Bank and entrusted the sums of money taken out to her deceased husband to buy the suit land. She produced a record of savings marked P. Exhibit 1(a) & 1(b). The intention was for the family to move in and build a home there. The said property was purchased for a sum of Kshs. 42,000.00 from one Kiprono Arap Byegen vide a sale agreement dated 29/07/2003, produced as P. Exhibit 1. The Appellant, together with others, attested to its execution. In the agreement, it was indicated that the Appellant was the deceased's wife.
12. The Appellant testified that although there was successful purchase, they could not develop it further due to insufficient funds. In an unforeseen turn of events in the year 2013, while visiting the suit premises, the Appellant found the Respondent depositing building materials to commence construction work. She discovered that in 2007, her deceased husband surreptitiously disposed of the suit land to the favor of the Respondent in the sum of Kshs. 45,000.00.
13. The Appellant stated that her husband informed her that he disposed of the land to the Respondent because he had borrowed some money from him. In the 'loan' transaction the suit land was security for the money borrowed. The agreement was entered into in a bar.
14. Unhappy with the state of affairs, the Appellant reported the matter to the area chief who summoned the Respondent to explain how he acquired the suit property. In the course of the meeting, the Respondent produced a copy of a sale agreement entered between himself and the Appellant's deceased's husband dated 23/09/2007.
15. The Appellant posited that the agreement was unenforceable because the area chief and the management committees of Tuwan Rural Urban Project were not involved in the process all together. She maintained that the agreement failed to meet the threshold of a property agreement within the context of Tuwan Rural Urban Project hence null and void for all intents and purposes. The Appellant continued that if money had changed hands, it was incumbent upon the 2nd Respondent to refund the said sum of Kshs. 45,000.00 as she was not a party to the sale agreement. The Appellant continued that she was willing to refund the Respondent the consideration sum that was paid to him by her deceased husband as she had nowhere else to go.
16. The Respondent filed an Amended Statement of Defence dated 03/06/2019 on 24/06/2019. He testified that in 2007, he was approached by Arap Kipyeng who informed him that the Appellant's deceased husband wanted to dispose of plot No. 5377 Tuwan Rural Urban Project. The parties discussed the matter and entered into an agreement dated 23/09/2007. He clarified that this did not take place in a bar. The purchase price was agreed at Kshs. 45,000.00 where the money was paid in two (2) installments of Kshs. 25,000.00 and Kshs. 20,000.00. Subsequently, the Respondent took possession after completing his obligations.



17. Later on, the Respondent testified that he was served with a court order stopping him from constructing on the suit land. It was then that he knew of Appellant for the first time. He maintained that he had the intention to develop the suit land. In fact, he has constructed a pit latrine. For these reasons, it would be unacceptable to take a refund of Kshs. 45,000.00. He proposed that if the court were inclined to make an order for refund, that the same be made in current rates. In addition, that he be refunded the materials so far purchased in the sum of Kshs. 130,000.00.

18. In dismissing the Appellant's suit, the trial court held as follows:

“The plaintiff is seeking nullification of the agreement dated 23/09/2007 on the basis that being family plot, the seller had no capacity to dispose it without consulting the family. Looking at the two agreements, the owners is indicated as Naftally Ouma Ajuoga. Documents reduced into writing are taken in their literal meaning. It cannot be varied by words. On the agreement dated 29/07/2003, the purchaser was Naftally Ouma Ajuoga. He later sold the land to the defendant through sale agreement dated 23/09/2007. Two contrasting positions were given by parties to this suit while testifying. None of them called witnesses to support their case. The court is now left to interpret document availed and make a determination. Again and unfortunately, the person who played a bigger role in the whole process is now deceased. Dead people tells no tales. He died with secrets which will have shade (sic) more lights on transactions.

Relying on the two sale agreements, I have no difficult in concluding that Naftally Ouma Ajuoga was the owner of plot number 5377 Tuwan Rural project (sic). The plaintiff in her testimony is claiming ownership as individual. In her pleadings, she is claiming the land as family plot. The claim by the plaintiff that money came from her savings was never proved. Not (sic) direct interlink was provided. What was so difficult in inserting a clause in the agreement that it was family plot taking into account that the process was superintended by assistant chief Tuwan sub location? Again, if her claim was true, there is David Mbugua who signed as a witness but was never called as a witness. No sufficient reasons have been advanced to nullify agreement dated 23/09/2007. Agreement dated 29/07/2003 clothed the deceased Naftally Ouma Ajuoga with capacity to sell the plot as he did through agreement dated 23/09/2007.”

19. According to the Appellant, she was the wife of the 2nd defendant (now deceased) in the suit at trial. She relied on her description of the sale agreement dated 23/09/2007 which described the Appellant as the 2nd Defendant's wife. It is for this reason that the Appellant contended that since she assisted her deceased husband to obtain the property, the same was in its nature matrimonial property.

20. The Appellant argued that the sale between the Respondent and the deceased husband was void since the property was matrimonial property, and that the husband ought to have consulted the family to give a consent to the transaction. That for want of the consent from the family the whole transaction should be cancelled.

21. The law governing matrimonial property is to be found in the *Matrimonial Property Act*. Section 2 as read with Section 6 of the Act defines a matrimonial home 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, and includes any other attached property; matrimonial property on the other hand means the matrimonial home or homes, household goods and effects in the matrimonial home or homes or any other immovable and movable property jointly owned or acquired jointly during the subsistence of the marriage.



22. In *Sophy Njiri vs. National Bank of Kenya & Another* [2015] eKLR, the Court held as follows:
- “A spouse has a right to the matrimonial home, and if that right is threatened or is being affected by some action by another person, the spouse may apply to Court for relief”.
23. Under Section 6 of the Act, matrimonial property is defined as:
- “a. the matrimonial home or homes;
 - b. household goods and effects in the matrimonial home or homes; or
 - c. any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”
24. Since the Plaintiff who claimed to be the wife of the deceased neither lived on nor had a home built on the suit land the Appellant ought to have led evidence in the lower court in support of subsection “c”. The Court is of that opinion because the property in dispute was immovable but which ought to have been proven to fall within that category. For it to be within it, the Appellant, and even the deceased husband who pleaded in his Defence that he was in agreement with the claim, ought to have led evidence to the effect that the property was jointly owned and acquired during the subsistence of the marriage.
25. It is important at this point for this Court to state that it does not have jurisdiction to determine whether or not there existed a marriage. For that reason, although the Appellant raised one ground of appeal that the evidence led was not taken into account, and that the court took into account extraneous factors and arrived at a wrong decision, it is clear that the predominant issue in the suit or matter before the trial court was that the property was matrimonial. That flowing from the issue, the agreement entered into by the deceased husband of the Defendant with the Respondent herein was null and void. I find that the Court did not consider any extraneous factor since it focused its mind on both the acquisition of the suit property and the ownership thereof and capacity to sell it as was done on the agreement dated 23/09/2007, impugned. This is because in its analysis in the judgment appealed against the court stated:
- “I have no difficult in concluding that Naftally Ouma Ajuoga was the owner of plot number 5377 Tuwan Rural project (sic). The plaintiff in her testimony is claiming ownership as individual. In her pleadings, she is claiming the land as family plot. The claim by the plaintiff that money came from her savings was never proved. Not (sic) direct interlink was provided.”
26. Nowhere in the analysis above is any issue other than what the parties presented to the court for determination was taken into account. Nor is there evidence to show that the court failed to take into account relevant evidence. About ownership the court made a correct finding that from the agreement dated 29/07/2003, the purchaser was Naftally Ouma Ajuoga. This is based on the written agreement that was before the trial court, and which the Appellant herself did not dispute in her testimony when she stated that the land was bought in the name of the said buyer or husband as the head of the home under the African customary law.
27. Furthermore, it is instructive that the Appellant was a witness to the agreement made on 29/07/2003. She was named therein as a wife, and not a co-purchaser. The agreement was plainly silent in terms of her contribution to the purchase of the property. From those clear terms of the agreement it is hardly



convincing even on a balance of probabilities that the property was initially purchased by the deceased in conjunction with the Appellant and/or as matrimonial property.

28. Further, this Court is of the view that the Appellant's evidence on contribution to the purchase of the property did not suffice to form the basis of a finding that she contributed to the purchase of the land. This is based on the parole evidence rule which precludes oral evidence to dislodge written terms of an agreement unless it falls among the exceptions therein. In terms of Section 97(1) of the Evidence Act, the provision is that:

“When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions of this Act.”

29. The question that naturally follows from the above finding (on ownership) is, and for avoidance of doubt, whether indeed the property was acquired jointly. This is the second limb of the provision of the subsection “c” which reads, “...and acquired during the subsistence of the marriage”.
30. Although subsection “c” does not provide for severance of ownership and acquisition during the subsistence of the marriage, and this Court has found, as with the trial court, that the property was owned by the deceased who sold it to the Respondent herein, this Court now considers whether the trial court's finding on how the property was acquired was an error. The court held “In her pleadings, she is claiming the land as family plot. The claim by the plaintiff that money came from her savings was never proved. Not (sic) direct interlink was provided.”
31. In order to arrive at the finding above the Court relied on the Appellant's evidence which was to the effect that the husband was her dependent at the time of acquisition of the property, that she had made savings to the K-REP Bank, which she withdrew and gave him to buy the land. The property was bought by the deceased husband from one Byegen in the sum of Kshs. 42,000.00. To support her testimony, she produced as P. Exhibit 1 being the agreement between the deceased husband and one Byegen, and P. Exhibit 1(a) and 1(b) being handwritten notes showing sums of money tabulated as savings. On this evidence the trial court held, as quoted in the previous paragraph, that the Plaintiff did not prove that the money used to buy the land was from her savings and there was no direct interlink (sic). This in my humble view was a correct finding which this Court has no reason to overturn.
32. Lastly, when this Court carefully considers the evidence by the Plaintiff, she testified that she discovered that the land had been sold in 2013, when she discovered that the Respondent was in the process of building on the land by depositing material on the land. But when the Court analyzed the evidence in totality, it became clear that, if indeed the land was matrimonial property (which this court has found otherwise) then it was practically impossible or unimaginable that from September 2007 to 2013 the Appellant would have no inkling that the land had been sold since, from the evidence of the Respondent, it was occupied by the Respondent from the time he completed the payment of the purchase price and was put into possession. First, the Court notes that there was no privity of contract as between the Appellant and the Respondent in regard to the agreement that was sought to be declared null and void. Thus, she could only challenge the same by way of fraud, mistake or misrepresentation. Therefore, if there was any fraud or misrepresentation of sorts regarding the sale the Appellant had the opportunity to challenge the sale within the time envisaged under Section 26 of the Limitation of Actions Act, Chapter 22 Laws of Kenya. This she could not raise the issue by way of a suit after the



lapse of three years from 23/09/2007. This Court concludes that the suit was, even, barred by way of limitation of actions in terms of Section 26 of the Act.

33. The upshot is that the entire appeal fails since it is not merited. It is hereby dismissed with costs to the Respondent.

34. Orders accordingly.

**JUDGMENT DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS
20TH DAY OF AUGUST, 2024.**

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

