



REPUBLIC OF KENYA



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**Barons Estate Limited & another v Buntai (Civil Suit 412 of 2018)
[2023] KEHC 24826 (KLR) (Commercial and Tax) (29 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 24826 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 412 OF 2018
EC MWITA, J
SEPTEMBER 29, 2023**

BETWEEN

BARONS ESTATE LIMITED 1ST PLAINTIFF

DOROTHY CHEPKURUI 2ND PLAINTIFF

AND

EMILY NKIROTE BUANTAI DEFENDANT

JUDGMENT

1. The plaintiffs filed a further amended plaint and sought a declaration that the Defendant holds motor vehicle registration Number KCF 392Y – Range Rover 4.4 Sdve Vodue SE in resulting trust for the 1st plaintiff; mandatory injunction directing the defendant to deliver both possession and ownership documents duly executed in favour of the 1st plaintiff, including; original logbook for the vehicle; transfer forms duly executed by the defendant in favor of 1st plaintiff; defendant’s certified copy of national identify card and /or passport and defendant’s valid KRA PIN Certificate; loss of user at the rate of Kshs. 25,000 per day or such other rate as the court may order from 4th December, 2015 to the date of compliance.
2. In the alternative, the plaintiffs sought Kshs. 22,307,573; interest on the amount from the date the money was paid to the vendor until payment in full and depreciation amount upon valuation of vehicle registration.
3. The plaintiffs further sought general damages for inconvenience; loss of enjoyment of vehicle and deprivation of the right of ownership of the vehicle as well as cost of this suit.

Defence



4. The defendant filed an amended statement of defence and denied that there was a business relationship between her and the 1st plaintiff. The defendant also denied that she entered into an oral agreement with the 1st plaintiff's directors to purchase a vehicle for her, taking into account the amount of money involved.
5. The defendant further denied that the plaintiffs or their agents facilitated purchase of the vehicle or contributed towards the purchase of the vehicle from South Africa. The defendant averred that the vehicle is lawfully owned by her and Credit Bank Ltd.
6. The defendant again denied that she had agreed to pay money to the 1st plaintiff or at all. The defendant asserted that she never made any promise to pay any money; that she was the owner of the vehicle and that there is no resulting trust in favour of the 1st plaintiff.

Plaintiff's case

7. The hearing of the suit commenced on 10th June 2021 before Mativo J. (as he then was) who took evidence from the first witness. The plaintiffs called three witnesses, namely, Collins Kipchumba Ng'etich (Mr. Ng'etich); Dorothy Chepkurui (Ms. Chepkurui); and James Midenga Odera (Mr. Odera).
8. Mr. Ng'etich, the 1st plaintiff's director, adopted his witness statement as his evidence before the court and produced the plaintiffs' bundle of documents as exhibits.
9. Mr. Ng'etich asserted that in October 2015, the defendant approached the 1st plaintiff for a credit facility of Kshs. 25,000,000 to purchase a motor vehicle from South Africa (the vehicle). The 1st plaintiff's board of directors approved the request on 17th October 2015 with conditions in a special resolution. The defendant was to pay for the vehicle once it arrived in the country and registered in her name, and in any case, not later than 30th June 2016.
10. Mr. Ng'etich, facilitated purchase of the vehicle in November 2015 at Kshs. 22,307,573 through the 1st plaintiff's agent, Ms. Chepkurui. The purchase price was effected through Diamond Trust Bank account maintained by Ms. Chepkurui, as an agent the 1st plaintiff. Ms. Chepkurui usually collected rents from the 1st plaintiff's properties. To facilitate importation of the vehicle, Ms. Chepkurui sought the services of her brother-in-law, Mr. Odera, who lived in South Africa.
11. The defendant executed a letter of authority authorising Mr. Odera to act on her behalf and facilitate shipment of the vehicle from South Africa and transfer of the vehicle to into her name. The vehicle was catalogued by Mr. Odera in the Import Declaration Form (IDF) No. E1511191919 dated 6th November 2015. The vehicle was then assigned Entry No. 2829637. All documents were issued in the defendant's name as the importer according to her instructions in the emails of 2-6th November 2015.
12. The amount of R1,705,440.45 was paid through Leon Motors Rustenberg's bank after which the vehicle was shipped to Kenya through Jomo Kenyatta International Airport (JKIA) as shown by the Air waybill dated 19th November 2015. Leon's Motors sent a letter dated 24th November 2015 to KRA confirming details of the vehicle for purposes of customs and import duty collection.
13. On 4th December 2015, Ms. Chepkurui paid import duty of Kshs. 9,347,748 and the vehicle was registered as KCF 392Y, Land River Range Rover 4.4 SDVE8 Vogue SE and released to the defendant.
14. The defendant did not, however, repay the amount to the 1st plaintiff. The default created a resulting trust since the 1st plaintiff had no intention of relinquishing its proprietary rights over the purchase of the vehicle or the vehicle itself to the defendant.



15. According to Mr. Ng'etich, there was no express trust vesting the rights over the vehicle to the defendant. The registration of the vehicle in the defendant's name was based on the assumption that she would reimburse the money.
16. Mr. Ng'etich admitted though, that there were no witnesses to the oral agreement between 1st plaintiff and the defendant; that there was no document confirming the appointment of Ms. Chepkurui as the 1st plaintiff's agent. and that although a written demand was sent in September 2018, oral demands had been made earlier. Mr. Ng'etich denied that these proceedings were a personal vendetta.
17. Ms. Chepkurui testified that in January 2015, the 1st plaintiff appointed her as an agent. She opened an account (No. 0048258001) with Diamond Trust Bank, for receiving rental income on behalf of the 1st plaintiff.
18. Ms. Chepkurui facilitated the sourcing and purchase of the vehicle on instruction from Mr. Ng'etich. According to Ms. Chepkurui, Mr. Odero identified the vehicle which the plaintiff approved. Ms. Chepkurui paid the purchase price and import duty through her account and instructed Martin Ndeinya, a clearing agent, to clear the vehicle. Ms. Chepkurui also paid IpeX Worldwide Logistics for shipment of the vehicle through Mr. Odero's account. After the vehicle was cleared, it was released to the defendant on Mr. Ng'etich's instructions.
19. Ms. Chepkurui denied that the defendant and her company (Atticon Ltd), sent money to her for the purchase of the vehicle. Ms. Chepkurui maintained that the money Atticon Ltd sent was for a different purpose. Ms. Chepkurui also denied knowledge of Manara Limited alleged to have received the purchase price.
20. On his part, Mr. Odero testified that in September 2015, Ms. Chepkurui asked him to source for a motor vehicle. He identified the vehicle after which Ms. Chepkurui introduced the defendant to him as the person in whose name the vehicle was to be registered before shipment. Mr. Odero learnt from Leons Motors that Ms. Chepkurui had paid the purchase price in two instalments of R 551,816.95 on 2nd November 2015 and R 1,153,623.50 on 6th November 2015 by RTGS.
21. Mr. Odero proceeded to book the vehicle, confirmed payments with Ms. Chepkurui and had the vehicle registered in the defendant's name. He secured shipment of the vehicle at R 62,895.04. Ms. Chepkurui sent the money which he paid; an airway bill number was generated and the vehicle was shipped on 11th December 2015. An Import Declaration Form was generated on behalf of Ms. Chepkurui and sent to the shipping company to facilitate the shipping of the vehicle through JKIA. All the documents relating to the purchase and shipment of the vehicle were to Ms. Chepkurui to enable her complete the clearing process.

Plaintiffs' submissions

22. The plaintiffs submitted through written submissions and oral highlights, that Ms. Chepkurui paid for the vehicle as shown in their exhibits (relying on 029RTG2151204002 on DExh33 also reflected in PExh10). The plaintiffs maintained that the defendant did not adduce any evidence, either bank statements or RTGS, to prove that she paid for vehicle. Even the document showing duty payment of Kshs. 9,347,718 was made by Chepkurui.
23. The plaintiffs asserted that the bank statement produced by the defendant for payments totalling to Kshs. 7,000,000 was made to Rhoda Kitany and Manara Ltd who are not parties to this suit and the purpose of the payment was not clear.



24. Relying on sections 107 and 119 of the *Evidence Act* and Woodroffe's Law of Evidence, 9th Edition (page 811-816), the plaintiffs argued that the Court ought to make an adverse inference against the defendant for not joining Rhoda Kitany and Manara Ltd to the suit or call them as witnesses to prove her claim that she paid for the vehicle.
25. The plaintiffs relied on *Kanyungu Njogu v Daniel Kimani Maina* [2000] eKLR, that when the court is faced with two possibilities, it can only decide the case on a balance of probability, if there is evidence to show that one probability was more probable than the other.
26. The plaintiffs again relied on *Evans Kidero v Speaker of Nairobi City County Assembly & another* [2018] eKLR, on the meaning of a balance of probability

Defendant's case

27. The defendant adopted her amended witness statement as her evidence in court and produced her bundle of documents exhibits.
28. The defendant denied that she entered into an oral loan agreement with the 1st plaintiff's directors, but admitted that she was introduced to Ms. Chepkurui, and Mr. Odero to assist her purchase the vehicle from South Africa.
29. The defendant admitted that there existed a business relationship between the 1st plaintiff and Atticon Ltd and that Mr. Ngetich was also introduced to her by Maryanne. The defendant further admitted instructing Ms. Chepkurui. According to the defendant, she paid Kshs. 28,100,000 to Ms. Chepkurui; that she also paid Kshs. 7, 000,000 to Ms. Chepkurui on 25th November 2015, but Ms. Chepkurui made all payments to South Africa as well as customs duty of Kshs. 9,347,748. The defendant admitted that she had no bank statement to show that she transferred money to Ms. Chepkurui.
30. The defendant questioned why the 1st plaintiff made a demand in September 2018 although the vehicle arrived in Kenya in November 2015. She maintained that there were several other disputes between her and the plaintiffs.

Defendant's submissions

31. The defendant argued that through written submissions and oral highlights that the vehicle was purchased through her personal savings and proceeds from Atticon Ltd. The defendant maintained that the 1st plaintiff did not contribute towards the purchase of the vehicle and cannot claim its ownership. The defendant asserted that no demand was made for repayment of the purported loan and no evidence was adduced of her promises to repay the money.
32. It is the defendant's case that the suit is not only a deliberate move to vex and strip her of her right and interest in the vehicle, but also a ploy to settle scores.
33. The defendant relied on sections 107,108 and 109 of the *Evidence Act* and *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* (Civil Appeal No. 219 of 2013) [2014] eKLR, to argue that the plaintiffs did not prove an oral loan agreement. This is because although the 1st plaintiff produced a board resolution, there was no evidence that Mr. Ng'etich was its director. The 1st plaintiff did not call any other director or officer to support its case.
34. The defendant further argued that the 1st plaintiff did not produce agency agreement with Ms. Chepkurui. The defendant asserted that there was a cordial and friendly relationship between herself and Ms. Chepkurui from whom she had learnt of Leon's Motors. The defendant maintained that all



documentation in respect of purchase of the vehicle were in her name and that was why the vehicle was registered in her name as the sole proprietor.

35. According to the defendant, the documents the plaintiffs produced did not indicate the purpose for which payments was made. Reliance was placed on *Siriba v Albert Mongare Okemwa* (Civil Appeal No. 61 of 2019) [2021] eKLR, that a deposit slip that does not indicate the purpose for which money is deposited is not sufficient proof of a loan.
36. Regarding the claim for a resulting trust, the defendant relied on *Twalib Hatayan Twalib Hatayan & Anor v Said Saggat Ahmed Al-Heidy & others* (Civil Appeal No. 51 of 2014) [2015] eKLR, to argue that a resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee.
37. Further reliance was placed on *Juletabi African Adventure Limited & another v Christopher Michael Lockley* (Civil Appeal No. 75 of 2016) [2017] eKLR, to support the contention that there was no proof of the parties' intention to create a trust which must be evident before the Court can conclude that there is a resulting trust.
38. The defendant argued that the receipt from KRA was proof of payment of the customs duty for the vehicle, and relied on *Total Kenya Ltd formerly Caltex Oil (K) Ltd Janevams Ltd* (Civil Appeal No. 178 of 2005) [2015] eKLR.

Determination

39. I have considered the pleadings, evidence and submissions by parties. I have also considered the decisions relied on by either side. The core issue in this suit is who paid for the vehicle and depending on the answer to that issue, whether the suit should succeed.

Who paid for the vehicle

40. The plaintiffs' case is that the 1st plaintiff financed the purchase of the vehicle through a loan to the defendant; had the vehicle shipped from south Africa and registered in the defendant's name.
41. The plaintiffs asserted through Mr. Ngetich that the defendant sought assistance from the 1st plaintiffs purchase the vehicle. The 1st plaintiff agreed and Mr. Ng'etich Ms and Chepkurui facilitated purchase of the vehicle from South Africa at Kshs. 22,307,573.
42. Ms. Chepkurui who was acting as the 1st plaintiff's agent transmitted funds for purchase and other charges for importation of the vehicle to South Africa. The purchase price was remitted in two instalments of R 551,816.95 on 2nd November 2015, and R 1,153,623.50 on 6th November 2015 through RTGS.
43. According to the plaintiffs documents relating to the purchase and importation of the vehicle had to be issued in the defendant's name as the importer as this was a requirement. The vehicle had also to be registered in the defendant's name before shipment. Once the vehicle arrived in the country, Ms. Chepkurui paid import duty and taxes to KRA amounting to Kshs. 9,347,748. The vehicle was then registered in the defendant's name and handed over to her.
44. The plaintiffs posited that the arrangement was that the defendant would refund the money once the vehicle arrived in Kenya and registered in her name. However, once the vehicle was released to her, she refused pay.
45. The defendant denied that the plaintiffs paid for the vehicle and argued that she paid for the vehicle from her own resources. The defendant maintained that even though Ms. Chepkurui paid for the



vehicle, she gave the money to Ms. Chepkurui. That was why all import documents were issued in her name and the vehicle was finally registered in her name, once in Kenya.

46. I have considered the evidence on record and the exhibits. There is a resolution by the 1st plaintiffs' directors dated 17th October 2015. The resolution stated that the defendant had approached the 1st plaintiff for a loan of Kshs. 25,000,000 to purchase a vehicle from South Africa. The 1st defendant accepted the request and that the purchase price together with shipping costs were to be paid directly to the supplier.
47. The resolution indicated that the defendant had agreed to refund the money to the 1st plaintiff by 30th June 2016. If the defendant did not refund the money by that date, the money would attract interest at prevailing commercial rates. The 1st plaintiff authorised Ms. Chepkurui to execute the resolutions.
48. There is documentary evidence on record to show that Ms. Chepkurui sent money to the seller in South Africa. The evidence in the documents produced by the plaintiffs, include, bank statements and RTGS. The plaintiffs also adduced evidence to show that import and excise duty was paid by Ms. Chepkurui. She also paid for the vehicle registration fee.
49. The defendant stated that the vehicle was purchased through her own resources and relied on documents in her exhibits. One of the documents showed money paid out from an account as follows:
 1. 13/8/2015 RTGS -2590
 2. 5/11/2015 RTGS-2000
 3. 25 /11/2015 RTGS 5000
 4. 7/12/2015 cheque Commissioner of Customs Services -2,278.17
 5. 19/6/2016 RTGS-3480
 6. 7/6/2016 RTGS-3480
50. The defendant did not, however, demonstrate that this money was paid towards the purchase of the vehicle. She did not also explain whether the money was in Kshs, USD or Rand. If in Kenya Shillings, the money could not have been enough to purchase the vehicle, meet shipping costs from South Africa to Kenya, import duty and registration fee.
51. Ordinarily, the law places the burden of proof on the plaintiff, (sections 107 through 109). However, the burden may shift depending on the evidence adduced by the plaintiff.
52. In this respect, the Supreme Court stated in *Raila Amolo Odinga & another v Independent Electoral and Boundaries Commission & 2 others (Presidential Election Petition 1 of 2017)* [2017] eKLR:

(132) Though the legal and evidential burden of establishing the facts and contentions which will support a party's case is static and remains constant throughout a trial⁵² with the plaintiff, however, depending on the effectiveness with which he or she discharges this, the evidential burden keeps shifting⁵³ and its position at any time is determined by answering the question as to who would lose if no further evidence were introduced.
53. Once the plaintiffs adduced evidence to demonstrate how the vehicle was sourced, paid for, imported and registered, the burden shifted to the defendant, who also claimed to have financed the purchase of the vehicle, to prove that her claim was correct.



54. It was not enough for the defendant to argue that she paid for the vehicle but failed to produce evidential proof to back up her case. The defendant did not demonstrate that she paid for the vehicle, how much she paid and how the money was paid.
55. Based on the evidence on record, I find and hold that the 1st plaintiff paid for the vehicle through Ms. Chepkurui in South Africa. The vehicle was then imported to Kenya, import duty was paid he vehicle was registered in the defendant's name.

Relief to grant

56. The plaintiffs sought a declaration that the defendant holds motor vehicle in trust for the 1st plaintiff and a mandatory injunction directing the defendant to deliver both possession and ownership to the 1st plaintiff; loss of user at the rate of Kshs. 25,000 per day or such other rate as the court may order from 4th December, 2015 to the date of compliance.
57. In the alternative, the plaintiffs sought Kshs. 22,307,573, the purchase price and other charges paid towards importation of the vehicle and interest on the amount from the date the money was paid to the vendor until payment in full as well as depreciation amount upon valuation of vehicle.
58. The plaintiffs further sought general damages for inconvenience; loss of enjoyment of vehicle and deprivation of the right of ownership of the vehicle as well as cost of this suit.
59. In the first prayer, the plaintiffs urged the court to find that there is a resulting trust in favour of the 1st plaintiff over the vehicle once the defendant failed to pay the money advanced towards purchase of the vehicle. The defendant argued that she never made a promise to pay any money. She stated that she was the owner of the vehicle and that there is no resulting trust in favour of the 1st plaintiff.
60. A resulting trust is implied where the person who transferred the property did not intend to pass title to the transferee. in this respect, the Court of Appeal stated in *Twalib Hatayan & another v Said Saggarr Ahmed Al-Heidy & 5 others* (supra), the Court of Appeal stated:

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial. (emphasis)

61. Referring to *Halsbury's Laws of England* 4th Edn, vol 20, Sweet & Maxwell p. 24), regarding the claim that the money was a gift and not refundable:

“where a person buys property and pays the purchase money, or part of it, but takes the purchase in the name of another, who is neither his child, adopted child nor wife, prima facie, there is no gift, but a resulting trust for the person paying the money.”

62. I have perused the pleadings and evidence. The 1st plaintiff's resolution was that it was to advance money to the defendant to buy the vehicle. The defendant was then to repay the money by 30th June



2016. If the defendant failed to repay, the money would attract interest at commercial rates. The 1st plaintiff paid the purchase price even though the vehicle was registered in the defendant's name.

63. The defendant did not allege that the 1st plaintiff purchased the vehicle to her as a gift, but that she paid for it which she failed to prove. From the evidence and conduct of the parties, the plaintiffs and the defendant were well known to one another and had something going on between them which they however withheld from the court.
64. On the evidence, I am satisfied that there was a resulting trust in favour of the 1st defendant over the vehicle. The question however is whether to order the vehicle to be transferred to the 1st plaintiff taking into account the time lapse.
65. Parties did not tell the court the status of the vehicle and whether the vehicle is still in the name of the defendant. In the circumstances, ordering the vehicle to be transferred to the 1st plaintiff may not be the most appropriate relief.

Conclusion

66. Having considered the pleadings evidence and submissions, the conclusion I come to, is that the 1st plaintiff paid for the vehicle at the request of the defendant. The defendant did not prove that she paid for the vehicle and how, thus failed to satisfy the court that the vehicle was purchased with her own resources.
67. Regarding interest, there is no evidence that the defendant agreed to repay the money with interest at commercial rates or any other rate.

Disposal

1. Judgment is entered for the 1st plaintiff against the defendant for Kshs. 22,307,573, with interest at court rates from the date of this judgment until payment in full.
2. Costs to the 1st plaintiff

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2023.

E C MWITA

JUDGE

