



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MILIMANI

ELC NO. 1302 OF 2016

BABUBHAI BHAGWANJI AMBA MADHIWANI.....PLAINTIFF

=VERSUS=

MARIA BURTON.....DEFENDANT

JUDGEMENT

Background.

1. The Plaintiff filed this suit against the Defendant claiming the following reliefs:-

a. A declaration that the registration of the Defendant on the property LR No7158/32 Maisonette No.5 in Nairobi , without any contribution by the Defendant towards acquisition of the property ,whatsoever ,created a Resulting Trust in favour of the Plaintiff, and the Defendant is liable to yield the interest to the Plaintiff upon demand;

b. An order directing the Defendant to execute a transfer of the interest registered to her over LR No.7158/32 maisonette No.5 in Nairobi in favour of the Plaintiff, within seven (7) days of service of Judgement and decree of Court, failing which the Deputy Registrar of the Court to execute the Transfer in favour of the Plaintiff;-

c. Costs of this suit;

2. The Defendant filed a defence and raised a counter-claim in which she sought the following reliefs:-

a. The Plaintiffs suit be dismissed with costs

b. A declaration that the parties are joint owners in equal shares and that the property be sold and the proceeds be distributed to the parties in equal shares.

c. An order for payment of mesne profits from May 2013 to the date of Judgement at the rate of Kshs.80,000 per month OR the Plaintiff do pay the defendant a sum equivalent to the value of her half share in the suit property.

3. The subject matter of this suit is maisonette No. 5, Grevillea, Grove, Westlands, Nairobi erected on LR No. 7158/32 (suit property). The suit property is registered in the joint names of the Plaintiff and the Defendant. The Plaintiff is residing in Kenya but also a resident of the United Kingdom. The Defendant is a resident of the United Kingdom.

4. The Plaintiff and the Defendant met in London in the late 90's . The Plaintiff had divorced his wife and the Defendant had divorce her husband. The two had their own houses in the United Kingdom. The Plaintiff sold his house in the United Kingdom and he could occasionally reside in the house of the Defendant and at times reside with his brother who was also in the United Kingdom.

5. In 2007, the Plaintiff purchased the suit property and moved in. The Defendant who was then working in the United Kingdom could occasionally visit the Plaintiff and spend time with him. With time, it became necessary that the Defendant acquires an alien resident visa so that she could have enough time to be in Kenya. The alien resident visa could be renewed periodically.

6. In the year 2012, the Defendant moved out of Kenya on the grounds that the Defendant was seeing other women. The Defendant was subsequently married in the United Kingdom on 21st June 2015. In 2016, the Plaintiff through his lawyer wrote to the Defendant asking the Defendant to sign forms asking her to relinquish her interest in the suit property on the ground that her trusteeship had been discharged. The

Defendant declined to sign the forms arguing that she was entitled to 50% share of the suit property. This is what triggered the current suit.

Plaintiff's Case

7. The Plaintiff's case is that he is the one who solely provided the funds for the purchase of the suit property and that the Defendant did not contribute even a single cent towards the purchase of the suit property. The Plaintiff contends that the registration of the name of the Defendant was purely as trustee and that there was no intention to confer any interest in the suit property upon her. The Plaintiff states that he included the name of the Defendant because he was aging and that he wanted that in case anything happened to him, the Defendant would transfer the property to his grandchildren.

8. The Plaintiff denied the Defendant's claim that they stayed as a couple who were married and that as such she is entitled to a share of the suit property. The Plaintiff states that the union between him and the Defendant was purely for companionship as good friends and that when the Defendant's son was wedding, he attended the wedding.

Defendant's case.

9. The Defendant's case is that she met the Plaintiff while he was staying in the United Kingdom in 1999. When the Plaintiff re-located to Kenya, he purchased the suit property and wherever the Defendant was in Kenya, she resided with the plaintiff. She used to pay for domestic shopping and used to pay for DSTV which she installed to enable her watch CNN news. She could also pay wages of their domestic servants including one who was a gardener and at times acted as their caddie during golf tournaments.

10. The Defendant is the one who purchased curtains for the house which is the suit property. She could also pay for holiday trips to various countries and could host golf tournaments at the Nairobi Royal Golf Club where they were members. The Defendant testified that she only moved out of Kenya in 2012 after she discovered that the Plaintiff was not faithful and that he used to see other women behind her back. The Defendant argues that she is entitled to 50% of the suit property on account of the contributions she made towards the improvement of the suit property, payment of domestic workers' wages and meeting expenses for other household goods and for holiday trips .

11. The Defendant argues that for all purposes and intents, she appeared as a wife of the Plaintiff and that the Plaintiff had promised that she will get 50% of the suit property. She therefore argues that the house be sold so that she gets her 50% share and mesne profits of **Kshs.80,000/=** per month with effect from 2012 until date of judgement .

Analysis of evidence and issues for determination

12. There is no contention that the suit property was wholly purchased by monies provided by the Plaintiff. The purchase price was **Kshs.15,000,000/=**. The deposit of **Kshs.1,500,000/=** was paid by Super Marketing and Distribution Limited a firm associated with the Plaintiff's nephew. This deposit was later reimbursed by the Plaintiff who issued cheque No. 000004 for kshs.1,500,000/= . The Plaintiff paid kshs.13,500,000/= vide cheque No.00003.

13. The Defendant does not dispute the fact that the entire purchase price came from the Plaintiff. The Defendant's contention is that she is entitled to 50% of the suit property because she had cohabited with the Plaintiff and that people viewed them as man and wife. In support of this contention, the Defendant called DW2 Gladys Marita Kunyu who used to be a house help at the suit property. This witness testified that at times she used to be paid by the Plaintiff and at times by the Defendant and that she knew the two as husband and wife and that whenever the two used to go for holidays, they went together.

14. The Defendant also called DW3 Sammy Olenyo Madonye who used to be a general worker of the two at the suit property. He also at times acted as their caddie whenever they went to play golf. He testified that he knew that the two were husband and wife and that they behaved as such. Either of the two used to pay him his salary. The Defendant also called DW4 Doungles Maranga Obachi, who used to be a guard at the suit premises. This witness testified that he knew the two as husband and wife. The last witness to be called was DW5 Allan Barngetuny who used to work with Royal Furnishings and Executive Curtains. He testified that the Plaintiff and the Defendant were his clients. There is a time they purchased curtains from the shop and he went and fitted them. He testified that he knew the two as husband and wife.

15. I have carefully considered the Plaintiff's evidence and that of the Defendant. I have also considered the submissions by the parties. The issues which emerge for determination are firstly, did the Plaintiff have the intention of incorporating the Defendant as trustee in the title to the suit property. Secondly, does this court have jurisdiction to entertain the Defendant's counter claim. Thirdly, is the Defendant entitled to half share of the suit property?

16. On the first issue, the Plaintiff's evidence is that he had incorporated the Defendants in the suit property for the benefit of his grandchildren in case he died. His intention was that in case he died, the Defendant was to convey the property to his grandchildren. This intention was not expressed anywhere. This intention came only from the evidence. The property was not registered in the name of the two as tenants in common. It was a joint registration. The Plaintiff had expressed his intention to terminate the trust but the defendant resisted. It is for the Court now to determine which kind of trust was intended.

17. I have examined the circumstances which brought the Plaintiff and the Defendant together. The two became close because each had divorced his/her partner. The two knew each other while in the United Kingdom. When the Plaintiff sold his house in the United Kingdom, he came to Kenya and purchased the suit property. The relationship which had developed in the United Kingdom extended when the Plaintiff moved to Kenya.

18. The Defendant did not sell her house in the United Kingdom because of the relationship. She sold it because her son who used to take care of it had gotten a job in Jordan and she could not have anyone to take care of it as she at times was in Kenya with the Plaintiff. All the

purchase monies was paid by the Plaintiff. The Defendant in her evidence stated that their relationship was not meant to result in a marriage.

19. In **Twalib Hatayan & another Vs said Saggar Ahmed Al-Heidy & another 5 others (2015) eKLR** the court of Appeal judges stated as follows:-

“ 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 interests upon the transferee (See Black’s Law Dictionary). This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention.(See Snell’s Equity 29th Edition , Sweet & MaxwellP.175). Therefore, unlike constructive trust where unknown intensions may be 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 (see Snell’s Equity at P.177).

20. In the instant case all the purchase money was given by the Plaintiff. Though the Plaintiff through his e-mails wrote to the Defendant promising her half share , it is clear that his intention was only to woe back the Defendant who had left him after discovering his philandering eyes on other women. The Plaintiff was desperate to have her back but the Defendant was determined not to come back and that is why she proceeded to marry in 2015. What was contained in the e-mails by the Plaintiff to the Defendant cannot be taken to have been intended to confer any interest upon the Defendant.

21. The Plaintiff having paid the entire purchase and having examined the origin of the relationship and how the suit property was purchased, it is clear that the Plaintiff had no intention to confer any interest upon the Defendant. I therefore find that this is a clear case where the court can automatically infer a resulting trust.

22. On the issue as to whether this Court has jurisdiction to entertain the Defendant’s counter-claim, I can say that this court has jurisdiction to deal with the same. Already the Defendant is a joint owner. There is no way this court can isolate this issue or determine it conclusively without delving into the issue of whether there is a basis upon which the Defendant lays claim to half share of the suit property.

23. The Defendant’s claim to half share of the suit property is based on cohabitation with the Plaintiff. The Plaintiff in her own evidence stated that the cohabitation was not meant to result into a marriage. This is fortified by the fact that soon after she found out that the Plaintiff was seeing other women she went back to the United Kingdom and married another man. If she had indeed believed that she was entitled to a presumption of marriage by co-habitation, she should have pursued that line before marrying. In the absence of any pronouncement of a presumption of marriage by cohabitation by a competent court, there is no basis upon which she can lay claim to half share of the suit property or any portion thereof.

24. The Defendant is aprobatig and reprobating. She states in her own evidence that the cohabitation with the Plaintiff was not meant to result in a marriage but at the same time, the evidence of her witnesses is that they viewed her stay with the Plaintiff as that of husband and wife. The Defendant did not ask this court to make any finding as to whether there was a presumption of marriage by cohabitation or not. In any case even if she had put forth that issue for determination, presumption of marriage can only arise after a party establishes long cohabitation. The cohabitation between the Plaintiff and the Defendant was intermittent and cannot qualify for a presumption of marriage. In the case of **Phylis Njoki Karanja & 2 others Vs Rosemary Mueni Karanja & another Nairobi Civil Appeal No.313 of 2001**

(2009) eKLR the Court of Appeal stated as follows:-

“ Before a presumption of marriage can arise, a party has to establish long cohabitation and acts of general repute, that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystalized into a marriage and it is safe to presume the existence of a marriage”.

25. The two decisions cited by the Defedant in her submission are not applicable in this case. The Defendant has already gone and is married elsewhere. She did not raise the issue of cohabitation before she contracted the marriage she is now in. The two cases therefore do not apply to the present circumstances.

Conclusion

26. It is clear from the above analysis that the Plaintiff has proved his case on a balance of probabilities. On the other hand, the Defendant has failed to prove her counter-claim. I proceed to dismiss the Defendant’s counter-claim with costs to the Plaintiff. Judgement is entered for the Plaintiff against the Defendant in terms of prayers (a), (b) and (c) of the Plaint filed on 21st October 2016.

It is so ordered.

Dated, Signed and Delivered at Nairobi on this 24th day of October 2019.

E.O .OBAGA

JUDGE

In the Presence of:-

Mr Webo for Mr Bwire for Plaintiff and Mr Sichangi for M/s Njeri Onyango for Defendant

Court Assistant: Hilda

E.O.OBAGA

JUDGE