



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI (NAIROBI)

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO.230 OF 2017

BEATRICE ATING'A PLAINTIFF

VERSUS

PURITY MUHONJA ONZERE DEFENDANT

J U D G M E N T

The Plaintiff filed this suit on 30th May, 2017 against the Defendant seeking the following prayers:-

The Plaintiff prayed for judgement against the Defendant for:-

1. A permanent injunction be granted restraining the Defendant from accessing or withdrawing funds deposited in her account number [particulars withheld] KCB Bank (K) Limited, Kariobangi Branch belonging to the Plaintiff;
2. A declaration be made that the Plaintiff is entitled to the beneficial access and beneficial use of the funds deposited into the Defendant's account No. [particulars withheld] by the American Authorities;
3. An order of specific performance compelling the Defendant to transfer all the funds wired to her account in respect of compensation for the Plaintiff to the Plaintiff's account number [particulars withheld] KCB Bank or alternatively KCB Bank Ltd be ordered to transfer the said funds to the Plaintiff's said account;
4. Costs of this suit.

The background of this matter is that the Plaintiff was an employee of American Embassy where she sustained injuries as a result of terrorist attack of the American Embassy on 7th August 1998. The Plaintiff was compensated for the injuries by the American Government; she contended that she authorized part of the compensation to be paid through the Defendant's account number [particulars withheld] KCB Bank (K) Limited, Kariobangi Branch; That Kshs. 20,000,000 was paid through the Defendant's above mentioned account. At the material time, the relationship between Plaintiff and the Defendant were mother and daughter in-law respectively.

Plaintiff filed Notice of Motion dated 30th May, 2017 together with the suit herein. In the application the Plaintiff sought orders to restrain the Defendant from accessing the funds paid through her account. At the time of filing the application, the Defendant had withdrawn Kshs. 4,000,000 from the account. The amount that remained in the said account was frozen by this Court pending hearing and determination of this suit.

The Defendant filed a statement of defence dated 25th September, 2017 denying allegations set out in the Plaintiff's Complaint. The Plaintiff filed a reply to defence dated 10th October, 2017 denying allegations contained in the defence.

SUMMARY OF EVIDENCE

The Plaintiff availed 3 witnesses namely B I A (PW1), V A O (PW2) and W M (PW3).

The Plaintiff testified that at the time of the terrorist bomb attack of the American Embassy in Nairobi, she was an employee of the Embassy. She said that following the injuries she sustained, the American Government worked out compensation for the victims and asked them to get personal representatives. She named the Defendant, her husband and her son as her representative. She said that she chose the Defendant who was her daughter in law as her (Plaintiff's) who was the Defendant's husband was out of reach on work assignment.

Plaintiff further testified that there was an arrangement to release the funds into her account by all her representatives immediately it reflected so that they could invest for support of the family. She said at the time money was transferred to the Defendant's account she had been arrested and that she asked the Plaintiff to send her cash bail and fare to go back and transfer the said money into her account. Plaintiff added that the Defendant on being released could not be reached on phone and failed to pick the Plaintiff. She testified that she had expressly informed the Defendant that the money she was to receive was to be invested in favour of her 1st two children who the Plaintiff lived with and cared for.

Plaintiff further testified that the Defendant transferred **Kenya Shillings Four Million (Kshs. 4, 000, 000)** to a stranger by the name Macharia in total violation and in breach of trust. That Defendant has refused to transfer the funds to her despite several attempts to reach her; that she is attempting to swindle her of the money.

PW2 who is the Plaintiff's son named beneficiaries for the compensation and added that the Defendant was supposed to receive the funds for and on behalf of the Plaintiff and transfer to the Plaintiff's account. He testified that the Defendant has refused to cooperate like the rest of the named representatives.

PW3 is a 17 year old boy who is the son to Defendant and grandson to the Plaintiff testified that sometime in 3rd term during closing day the Defendant visited him in the company of an adult male who was introduced to him as his uncle. He testified that the Defendant asked him to accompany her to Nairobi to assist her get some money. He said the Defendant gave him a mobile phone with 2 numbers which he could use to reach her.

Pw3 further testified that the Defendant requested him to steal any document from the Plaintiff's (grandmother's) bedroom that had bearing on this case (either from USAID) or American Government which she would use to access the funds frozen. He said the Defendant offered him **Kenya Shillings Ten Thousand (Kshs. 10,000)** if he accomplished the task. Pw3 said he declined to do as requested by the Defendant and reported the incident to the grandmother immediately.

The Defendant adduced evidence and never availed any other witness. She denied having entered into any agreement with the Plaintiff to act as her attorney and that the amount that was deposited in her account was her share of the compensation.

PLAINTIFF'S SUBMISSIONS

The Plaintiff submitted that this suit arise out of breach of trust by the Defendant to act as per family plans, mutual agreement and understanding. The Plaintiff submitted that the act of depositing money in the Defendant's account was not intended for the Defendant's benefit but for the benefit of her first two children W M and B A whom she sired with the Plaintiff's son V O. Plaintiff submitted that she lives with and maintain the above two children.

The Defendant's submissions also restated the ground on the face of the application and the averments. Counsel for the Defendant cited that in the case of **Mbothu & 8 Others Vs. Waitimu & 11 Others (1986) KLR 171** the Court with respect, correctly stated that:-

“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...”

ANALYSIS AND DETERMINATION

I have considered evidence adduced by the parties herein. I have also considered submissions filed and oral arguments of counsels herein while highlighting the written submissions.

ISSUES FOR CONSIDERATION

- 1. Whether the Plaintiff in appointing the Defendant as her agent/ representative, intended that the proceeds meant to benefit the Defendant or be utilized in the benefit of the Defendant's first two children.*
- 2. Whether the Plaintiff is entitled to the proceeds transferred to the Defendant's account number [particulars withheld] KCB Ltd, Kariobangi Branch to hold in trust for the benefit of the Defendant's first two children.*
- 3. Whether the Defendant's first two children, former husband (who is the Plaintiff's son) are entitled to the beneficial interest in the funds in the Defendant's frozen account.*

From evidence adduced there is no dispute that the Plaintiff herein worked for the American Embassy and that she was injured during the 1997 terrorist attack of the Embassy. There is also no dispute that she sustained injuries in the attacked and that she was compensated for the injuries. It is evidenced that the compensation was made through her family members and that prior to the payments she executed documents authorizing the family members to receive the payments through their respective accounts and that Kshs. 20 million was to be paid through the Defendant who is her son's wife. Evidence shows that Plaintiff lives and maintains two sons who were sired by the Defendant and her son. The Defendant also confirmed that she has given birth to other children after separating with the Plaintiff's son. She confirmed that the first two children are living with the Plaintiff and she is maintaining them.

Defendant informed Court that out of the 20 million, she has withdrawn 4 million which she used to purchase land and though she never produced any document to confirm that. She further confirmed that she never involved her husband the Plaintiff's son in the purchase of the

land.

It is evident that the Defendant fell out with the Plaintiff after the payment of the money. Evidence adduced show that before money was paid the parties herein agreed together with the other family members on how it would be paid to them from the American Government and that the Plaintiff intended to have the funds benefit her family which included the Defendant who lived with her as a daughter-in-law at the material time. Evidence also shows that the Plaintiff intended to have her two grandchildren provided for thus money being paid through their mother. There is no doubt however that she is the one taking care of the two grandchildren. This was confirmed by one of the children who confirmed that he and his brother live with the Plaintiff and that she is maintaining them.

It is evident that the Defendant failed to deal with the funds paid through her account as expected by the Plaintiff who the primary beneficiary was following the injuries she sustained. The person being compensated by the American herein is still alive. There is no dispute that she was the one being compensated. It is her who has the right to decide on how she will want to spend the compensation. Any other person who feels that he or she has a claim over the compensation may institute a claim against the Plaintiff. The Plaintiff is entitled to compensation arising from the injuries she sustained.

FINAL ORDERS

1. I direct that the amount paid to the Defendant's account no. No. 1206288132 KCB Bank Eastleigh Branch by the American Government be transferred to the Plaintiff account number [particulars withheld] KCB Bank.
2. I further order the Defendant to pay back the Plaintiff Kshs. 4,000,000 which being part of payment from American Embassy withdrawn from the said account, be paid to the Plaintiff.
3. In the alternative to order No. 2 above, if any property has been purchased using Kshs 4,000,000 being part of Plaintiff's compensation, the same be transferred to the Plaintiff.
4. Costs to the Plaintiff.

Judgment dated, signed, and delivered at Nairobi this 20th day of July, 2017.

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RACHEL NGETICH

JUDGE

IN THE PRESENCE OF:

GRACE: COURT ASSISTANT

BOSEK: COUNSEL FOR THE PLAINTIFF

WESONGA: COUNSEL FOR THE DEFENDANT