



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO.284 OF 2007

MAGRA GRONSTRAR.....PLAINTIFF

VERSUS

BAYA ABRAHAM WANJE.....DEFENDANT

JUDGMENT

By an amended plaint dated the 23rd September, 2008, the Plaintiff sought as against the Defendant order declaring that the two motor vehicles KAX 872M and KAY 860M Lane Reference NO.MN/111/2012 and balance of money equivalent to Kshs.4,080,000 deposited by the Plaintiff into account NO.105209265 at Barclays Bank, Mombasa, in the defendants' name is the exclusive property of the plaintiff; a mandatory injunction compelling the Defendant to execute a transfer of the two motor vehicles and the land in favour of the Plaintiff and to deliver the possession thereof to the Plaintiff, refund of Kshs.400,000 deceitful obtained by the Defendant from the Plaintiff and refund of Kshs.2,080,000.

A permanent injunction restraining the Defendant from parting with the possession of the parcel of land, the motor vehicles and the balance of the money in the bank andfrom taking possession or remaining in possession or otherwise interfering with the Plaintiff possession of those parcel of land and the two motor vehicles, that the Defendant be ordered to return to the Plaintiff the remaining balance in account No.165209265 at Barclays Bank as at 3rd October, 2007.

The facts pleaded as giving side to the suit are that sometimes in the year 2006 the Plaintiff visited Kenya as a tourist and stayed at **White Sands Hotel** where the Defendant worked as a waiter. The parties became friends and became intimate as a result of which intimacy, the plaintiff developed trust in the Defendant on which account the Plaintiff wired into an Account No.165209265, operated at Barclays Bank Bamburi Branch in the name of the Defendant the sum of Euros 40,000/= It is alleged by the Plaintiff that the money was so transferred to the defendants account not for his use but for the sole use of the Plaintiff and that it was used to purchase the motor vehicle and the parcel of land and that it was at all time, held in trust and to the benefit of the Plaintiff.

The Plaintiff's pleadings were supported by the sworn evidence of the Plaintiff in which the Plaintiff said that he met the Defendant in September, 2007 as pleaded in the Plaint. That he came back to Kenya to live and that the Defendant had led him into believing that, she being a tourist, could not buy anything in Kenya in her name nor open an account in her name and that as a consequence of such representation and the Defendant being her friend she banked (wired) into the Defendant's Account the sum of Kshs.40,000= (Euros) on 8th June, 2007.

A document in a foreign language, which appears to be a bank statement, but said to be a bank transfer, was produced as exhibit P1. In it there is an entry of 8th June, 2007 showing an entry of 40,000 Euros against the name and address of the Defendant

The Plaintiff equally produced a copy of certificate of title over CR No.24167/1 as exhibit P3 and said that the property was bought at Kshs.700,000 and a receipt for Kshs.630,000 issued by Mogaka Omwenga & Co. Advocates in the names of both Plaintiff and the Defendant being purchase price of the suit parcel of land. The Plaintiff further stated that the advocate informed her that he could not buy the parcel of land in her own name.

She went on to state that she bought the motor vehicle registration number KAY 860H at Kshs.1,300,000 for own use and that it was also registered in the name of the Defendant and that the purchase price was withdrawn from the account of the Defendant into which she had wired the money. Another motor vehicle registration number KAX 872M was bought at Kshs.700,000 using money from her own account and not using the funds deposited at the Defendant's account at Barclays Bank in the Plaintiff's calculations and evidence a sum of about Kshs.2,000,000 remained in the account after the purchase of the parcel of land and the first motor vehicle, and that she used about Kshs.1,000,000 on her expenses and that another Kshs.1,000,000 was withdrawn by the Defendant and banked at Kenya commercial Bank in an account held in the name of the Defendant's son. He prayed that the property be transferred into her name so that she moves on with her life.

On cross-examination, the Plaintiff confirmed the dates when she came to Kenya for the first time as 2008 but later corrected to say it was in September, 2006. She confirmed that she put in the money into the Defendant's account willingly and without being forced and that she rented a house in which she lived with the Defendant and his son.

The Plaintiff however was not sure of the amount that remained in the account and taken by the Defendant and that she herself had received gifts from loves ones but that there was no reason for her to gift the Defendant with the very large sum of Kshs.

On further cross-examination, Plaintiff said that she had earned the money through hard work for a period of 52 years and that she could not afford to give a gift of **40,000 Euros**.

On his part the Defendant the Defendant filed a statement of defence dated 16.11.2007 in which it is pleaded that the sum of 40,000 Euros was willingly and without coercion transferred into this account as a gift in consideration of good company he offered to the Plaintiff and that he was not answerable to the Plaintiff in the manner he was to use the money. On the vehicles the Defendant pleaded that the same were bought by own money for which reason the Plaintiff had no right to lay a claim over the same. However, for the parcel of land the Defendant conceded and acknowledged the Plaintiff right to 50% of the interest therein. The Defendant concluded his defence by stating that this suit is a design to recall a gift given by the Plaintiff to the Defendant which the Defendant contends is not enforceable as a right.

In support of the pleading the Defendant gave sworn evidence to the effect that the Plaintiff was his girlfriend having met her in 2006 and parted in 2008. He denied misleading the Plaintiff nor cheated her over her money. He testified that the money was banked into his account as gift and without any directions on how it was to be utilised and on account of the fact that the Plaintiff was his girlfriend.

On the parcel of land the Defendant admitted that the property was bought and registered in joint names for the purposes of being developed as they intended to live as husband and wife.

On the motor vehicles, the Defendant was affirmative that the vehicles were bought by himself from own money and that Plaintiff has no maintainable claim over the same. As at the time the parties gave evidence, it was common ground that the Plaintiff was in possession of KAY 860H while the Defendant was in possession of KAX 872M. According to the defendants, the plaintiff came into possession of that motor vehicle on account of the fact that on the day the parties parted ways, the defendant had gone to work and when he came back the Plaintiff had locked the home gate with the car inside.

He sought that the cars be given to him and the parcel of land shared equally. On cross-examination he admitted having gone with the Plaintiff to buy the car because she was a girlfriend; that at White Sands he earned Kshs.30,000 which was banked in the same account in which the Plaintiff also wired the money. He was however not sure how much was in the account before the deposit by the Plaintiff.

On re-examination, the Defendant said that there was no written memorandum by the Plaintiff on how the money was to be used and that in addition to the salary he earned service fees which depended on the guests served and that would push his salary by a sum of between 20,000 and 40,000 per month.

SUBMISSION BY THE PARTIES:-

Both parties filed submissions and attended court to highlight the same. On behalf of the Plaintiff, the submissions relied upon were those dated 20th March, 2012 and filed on 5th September, 2012 together with supplementary list of authorities dated and filed on 19th November, 2015. His submissions were that this is a case where the Defendant took advantage of the Plaintiff, a trusting tourist to unfairly and unjustly enrich himself from the Plaintiff's investment. It was stressed that there was evidence that the sum of 40,000 Euros was transferred from the Plaintiff's account in Netherlands into the Defendant's personal account at Barclays Bank of Kenya, Mombasa Branch and was used to buy two motor vehicles KAY 860H and KAX 872M and a parcel of land known as MM/111/2012. To the Plaintiff there was evidence that the purchase price for the property was provided solely by the Plaintiff albeit channelled through the Defendant's account for reasons, she alleged, she was misled to believe that it was impossible or very difficult to purchase the property in her own name.

The Plaintiff then placed reliance on decided cases and the scholarly writing for the propositions that where a property is registered in a name other than the person providing the purchase price then there is established a resulting trust and that the existence of love between lovers or married couples does not negate the trust. To the court was cited **W.J Mowbray, Lewin on trusts, 16th Edition page 129, Petit Vs. Petit (1969) 2 ALL ER 385, Charles Phillip Mason Vs. Venesa Kalaki Wason (2008)eKLR Helga Hahwana Vs. Charles Mumba Mwangandi (2010) eKLR**, and the 5 decisions in the supplementary list of authorities.

For the Defendant, the submissions were dated 3rd November, 2012 and filed in court on the 29th July, 2013 when parties attended court to highlight its filed submissions. Ms. Kariuki adapted such submissions and pointed out that the motor vehicle KAX 872M was bought in March yet the money was transferred in July, 2007. On the use of the money so sent, Ms. Kariuki took the view that the intention was to have the land registered in both names. On allegations of deceit and misrepresentation, it was submitted that the same amounted to fraud and the standard of proof was higher than a balance of probabilities. For that submissions reliance was placed on the decision in **Urmila Shah Vs. Barclays Bank International Ltd (1976 – 80) I KLR** it was equally submitted that the documents relied upon by the Plaintiff were in a language other than that of the court and should not have been admitted in evidence.

In effect the Defendant urged the court to dismiss the Plaintiff's suit for having been propelled by bitterness resulting from strained intimacy leading to an alleged assault upon the Plaintiff on 5th November, 2007 closely followed by the filing of the suit on 8th November, 2016.

ISSUES FOR DETERMINATION,

In their respective submissions, the parties framed issues separately as follows:-

- i. Whether the plaintiff transferred equivalent of Kshs.4,080,000/- from her account to the defendant's bank account in Kenya.**
- ii. Whether the defendant made the representations pleaded in paragraph 5 a-g of the Amended Plaint or any part thereof to induce the plaintiff to transfer the suit funds into**

defendant's account.

iii. Whether the funds were a gift to the defendant or to be held in the defendant's account in trust for use by the plaintiff.

iv. Whether the suit properties acquired by the defendant using the said funds are held by the defendant in trust for the plaintiff.

v. Whether the defendant should be compelled to transfer the suit properties registered in his or joint names to the plaintiff.

vi. Whether the defendant should refund the Kshs.400,000/= and account for the residual Kshs.2,080,000/=

Ultimately after the evidence was led the question of transfer of equivalent of Kshs.4,080,000 from the Plaintiff to the Defendant's account was not in dispute. That settlement goes a long way to settle the Defendant's concern that the document produced to evidence the transfer was not in the language of the court and therefore ought not to be admissible in evidence. There being no dispute on that fact, it would be unnecessary to belabour the same and seek to make any determination on it. It however suffices to say that the document was produced as exhibit P1 at trial, and in the presence of Mr. Ndegwa Advocate for the Defendant, admitted without protestation. It surely cannot be a dispute how if it was not a dispute then. May be it would have been an issue had there persisted an issue whether or not the money was ever remitted.

When all is said and done, and regard being had to the set of issues by the parties, the issues that isolate themselves for determination by the court are:-

1. Was the sum of 40,000 Euros (Kshs.4,080,000) transferred from the Plaintiff's account, a gift to the Defendant?

1b) If it was not, does a resulting trust arise?

1c) If it was, does a resulting trust arise?

2. What orders should be made on the title and property in the land and motor vehicles?

3. Should the Defendant be made to account for any sums remaining in the Defendant's Account No.165209265?

4. Who should pay the costs of this suit?

ANALYSIS AND DETERMINATION

The parties in this suit took, in evidence and submissions, and continue to retain rival position on what the intention was for the Plaintiff to transfer the 40,000 Euros into the Defendant's Account. According to the Defendant the money was sent to him as a gift while the Plaintiff position is that it was money, intended for her to use to invest in Kenya having fallen in love with the country.

To this court, a determination of the purpose of the money determines the entire dispute. What is not disputed is that the parties met in 2006 while the Plaintiff was visiting Kenya with her husband. She went back to Netherlands but came back in January, and February, 2007. It is confirmed by both that they developed intimacy, and in the words of the Defendant, they proposed and hoped to buy a house and live as man and wife.

However that was not to be because it would appear sometimes on 5th November, 2008, there was a disagreement and a fight as evidence by the P3 filed with the Plaintiff's list of documents. Soon

thereafter, to be precise on the 3rd day being 8th November 2008 in this suit was filed. Could there be a correlation between this suit and the disagreement? How does that impact on the parties' earlier intentions?

It might be necessary to consider the entire evidence to get the parties intention or probable intention as either side do not agree on one version. While the Plaintiff maintains that it was the 40,000 Euros which was employed to buy the two vehicles and the land at an aggregate of Kshs.2,630,000 and that she used for own substance and expenses about Kshs.1,000,000= She still says about 2,000,000 was the balance unspent.

I find this evidence to be at variance with the documents filed. While it is agreed that the money sent was Kshs.4,080,000 or there above the aggregate spent according to the plaintiff is about Kshs.3,630,000= that to me could leave a balance of about Kshs.450,000 and not Kshs.2,000,000.

Additionally, the motor vehicle KAX 872M appears to have been registered in March, 2007 some months before the money was wired into the Defendant's account. It surely could not have been purchased form that money.

More importantly the Plaintiff has pleaded particulars deceit against the Defendant which are a kin to allegations of fraud or just obtaining money by false pretence. That to this court is *quasi criminal* and would attract a burden of proof that is above the proof on a balance of probabilities.

To this court the Plaintiff did not meet her onus in proving the particulars of the deceit. In fact in cross-examination the witness said:-

"I did put in the money willingly. I was not forced."

This kind of evidence to this court resonates well with the Defendants account that the money was sent for as a gift and for the purpose of buying the parcel of land for a home to be used by both as man and wife. I am not persuaded that the Plaintiff was misled on how to handle her money and investments.

To me she fell in love and was dealing with the Defendant as a lover and for that matter a prospective husband till the parties differed as aforesaid.

In the absence of proof of deceit, the basis upon which the Plaintiff suit is grounded fails and it follows therefore that no burden has been shifted upon the Defendant to prove that the money was a gift and nothing else. Under section 107-109, Evidence Act, the burden was always upon the plaintiff to prove her case because it was her seeking remedies and thus the person to lose if no evidence at all was led.

This determination answered the first issue in the affirmative with the consequence that the answers to issues number **1a** and **1b** are themselves determined on the foregoing determination. Without proof that the money was not a gift it follows that none of its benefits were to revert to the Plaintiff and therefore no resulting trust was ever created.

Having found that there was no resulting trust or indeed any reversionary interest in the money it truly follows that no accounts can be ordered.

The upshot and result is that the suit fails and is hereby dismissed with costs.

Dated and delivered at Mombasa this 24th day of March 2017.

HON. P.J.O OTIENO

JUDGE