



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**Criminal Case 4 of 2008**

**HELGA HAHMANN.....PLAINTIFF**  
**VERSUS**  
**CHARLES MUMBA MWAGANDI.....DEFENDANT**  
**JUDGMENT**

The plaintiff, **Helga Hahmann**, instituted this suit against the defendant **Charles Mumba Mwangandi**, by way of a plaint dated 8<sup>th</sup> January, 2008 and filed on 9<sup>th</sup> January, 2008. She claimed two reliefs namely a declaration that the house at Mwaroni on plot No. 3837 South Coast (hereinafter “*the suit house*” and “*the suit plot*”) and motor vehicle registration number KAT 482K Toyota Hiace (hereinafter “*the suit vehicle*”) legally belong to her and an order that the said properties be transferred and handed over to her. The foundation of her claim was pleaded in paragraphs 3, 4 and 5 of the said plaint. In paragraph 3, it was pleaded that the plaintiff on diverse dates between 31<sup>st</sup> January, 2006 and 25<sup>th</sup> March, 2007 advanced monies to the defendant who had undertaken to construct for her a holiday home in Kenya and later the plaintiff advanced monies to the defendant for the purchase of a motor vehicle. In paragraph 4 it was averred that the defendant constructed and purchased a house on the said plot and the said motor vehicle using the plaintiff’s monies and in paragraph 5 the plaintiff pleaded that the defendant fraudulently and dishonestly converted the said properties for his own use and had illegally and unlawfully taken possession of the same. Particulars of the fraud are given in the said paragraph.

The defendant denied the plaintiff’s claim in a defence dated 4<sup>th</sup> February, 2008 and filed on 7<sup>th</sup> February, 2008. The defendant specifically averred that the plaintiff while in Germany only sent him monies for securing and reserving hotel accommodation during her holidays but that the issues of a holiday home and a motor vehicle were an afterthought. The defendant further specifically pleaded that he solely purchased the suit plot and the suit vehicle and that he is still constructing a house on the said plot. The defendant further specifically denied the fraud alleged in the plaint and the particulars stated therein.

At the close of pleadings, the plaintiff framed the following issues:-

- 1) **Did the plaintiff relate with the defendant on diverse dates between 7<sup>th</sup> May, 2004 to the year 2007?**
- 2) **Did the defendant send money for the purchase of land and construction of a house in Kenya and for the purchase of a motor vehicle on her behalf to the defendant?**
- 3) **Was the money sent, if any, utilized for the purchase of plot No. 3837 Mwarani and a house constructed thereon and for the purchase of motor vehicle registration number KAT 482 K Toyota Hiace?**
- 4) **Did the defendant receive any funds from the plaintiff directly and/or through her friends?**
- 5) **Who is the legal owner of plot No. 3837 Mwarani South Coast and motor vehicle registration number KAT 482 K Toyota Hiace?**
- 6) **Which party shall bear the costs of the suit?**

The defendant on his part framed the following issues for determination:-

- 1) **Who is the registered owner of motor vehicle registration number KAT 482 K Toyota Hiace?**
- 2) **Who is the registered owner of plot number Kwale/Ukunda/3837?**
- 3) **Who bought the motor vehicle registration number KAT 482 K Toyota Hiace?**
- 4) **Who bought plot No. Kwale/Ukunda/3837?**
- 5) **Who has the physical possession of the properties vehicle KAT 482 K and Kwale/Ukunda/3837?**
- 6) **What was the respective contribution of the parties herein to the acquisition of the properties herein?**
- 7) **What are the orders as to costs?**

The trial then commenced before me on 24<sup>th</sup> March, 2010 when the plaintiff testified. The trial was resumed on 17<sup>th</sup> June, 2010 when the defendant testified. Counsel agreed to file written submissions which were duly in place by 8<sup>th</sup> July, 2010. The plaintiff's testimony was as follows. She lived in Germany where she had retired as a banker. In the year 2004, while on a visit to Kenya, she met the defendant at Tiwi Hotel and at the end of her holiday returned to Germany. While in Germany she received several text messages from the defendant who was then seeking her assistance on the ground that he was poor. She then visited Kenya again at the end of the year 2004 and returned to Germany. She again visited Kenya in the year 2005 October when she stayed with the defendant who had become her friend. She went back to Germany but visited Kenya again in January 2006 staying for four weeks and returned to her home country. She returned to Kenya in June of the year and stayed at Tiwi Hotel with the defendant for 4 weeks. She returned to Kenya in January 2007 and that time round stayed with the defendant in the suit house. She then left for Germany in February or March 2007 and returned in December 2007. She stayed up to January 2008 in the suit house. The plaintiff produced Ex 1 comprising travel bookings and travel documents to buttress her testimony. During the last visit, she requested the plaintiff to transfer the suit house to her. He promised to do so on condition that the plaintiff would transfer her house in Germany to him. She testified that, she had previously informed the defendant that she loved Kenya and asked him to buy land and put up a house for her as a holiday home. The property had indeed been purchased and a house put up by the defendant using money which she sent him through Western Union Money Transfer Service and through friends. She further told the court that she started sending money to the defendant from 15<sup>th</sup> December, 2005 and continued doing so up to March, 2007. In total she sent to the defendant 40,050 Euros.

The plaintiff further testified, that she purchased motor vehicle registration number KAT 482 K. The title of the suit plot and the motor vehicle was to be in her name and the defendant lied to her that he was doing so when in fact he registered the two properties in his name. The plaintiff produced Western Union Money Transfer documents and acknowledgements made by the defendant as exhibits.

In cross examination, the plaintiff testified that she admired the defendant and the two became friends but the friendship ended towards the end of 2007 and the beginning of the year 2008 when she discovered that the defendant was married and had two children. She could not however say who had sold the suit land and at how much the suit house had been built. She also did not know for how much the suit motor vehicle had been bought.

The defendant then took the witness stand. His evidence was as follows: - He was employed as a supervisor in a Hotel and also did commercial farming. He had been in the Hotel industry since 1991 and it was in the course of his employment that he met the plaintiff at Travelers Tiwi Beach Hotel in 2004. They became friends and the plaintiff told him that he would take care of him. The plaintiff went back to Germany and in the year 2005, she sent him money for hotel booking. She then came in April, 2006 and the two stayed for one month at Neptune Village. At the time, he had already purchased the suit plot and asked the plaintiff to assist him. He had however completed the purchase price and commenced putting up the suit house. The plaintiff only came to know about the house in the year 2007 and refused to go to the house because it is in the country-side. When she finally saw the house, she promised to assist him construct a fence, tile the floor and provide a gate. She provided the assistance for which, he was grateful. He had at the time of his testimony entered the house which he uses as his residence.

The defendant further testified that the suit vehicle was his. He had purchased the same in the year 2005 at Kshs. 1.4 million. The plaintiff had however only assisted with some of the installment payments. He used the vehicle as a matatu but it had been involved in an accident at the time of testifying. The defendant produced titles to both the suit plot and the suit vehicle which are in his name. The defendant further told the court that in 2008, the plaintiff asked him to sell the house to enable them buy a beach plot and further sell the suit vehicle to start construction on the intended beach plot. He declined and the plaintiff threatened to use all means at her disposal to have the suit house and suit vehicle sold. She had even tried to involve anti-corruption officers and private debt collectors in the matter. He denied that the plaintiff was entitled to any of the reliefs sought in the plaint.

On cross-examination, the defendant testified that the plaintiff commenced sending money to him in December, 2005 after he had already purchased the suit plot. He also acknowledged that Brigit gave him money on behalf of the plaintiff and he acknowledged receipt of the same indicating that the money was for a house. He also received money from the plaintiff for installment payments for the suit vehicle whose log book he obtained in the year 2006. He also stated that he used the money from the plaintiff for his own treatment, up-keep, holiday and hotel booking.

In her written submissions, Learned counsel for the plaintiff contended that the plaintiff had proved, on a balance of probabilities, that the defendant received money from the plaintiff for the purchase of the suit plot, construction of the suit house and purchase of the suit vehicle and that even though the suit properties are registered in the name of the defendant, the registration is in trust for the plaintiff. Counsel further contended that the sum of 40,050 Euros sent by the plaintiff to the defendant could not have been for the defendant's use and hotel booking only. Counsel pointed out that EX. 1 clearly showed that the plaintiff paid for her hotel accommodation directly and not through the defendant. She also pointed out that in some of the acknowledgement receipts the purpose for what the money was sent was clearly indicated to be a house and a vehicle. In the premises, counsel submitted that a resulting trust had been proved against the

defendant.

In his response, counsel for the defendant submitted that the plaintiff had failed to prove her case on a balance of probabilities. In his view, there was no evidence that the plaintiff's money was used to purchase the suit plot given that the same was registered in the name of the defendant on 25<sup>th</sup> October, 2005. With respect to the suit vehicle, counsel submitted that the same had been solely acquired by the defendant. The sum acknowledged by the defendant, according to counsel for the defendant, were used to put up a wall, fence and complete the finishing works on the suit house but not purchase the suit properties as claimed by the plaintiff. In the premises, counsel submitted that the plaintiff's case be dismissed with costs.

I have now considered the evidence, documents produced and the submissions of counsel. Having done so, I now consider what in my view are the issues for determination. The parties filed separate issues. However, a determination of the issues filed by the plaintiff would answer all the issues in dispute. There is really no dispute that the plaintiff and the defendant met sometime in the year 2004 and in due course struck a friendship which blossomed until the year 2008 when the relationship became strained. In the course of their relationship, the plaintiff sent money to the defendant. The defendant does not deny receiving the same. The plaintiff produced Western Union Money Transfer documents (EX. 2) and acknowledgment receipts (EX. 3, 4 and 5) which proved on a balance of probabilities that she sent a total of 40,050 Euros to the defendant. Those documents were not contradicted by the defendant. The purpose for which the money was paid and received was however in serious contention. The plaintiff's case is that, the money was for purchase of the suit plot and vehicle and for construction of the suit house. The defendant's case is that the money was for hotel booking and for his up-keep which the plaintiff had earlier promised to finance. The defendant's explanation is however not in accord with the evidence. Firstly, the defendant gave the impression that he was well to do and in addition to his salary as a hotel supervisor, he practiced commercial farming. If that was the correct status of the defendant, he needed no financial up-keep from the plaintiff. Secondly, some of the acknowledgment receipts signed by the defendant indicated the purpose for which the money was received. EX. 3 (letter of confirmation) indicated that 12,000 Euros were received for a matatu and a house. EX. 4 indicated that 4,100 Euros were received "*for the building of Mrs. Hahmann's house till its complete and she is a joint owner*". EX. 5 is also an acknowledgment of Kshs. 60,000/= by the defendant for "*the building of the house*".

The defendant contended that the said documents were in the German language which he does not understand and he signed the same without appreciating the contents thereof. The defendant's contention is not plausible. I say so, because the said acknowledgements were made long before the relationship between the plaintiff and the defendant became strained. Indeed at the time of the acknowledgments, their relationship was at its peak. I am not persuaded that at that point in time, the plaintiff was executing a scheme to illegitimately get the defendant's property. The plaintiff further produced EX. 1 which proved, on a balance of probabilities, that she paid for her tickets and hotel bookings herself and not through the defendant. I also do not consider the said sum of 40,050 Euros, small. It could not, in my judgment have been sent to the defendant for his up-keep.

In all those premises, I am satisfied that the plaintiff sent the 40,050 Euros to the defendant for investment in the said suit house and suit vehicle. With regard to the suit plot, the Title Deed (copy) produced by the defendant as DEX. 1, shows that the defendant was registered as proprietor thereof on 25<sup>th</sup> October, 2005. By that time the plaintiff had not remitted any funds to the defendant. In the premises, I accept the defendant's testimony that he purchased the suit plot by funds from his own sources. Having found that the suit house was constructed by funds furnished by the plaintiff, I consider the suit plot to be the defendant's contribution to the investment. There is also no dispute that the actual construction of the house was carried out by the defendant solely. The construction or the supervision thereof was a further contribution by the defendant towards the joint project.

With regard to the suit vehicle, a copy of the log book was produced by the defendant as DEX. 2. It indicates that the defendant was entered as the proprietor thereof on 8th June, 2006. By that time, the defendant had received most of the monies from the plaintiff. The defendant contended that he purchased the said vehicle by funds from his own sources. He however did not produce the hire purchase documents he alluded to nor did he produce any agreement to buttress his assertions. He also did not produce any documentary evidence of income from his alleged farming activities. In the premises, I am satisfied that the suit vehicle was purchased by the defendant from funds furnished by the plaintiff.

My above analysis of the evidence adduced before me, has provided answers to all the issues framed by the parties save for costs. Answers to issues number 1 and 4 framed by the plaintiff are in the affirmative. Save for the purchase of the suit plot which I have found was purchased by the defendant by funds from his own sources, the answers to the rest of the issues numbers 2 and 3 are in the affirmative.

With regard to issue number 5, the answer in view of the above is that although the suit plot and the suit vehicle are registered in the name of the defendant, he is not the absolute proprietor thereof. He holds the suit plot on a resulting trust in favour of the plaintiff in respect of one half interest therein. He also holds the suit vehicle on a resulting trust in favour of the plaintiff. In **Underhill's Law Relating to Trusts and Trustees 12<sup>th</sup> Edition** the following paragraph is

found at page 205:-

**“When real or personal property is conveyed to a purchaser jointly with others or to one or more persons other than the purchaser, a resulting trust will be presumed in favour of the person who is proved by parol or other evidence to have paid the purchase money in the character of the purchaser.”**

AND in Lewin on Trusts 16<sup>th</sup> Edition by W.J. Mowbray the following passage is found at page 129:-

**“When real or personal property is purchased in the name of a stranger, a resulting trust will be presumed in favour of the person who is proved to have paid the purchase money in the character of the purchaser. The clear result of all these cases without a single exception is that the trust of a legal estate, whether freehold, copyhold, or leasehold, whether taken in the name of the purchasers and others jointly or in the name of others without that of the purchaser, whether in one name or several, whether jointly or successive results to the man who advances the purchase money.”**

I have found that the plaintiff furnished the funds which purchased the suit vehicle and were used in the construction of the suit house on the suit premises. She therefore furnished the purchase money and a resulting trust is presumed. In the end judgment is entered in favour of the plaintiff and against the defendant as follows:-

- (a) It is declared that the plaintiff and the defendant are proprietors in common in equal shares of plot Number Kwale/Ukunda/3837 with all developments thereon.**
- (b) It is further declared that the motor vehicle registration number KAT 482 K Toyota Hiace belongs to the plaintiff on the basis of a resulting trust in her favour.**
- (c) The defendant should transfer half the interest in plot number Kwale/Ukunda/3837 together with the house thereon to the plaintiff within sixty (60) days from the date hereof failing which the Deputy Registrar of this court will execute transfer documents in respect of the half interest for and on behalf of the defendant.**
- (d) With regard to costs, I observe that the plaintiff has substantially succeeded in her prayers. She is therefore entitled to the costs of the suit. Accordingly, the defendant shall pay the costs of the suit.**

Judgment accordingly.

**DATED AND DELIVERED AT MOMBASA THIS 30<sup>TH</sup> DAY OF AUGUST 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

Ms. Kayata for the Plaintiff and Mr. Simiyu for the Defendant.

**F. AZANGALALA**

**JUDGE**

**30<sup>TH</sup> AUGUST 2010**