



WOLFGANG ANTON GIROSTEIN.....PLAINTIFF

-VERSUS-

ELIZABETH WANJIRU GATUMBI

MATHEW NJENGA NJERU.....DEFENDANTS

### JUDGMENT

The record shows that the defendants, though served with summons, did not enter appearance or file a defence; and on that account the Deputy Registrar, on **25<sup>th</sup> October, 2006**, entered interlocutory judgment against the defendant. The interlocutory judgment has remained unchallenged over the last three years; and on 25<sup>th</sup> September, 2009 this matter came up before me for formal proof.

The plaintiff who was sworn and spoke in German, with interpretation into English, appeared as PW1, and said he had come to Kenya and met 1<sup>st</sup> defendant sometime in 1996, at Kenya Bay Hotel. A businessman living in Germany, the plaintiff would come to Kenya from time to time, during holidays, and he on those occasions, lived together with 1<sup>st</sup> defendant.

In the course of 2000 the plaintiff and 1<sup>st</sup> defendant purchased the following Mombasa properties:

- (a) Plot No. 2198/Section III/Mainland North;**
- (b) Plot No. 2197/Section III/Mainland North;**
- (c) Plot No. 2194/Section III/Mainland North.**

He produced the title deeds of the three properties, as part of the evidence; and he produced certificates of search showing the said properties as registered in his name jointly with 1<sup>st</sup> defendant. The source of the purchase money, the plaintiff testified, was himself entirely, and 1<sup>st</sup> defendant had made no monetary contribution. When the plaintiff and the 1<sup>st</sup> defendant had taken the decision to register title for the said properties in their joint names, the relationship which informed their preference was that of boy-friend and girl-friend.

The said properties and the developments thereon, brought rental income, and the collection of the rent was done by 1<sup>st</sup> defendant; she was keeping, out of the rent proceeds, the sum of Kshs. 40,000/= and a certain unspecified sum would be made over to the plaintiff herein.

The plaintiff is now seeking to sell the said properties, though 1<sup>st</sup> defendant has not given her co-operation in that regard. He told the Court that since the defendant had been his friend for some ten

years, he was willing to share the proceeds of the sale of the properties with her, on a 50%-50% basis, and his concern was that his relationship with 1<sup>st</sup> defendant should be “terminated in a fair manner”.

Learned counsel **Mr. Muinde** submitted that the plaintiff has made his case on a balance of probabilities: that the 1<sup>st</sup> defendant has taken over the suit properties and has unilaterally collected rents, and managed these properties through 2<sup>nd</sup> defendant, in a manner that wholly excludes the plaintiff, and so the plaintiff prays that the joint proprietorship be severed, the properties sold, and the share due to him be paid into his own agency, known as Girolstein Properties.

Counsel urged that in joint-proprietorship, there is unity of possession “which means that each joint owner is as much entitled to the possession of every part of the co-owned land as the other”. It was, in the premises, urged that “a co-owner, in this case 1<sup>st</sup> defendant, cannot therefore prevent the plaintiff from taking his appropriate share of the rents and profits derived from the subject properties”. Counsel submitted that the 1<sup>st</sup> defendant “cannot also purport to be the sole owner of the subject properties to the exclusion of the plaintiff. Such conduct by the 1<sup>st</sup> defendant is contrary to the concept of joint proprietorship and is clearly illegal.”

Learned counsel urged that this Court should intervene and order severance, in the interests of justice, and grant several prayers made by the plaintiff.

In the evidence, the plaintiff avers that the 1<sup>st</sup> defendant herein had no source of income, and was unemployed, when he befriended her and they later came to own joint-property; the plaintiff says he was better endowed, and had rental income from his country, and thus he was in a position to produce the money that paid the price of the suit properties. From observing the demeanour and inclination of the plaintiff as he stood in the witness-box, I did not form the impression he was giving untruthful information. I thus accept the plaintiff’s account: it is his money that went into the purchase of the suit properties. From that determination of fact, the scheme of justice will dictate that the plaintiff not be dispossessed, in the manner sought by the 1<sup>st</sup> defendant. It also is to be taken as true, that 2<sup>nd</sup> defendant has been on hand to aid 1<sup>st</sup> defendant in the said project of dispossession – as evidence was given that 2<sup>nd</sup> defendant had been found sleeping in the plaintiff’s bed, and wearing his jewellery. The plaintiff has been gracious enough to ask for a modification in prayer No. (9) in the plaint, to the effect that he do share the joint property on a 50%-50% basis with 1<sup>st</sup> defendant; and these are parameters in this case which the Court should adopt, in attempting to render justice as between the parties.

I determine this case by ordering as follows:

(1) ***It is declared that the suit plots, namely***

***plot No.2198/Section III/M.N, Plot. No.***

***2197/Section III/M.N and plot No. 2194/Section***

***III/M.N. and the improvements standing***

***thereon legally belong in joint equal shares to***

***two persons, namely the plaintiff and the 1<sup>st</sup>***

***defendant.***

***(2)A permanent injunction is hereby issued, restraining the defendants by themselves, their agents and/or servants and/or any other person acting on their behalf from leasing, alienating, managing and/or collecting rents accruing from the said three plots, namely, Plot No. 2198/SectionIII/M.N.; Plot No. 2197/Section III/M.N.; and Plot No. 2194/Section III/M.N.***

**(3)An order of sale is hereby issued, in respect of the said three plots and all improvements thereon, namely Plot No. 2198/Section III/M.N.; Plot No. 2197/Section III/M.N.; and Plot No. 2194/Section III/M.N. – and the proceeds of the said sale shall be shared on the terms set out in Order No. 1 herein.**

**(4)The costs of this suit shall be borne by 1<sup>st</sup> and 2<sup>nd</sup> defendant.**

**(5)The said costs shall bear interest at Court rate, as from the date of filing suit, until payment in full.**

**Orders accordingly.**

**DATED and DELIVERED at MOMBASA this 30<sup>th</sup> day of October, 2009.**

**J. B. OJWANG**

**JUDGE**

Coram: ***Ojwang, J.***

Court Clerk: ***Ibrahim***

For Plaintiff: ***Mr. Muinde***

Defendants: ***Absent and unrepresented.***