



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA**

Civil Suit 225 of 2000

HERMANN BERNWINKLER JOSEPH PLAINTIFF

VERSUS

ALLAN KIIMA KIVATA

CAREN MWENDE HERMANNDEFENDANTS

JUDGMENT

The Plaintiff claims in his plaint that on 27th January 1993 he bought a plot in Mombasa known as Plot No. 23587/1 MN for Sh. 85,000/- and on 22nd December of the same year he bought Plot No. C.R. 1348/I MN with a house thereon at Nyali Estate in Mombasa for Sh. 1,500,000/-. In 1984 he had built a house without land on plot no. 286/17 in Kisauni at a cost of shs. 150,000/-. Though the defendants did not contribute anything to the acquisition of those properties he caused those properties to be registered in his name and those of the defendants on compassionate grounds when their mother who was his girlfriend died in 1990 to enable them earn a living and on the further ground that being a foreigner he was not allowed to own immovable property in his sole name.

The plaintiff further claims that besides sending them money for their upkeep and school fees for the second defendant he also bought two vehicles, one in 1994 and the other in 1996 which he caused to be registered in the names of the first defendant. Since 1990, the plaintiff further claims, the defendants have earned over shs. 18 million from renting those two houses and running matatu business with one of those vehicles.

On 27th April 2000 the plaintiff proposed to the defendants that in view of the income they had earned from those properties they should be sold and the proceeds thereof be shared in the proportion of 60/40 in favour of the plaintiff.

Having rejected that proposal he now claims for a declaration that he is entitled to 100% share of those properties and an order that the defendants do transfer their respective shares to him and account for the income received from 1990 to 2000. He further claims for an order to restrain the first defendant from

collecting rent from the landed properties and instead that the same be collected by an estate agent. He also of course claims for the costs of this suit and interest thereon.

The defendants filed a joint statement of defence and stated that the landed properties are owned by them and the plaintiff as tenants in common in equal shares. Regarding the vehicles they stated that the plaintiff bought the same as gifts for them.

The plaintiff testified on 10th November 2004 before the Hon. Justice Mwera who has since been transferred and the matter came before me on 8th February 2007 for defense hearing under the provisions of Order 17 Rule 10. The defendants being absent and there being no good reasons for their absence I refused their Counsel's application for adjournment whereupon he said he had no evidence to offer. Like Counsel for the plaintiff he made no submissions and left the matter to me for decision on the evidence on record.

In his testimony the plaintiff said that he knew the defendants' mother in 1980 and they became lovers. Between that time and 1990 when she died he stayed with her and her children whenever he came to Kenya. Although he did not marry their mother the second defendant called him "dad" and he took care of them as his own children as they had been abandoned by their father.

In cross-examination the plaintiff stated that he bought the properties in his joint name and those of the defendants to enable them earn a living and because he wanted them to inherit the properties if he died. He admitted that there was no agreement between him and the defendant on how the properties were to be managed or how the income therefrom could be shared.

I have considered this evidence. Though uncontroverted it is clear to me that the plaintiff bought the landed properties for his and the defendants' joint benefit. He said that in his evidence and added that he intended the defendants to inherit them when he died and even made a will to that effect, which he has since revoked. In the circumstances I cannot accept the plaintiff's claim for accounts. Having not been told that they would at one time give an account, I doubt if the defendants kept any accounts. It will therefore be very unfair to require them to give an account now.

The defendants have in their statement of defense stated that they own the landed properties with the plaintiff as tenants in common in equal shares. In view of the plaintiff's own testimony as stated herein above, I agree with that.

I, therefore, find and order that the pieces of land known as Plot No. CR. 19348/1 MN situate at Nyali and plot no. 23587/1MN in Kisauni are owned by the plaintiff and both the defendants as tenants in common in equal undivided shares.

As the plaintiff has fallen off with the defendant's I order that the two properties be sold and the proceeds thereof be shared equally among them. As regards the house without land on Plot no. 286/7 the plaintiff stated in his testimony that he, in 1995 authorized the first defendant to sell it. I do not therefore understand why he now claims it. His claim in respect of that house without land is therefore dismissed.

The remaining claim is for income from the two vehicles which as already stated were registered in the name of the first defendant. The plaintiff said they have since been sold and he adduced no evidence of the income if any they generated before sale. In any case, like the landed properties, they were meant to earn a living for the defendants. The defendants cannot therefore be called upon to account for the income they earned from their operations. The plaintiff's claim in this respect must also fail.

In the result, save for the two properties known as Plot No. CR. 19348/1 MN and Plot No. 23587/1 MN which I have found to be owned by the plaintiff and the dependents as tenants in common in equal undivided shares and which I have directed to be sold and the proceeds thereof to be shared equally among the plaintiff and the defendants, the rest of the plaintiff's claims are hereby dismissed.

The plaintiff has lost nearly half of his claims. I therefore order that each party bears its own costs.

DATED and delivered this 28th day of February 2007.

D.K. MARAGA

JUDGE

28.2.2007

Before Maraga Judge

Swaleh for plaintiff

Were for Kagwe for defendants

Court clerk – Mitoto

Court – Judgment delivered in court.

D.K. MARAGA

JUDGE