



**Musyoka v Nguma (Environment & Land Case 182 of 2021)
[2022] KEELC 15339 (KLR) (9 December 2022) (Judgment)**

Neutral citation: [2022] KEELC 15339 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 182 OF 2021**

AE DENA, J

DECEMBER 9, 2022

BETWEEN

DORCAS NGENIU MUSYOKA PLAINTIFF

AND

STEPHEN NGUMA DEFENDANT

JUDGMENT

1. This suit was commenced by way of plaint dated 3/11/2020 against the defendant. It is the plaintiff's case that sometime in 1996 they were neighbors and good family friends with the the defendant residing in Msambweni. That the Plaintiff was a good friend of the defendant's wife Grace Watetu Mathenge. The plaintiff states that she relocated to Australia in the year 2001. That in 2011 she was desirous of purchasing land in Kwale and authorized the Defendant and his wife to source a good parcel of land for her and to do all the necessary negotiations and transactions on her behalf. They identified plot Kikoneni/bumbania/693 at a price of shillings four Hundred and Eighty Thousand (Kshs 480,000/=.) The Plaintiff states that on 15/08/2011 she transferred from Australia a sum of shillings Six Hundred and Forty-Nine Thousand Six Hundred and Ninety-Eight and sixty-Five Cent (Kshs.649,698.65/=) to Grace Watetu Mathenge the defendant's wife's account in Equity Bank.
2. The Plaintiff pleads that on 9/11/2011, the Defendant entered into a sale agreement with the owner of Kikoneni/bumbani'A/693 (herein suit property) and the purchase price was paid by the Defendant's wife from the money transferred to her account from Australia. It is stated that Defendant proceeded to transact the sale in his name and transferred the land in his name as the absolute owner. The Plaintiff's claim is that at all times it was agreed between the plaintiff and the defendant and Grace Watetu Mathenge that the land was to be held in trust for the Plaintiff and they were to transact the land in the utmost good faith as the agents for the Plaintiff and as her trustees.
3. The Plaintiff states that the Defendant continues to hold the suit property as the trustee for the plaintiff but has refused to transfer back the land to the Plaintiff despite several demands to do so and claims to



own the land absolutely. He denies he is a trustee of the plaintiff, continues to unlawfully occupy the same and even purported to sell a portion of it to a third party hence necessitating this suit.

Defence

4. Despite being served with the relevant pleadings and summons to enter appearance, the defendant did not file any document in defence of the case against him. See the affidavit of service sworn by Martin Njuguna Njau on 27/5/2021 and filed on 15/3/2022. The Defendant was served with the hearing notice evidenced by the affidavit of service filed on 26/7/2022.

Plaintiffs case

5. PW1 Dorcas Ngeniu Musyoka testified on 26/7/2022. She adopted her statement dated 3/11/2020 as her evidence in chief. She reiterated the averments as raised in the plaint and stated that the defendant and his wife were her good family friends before she relocated to Australia. That after purchase of the land, it was transferred to the defendant's name with the understanding that he would later transfer the same to her upon her return to Kenya. She told this court this was based on the good relationship she enjoyed with the defendant's wife. In addition, the PW1 informed this court that even after the suit was registered in the defendants name, the defendant assured her there was no problem. That she sent money to facilitate the transfer of the suit property to her but the defendant did not. She later learnt the defendant had sold the land to someone else. The plaintiff prays that a declaration is made that the defendant was holding the land in trust for her and that the same ought to be transferred to her. The plaintiff further asked for costs of the suit.
6. PW2 Grace Watetu Mathenge** adopted her statement dated 3/11/2020 as her evidence in chief. It is her testimony that she has known the plaintiff as a neighbour in Msambweni and a friend for over 25 years. That around the year 2001 the plaintiff relocated to work and live in Australia. That in 2011 the plaintiff requested and authorised her to purchase a parcel of land on her behalf. The witness states that she managed to get the same and purchase it a price of Kshs 480,000/-. That the purchase price was sent to her bank account and together with her husband. She told the though she had been authorised to buy the land in her name due to exigency of her work she requested her husband the defendant to handle the transaction. That it was an understanding that the land was to be held by the defendant in trust for the Plaintiff. That her role was just to facilitate the purchase. That the land was in her husband's name and several requests to him to transfer the same to the plaintiff have been in vain. According to PW2 the land rightfully belonged to the plaintiff and she asked the court to declare that the Defendant was only a trustee of the Plaintiff and not the absolute owner of the land.
7. With the above the plaintiff closed its case.

Submissions

8. It is Plaintiff's submissions that the purchase of the suit property herein falls within a Benami purchase in the Indian law. That such transactions occur when a party buys property in the name of another without indicating his intention to benefit from the said transaction. The case of *Bishan Singh Chada Versus Mohinder Singh and another* [1956]29 KLR 20 was cited in support. It is urged that the evidence on record shows that the plaintiff transferred the purchase price to the defendant's wife and that the defendant abused the trust the plaintiff had in him and kept the land to himself. The court is referred to two authorities ELC suit no 114 of 2017 *John Guchu Njoroge Versus Mboi Kamiti Farmers Company Limited* and HC Civil case no 617 of 1995 *Yogendra Purshottan Patel Versus Pascale Mireille Baksh*.



Analysis and Determination

9. I have considered the evidence adduced in court, the submissions as well as the authorities cited. The plaintiff's case is that she had been having a good relationship with the defendant and his wife PW2 as family friends. At that time, she was living and working in Msambweni with the defendant's wife. That after relocating to Australia she asked the defendant and his wife to identify and purchase land on her behalf which they did. That the land was registered in the defendant's name with the intention of having the same later transferred to her names but this had not materialized to date since the defendant has refused to transfer the land to her. In support of her case the plaintiff produced copies of Sale Agreement dated 9/11/2011 for purchase of the suit property between the defendant and one James Kairo Kingitha, payment receipts evidencing the transfer of funds from the plaintiff's bank account to that of PW2, copies of emails communicating the purchase of the property between PW2 and the plaintiff, copy of photograph taken on the date of the purchase of the suit property, a Power of Attorney for purposes of these proceedings and a copy of the title deed registered in the defendant's name.
10. The plaintiff's assertion is backed by the evidence of PW2. She states that she is the defendant's wife and confirms that it is the plaintiff who sent funds to purchase the land. It is her testimony that the land was purchased for the plaintiff and is being held in trust by the defendant.
11. What is bare before court is the fact that the Plaintiff seeks to be registered as the proprietor of the suit parcel and which is already registered in the defendant's name. As it stands the evidence before court is uncontroverted. The court of appeal in *Kirugi & another v Kabiya & 3 others* [1987] KLR 347 held that the burden is always on the Plaintiff to prove his case on the balance of probabilities, and that such burden is not lessened even if the case is heard by way of formal proof. Section 107 of *Evidence Act* states:
- Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- Section 108 of *Evidence Act*, further states thus:
- The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."
12. The evidence placed before court in my view cements the plaintiff's case. It has been proved that funds were sent to the defendant for purchase of the suit land on behalf of the plaintiff. This has been clearly demonstrated by the bank fund transfer receipts and the email communication between PW2 the defendant's wife and the plaintiff. The sale agreement also evidences the sale and whose date corresponds with the time the funds were transferred including the amount stated. This can also not be a coincident. The email correspondence exchanged clearly shows that the land was not being purchased for the defendant. The plaintiff in the emails is so excited that she will finally realise her dreams to own land and farm. It is also the evidence of the defendant's wife PW2 that the land was purchased for the plaintiff, she received the money from the plaintiff and it was being held in trust for her by the defendant. The emails also show the good relations and trust between the plaintiff and the defendant's wife. Had PW2 meant otherwise or to keep the property for her husband she would not have shared the sale agreement which bore the defendant's name with the plaintiff via email. And if this was not the understanding the plaintiff would also have raised her concerns then, meaning that she had no doubts that the property was being purchased on her behalf. This court has reason to doubt that the land was meant for the plaintiff. The intention of the parties are very clear. In any event the



evidence has not been controverted. Indeed, the plaintiff has been able to demonstrate that there existed a fiduciary relationship between her and the defendant and his wife and it is upon such trust that the suit parcel was purchased. From my analysis of the documentary evidence above it is clear that the defendant took advantage of the trust to keep the parcel to himself. The court in *Rose Naswa Masinde Vs. Lilian Nekesa Simiyu* (2014) eKLR the court held that a trust can and will be implied in order to give effect to the intention of the parties.

13. A copy of the title deed has been produced evidencing that the land is registered in the name of the defendant. Section 25 of the [Land Registration Act](#) on rights of a proprietor stipulates as follows:-

25. (1) The rights of a proprietor, whether acquired on first registration or subsequently for valuable consideration or by an order of court, shall not be liable to be defeated except as provided in this Act, and shall be held by the proprietor, together with all privileges and appurtenances belonging thereto, free from all other interests and claims whatsoever, but subject— (a) to the leases, charges and other encumbrances and to the conditions and restrictions, if any, shown in the register; and (b) to such liabilities, rights and interests as affect the same and are declared by section 28 not to require noting on the register, unless the contrary is expressed in the register. (2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee.

Having made a finding that there was no doubt that the intention of the parties was for the land to be held in trust, the defendant cannot be relieved of his obligations to which he is trustee by dint of section 25(2) above and the plaintiff is therefore entitled to have the land registered in her names.

14. The plaintiff has further sought for mesne profits. The said prayer has been specifically made in the plaint. Section 2 of the [Civil Procedure Act](#) cap 21 of the Laws of Kenya defines mesne profits as follows:

"mesne profits", in relation to property, means those profits which the person in wrongful possession of such property actually received or might with ordinary diligence have received therefrom, together with interest on such profits, but does not include profits due to improvements made by the person in wrongful possession;

15. The Court of Appeal in the case of [Attorney General v Halal Meat Products Limited](#) [2016] eKLR considered when mesne profits could be awarded. The court stated as follows: -

It follows therefore that where a person is wrongfully deprived of his property he/she is entitled to damages known as mesne profits for loss suffered as a result of the wrongful period of occupation of his/her property by another. See McGregor on Damages, 18th Ed. para 34-42."

16. The court in the case of [Karanja Mbugua & another v Marybin Holding Co. Ltd](#) [2014] eKLR stated as follows with regard to mesne profits: -

This court is alive to the legal requirement that mesne profits, being special damages must not only be pleaded but also proved, as shown by the provisions of order 21, rule 13 of [Civil Procedure Act](#). The said provisions state as follows with regard to a decree for possession and mesne profits:

"(1) Where a suit is for the recovery of possession of immovable property and for rent or mesne profits, the court may pass a decree-



- a. For the possession of the property.
- b. For the rent or mesne profits which have accrued on the property during a period prior to the institution of the suit or directing an inquiry as to such rent or mesne profits.
- c. Directing an inquiry as to rent or mesne profits from the institution of such suit until:-
 - i. The delivery of possession to the decree-holder
 - ii. The relinquishment of possession by the Judgment – debtor with notice to the decree-holder through the court; or
 - iii. The expiration of three years from the date of the decree, whichever even first occurs.

(2) Where an inquiry is directed under sub-rule (1) (b) or (1) (c), a final decree in respect of the rent and mesne profits shall be passed in accordance with the result of such inquiry.”

The Plaintiff did not bring any proof of the basis for the demand of mesne profits of Kshs 45,000/= per month, and this court is therefore not able to award the same. In any event when the Plaintiffs agreed to give vacant possession to the Defendant after payment of only the deposit, and they must be taken to have accepted the risks that would follow in the event of non-performance of the contract. The forfeiture of the deposit by the Defendant therefore in the circumstances adequately compensates them for such non-performance.”

17. Based on the above case law and provisions of the law It is my opinion that the plaintiff has not presented evidence before this court to enable the court decide on the issue of mesne profits.
18. From the foregoing I find that the plaintiff has discharged her duty of proof of her case on a balance of probabilities that the suit property herein was purchased on her behalf.
19. Accordingly, I enter judgement for the plaintiff against the defendant in the following terms;
 - i. A declaration be and is hereby made that the Defendant holds the land Kikoneni / Bumbani‘A’/693 in trust for the plaintiff herein.
 - ii. An order be and is hereby made for the transfer of the said land Kikoneni /bumbani ‘A’/693 to the Plaintiff by the Land Registrar Kwale.
 - iii. The Plaintiff is at liberty to undertake eviction proceedings under the provisions of section 152 E of the *Land Act* failure to which legal forceful eviction shall follow.
 - iv. Cost of this suit are awarded to the Plaintiff.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 9TH DAY OF DECEMBER, 2022.

A.E. DENA

JUDGE

Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:



Mr. Muraguri for the plaintiff

N/A for the Defendant

Mr. Mwakina.... Court Assistant

