



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MOMBASA**  
**CIVIL CASE NO.245 OF 1997**

ABIBA TIRINDI.....PLAINTIFF

V E R S U S

KARL HASENFUSS.....DEFENDANT

**J U D G M E N T**

This matter has a familiar ring to it: The ring about a European retiree trooping to Africa and on his first night-out meets an African woman in a sleazy nightclub. Before dawn they declare unending love to each other, when deep inside their hearts they are plotting how to exploit each other. The man seeking a foothold in the country and the cheapest and most comfortable way to spend the remaining days of his life. The woman eyeing the retirement benefits and what it can buy or build for her. The bubble bursts sooner than later and they are forced to confess their selfish designs on each other in open court.

What is the story this time round?

The Defendant, KARL ERICH HESENFUSS (KARL) is a German national who first came to Kenya as a tourist in 1972. He met the Plaintiff ABIBA TIRINDI MUTHINJA (ABIBA) a self-confessed prostitute, in 1988 at a bar known as TOYZ BAR & NIGHT CLUB. They fell in love. Promises of marriage were soon floated on both sides and Karl, on no less than four occasions, took Abiba to Germany in all-expenses paid trips between 1989 and 1991. Abiba then agreed to marry Karl if he came to settle in Kenya.

In 1992 Karl retired from his employment, sold his property in Germany and came to Kenya. We shall examine shortly what he did with his money but he claims he bought a plot in Chaani and constructed a house with the intention of living there with Abiba as a family. But Abiba says the plot was hers and she is the one who constructed the house for her own occupation. She only invited Karl to stay there in 1995 but she moved out in 1997 when Karl became abusive and generally of bad behaviour. She then came to court on 13.8.1997 to reclaim her plot and house. She makes 5 prayers in her Plaintiff:-

*“a) Possession of the said parcel of land and the building thereon.*

*b) An injunction to restrain the defendant by himself his agents and or servants or otherwise howsoever from remaining on or continuing in occupation of the said parcel of land and the building thereon.*

*c) General damages.*

d) *Mesne profits at the rate of Kshs.16,000/- per month from 1st March, 1997 until possession is delivered up.*

Karl denied those claims in his defence and filed a counter-claim of his own seeking the following prayers:-

*“a) Dismissal of the Plaintiff’s suit with costs to the Defendant.*

*b) An injunction to restrain the Plaintiff by herself her agent and or servants or otherwise from in any way whatsoever interfering with the Defendant’s rightful occupation and enjoyment of parcel No.10/18 Chaani and the building thereon.*

*c) An order to cancel from the register the name of the Plaintiff as the sole proprietor of Plot No.10/18 Chaani and in its place the Defendant’s name be registered forthwith as the lawful sole owner of the said plot .*

*d) Costs and interest of this suit.”*

Issues were joined after the filing of reply to defence and defence to counter-claim. Thirteen of them were agreed for determination as follows:-

*“1. Is the Plaintiff the rightful owner of the parcel of land known as Plot Number 10/18 CHAANI, Mombasa as stated in Paragraph 3 of the plaint?*

*2. Did the Plaintiff acquire the said parcel of land for herself and on her own behalf or on the behalf of the Defendant as alleged in paragraph 4 of the defence and counterclaim? 3. Does the Plaintiff hold the said parcel of land in trust for the defendant as alleged in paragraph 30 of the defence and counterclaim.*

*4. Was the building standing on the said parcel of land constructed by the Plaintiff or the Defendant. 5. Does the defendant have a claim, if any, over the said parcel of land and the house thereon?*

*6. Did the defendant provide the funds for the purchase of the said parcel of land and or the construction of the house thereon as alleged in paragraph 30 of the defence and counterclaim?*

*7. Was the defendant the sole financier of the purchase price of Plot 10/18 and the construction works thereof or was he assisted in a (sic) way by the Plaintiff?*

*8. Is the defendant in wrongful occupation of the said parcel of land and the house thereon as alleged in paragraph 12 of the Plaintiff?*

*9. Are there or are there not grounds for restraining the defendant from dealing with the suit property?*

*10. Did the Plaintiff promise to marry the defendant as alleged in paragraph 18 of the defence and counterclaim? 11. Should the name of the Plaintiff be cancelled as the registered owner of Plot No.10/18 Chaani and the Defendant be registered in her place?*

*12. Is the defendant entitled to the order of injunction restraining the Plaintiff from interfering with his occupation and enjoyment of plot No.10/18 Chaani and the premises thereof?*

*13. Costs of the suit?”*

Those issues are answered by evidence tendered by three witnesses:

two for the Plaintiff and one for the Defendant.

The Plaintiff's version of events is this:

When she testified on 27.5.1999 she was a housewife aged 35 married to a Burmese seaman and now resides in Ganjoni, Mombasa. On 2.3.1992 she purchased Plot No.10/18 at Chaani from one GRACE WANJIKU NGUGI. The written agreement between the two produced as Exhibit 1 shows that the plot was in the Second Urban World Bank Project within Mombasa Municipality and was sold for Kshs.70,000/-. It was undeveloped save for a foundation dug by the owner for a house.

For the next 11/2 years Abiba constructed the ground floor of the house. It was a two-floor 3-Bedroomed house with one kitchen, one store and two toilets. She never entered into the house as she was staying in Ganjoni when construction was going on under the supervision of her mother who was occupying an adjoining plot.

As to how she met Karl, she admitted as claimed by him, that they met in a nightclub in 1988 and became lovers. He used to visit Kenya yearly thereafter and they would stay together. He would also take her to Germany on all-expenses paid trips. Marriage proposals were also discussed and she agreed to it after consulting her parents. She took him to Meru, her parent's home (actually her sister's) and they collected two other children she had with different men. She admitted that Karl used to give her financial assistance and would send between DM.300 to DM.400 every month for her upkeep when he was in Germany. They would stay together when he was in Kenya and they did so upto 1996 although she also testified that she was married to her current husband in 1993 and they were also staying together!

In 1995 Karl requested her to allow him to complete the remaining part of the house so that he can move in and she allowed him to do so since they were still friends. He completed the first floor and started residing there. It has the same units as the ground floor which Abiba had constructed.

When they disagreed Karl took the ground floor and rented it out at Kshs.8000/- per month while he stayed on the first floor.

In cross-examination Abiba said she only went to school upto Std.7 and has no training for anything. She has never been employed anywhere or done any business in her life. She said she came to Mombasa from Meru to roam about in Night Clubs in order to get some money for her children's upkeep. She was looking for money from men and that is how she met Karl at Toyz Night Club. She was aware that Karl was receiving some equivalent of Kshs.60,000/- per month in pension and that he sold his house in Germany for DM.156,000 to come and stay in Kenya.

As to how she got money for developing the plot, Abiba said she got it from Florida Night Club where she was prostituting herself to tourists. She could earn between Kshs.10,000/- - 15,000/- and she used to take the money to her mother to buy building materials. She had no Bank Account or any record of how she spent the money or how much she spent on construction of the house. She had no receipts or other documents to show for anything that she did on the house.

She denied that she is the one who suggested to Karl that he should have the plot in her name since non-citizens were not allowed to own property or that she would hold it in trust for him until he acquired a Work Permit. She admitted however that she has never occupied the house at Chaani.

Her mother, ROSE THOMAS, (Rose) testified for her. She is a widow who has stayed in Mombasa all her life. As far as she knew, Karl and her daughter were husband and wife. They were not formally married but they had stayed for many years together.

She did not know when the plot was purchased but she was the one who introduced her daughter to the seller and the agreement was signed. Her daughter paid for the plot and thereafter asked her to look for fundis to construct. She was in-charge of the works and used to receive money from her daughter to pay the workers. Her daughter never told her where she was getting the money from and she never asked. But

she knew the kind of work she was doing. She did not know anything about Abiba's relationship with Karl but Karl never gave her any money.

She saw Karl when he took possession of the plot and continued construction without assistance from her until he finished and occupied the first floor and rented out the ground floor. He stays there with his new wife but the house belongs to her daughter. The daughter did not own anything before she met Karl.

Rose had nothing to show for any records of construction of the building or expenses thereon. She never had any to start with. After the relationship between the two went sour, Abiba bought a Matatu and a saloon car. She did not know about Abiba's current husband, when they met or whether they are married.

Karl's version of course differs in material particulars.

He was a policeman in Germany for 42 years.

He was born in 1933 and retired in 1992. He had divorced his wife in 1973 and had a daughter of 38 years. She was older than Abiba. From the first night he met Abiba in 1988 they became lovers and in the next few years their love blossomed. He opened an account for her with M/s. Barclays Bank, Nkrumah Branch, A/C 5858266 and used to send in excess of DM1000 to her per month. Exhibits 2 & 3 testify to that. In 1989, 1990, 1991 and 1992 he took her to Germany at his expense and she promised to marry him. On returning to Kenya she took him to Meru where two of her children were staying with her sister (not parents) and were not going to school as Abiba was not in employment. They brought them to Mombasa and Karl started looking after them and paying their school fees.

In 1989 they discussed plans about buying a house to stay in. They agreed on buying a plot outside town and Abiba was left to look for one. She called him in Germany in 1992 and told him she had found a plot costing Shs.180,000/-. He transferred DM4,500 into her Account for purchase of the plot. She subsequently called to confirm that the plot had been purchased at Chaani, Mikindani, Mombasa.

Upon his retirement in 1992 he sold his house in Germany for DM157,000 and as agreed with Abiba he came to settle in Kenya. The money raised was for development of the Chaani plot. Exhibits 3(a) & 3(b) confirm sale of the German house. Thereafter he would receive pension funds and has been receiving it through a local Bank Account opened with M/s National Bank of Kenya at the rate of about Kshs.85,000/- per month depending on DM exchange rates. Exhibits 1 – 40 testify to that regular income.

Karl further testified that when he came to Kenya he found Abiba had borrowed some money from two women to start construction of the house they had agreed on. He refunded the money to the two women and took over construction of the building. It was further agreed between him and Abiba that supervision of the construction works could be done by Abiba's mother who was living only 11 metres away. He started giving money to the mother for that purpose.

Matters came to a head at the end of 1993 when Karl returned from Germany only to find Abiba in bed with a Korean. They disagreed from then onwards.

He moved to another hotel and also took over the construction of the house. He stopped giving money to the mother. Abiba burned some of the construction documents but there is a bulk of them; 56 receipts produced as Exhibit 4. He moved into the house in 1994 and completed the entire house. It is a two storey house with two living rooms upstairs, 4 bedrooms, two kitchens, two bathrooms. Downstairs with three bedrooms, two toilets and a kitchen. He has occupied upstairs but downstairs is unoccupied. Abiba has never been to that property nor spent any money on it. She holds it in trust for him and it should be transferred to him.

In cross-examination Karl admitted that Abiba confessed to him that she was a prostitute but when he promised to help her out she promised to stop it. Pressed to produce documents to confirm that he forwarded DM4500 for purchase of the plot, Karl said Abiba burned the documents. She burned those

records together with others showing that Karl had given to her mother, Rose, Kshs.1.3 million towards purchase of material and labour for the house before he took over construction.

He denied that he was a violent man and contended that there were no police reports to that effect. He never took the house by force as it was his own property.

I have considered the evidence on record and the submissions made on it by both counsel M/s Waweru and Omwenga for the Plaintiff and Defendant respectively.

The issues raised may now be tackled. Issues 1, 2 & 3 are interrelated and may therefore be discussed together.

Although the plot in issue is referred to as No.10/18, it does not appear to be registered as such under any law known in Kenya – either the Land Titles Act, Registration of Ritles Act or the Registered Land Act. No Title documents under those Acts were produced in evidence. It would appear that the plot is a subdivision of a larger parcel of land whose true ownership is still vested in the Municipal Council of Mombasa until such time as the Council will give consent for registration and transfer under any of the existing Laws.

Be that as it may, the documents produced show that the Council intended to transfer the plot to one Grace Wanjiku Ngugi upon compliance with certain conditions. There is no evidence tendered from the said Grace Wanjiku Ngugi or the Council but there are further documents produced to show that a Power of Attorney was issued to Abiba after an agreement was signed between her and Grace Ngugi for sale and transfer of the said plot in 1992. Possession of the plot was given to Abiba but the ownership of the plot in the Council's books remained Grace Ngugi's until the Council approved the change of name in September 1996. The Council did not issue transfer documents – Certificate of Transfer and Letter of Allotment – until June 1997. As far as the Municipal Council is concerned therefore the plot in issue is allotted to ABIBA TIRINDI. That is all that can be said about the plot and Abiba's "right" to it.

Abiba says she bought it on her own volition and with her own funds. I do not believe her.

Firstly she admits and her mother confirms it that she owned nothing before she met Karl. She was just another prostitute in town with no record of what money she earned or how she spent it. They would be illegal earnings anyway. There was nothing to show that she had any lawful income. Her children, the by-products of her promiscuity, were being taken care of by her sister in the rural areas. Until Karl came along that is. I believe there were discussions on marriage and about future settlement in Kenya. I believe there were discussions on the purchase of the plot between Abiba and Karl. I believe Karl provided the funds through which the plot was purchased. Karl testified that the money came through transfer into Abiba's Account but Abiba was evasive about the existence of any such Bank Account despite evidence shown that it existed. She was in a position to produce the records of her own Account and the failure to do so draws a negative inference against her. I do not put her beyond the accusation that she burned Karl's records relating to that amount.

The plot was therefore, in my judgment, purchased on behalf of both Abiba and Karl in anticipation of their marriage. That consideration totally failed when Abiba was found in bed with another man and the marriage plans were shelved for good. They both have different life partners now. In the event Abiba holds the plot in trust for Karl.

It was contended by Mr. Waweru for Abiba that a trust cannot be implied or presumed. Civil Appeal No.306/97 Joseph Marison – Vs- Kibilat Bargaliet (UR) was cited in aid. But that decision is distinguishable; firstly because it dealt with a first registration under the Registered Land Act which is not the case here; and secondly the issue of Trust is expressly pleaded in this suit and the circumstances giving rise to it are also pleaded and in evidence. A finding on the issue may therefore be made.

Abiba also appears to have acknowledged Karl's entitlement to the plot. She has never been to the plot since it was purchased and when Karl moved in it was handed over to him as of right. He was not a

trespasser. He carried out construction of the building thereon openly until Abiba felt emboldened by the documents obtained from the Council in 1997 to challenge Karl. Issue No.4

On the evidence, the early phases of the building were supervised by Abiba's mother but as far as she knew the money was supplied by her daughter. She had no inkling where the daughter was getting her money from as she was not employed and had no business. She knew but did not want to disclose that she was in prostitution. I do not believe Rose when she says Karl never gave her any money for construction of the building. She was as evasive as her daughter in keeping away any documentary proof in this matter. She did not impress me as a witness of truth. I am satisfied on a balance of probability that Karl had the resources and did in fact supply the funds for construction of the buildings on plot 10/18. Issue No.5

Yes Karl has an interest in the plot and the buildings which go with it.

Issue No.6 : is answered in the affirmative and the reasons have been given above in issues 1, 2 & 3.

Issue No.7

Karl was the sole financier of the purchase of the plot and of the construction. Such assistance as may have been supplied by Abiba at the initial stages, which is not apparent since everything was left to her mother, was amply compensated for by Karl who supported her and her children.

Issue No.8 : is answered in the negative.

Issue No.9:

I see no lawful grounds for restraining Karl from dealing with the property. Issue No.10:

Both parties concede, despite an attempt to side-step it in the plaint by Abiba, that there was a promise of marriage and indeed Abiba took the bold step of taking Karl to Meru where they collected her children and they all settled down in Mombasa pending formalisation of matters. Abiba's own mother believed they were man and wife although there was no formal marriage concluded. I believe Abiba was the stumbling block as she was enjoying the best of both worlds without a formal marriage.

Issue No.11:

The Municipal Council records should be altered to reflect the true state of affairs on the ground unless there are any legal impediments for so doing.

. Issue No.12:

I would issue an order of injunction to restrain the Plaintiff, Abiba, from interfering with Karl's occupation and enjoyment of Plot No.10/18 Chaani and the developments made and being thereon.

The upshot is that the Plaintiff's suit is dismissed with costs. The Defendant's counterclaim is granted with costs.

Dated this    day    of 2001.

P.N. WAKI

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