



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL CASE NO.346 OF 1998

1. PETWA KOWALAZYK &

2. KAZUNGU KITSAO PLAINTIFFS

VERSUS

1. KOWALAZYK PETER &

2. AGNES KOLI DEFENDANTS

RULING

The Hon. Mr. Justice P.N. Waki, then a High Court Judge but now a Judge of Appeal, gave a ruling on the 27th April 1999 in this dispute between the plaintiffs and the defendants. In the first pages of that ruling facts of this suit are ably narrated and I will do no better but to reproduce them verbatim in this ruling:

“The main dispute herein rotates around the property LR Kwale/Diani Complex/354 (the property) measuring approximately 0.40 HA (1 acre) and the developments made and being thereon. It would appear to be agricultural land within the definition of the Land Control Act Cap 302 Laws of Kenya and to be subject to the provisions of that Act.

That is because the original registered owner, one JUMA ABDALLA NGOMBE found it necessary to apply for the consent of the Land Control Board before the sale and transfer of the land. On 8.3.1994 the MSAMBWENI LAND CONTROL BOARD granted its consent to the transaction. The purchasers/transferees stated in that consent and in the Sale Agreement dated the 17.2.94 are PETER KOWALCZYK (Peter) and PETRA KOWALCZYK (Petra) They are man and wife and are both of German Nationality. There is no evidence that they are citizens of Kenya.

Now it is expressly provided in the Land Control Act under S.9 (1) (c) that the Land Control Board shall Refuse consent in any case in which the land is to be disposed of by way of sale, transfer, lease, exchange or partition to a person who is not a citizen of Kenya. For reasons which are not apparent at this stage, however, the Land Control Board gave its consent to the two foreigners. Peter and Petra were residing in Germany at the time of purchase of the property and only used to come to Kenya for Holidays.

They instructed an Advocate to deal with the matters of transfer in their absence. Peter sent the whole of the purchase price of Shs.600,000/- to the advocate then acting for them but the Advocate did not pay the seller. Peter sent some more money in May 1994, through his wife (Petra) and son (Thomas) and he was left back in Germany. Two months later the wife and son returned to Germany carrying with them a copy of Transfer of Land and the Title deed of

the property.

To his shock he noticed that the transfer was drawn in favour of himself, his wife and one KAZUNGU KITSAO (Kazungu). Kazungu's name was also included in the Title as a co-owner of the property. The Transfer of Land Form was signed by Kazungu, Petra and the son, Thomas. But the Land Registrar, Kwale who certified the signatures for both the seller and the purchaser, certified that it was Peter who appeared before him and signed the transfer.

Peter protested the inclusion of Kazungu's name in the Title and the signature on the Transfer form by his son who had no authority to sign on his behalf. Petra however explained that she had been advised that Kazungu's name must appear on the Transfer and Title if it was going to be issued to foreigners and therefore execution of the Transfer by their son was in Peter's interest. Petra further insisted that Peter had given his consent through telephone for the two courses of action.

Kazungu was a waiter in one of the Beach Hotels in Diani before he met and befriended Petra in 1993. He was later introduced to Peter and was instrumental in locating the property for purchase by the two and subsequent construction of a House therein which was supervised by Kazungu. Peter came to Kenya in August 1994 and confronted Kazungu on the inclusion of his name in the Title. Kazungu agreed to sign a note relinquishing his purported rights to the property which lawfully he said belonged to Peter and Petra. He also executed an irrevocable power of Attorney in favour of Peter and Petra as later as September 1998.

He removed a caution he had filed. His signature was witnessed by the Land Registrar, Kwale. Between August 1994 and September 1998 a lot happened between the three protagonists. Petra for one filed a Divorce in Germany on 13.9.1997 and alleged that Peter was committing adultery with one AGNESS KOLI (Agnes). Peter shot back in January 1998 alleging that Petra and Kazungu were committing adultery and were purportedly living in the property as husband and wife. As far as he knew Kazungu had been employed in the house as a caretaker on a monthly salary and had boarding facilities there.

He would take care of the house when Peter and Petra were in Germany. Due to Kazungu's misbehavior Peter terminated his services in the house in August 1998. Petra reacted by changing all the locks of the house and reinstating Kazungu. Peter reported the matter to the police and re-established control. He dismissed Kazungu and brought in AGNES whom he said was necessary caretaker and would provide nursing care for him as he suffers from heart ailment. The plot thickened.

Petra decided she would not stay in the same house with a concubine or mistress although Peter had no objection to her taking residence as she was a co-owner of the property and was his wife until such time as a divorce would be pronounced. Petra however came to court in September 1998 and filed this suit. She made Kazungu a co-plaintiff and they both sued Peter and Agnes."

In that initial plaint, the Plaintiffs were seeking a declaration that Peter is not entitled to allow Agnes into the property which the three of them own in-common and also sought an injunction to restrain Agnes from entering or remaining on the property.

Petra and Agnes filed a defence on 26th October 1998 denying the averments in the plaint and pleading that in fact Kazungu is a fraudster who acquired his purported interest in the property by fraud in collusion with Peter and Thomas and prayed for the suit to be dismissed.

Petra also put in a counterclaim and prayed for a declaration that the registration of Kazungu's interest in the property was obtained by fraud and for the removal of his names from the Land Register of the property.

On 16th April 2002 an amended plaint was filed where all the above averments were repeated but only one more prayer was added: namely, a declaration that the property belongs to the three registered proprietors jointly and neither of them is entitled to use it to the exclusion of the others.

Before the court now is a Chamber Summons filed under Order VI Rule 13 (d) of the Civil Procedure Rules by Petra and Agnes seeking the striking out of the amended plaint on the ground that it is an abuse of the court process.

The other grounds are that Peter had stated on oath in the High Court of Germany in the Divorce Proceedings that Kazungu had no interest in the property because he was merely a houseboy, while now she refers to him a joint owner of the property.

Petra and Agnes also seek an order directed at the police to commence investigations into the alleged perjury, forgery and impersonation committed by Peter.

I have given serious considerations to the affidavit evidence and submissions made.

I find that that Amended plaint is not an abuse of the court process. Through it all issues relating to the ownership of the property will be ventilated.

This application is dismissed, with costs to the plaintiffs.

It is so ordered.

Dated and delivered at Mombasa this 29th July 2003.

A.G.A. ETYANG

JUDGE