



**AIA v SMH (Environment & Land Case 172 of 2016)
[2021] KEELC 4785 (KLR) (10 March 2021) (Judgment)**

AIA v SMH [2021] eKLR

Neutral citation: [2021] KEELC 4785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 172 OF 2016**

CK YANO, J

MARCH 10, 2021

BETWEEN

AIA PLAINTIFF

AND

SMH DEFENDANT

JUDGMENT

1. The Plaintiff instituted this suit by way of a plaint dated 24th June, 2016. The plaintiff is seeking for judgment against the defendant as follows:
 - a) A declaration that the plaintiff is the rightful owner of the house situated on Plot No. [...] / II/MN Manoni Kisauni
 - b) A permanent injunction restraining the defendant from any claim on the house situate on Plot No. [...] / II/MN Manoni Kisauni
 - c) Cost of this suit.
2. The plaintiff avers that he was married to the defendant under the Islamic Law which marriage broke down irretrievably and the plaintiff applied for dissolution of the marriage in Kadhi's Court Divorce Cause No. 144 of 2013 and the marriage was dissolved. The plaintiff avers that between 2007-2014, he used to work in Saudi Arabia to enable him support his family and to save for investments. That in the year 2011 while he was still in Saudi Arabia, he discussed with the defendant about investment and the plaintiff started sending money to the defendant every month for purposes of the investment, in particular to buy a house which could be leased out and earn the family some money at the end of every month. The plaintiff avers that by August 2012, the money he had been sending to the defendant was enough to purchase a house and he requested the defendant to look for a house which they could



buy. The plaintiff avers that the defendant found a house situated in a portion of PLOT NO. [...] / II/MN Manoni Kisauni and since the plaintiff was not in the country, he requested the defendant to enter into an agreement to purchase the house on the plaintiff's behalf. The plaintiff avers that he has since returned to the country and is jobless and the suit house is his only source of income, but that the defendant has since turned against him and is claiming that the house is hers. The plaintiff's claim is for the house to be registered in his name since he is the rightful owner, or in alternative the defendant should refund/pay the plaintiff amount equivalent to the market value of the house.

3. The plaintiff testified before court and reiterated the averments in the plaint. He testified that he used to send the sum of Kshs.100,000/- to the defendant to be invested in purchasing a house for him. The plaintiff stated that the defendant together with her brother took the money and purchased a house as agreed. The plaintiff added that the defendant did not follow his instructions. He stated that when he returned to the country in the year 2015, he found out that the house purchased was registered in the defendant's name. He produced the money transfer documents and interim statement of account as p.exhibits 1 and 2. He also produced the agreement for sale as p.exhibit 3. The plaintiff stated that the defendant refused to hand-over the house to him. His claim is for the house to be handed over to him. The plaintiff also relied on and adopted his witness statement dated 24th June, 2016 as part of his evidence-in-chief.
4. When cross-examined by Mr. Masore, learned counsel for the defendant, the plaintiff stated that he got married to the defendant, under Islamic Sharia Law in 2007, but divorced in the year 2013. That the suit house was purchased in the year 2012 when the defendant was still married to the plaintiff. When shown the agreement for sale, the plaintiff admitted that under paragraph 3 thereof, they had agreed that the house shall be transferred to their children when they attain the age of 18 years. He stated that they have two children with the defendant. He admitted that the children are school going and that since 2015, he has never sent money to the defendant. When the plaintiff was re-examined by Mr. Muliro, learned counsel for the plaintiff, the plaintiff stated that their agreement was that the house should be in the children's names when they attain the age of 18 years. He stated that the Kadhi's court only made a decision on the divorce case and did not resolve the issue over the house.
5. In her amend defence dated 10th January, 2019, the defendant admitted receiving money from the plaintiff. The defendant however pleaded that vide an agreement dated 14th May, 2014, the defendant was to reimburse to the plaintiff Kshs.1,000,000/= being monies owed and due to the plaintiff from the defendant but the said amount was subject to deductions on account of Kshs.300,000/= for the defendant's maintenance for three months and the remaining Kshs.240,000/= would be used for the children's maintenance from May 2014 to April 2015. The defendant stated that the suit premises was to be registered in the defendant's name as a trustee for their children. That accordingly, the plaintiff is estopped from claiming the same. The defendant further stated that she channeled the proceeds from the rental income from the suit premises towards maintenance of their children in accordance with the purpose of which the property was purchased.
6. In her evidence, the defendant admitted receiving money from the plaintiff and testified that they bought the house for the benefit of their children and added that she uses the income from the suit premises to take care of the children. That in the agreement for sale, they agreed to have the house registered in the name of the two children when they attain the age of 18 years. The defendant urged the court to let her retain the house in her name until the children attain the age of 18 years when the same will be transferred in their names.
7. Both parties filed written submissions reiterating their respective positions. I have considered the pleadings, the evidence tendered and the submissions filed. The court finds that the issues for determination are whether the plaintiff has proved his case on a balance of probability; whether the



plaintiff is entitled to the reliefs sought in the plaint; and what orders are appropriate to grant in the matter.

8. In this case, it is not disputed that the plaintiff and the defendant were husband and wife. Though divorced, the parties have two issues from the marriage. It is also not disputed that the plaintiff used to work in Saudi Arabia and used to send money to the defendant who was in Kenya. From the evidence on record, the money was used to purchase a house sitting on Plot Number [...]/II/MN Manoni Kisauni. It is evident that vide an agreement dated 14th May, 2014 between the plaintiff and the defendant, and in particular Clause 3, the parties herein agreed that the house that is in the name of the defendant shall be transferred to the children when they attain the age of eighteen (18) years. Both parties are in agreement that the children are still minors. Having agreed that the house that is in the name of the defendant would be transferred to the children when they attain the age of majority, in my humble view the plaintiff is estopped from now claiming that the house is solely his. It is apparent that the suit house was left to the defendant to support the children until they attain majority age, when the house would be transferred to them. It is worth noting that the said agreement dated 14th May, 2014 was made the parties herein had agreed to dissolution of their marriage. Indeed in his evidence during re-examination, the plaintiff confirmed that their intention was that the house should be transferred to and registered in their children's names when they attain the age of eighteen years (18) years. The plaintiff's only concern is that the house is registered in the defendant's name. In this case, it is not in dispute that the children are still minors. It is also not in dispute that the defendant is the one who takes care of them by paying for their school fees, medical expenses, clothing and providing for their needs, among others. Since it was the intention of the parties as expressed in the agreement dated 14th May 2014 that the house in the name of the defendant would be transferred to the children when they attain the age of eighteen (18) years, and since there is no sufficient reason as to why the said agreement should not be enforced, it follows therefore that the most fair and just order to make is that the suit premises should remain in the name of the defendant but to hold in trust for the two children, R and M until both attain the age of eighteen (18) years when the house will be transferred and registered in their joint names as per the wishes of both the plaintiff and the defendant.
9. Having considered and reviewed all the evidence and material placed before the court, I find and hold that the final orders to issue are as follows:
 1. The plaintiff's case has no merit and is dismissed.
 2. The suit premises to remain in the name of the defendant but to hold in trust for the two children, R and M until both attain the age of eighteen (18) years when the house will be transferred and registered in their joint names.
 3. Considering the relationship of the parties herein, I order each party to bear own costs.
10. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY DUE TO COVID-19 PANDEMIC THIS 10TH DAY OF MARCH, 2021.

C.K. YANO

JUDGE

In the presence of:

Yumna Court Assistant

C.K. YANO



JUDGE

