



**Karugi v Gaitho; Maina (Interested Party) (Environment & Land Case 5 of 2023)
[2024] KEELC 645 (KLR) (Environment and Land) (14 February 2024) (Judgment)**

Neutral citation: [2024] KEELC 645 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT VOI
ENVIRONMENT AND LAND
ENVIRONMENT & LAND CASE 5 OF 2023
SM KIBUNJA, J
FEBRUARY 14, 2024**

BETWEEN

EILEEN MERCY WANGARI KARUGI PLAINTIFF

AND

CRISPUS MAINA GAITHO DEFENDANT

AND

ROSE WAMBUI MAINA INTERESTED PARTY

JUDGMENT

1. This suit was commenced by the plaintiff against the defendant through the plaint dated the 10th December 2018 and filed with the court on the 11th December 2018. The plaintiff seeks for the following:
 - a. A declaration that the defendant holds the properties known as:
 - i. Plot No. 2618 Taveta Phase 11 Settlement Scheme;
 - ii. Plot No. Subdivision No. 237617 (Original Number 3840/4 Section 111 MN Creek Age Lodge C.R. No.33354/3);
 - iii. Plot No. 15031/89 C.R. No. 13016/43;
 - iv. Plot No. 15031/157 C.R. No. 50353 Galaxy Voi;
 - v. Plot No. Voi Subdivision Nos. 89, 90, 157, and 158 Voi;
 - vi. Plot No. 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort;



- vii. Other properties in Umoja, Ruai, Sultan Palace and St. Kelvin Hill School Voi, and others to be mentioned with the leave of the court.

With all the developments thereon in trust for the plaintiff.

- b. The aforesaid properties to be settled for the benefit of the plaintiff in a 50:50 proportion as between the defendant and plaintiff.
- c. A mandatory injunction do issue reinstating the plaintiff into her house situated on plot number 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort.
- d. A permanent injunction do issue restraining the defendant by himself, his agents and or servant or otherwise from encumbering, dealing with, or in any way interfering with, selling, offering for sale, disposing of, leasing and/or alienating the whole or any part of the properties listed in prayer (a) above.
- e. An account or enquiry be made to the beneficial ownership of the properties listed in prayer (a) above.
- f. An account be made as to the rent collected by the defendant in all the properties from 12th July 2018 to date.
- g. Costs of the suit and interest thereon.
- h. Any further other relief the court may deem fit and just to grant.

The plaintiff among other averred that she cohabited with the defendant from 2003 and during that time they acquired several properties with her contribution. That they intended to share those properties between them equally and that she would reside on plot number 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort. That on the 29th November 2010, they registered Galaxy Crislyn Kenya Limited, a private company limited by shares, each holding 50% shares. That on the 2nd July 2018, the defendant walked out of the relationship and carried with him all the original documents of the properties they had purchased. That through the letter dated 20th November 2018, she informed the defendant of her intention to have her share of the properties but the defendant did not respond. That on the 7th December 2018, the defendant evicted her from plot No. 9122/23 Jumba Ruins Road, Mtwapa Galaxy Resort, which was registered in their company's name, in which they were both directors. That the defendant's action are oppressive and in violation of the laws prays for the orders sought in through the plaint.

2. The plaintiff's claim was opposed by the defendant through his statement of defence, dated the 4th January 2019. He admitted the registration of the Galaxy Crislyn (K) Ltd, the company, but averred that it never operated but remained dormant. He denied that plot No. 9122/93 Mtwapa, was owned by the company and averred that it was belonged to Rose Wambui Maina, the interested party. He averred that the plaintiff was the owner of the 5-bedroom massionate on plot No. 1956/457, Voi Municipality.
3. That vide the notice of motion dated the 16th September 2020, Rose Wambui Maina applied to join in the proceedings as an interested party for reasons *inter alia* that she was the registered owner of plot No. 9122/93 Jumba Ruins- Road, Mtwapa Galaxy Resort, that the plaintiff had occupied. The application was heard and granted through the ruling delivered on the 20th January 2021 and the interested party was granted liberty to file pleadings to safeguard her interest. The interested party then filed her statement of defence dated the 11th February 2021 inter alia averring that she was the lawful wife to the defendant; that she denied that plot No. 9122/93 has ever been owned by Galaxy Crislyn (K) Ltd, averring that the said plot belonged to her.



4. During the hearing, the plaintiff testified as PW1. She adopted the contents of her statement and documents in the list both dated 10th December 2018 as her evidence in chief. It was her testimony that the defendant was her husband for fifteen (15) years while the interested party was his estranged wife. That the defendant walked out on her, but would return at night and break the items in her house at Galaxy hotel, beat her up breaking her wrist. She reported to FIDA who summoned him in writing, but he burnt the letter. Then on 7th December 2018, the defendant arrived with goons and evicted her from the building and has not allowed her back even after the court directed she be reinstated. She added that it is only through the affidavit filed by the defendant that she learnt Galaxy hotel had been transferred to the interested party. She testified that she had worked with KCB for 31 years until she retired in 2016. She would get loans that they would use to acquire properties, and as she was not formally married to the defendant, they registered the company that they jointly owned. That the Galaxy Resort had 22 rooms, bar & restaurant that she operated and the apartment where she lived with the defendant. During cross examination, PW1 testified that there was no customary or church wedding between her and the defendant. That she was married to one Hussein, with whom she had a son. That in 2009, the defendant had accompanied her to the Kadhi to divorce her husband, but the divorce was not finalised. That when she met defendant in 2003, he had told her that he was married but was having problems with his wife. That though they would discuss with defendant what properties to contribute for and acquire, none was registered in her name or in their joint names. That the company was registered in 2011 but did not have any bank accounts but was using the two for Galaxy Resort business. She told the court that she had given defendant Kshs.300,000 for the purchase of the plot No. 9122/93 that defendant bought in 2008 from one Taib. That she contributed in developing that plot but could not quantify how much. She testified that she owns a house at Voi that was sold to her on paper, but she has not gone there and defendant has vandalised it. That the sale agreement over the Voi house was for the purposes of obtaining a mortgage facility from her employer after it declined to charge the Mtwapa plot No. 9122/93 for reason that it contained a bar facility. That they used the money loaned to complete the construction on plot No. 9122/93. That though they registered the company in 2010 to help them cement their relationship, as they were not married, no properties were registered with the company as she trusted the defendant. That plot No. 9122/93 has never been registered in her name. That they were operating the Galaxy Resorts hotels Voi and Mtwapa under the company's name, and that the Voi house was occupied by the interested party and her children, when it was transferred to her to use for the mortgage purposes.
5. The defendant testified as DW1 and adopted the contents of his statement dated the 4th January 2019 as his evidence in chief. He also produced the 19 documents in his list of documents as exhibits. It was his evidence that the interested party is his wife. He told the court that he was allocated plot No. 2618 by the Settlement Scheme that he later sold. That Galaxy Voi, plot numbers 1503/89, 90/157 and 158 are his as he bought them from Voi Development Company in 1997. That he started developing the plot where Galaxy Voi is and opened the business in 2003 before meeting the plaintiff. He told the court that he met the plaintiff when she came to the hotel with her colleagues from KCB and they became friends. The friendship lasted for some months after which they agreed to each return to their spouse. He disputed the plaintiff's claim that they bought the Mtwapa plot and developed it together during the time of their relationship. He told the court that one Muchoki and himself had initially hired the Mtwapa plot while vacant for 21 years in 2013. They then developed a hotel and other rooms. The owner later offered to sell the plot to them but they had no money to purchase it. They contacted one Mburu who bought the plot and he transferred the 21-year lease to them. The defendant denied owning any plots at Umoja, Ruai, and Sultan Palace. He added that St. Calvin Hill School plot had been bought by the plaintiff from Mwamunga and that she later sold it and therefore did not belong to him. He testified that he owned plot No. 9122/93 Mtwapa up to 2018. That he had bought it from



Kitui Flour Millers for Kshs.300,000 in started developing it in 2008. That he opened the hotel in December 2009. That the development consists of guest houses, bar, apartments and restaurant. He added that he was staying in a one bedroom apartment at Mtwapa, that he later left to the plaintiff after she was transferred to KCB Mtwapa in 2009. That after completing the construction, he offered to sell it to the plaintiff who accepted and he asked her to buy it at Kshs.12 million that was its forced value price. Later, the plaintiff who had moved into one of the apartments in the building told her the bank had declined to accept the title of the property as security for the mortgage because it had a bar. The defendant then offered to sell to the plaintiff the 5-bedroom masionette on plot No. 1936/457 Voi, Karriokor, where his wife and two sons resided and she accepted. The property was valued at Kshs.4 million and they did the sale agreement in 2010. He however denied that he received the Kshs.4 million to finish the 3rd floor of Mtwapa Galaxy development That he did not inform his wife of that transaction as he had agreed with the plaintiff that his family would continue living in that property while plaintiff continued to live in his apartment at Galaxy Mtwapa. He continued that in 2017, the plaintiff informed him that she wanted to take over her Voi house and he conceded. Then on 20th November 2018, the plaintiff wrote to him with a copy to the interested party that they should share the properties. Defendant said he discussed with his family and they agreed to move to the Mtwapa Galaxy house on the property he had transferred to the interested party in 2017. He told the court that the plaintiff and himself had registered Galaxy Limited but it did not have any properties or operations in its name. During cross examinations DW1 conceded he was in an intimate relationship with PW1 from 2003 to 2004. He indicated that he has no interest over the plot allocated vide allotment letter dated 12th June 3007 in the plaintiff's name. That Galaxy Hotel is on plots Nos. 15031/157 and 15031/158. That after the plaintiff asked him to hand over the Voi house to her, he in turn asked her to vacate from the Mtwapa apartment. That he transferred the Mtwapa property to his wife, interested party, on 17th September 2018.

6. The interested party testified as DW2 and adopted the contents of her statement dated the 23rd February 2021 as her evidence in chief. She told the court that the defendant was her husband from 1991 and that they wedded on the 18th December 2004. She added that they have two children born in 1993 and 1997. DW2 testified that she became the registered proprietor of plot No. 9122/93 Mtwapa Galaxy on the 17th September 2018, and should be allowed to continue being the owner. During cross-examination, DW2 told the court that the plot was transferred to her name by the defendant as a gift. That to her knowledge, the relationship between the plaintiff and defendant was business and not intimate.
7. The court gave directions on filing and exchanging submissions within the set timelines, on the 18th December 2023 and by the time the file was forwarded to the judge by the Deputy Registrar Voi, only the learned counsel for the defendant had filed his submissions dated the 23rd January 2023, that the court has considered.
8. The following are the issues for the court's determinations:
 - a. Whether the plaintiff has established the existence of a trust for her benefit in the registration of the defendant with the suit properties, or any of them.
 - b. If the answer to (a) above is in the affirmative, what is the extent of the plaintiff's entitlement in each of the suit properties.
 - c. Who pays the costs of the suit?
9. The court has carefully considered the parties' pleadings, testimonies presented by PW1, DW1 and DW2, submissions by the learned counsel and come to the following findings:



- a. That from the testimonies of the plaintiff and defendant, it is apparent they met at the latter's hotel at Voi in 2003, and thereafter started an intimate relationship. What is not agreed between the two is how long that relationship lasted. The plaintiff averred at paragraph 8 of her plaint that the defendant walked out of the relationship on the 2nd July 2018 and carried all the original documents relating to the properties they had acquired. The defendant disputed that averment at paragraph 7 of his statement of defence, while to the interested party, the relationship between the two was only business.
- b. The properties the plaintiff is seeking to be declared to be the owner of half share are those that at acquisition were registered with the defendant as the proprietor. Sections 24 and 25 of the repealed *Registered Land Act* chapter 300 of Laws of Kenya that are now sections 24 and 25 of the *Land Registration Act* No. 3 of 2012 sets out the interest and rights conferred to an owner of land upon registration. Further section 26 of the *Land Registration Act* provides that the certificate of title issued by the Registrar upon registration "shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute and indefeasible owner, subject to the encumbrances, easements and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge, except-
 - a. on the ground of fraud or misrepresentation to which the person is proved to be a party; or
 - b. where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme."

Sections 107 to 109 of the *Evidence Act* chapter 80 of Laws of Kenya places the obligation of proof upon the party who alleges the existence of facts. In this case, it is the plaintiff who asserts or alleges that she is entitled to half share of the listed properties that are registered in the name of the defendant, claiming that they acquired them together during the time of their intimate relationship. The defendant and the interested party have disputed the plaintiff's claim over the properties that are in their names. The plaintiff therefore has to bear the burden to tender evidence to establish the existence of a trust in her favour to succeed in her quest.

- c. That in the case of *Juletabi African Adventure Limited & Another v Christopher Michael Lockley* [2017] eKLR, the Court of Appeal held:

"It is settled that the onus lies on a party relying on the existence of a trust to prove it through evidence. That is because;

"The law never implies, the court never presumes, a trust, but in case of absolute necessity. The courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied."

And, in the case of *Peter Ndungu Njenga v Sophia Watiri Ndungu* [2000] eKLR, the court held that;

"The concept of trust is not new. In case of absolute necessity, but only in case of absolute necessity, the court may presume a trust. But such presumption is not to be arrived at easily. The courts will not imply a trust save in order to give effect to the intention of the parties. The intention of the parties to create a trust must be clearly determined before a trust is implied."



Throughout her testimony, the plaintiff made a spirited attempt to get the court agree with her that she actively contributed financially in the resources employed to acquire the listed properties that were registered with the defendant. She implored the court to make a finding that the defendant held 50% of each of those properties, including plot No. 9122/93 Mtwapa Galaxy Resort that was transferred to the interested party on 17th September 2018, in trust for her. I have gone through the documentary evidence filed and produced as exhibit by the plaintiff and I have not seen any evidence that shows payments by her for the purchase, or part payment of any of those properties.

- d. Looking at the copies of the documents attached to the plaintiff's list of documents dated 10th December 2018, I notice that they include her PIN and identity card, photographs capturing various moments in time, title for LR No. 1956/457 that show that it was transferred to Crispus Maina Gaitho, the defendant, on 9th April 1997 and on 22nd December 2010 it was transferred to Eileen Wangari Karugi, the plaintiff. There are copies of the plaintiff's bank statements, letter of offer dated 27th August 2012 for plot No. 2618, Taveta Phase 11 Settlement Scheme in the defendant's name, certificate of title for C.R.35826 in the name of Billy Thuva Kalume that is incomplete, certificates of title for LR. No. 15031/89 & 15031/157 registered in the name of defendant on 2nd December 2010. There is also certificate of title for C.R. No. 41590 in the names of Sheikh Ali Taib & Salim Aeme that is incomplete, copies of letter dated 30th August 2012 from Mbaluka & Company advocates on Galaxy Crilyn Kenya Limited, National Police note on damages of motor vehicle KCB486P, Mercendez Benz dated 26th June 2018 and photographs. These are followed by hospital clinical and laboratory notes and affidavit sworn by the plaintiff on the 16th August 2016 inter alia deposing that she is married to the defendant under kikuyu customary law and asking her employer to replace the name of her former husband, Hussein Mvuria Mwadzaya, with that of the defendant. Next is an account amendment form dated 8th September 2018 in which the plaintiff applied to have the name of defendant removed and she be the sole account holder. There are also copies of bank statement for Galaxy Resort Mtwapa of 1st July 2018 to 31st July 2018 and letter from FIDA to the defendant dated 4th September 2018. The foregoing documents do not in any way show that the person registered with any of the properties was holding 50% of the same in trust for the other.
- e. In his list of documents dated the 4th January 2019, the defendant attached among others allotment letter dated 12th June 2007 in the name of the plaintiff, sale agreement dated 20th December 2007 between the plaintiff as vendor, and Kefa Kevin Nyongesa as purchaser over plot numbers 15031/69 and 15931/70, title for LR. No. 9122/93 showing the defendant became the registered owner on 20th November 2008 and transferred it to the interested party on 17th September 2018, certificate of church marriage between the defendant and interested party of 18th December 2004, valuation for LR. No. MN/111/9122/93 dated 22nd February 2010, sale agreement between the defendant as vendor and plaintiff as purchaser dated 10th October 2010 over plot No. 1956/457, Voi Municipality, letter dated 20th November 2018 on behalf of the plaintiff to defendant issuing him seven days notice to vacate from Voi plot NO. LR 1956/457 C.R. No. 29365 or be evicted. There is also the lease agreement dated 8th June 2010 between Billy Thuya Kalume as lessor and defendant and another as lessee over MN/111/4209. There is nothing in all those annexed documents that gives the impression that the defendant was to hold in trust for the plaintiff 50% any of the properties registered in his name.



- f. The plaintiff claim that the registration of the Galaxy Crislyn Kenya Limited, a private company limited by shares in 2011, with defendant and herself holding 50% shares, was the mark of cementing their relationship and ensuring the properties they acquired were registered in its name does not help her in any way. This is because none of the properties, bank accounts or business allegedly operated by any of the parties, whose documents were filed with the court, are in the company's name. Though the plaintiff claimed that the Mtwapa Galaxy Resort business was being conducted or operated through the company, there was no documentary evidence produced to the court. The court would have expected documents like bank statements, invoices, statutory returns and receipts etc would have been availed. This is especially so when the defendant disputed that allegation, and both defendant and plaintiff had agreed in their testimonies before the court, that no property had been registered in the name of the company. If indeed the incorporation and registration of the company was for the plaintiff and defendant to register their allegedly jointly acquired properties through it, the fact that no such property was so registered by 2018 when the parties were parting ways, can only mean none had been jointly acquired by then.
- g. The plaintiff has therefore failed to discharge the duty bestowed on her of tendering evidence upon which the court could have made a finding of the existence of a trust in the registration of the properties in the name of the defendant for her benefit. That though under section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya costs follow the event unless otherwise ordered for good cause, the court has considered the previous friendly relationship between the parties, and is of the view that so as to promote healing resulting from the break-up, each party should bear their own costs.
1. That in view of the foregoing conclusions, the court finds and orders as follows:
 - a. That the plaintiff has failed to prove her claim to the standard required by the law of a balance of probabilities.
 - b. That the plaintiff's suit is hereby dismissed.
 - c. That each party to bear their own costs.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED ON THIS 14TH DAY OF FEBRUARY 2024.

S. M. KIBUNJA, J.

ELC MOMBASA.

In The Presence Of:

Plaintiff : M/s Mwakisuso For Waihenya

Defendant: M/s Atieno For Muthami

Interested Party :no Appearance

Wilson – Court Assistant.

