



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 86 OF 2013**

**SYLVIA MARIA HALLAL WEIS.....PLAINTIFF**

**-VERSUS-**

**RASHID ABDALLA MWAMZUNGU & 2 OTHERS....DEFENDANTS**

**JUDGMENT**

(Suit property having been jointly registered in the name of the plaintiff and 2<sup>nd</sup> defendant; property subsequently transferred to solely into the name of the 1<sup>st</sup> defendant who is husband to the 2<sup>nd</sup> defendant; plaintiff contesting the transfer; evidence showing that the suit property was purchased and solely developed by the plaintiff; apparent that the transfer to the 1<sup>st</sup> defendant was so that the 1<sup>st</sup> and/or 2<sup>nd</sup> defendants could buy off the plaintiff's share; court implying a constructive trust and making an order for the sale of the property with 50% of the proceeds to be paid to the plaintiff)

1. This suit was commenced through a plaint filed on 6 May 2016 originally against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaint was subsequently amended on 16 December 2016 to include the Land Registrar, Kwale, as the 3<sup>rd</sup> defendant. The plaintiff and the 2<sup>nd</sup> defendant (Raenate Wolf Wien) are of Austrian nationality. The 1<sup>st</sup> defendant is husband to the 2<sup>nd</sup> defendant having gotten married in December 2011. In the amended plaint, it is pleaded that in May 2011, the plaintiff purchased the land parcel Kwale/Ukunda/4512 (hereinafter referred to as the suit property) with the 2<sup>nd</sup> defendant. The plaintiff avers that she solely paid the purchase price of 6000 Euros and had the property registered in the joint names of herself and the 2<sup>nd</sup> defendant in equal shares. She pleads that she proceeded to solely develop a residential house at a cost 40,000 Euros. The funds were channelled through the 1<sup>st</sup> defendant who acted as the overall supervisor of the development. It is pleaded that in the year 2012, the plaintiff and the 2<sup>nd</sup> defendant moved into the house and lived together until 10 March 2012 when the plaintiff and her spouse moved out. She avers that she moved out since the cost of living was very high and she was the sole financier of the daily expenses of both herself and the 1<sup>st</sup> and 2<sup>nd</sup> defendants and further that they were abusive to her. She pleads that she demanded for her share of the property which demand was neglected. She subsequently conducted an official search which showed that the 1<sup>st</sup> defendant is registered as the sole proprietor. She pleaded that the 3<sup>rd</sup> defendant unlawfully processed documents which were not in order and unlawfully issued title to the 1<sup>st</sup> defendant. She cited absence of executed consents, land transfer, or sale agreement. She pleaded conspiracy between the defendants to defraud her of her investment. She asserted that she and the 2<sup>nd</sup> defendant are the absolute owners and that there has been no change. In the amended plaint, she asked for the following orders :-

- a. A permanent injunction restraining the defendants, by themselves their agents and/or servants or any person acting in their authority from transferring and/or disposing or in any way parting possession with the suit property, to wit, title No. Kwale/Ukunda/4512.
- b. Orders of mandamus be issued to the 3<sup>rd</sup> defendant, its agents or officers or any other person(s) be compelled to revoke the title Kwale/Ukunda/4512 issued on 7/2/2012 to the 1<sup>st</sup> defendant and order the title issued on 24 August 2011 to the plaintiff jointly with the 2<sup>nd</sup> defendant to remain valid the subject of this suit (sic).
- c. Special and general damages.
- d. Costs of and incidental to this suit.
- e. Interest on (c) and (d) above at court rates from the date of filing till final disposal of the suit.

2. The 1<sup>st</sup> and 2<sup>nd</sup> defendants entered appearance and filed a defence on 25 June 2013. A second defence was later filed on 11 August 2016. On 17 February 2016, it was pointed out that there are two defences on record and counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants abandoned the defence filed on 25 June 2013 and adopted the defence dated 10 August 2013 and filed on 11 August 2013. In this defence, the 1<sup>st</sup> and 2<sup>nd</sup>

defendants admitted that the plaintiff solely purchased the suit property and solely paid for its development. It is however pleaded that there was agreement that the 2<sup>nd</sup> defendant would have 50% of the property as appreciation for her having agreed to leave her family and employment back home to come and reside in Kenya with the plaintiff and for caring for her. It is pleaded that the plaintiff and the 1<sup>st</sup> and 2<sup>nd</sup> defendants moved into the house, but subsequently the plaintiff got married, and since she wanted space and privacy, they moved out of the house. It is pleaded that in fulfilment of the agreement between the plaintiff and the 2<sup>nd</sup> defendant, entered into before they came to Kenya, the plaintiff decided to transfer her share to the 1<sup>st</sup> defendant and consequently the 2<sup>nd</sup> defendant also transferred her share to the 1<sup>st</sup> defendant as she was contemplating going back home to take care of her ailing parents. The 1<sup>st</sup> defendant thus became the sole registered owner of the suit property. They asked for the dismissal of the suit with costs.

3. For the 3<sup>rd</sup> defendant it is pleaded that the suit property is registered in the name of the 1<sup>st</sup> defendant. It is denied that the registration was by way of fraud. It is averred that a letter of consent and transfer forms were presented for the transfer of the property to the 1<sup>st</sup> defendant.

4. The plaintiff was previously being represented by counsel, but on 24 October 2016, she filed a notice to act in person. She remained unrepresented thereafter.

5. In evidence, she adopted a witness statement that she had recorded on 6 May 2013. In that statement, she stated that in May 2011, she orally agreed with the 2<sup>nd</sup> defendant to purchase the suit property and that she solely paid for the purchase. The property was then registered in her name and the name of the 2<sup>nd</sup> defendant in equal shares. She then financed development of the house and they moved into the house in November 2011. She later moved out. She stated that it was agreed that she would be refunded her 50% share as she was no longer in occupation of it. She stated that the 1<sup>st</sup> and 2<sup>nd</sup> defendants requested her to convey her 50% share to the 1<sup>st</sup> defendant to hold in trust for herself (plaintiff) to enable them use the title to secure a loan so that they can run a business and refund her the 50% share. They would then retain the house. She made a demand for her share but it was neglected, and later, when she did a search, she was astonished to find out that the property is registered in the name of the 1<sup>st</sup> defendant. She learnt that the 1<sup>st</sup> defendant wanted to dispose it and that the 2<sup>nd</sup> defendant was back in Europe. She feared that the property would be disposed without her being refunded her 50% share. She produced copies of emails exchanged, the demand letter, copy of title in her name and the 2<sup>nd</sup> defendant, and the search showing that the property is now in the sole name of the 1<sup>st</sup> defendant.

6. Cross-examined, she testified that she did not have a written agreement for the sale. The title was issued in her name and that of the 2<sup>nd</sup> defendant. She denied transferring the land to the 1<sup>st</sup> defendant and denied having signed the transfer instrument transferring the land to the 1<sup>st</sup> defendant. She and the 2<sup>nd</sup> defendant are Austrian and they came to Kenya as friends. She and her husband (Salim), and the 1<sup>st</sup> and 2<sup>nd</sup> defendants lived together in the house, but she moved out on 10 March 2012. She denied that she left the house because she had transferred her share to the 1<sup>st</sup> defendant. She denied that the 1<sup>st</sup> defendant is holding the title in trust.

7. With the above evidence, the plaintiff closed her case.

8. The 1<sup>st</sup> and 2<sup>nd</sup> defendants did not avail themselves to court despite numerous adjournments being given in their favour and their case was closed without any evidence being tendered.

9. For the 3<sup>rd</sup> defendant, Ms. Widal Al-Amin, a District Land Registrar, Kwale, testified. She testified that the land was previously owned by one Juma Bakari who transferred it to the plaintiff and the 2<sup>nd</sup> defendant. The property was subsequently transferred to the 1<sup>st</sup> defendant. She testified that there is a transfer document and a letter of consent and that stamp duty was paid. The passport numbers for the transferors were given. She testified that ordinarily an original title deed accompanies the transfer and it is then cancelled after which a new title deed is issued in the name of the purchaser (or transferee). In this instance the original title deed of the plaintiff and 2<sup>nd</sup> defendant was in the file though not cancelled.

10. Cross-examined by counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, she stated that the failure to cancel the title deed of the plaintiff and 2<sup>nd</sup> defendant may have been an oversight. She affirmed that a transfer was effected to the 1<sup>st</sup> defendant.

11. Cross-examined by the plaintiff, she could not tell whether or not the signature in the transfer was of the plaintiff. She was not in position to tell that the plaintiff never signed the transfer and was not aware of any certification from the police that the signatures in the transfer were not of the plaintiff. She added that the proprietor of the land is the person last entered and in this instance it is the 1<sup>st</sup> defendant.

12. I invited the parties to file written submissions which they did. I have taken these into account.

13. In his submissions, Mr. Aboubakar, learned counsel for the 1<sup>st</sup> and 2<sup>nd</sup> defendants, submitted inter alia that there is no prayer in the plaint seeking nullification of the title of the 1<sup>st</sup> defendant. He nevertheless submitted that title can only be cancelled if obtained by fraud, misrepresentation, or if obtained illegally, unprocedurally or through a corrupt scheme. He submitted that there are no specific claims that the 1<sup>st</sup> defendant acquired the title on any of these grounds. He pointed out that the plaintiff has not pleaded any particulars and submitted that she is bound by her pleadings. He submitted that if the case is of breach of trust she has failed to file such particulars. On the claim of the plaintiff that she did not sign the transfer, counsel submitted that this was never pleaded by the plaintiff; that she failed to call the witness who attested to her signature; and that she failed to adduce any forensic report or a document examiner's report. He thought that the suit should be dismissed.

14. Mr. Makuto, learned State Counsel, for the 3<sup>rd</sup> defendant, fully relied on the evidence on record and did not make any submissions.

15. I must say that the plaintiff's submissions are quite jumbled up, but I will pardon that, considering that she is acting in person. There is

some reference to a dismissed application (which is presently not relevant) and that the 1<sup>st</sup> and 2<sup>nd</sup> defendants have not furnished the original title (again not relevant). What I can pick out as useful is her submission that the 1<sup>st</sup> and 2<sup>nd</sup> defendants did not testify. There is also contention that the transfer to the 1<sup>st</sup> defendant was not done properly and that her title is still intact.

16. I take the following view of the matter.

17. A case is determined through the pleadings of the parties and that is where I opt to start. The plaintiff pleaded to have purchased the suit property and to have developed it using her own funds. That is admitted by the 1<sup>st</sup> and 2<sup>nd</sup> defendants. It will however be recalled that the 1<sup>st</sup> and 2<sup>nd</sup> defendants in their defence averred that there was an agreement that 50% of the share of the house would be registered in the name of the 2<sup>nd</sup> defendant despite her not making any monetary contribution. It was said that this was an appreciation for her having agreed to stay in Kenya and care for the plaintiff. Not much will arise out of this because the plaintiff herself does not contest the 50% share to the 2<sup>nd</sup> defendant. The consent to transfer the land to the plaintiff and the 2<sup>nd</sup> defendant was issued on 11 May 2011 and the property was transferred to them on 24 August 2011. Up to that point in time, there is no dispute.

18. The issue here is the transfer to the 1<sup>st</sup> defendant which I can see was effected on 7 February 2012, just about 6 months after the transfer of the property to the plaintiff and 2<sup>nd</sup> defendant. In her pleadings and evidence, the plaintiff avers to have moved out of the house on 10 March 2012 owing to disagreements in the communal living that they had. Her contention is that this transfer was fraudulent and she has pleaded absence of consents, sale agreement and transfer. In her evidence, she denied having executed a transfer to the 1<sup>st</sup> defendant. She also pleaded that the issue is under investigation and referred to an OB No. 27/27/9/2016.

19. I do not believe the plaintiff when she states that she never signed a transfer to the 1<sup>st</sup> defendant. Firstly, this was never the pleading of the plaintiff when she first filed suit. In her original plea, she pleaded that it was agreed that she would convey her share of the property to the 1<sup>st</sup> defendant to hold in trust so that the 1<sup>st</sup> and 2<sup>nd</sup> defendants can obtain a loan and refund her 50% stake in the property. This is also what she recorded in her statement which is now her evidence in chief. In it she avers that she demanded her share of the property. She could not of course demand to be given her 50% share of the property if she had not first transferred it to the 1<sup>st</sup> and/or 2<sup>nd</sup> defendants. If she had not transferred her stake, then there would be nothing to demand, because she would still be holding it. Nowhere in her statement did she say that she never signed a transfer to the 1<sup>st</sup> defendant. In fact, her fear was that the property would be disposed of without her being refunded her 50% stake.

20. I am buttressed in my finding because despite the issues herein having taken place in the year 2012, and this suit having been filed in the year 2013, no complaint of any forgery was made until 27 September 2016, for this is the date of the OB number provided. This report, to me, was clearly an afterthought. If indeed there was no transfer executed by the plaintiff, I think this would have been consistently asserted from the year 2012 and I would expect that a report would have been made at about that time.

21. I am thus not persuaded with the plaintiff's claim that she never voluntarily transferred the property to the 1<sup>st</sup> defendant. I think the plaintiff and 2<sup>nd</sup> defendant agreed that the property would be transferred to the 1<sup>st</sup> defendant to hold absolutely but with the understanding that he would refund the plaintiff's 50% stake upon the transfer.

22. In my view, this is a case where the court can impose a constructive trust. As stated in *Hanbury & Martin, Modern Equity*, 14<sup>th</sup> Edition, at page 291-292, "*the principle is that where a person who holds property in circumstances in which in equity and good conscience it should be held or enjoyed by another, he will be compelled to hold the property on trust for that other.*" In our case, the 1<sup>st</sup> and 2<sup>nd</sup> defendants never contributed to the purchase of the property or to its development. Granted, it appears as if the plaintiff was ready to share the property with the 2<sup>nd</sup> defendant arising out of their friendship which was done. But there is no other explanation as to why the plaintiff would transfer her property to the 1<sup>st</sup> defendant to hold absolutely apart from that he was to subsequently make payment for it. I am persuaded that this transfer to the 1<sup>st</sup> defendant was to enable the 1<sup>st</sup> and/or 2<sup>nd</sup> defendant use the property to pay off the interest of the plaintiff in the property so that the 1<sup>st</sup> and 2<sup>nd</sup> defendants could hold it absolutely. Not to hold otherwise would lead to an unjust enrichment to the 1<sup>st</sup> defendant who contributed nothing towards the property. Imposition of a constructive trust, as was stated by the Court of Appeal in the case of **Twalib Hatayan & Another vs Said Sagar Al-Heidy & 5 others (2015) eKLR**, "*is thus meant to guard against unjust enrichment.*"

23. In my view, this is a fit case for the imposition of a constructive trust for the 50% share of the plaintiff. Instructively, the 1<sup>st</sup> and 2<sup>nd</sup> defendant chose not to appear in court to explain themselves or justify the transfer of the property to the 1<sup>st</sup> defendant. As I have stated, I do not see how the plaintiff would for nothing, transfer her stake of the property to the 1<sup>st</sup> defendant as the two had no relationship whatsoever.

24. I am thus persuaded to enter judgment for the plaintiff for a 50% share of the suit property. I issue a declaration that the 1<sup>st</sup> defendant holds half share of the suit property in trust for the plaintiff. Since the plaintiff wishes to have her share liquidated, I order that the property be valued by the Government Valuer, resident in Kwale County, and upon valuation, the 1<sup>st</sup> defendant to within 3 months of the valuation, pay the plaintiff 50% of the value of the property. In default, the property be sold by way of public auction with the forced sale value being the reserve price, and 50% of the proceeds to be paid to the plaintiff. The auctioneer to conduct the auction be appointed by the Deputy Registrar of this court and the Deputy Registrar to receive the report of such auction and be at liberty to make such further orders in execution of this judgment. The costs of the valuation and the costs of the auction will be shouldered by the 1<sup>st</sup> defendant or will be deducted from what will be due to the 1<sup>st</sup> defendant if the plaintiff is forced to shoulder the same in order to give effect to the judgment.

25. The only issue left is costs of this suit. The plaintiff will have the costs of this suit to be shouldered by the 1<sup>st</sup> defendant.

26. Judgment accordingly.

**DATED AND DELIVERED THIS 4TH DAY OF NOVEMBER, 2021**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

**AT MOMBASA**