REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

MILIMANI LAW COURTS

ELC CIVIL APPEAL NO. 62 OF 2019

BETWEEN

CHARLES IRACHI MUHOMA...APPELLANT

AND

SHADRACK KERWA MUHOMA..RESPONDENT

(*Being an Appeal from the Judgement of Hon C.Obulsta SRM*

delivered on 15th April 2014 in Milimani Commercial Court

CMCC No. 11586 of 2003).

JUDGEMENT

1. The Appellant and the Respondent are brothers. The Respondent who was working with Kenya Agricultural Research Institute (KARI) purchased plot No.251 which later became LR No. Nairobi Block /139/876 (suit property) through transfer of a share in Marurui Farmers Company Limited. The share was owned by Peter Joseph Gichuki Njuguna who transferred it to the Respondent on 21st March 1991.

2. It is said by the Appellant that the Respondent approached him and told him that he had no funds to develop the suit property. It was then agreed between the two that they develop a bungalow on the suit property which was to be let out and rental income shared equally between the two. The two agreed that the cost of putting up the bungalow was Kshs.720,000/=.

3. The Appellant contributed Kshs.360,000/- and the Respondent contributed KShs.360,000/= being Kshs.330,000/= in cash and the other Kshs.30,000/= being the cost of purchase of the suit property. The construction then started in 1991 and was completed in 1999. Instead of the Respondent letting out the bungalow, he moved in with his family. This is what prompted the Appellant to file a suit in the Lower Court in which he sought a declaration that he was entitled to half of the rental income from the suit property with effect from 1999 and in the alternative sought an order that the suit property be sold so that the two can share the proceeds equally.

4. The suit was fully heard and in a Judgement delivered on 15th April 2014, the trial magistrate found that the Appellant had not proved his case on a balance of probability. The trial magistrate however found that the Appellant was only entitled to half the amount which the Respondent had agreed to give to the Appellant based on a letter dated 27th January 1998 in which the Respondent had indicated that the land and developments comprised in the suit property was worth Kshs.500,000.= and that the suit property was owned by him and the Appellant in equal shares.

5. It is the Judgement of the Lower Court which prompted the Appellant to file this appeal in which he raised the following grounds of Appeal.

> ***i. The trial Magistrate erred in facts and the law in failing to find that the suit land, Plot No.251 within Marurui Farmers Company Limited also known as Nairobi Block /139/876 was the joint property of both the Appellant and the Respondent who bought the same and developed it in equal shares.***
>
> ***ii. The trial Magistrate erred in facts and the law in failing to find the Respondent illegally and unprocedurally registered himself as the proprietor of Title No. Nairobi Block /139/876 to the total exclusion of the Appellant in a fraudulent manner.***
>
> ***iii. The trial Magistrate misapprehended the facts of the case and proceeded to apply the wrong principles of the law in arriving***

at his judgement.

iv. The trial Magistrate erred in facts and the law in failing to find that despite Title No. Nairobi Block /139/876 being registered as a first registration the same does not disentitle the Appellant of compensatory rights on the basis of the current market value of the land and the development thereon.

v. The trial Magistrate erred in facts to establish that the family members, the Appellant and the Respondent did not intend and anticipate to have a legal dispute regarding purchase and development of Title No. Nairobi Block /139/876 in equal share and the consideration of the totality of their circumstances should have been considered.

vi. The trial Magistrate was biased against the Appellant and by large considered extraneous issues by arriving at a Judgement that worked injustice against the Appellant.

vii. The judgement has substantially contradicted the provisions of the Land Act and the rules made thereunder.

6. Directions were given on 23rd July 2019 that the Appeal was to be disposed of by way of written submissions. The Appellant filed his submissions on 30th July 2019. The Respondent did not file any submissions and if any were filed, then the same are not in the court file. I have carefully gone through the Record of Appeal which contains proceedings and the Judgement which is impugned. As a first Appellate Court, my duty was well captured in the case of **Selle & Another Vs Associated Motor Boat Co Limited & Others (1968) EA 123** where it was held as follows:

> ***"An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (*Abdul Hameed Saif v. Ali Mohamed Sholan,* (1955), 22 E.A.C.A. 270)."***

7. Having considered the grounds in the memorandum of appeal, the proceedings and Judgements as well as the submissions , the following issues emerge for determination;-

i. Did the Appellant contribute kshs.360,000/- towards the development of the suit property.

ii. Was the Appellant entitled to rental income from the suit property?

iii. Was there an agreement /arrangement that the Appellant and the Respondents were to be registered as joint owners of the suit property.

iv. Was there anything wrong in the Respondent registering the suit property in his name.

v. Was the trial magistrate correct in awarding Kshs.250,000/= being half of the amount which the Respondent indicated in his letter of 27th January 1998.

8. The Appellant testified that he contributed a total of Kshs.360,000/= being half the 720,000/= which they had agreed would be the cost of construction of the bungalow on the suit property. Though the Appellant stated that he took loans from Mwalimu Sacco and paid the Respondent, there is no evidence that he took any loan. There is also no evidence that he paid the sums he claims to have paid between 1991 and 1998. The Respondent in one of the letters produced by him showed that the appellant had applied for a loan but the loan could not be approved as the application did not contain all the required documents.

9. The Appellant's witnesses including his mother and brother merely said that the Appellant gave the Respondent Kshs.30,000/= . According to the mother, the amount was for consent for transfer of the suit property to the Respondent. For the Appellant's brother who testified on his behalf, the Kshs.30,000 was for construction. It was not said when this monies were paid. The Appellant simply said that it was given to the Respondent at home and that more money was given in Nairobi and other forums. The trial magistrate arrived at a correct finding that the Appellant had not proved that he contributed Kshs.360,000/=.

10. The Appellant claimed that the Respondent moved into the suit property in 1999. Contrary to the allegations by the Appellant, evidence on record shows that the house on the suit property was not complete as at 1999. The Respondent produced receipts showing that the house was being constructed even as late as 2000 , 2001 and 2002, that is the time the Respondent applied for electricity connection. The Respondent's evidence which was not challenged is that only one room where the caretaker was staying was habitable. The Respondent called a witness who supported his evidence. It is therefore not true that the house on the suit property was occupied and was generating rental income. The trial magistrate considered all these evidence and came to a finding that there was no basis for the Appellant to claim rental income from a house which was incomplete.

11. There was no evidence adduced by the Appellant to show that there was an agreement that the Appellant and the Respondent were to be registered as joint owners of the suit property. The trial magistrate found that the mere fact that he may have given the Respondent some money, did not automatically qualify him to be a joint owner. The trial magistrate correctly found that the suit property had been purchased solely by the Respondent and not as family property. There was therefore no basis upon which the Appellant would claim joint ownership.

12. The Respondent processed title in his own name. This is because he purchased the suit property as an individual. There was therefore nothing wrong in the Respondent registering the suit property in his own name. The trial magistrate found that the Appellant may have given the Respondent some money as the Respondent acknowledged in some of the correspondence but this did not entitle the Appellant to insist to be registered as a joint owner.

13. The trial magistrate found that the Appellant had not proved that he was a joint owner of the suit property and that therefore there was no basis for seeking any rental income or even to an order that the suit property be sold and proceeds from there shared equally . These findings by the trial magistrate were based on the evidence adduced and were based on sound reasoning.

14. The trial magistrate decided to award the Appellant Kshs.250,000 /= being half of what the Respondent had indicated in his letter of 27th January 1998. The trial magistrate awarded this amount because he found that the Appellant may have given some money to the Respondent but not as a joint owner. This amount I can say was given ex-gratia to cushion the Appellant for any monies he may have given the Respondent but not because it was half his share of what the Respondent had indicated as the value of the land and developments. The Respondent is not a surveyor and what he may have thought to be the market value may have been far in excess of what the real value of the incomplete house together with land was.

15. In any case, the Respondent had testified that he wrote the said letter after his wife had threatened to kill him and that he was trying to secure his interest by saying that the property was jointly owned by him and the Appellant. I therefore find that Appellant’s appeal lacks merit. The same is hereby dismissed with no order as to costs as the parties herein are siblings.

Dated, Signed and delivered at Nairobi on this 5th day of May 2020.

E.O.OBAGA

JUDGE

In the absence of parties who had been duly notified that Judgement was to be delivered virtually through Microsoft teams.

Court Assistant: Hilda

E.O.OBAGA

JUDGE