



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 204 OF 2014

JAMES MAINA KIMANI.....PLAINTIFF

VERSUS

POLINE WAWIRA NJOKA ALIAS

PAULINE WAWIRA MAINA.....DEFENDANT

JUDGMENT

Background

The plaintiff vide a plaint dated 8th November 2013 sought the following orders:-

- (a) A declaration that the plaintiff is solely entitled to ownership and possession of the Plot No. 20727/99 (IR 121283) and L.R. No. NGARIAMA/NGIRIAMBU/3924.***
- (b) A declaration that the defendant holds L.R. No. NGARIAMA/NGIRIAMBU/3924 and Plot No. 20727/99 (IR No. 121283) in trust for the plaintiff and an order for determination of the trust.***
- (c) A mandatory order directing the defendant to transfer the suit properties L.R. No. NGARIAMA/NGIRIAMBU/3924 and Plot No. 20727/99 (IR No. 121283) to the plaintiff failure to which the Deputy Registrar of the High Court do sign the transfer in favour of the plaintiff and to dispense all the requisite documents and Titles.***
- (d) A permanent injunction restraining the defendant from interfering with the plaintiff's quiet enjoyment and occupation of the suit properties.***
- (e) That the defendant do pay costs of and incidental to this suit.***
- (f) Any other relief the Court may deem just to grant.***

The defendant filed a statement of defence dated 30th July 2014 denying the plaintiff's claim and sought to have the suit dismissed with costs.

Plaintiff's summary of Facts

The plaintiff testified as PW1 and stated that he is a Kenyan citizen working in the United States of America as an assistant accountant. He said that he has known the defendant from the year 1996 when he was working for Kenya Airways as an assistant accountant. He came to know the defendant when she came to his house selling milk. They became friends and even took her to college. After college, the defendant got employed with an Insurance Company known as Gemini Insurance Company. They even got a child by the name Collins born on 14/11/1998. They lived together after getting the child as husband and wife. In the year 2001, the plaintiff moved to the United States of America after securing a job. However, he continued supporting the defendant and the child. Before leaving for the USA, the plaintiff was given final dues by Kenya Airways in 2001. By then, the defendant had stopped working for a Company she was working for namely Family Insurance Brokers. That company had a sister company which was selling land namely Daykio Plantation Ltd. One of the properties they were selling was situated at Membley Estate in Nairobi. Being an employee of Family Insurance Brokers which was a sister company, the defendant was being considered as an employee of sister Company. When the plaintiff got his final dues on 21/11/2001 and after discussing the prospect of owning a family property, he withdrew a sum of Ksh. 300,000/= from his final dues and went with the defendant to Daykio Plantation Ltd offices situated at Family Bank building where he paid a sum of Ksh. 100,000/= which was the initial deposit for the plot. On 5th December 2001, he left to the United States of America but continued paying the balance of the purchase price towards the acquisition of the said plot. He used to send money to the defendant. Since the defendant was the one making the payments and being an employee of a

sister company to the Vendor, the initial receipt was issued in her name. In the course of 2002, he had paid the balance in the sum of Ksh. 250,000/= including legal fees. He produced a Kenya Commercial Bank account statement which shows a cheque deposit from Kenya Airways of Ksh. 804,537.10. He accompanied the defendant to Daykio Plantation Ltd where he paid the sum of Ksh. 100,000/=. In December 2001, he left for the USA. He continued sending money through either Western Union or Money Gram. In mid-2002, he asked the defendant to open a bank account where she could be depositing the money he was sending her. On 20th June 2002, the defendant sent him an e-mail confirming that she had opened a bank account at Barclays Bank Embu Branch account number 129 86 93 in her name. After he finished paying for the plot at Mimbley, the plaintiff asked the defendant to look for a piece of land in either Kirinyaga or Embu. The defendant used to update him on the progress of the plot at Mimbley and even proposed that they build a house in that plot. He also referred to numerous e-mails one of such e-mails is dated 7/7/2003 where the defendant was giving a proposal on what kind of a house she wanted him to build in that plot.

The defendant also updated the plaintiff that the titles in respect of the plots would come out in their joint names. He referred to an e-mail dated 2nd April 2001 where she informed him that she was given the title and that there was a balance of Ksh. 10,000/= which was the lawyer's fees. The e-mails were also produced as Plaintiff's Exhibits 3 (a) (b) and (c) respectively. The plaintiff stated that he used to send the defendant money whenever she asked him through Western Union and direct bank transfer to Barclays Bank, Embu branch. The defendant could up-date him on the deposits and

withdrawals from the Barclays Bank account at Embu. He referred to one of the e-mails dated 20/9/2002 which he also produced as Plaintiff's Exhibit No. 4. He could also send some of the money through Money Gram. He stated that when this case started, he was able to get some Money Gram statements for only 10 years which he also produced as Plaintiff Exhibit No. 5. Whenever he sent money to the defendant, she could send him an e-mail acknowledging the same or they could even talk on phone. On 10th February 2005, the defendant sent him an e-mail. On 2nd February 2005, there was a Money Gram of Ksh. 1,000/- Us Dollars sent to fence the plot at Mimbley. On 5th June 2003, the defendant sent an update concerning the water connection expenses and a deposit of Ksh. 20,000/= on the Barclays Bank account. On 5th June 2003, he sent her 300 Dollars through Money Gram. He produced the same as Plaintiff Exhibit No. 6. Thereafter, he was done with the plot in Mimbley, Nairobi.

On 17th September 2003, the defendant sent him an e-mail that she had found a piece of land at Kirinyaga viable for horticulture. He sent her money to purchase the land. He identified the e-mail which he produced as Plaintiff Exhibit No. 7. The land was at a town known as Difatha near Embu town. The defendant kept on updating him on the person selling the land measuring approximately one acre. The defendant sent him photographs and letters which he produced in evidence. He sent her money to buy and build a house on it. The defendant sent him an e-mail requesting for more money when the property in Kirinyaga was being constructed. On 19th September 2005, the defendant sent him yet another e-mail and on 21st September 2005, he received another e-mail where she acknowledged receipt of some money he had sent her and confirmed that she had banked the same. He sent money on diverse dates which is reflected from Money Gram he produced. On 19th September 2005, he sent a sum of 1,400 Us Dollars. On 13th October 2005, he sent a further sum of 600 Us Dollars. He produced the e-mails as Plaintiff Exhibits No. 8 (a) (b) and (c) respectively. He said that all the monies he sent to the defendant were acknowledged on phone or e-mail. Between the year 2001 and 2010, the plaintiff was living in USA. He continued receiving e-mails from the defendant even after 2007. He was also sending school fees separate from the ones he was sending for the purchase and construction of the plot in Kirinyaga County. He referred to an e-mail dated 15th March 2010 where the defendant was talking of the title deed in respect of the Mimbley, Nairobi plot which he produced as Plaintiff Exhibit No. 9.

On 25th July 2011, the defendant sent him an e-mail in respect of the property in Kirinyaga which he also produced as Plaintiff Exhibit No. 10. The plaintiff stated that sometime in 2013, he noticed that the defendant was having affairs with numerous men. When he came back to Kenya, he asked the defendant about the properties and the defendant decided to file a case at Thika claiming that he was harassing her being CMCC No. 25 of 2013 (Thika). He produced a copy of the plaint in that suit as Plaintiff Exhibit No. 11. The defendant also refused to disclose the land reference of the plot at Mimbley, Nairobi. He engaged a surveyor who conducted a search and he managed to place a caution on the land being L.R. No. NGARIAM/NGIRIAMBUR/3924. He produced the green card as Plaintiff Exhibit No. 12. He stated that he sent money to the defendant to build a three (3) bedroom house, a fence and a gate. He also managed to get the reference of the plot in Mimbley, Nairobi being L.R. Number 20727/99. He also produced the certificate of official search as Plaintiff Exhibit No. 13. Beside the e-mails and the phone calls, the plaintiff also stated that they used to communicate with the defendant through letters which she used to send to him. He referred to one such letter dated 15/8/2006 which was produced as Plaintiff Exhibit No. 14. On 6/6/2005, the defendant gave him a plan for the Kirinyaga house which he produced as Plaintiff Exhibit No. 15.

On 26th May 2003, the defendant wrote the plaintiff another letter produced as Plaintiff Exhibit No. 16. The defendant also sent the plaintiff photographs of the house. The same was produced as Plaintiff Exhibit No. 17 (a) (b) (c) (d) (e) respectively. He said that he left Kenya Airways after being offered a job in the USA. He stated that he used to explain/specify to the defendant the purpose of the money he used to send e.g. school fees, purchase of land, construction etc. He produced two e-mail letters dated 5/9/2012 and 9/1/2008 marked Plaintiff Exhibit No. 18 (a) & (b). On 21/8/2003, the defendant sent him an e-mail updating him on the Balance in her Barclays Bank account which she stated was Ksh. 218,000/=. He produced the same as Plaintiff Exhibit No. 19. The plaintiff referred to a bundle of e-mails and correspondences between him and the defendant which he produced as Plaintiff Exhibit No. 20. He stated that he purchased the two properties in Mimbley, Nairobi and Kirinyaga as well as undertaking the development in the Kirinyaga land. He stated that the defendant finally defrauded him in registering the two properties in her personal name. He stated that the defendant registered the two properties in her name to hold the same in trust for him. He sought to have the name of the defendant cancelled and replaced with his name. He also sought for costs.

PW2 was MERU EPHANTUS MAINA who is a software Engineer. He is the Holder of Bachelor of Science Soft Ware Engineering from

Kenyatta University. He produced his degree certificate in evidence as Plaintiff Exhibit 21. He stated that he has been in the field of computers since the year 2000 and he has created over 40 software applications. He even won a certificate in Student Exhibition on mobile application. During his free time, he manages e-mails and website for many clients. In this case, he was approached by the plaintiff who wanted him to clarify whether the e-mails he had received were from Kenya. According to him, the e-mails he was given were from the defendant to the plaintiff. The plaintiff gave him his yahoo e-mails from the year 2002 to 2013. The plaintiff gave him specific e-mails adding up to 50 in number. After checking the e-mails, he was able to find out that all the 50 e-mails originated from Nairobi, Kenya. The e-mails were sent to him in the United States of America. He stated that in determining where an e-mail originated from, one has to check the e-mail header. He stated that e-mail works the way a Post Office Box operates. He said that the protocol is known as post office protocol. As an e-mail moves from one server to another, it is stamped by that server which stamp includes the internet protocol (IP) address and time when one opens the e-mail. Based on that, he was able to open the plaintiff's e-mail inbox holder and he could get the header and check where the first server originated. He could therefore determine the country where it originates from and the actual geographical coordinate of the first server. He checked through all the e-mails the plaintiff gave him and he was able to find out that it came from Nairobi in Kenya. He checked from the inbox to determine where the e-mail was sent from. After he received the e-mails, he was able to check and sample a few of them. The first was an e-mail sent by the defendant to the plaintiff. The IP address was 195 – 200. 70. 3. The IP address belongs to MTN business Kenya. He stated that MTN is an Internet Service Provider located in Nairobi city. He said that that e-mail arrived at Carlifornia Samfill in a server owned by yahoo whose IP address is 216. 136. 2264. 45 which is in the USA. The e-mail shows that it went through servers, one in Kenya (MTN) and two in the USA owned by yahoo. He referred to another e-mail dated 15/3/2005 which he stated originates from Kenya to Carlifornia. The third e-mail is dated 15/8/2005 from Nairobi to Carlifornia. He thereafter did a report which contains the technology available for understanding how e-mail works. It also contains the definition of different terms, relevant law, what body deals with issuing IP address, who is authorized in Kenya to issue the IP address, who were the Internet Registrars in Kenya between 2002 – 2005 and the current Registrars. He has also given an example of how an e-mail header looks like, on line service that he used to trace how the IP moves etc. He produced his report as Plaintiff's Exhibit No. 22.

The expert witness stated that it is not possible to hack an e-mail and also hack where they are originating from. He said that if someone hacks an e-mail account, the header would show that the e-mails were coming from USA to USA. He stated that the place of origin cannot be changed. If an e-mail is hacked, it means that someone has gained access to your e-mail account without authority. The witness further stated that since 2003, all the major e-mail providers e.g. yahoo provided security features so that if someone locks into someone else's e-mail account from a different geographical location, the provider would notify the e-mail account holder that someone has locked into his account from a different account. The provider can then give the e-mail account holder an option of either changing his password or locking the account. From the e-mails he checked, he never saw any complaint from the defendant telling the plaintiff that she had not sent any of the e-mails. If someone sends an e-mail to another person, it is going to be reflected in the e-mail folder. Any movement of the owner from its geographical location will be notified by the provider. He stated that both the two e-mails for the plaintiff and the defendant from the same provider –

Yahoo would have warned the defendant if there was any interference of her e-mail and if the e-mails did not come from her, she could have reported to the provider or the Police. In his opinion, the e-mails were sent from Kenya by the defendant to the plaintiff's e-mail in Carlifornia, USA.

The Defendant's summary of Facts

The defendant alone testified and stated that she came to know the plaintiff in 1996 as a customer while she was doing business of selling milk in Nairobi. She referred to her statement dated 6/2/2019 which she sought to be adopted in her evidence. She also referred to her list of documents dated 5/2/2019. She produced all the 24 items except Item No. 20 which is a report referred to as "*Extra Marital Report*". She stated that her relationship with the plaintiff was that of a friend and they even got a child with him. She stated that the plaintiff provided for the child until the year 2013. She gave the name of the child as Collins Kimani. The defendant testified that they had intention of becoming husband and wife with the plaintiff.

The plaintiff introduced her to his family which include brothers and sisters. The plaintiff was providing her and the child with financial support. On 5th December 2001, the plaintiff left for USA. While he was in the USA, the plaintiff was still providing the defendant and the child financial support. He could send money and instruct her through phone call or e-mail how to utilize the money. She stated that she could give money to the plaintiff's parents and siblings. She stated that they used to communicate with the plaintiff through phone calls or e-mails. She referred to Defence Exhibit No. 23 which are some of the many e-mails they were using to communicate. Whenever he sent money to the plaintiff's father, he could acknowledge receipt in writing. She stated that she shared her password with the plaintiff and that he would access all her e-mails. Being the father to her son, she stated that she did not see any reason why she should doubt him. She later changed her password in the year 2007. She referred to Defence Exhibit No. 22 which is an acknowledgment from the service provider. She referred to the evidence by PW2 who is an expert and denied having sent those e-mails. She also denied that the plaintiff sent her money to purchase the land in Kirinyaga (Embu) or to construct a house therein.

She stated that she acquired the land in Embu (Kirinyaga) in the year 2004 after taking a loan. She referred to Defence Exhibit No. 23 in support of her contention. She stated that she took a loan in 2004 which she cleared in 2005. In regard to the land in Nairobi, she stated that she paid the initial deposit of Ksh. 100,000/= which she withdrew from her Sacco. She also stated that she took a loan in the year 2001. She stated that she did not get the money the plaintiff withdrew from his account being his final dues from the Kenya Airways. She stated that the plaintiff did not give her any money for the purchase of the plot. She confirmed having received money from the plaintiff between 2003 – 2012. She said that the money was to take care of his children, her son, the plaintiff's parents and siblings. She stated that the total amount came to Ksh. 2,841,715/=. She stated that that amount is not commensurate with the amount she used to construct the house in Embu which she stated is a sum of Ksh. 3.5 million. She denied holding the two properties in trust for herself and the plaintiff. She stated that she has not developed the plot in Nairobi because the plaintiff placed a caution. She wants the Court to order the removal of the same.

Legal Analysis and Decision

I have considered the testimony of the plaintiff and his witness who is an IT expert. I have also considered the evidence of the defendant and the submissions by the counsels.

Undisputed Facts

The following are undisputed facts:-

- (1) *The plaintiff and the defendant had been in intimate relationship and were blessed with one issue namely Collins Kimani.*
- (2) *The said Collins Kimani was born on 14/11/1998.*
- (3) *In the year 2001, the plaintiff moved to the United States of America (USA).*
- (4) *The plaintiff and the defendant continued being friends and the two kept communicating through telephone, e-mail and letters including photos.*

From the pleadings and the evidence adduced, the following are the probable issues for determination:-

- (1) *Whether the defendant holds plot Number 20727/99 (IR 121283) and L.R. Number NGARIAMA/NGIRIAMBU/3924 in trust for the plaintiff?*
- (2) *Whether the monies sent by the plaintiff to the defendant via Money Gram were the sole purpose of acquisition and developing the suit properties?*
- (3) *Whether the defendant's e-mail account were hacked?*
- (4) *What appropriate orders to issue?*
- (5) *Who will bear the costs of this suit?*

Whether the defendant holds Plot No. 20727/99 (IR 121283) and L.R. No. NGARIAMA/NGIRIAMBU/3924 in trust for the plaintiff?

There is no dispute that the plaintiff and the defendant were intimate friends and they got a child out of their relationship. It can also be discerned from the evidence that the two had big plans of becoming a family as can be seen from the correspondences exchanged between the two. In an e-mail sent by the defendant to the plaintiff on Thursday, June 2, 2002 at 10.13 a.m, the defendant was updating the plaintiff of opening a current account with Barclays Bank of Kenya Limited. The e-mail reads as follows:-

"..... I received Ksh. 15,200 which you sent and a big thank you from me. I managed to open a current account with Barclays Bank of Kenya and not Co-operative as earlier advised"

In yet another e-mail sent by the defendant on Friday 20th September 2002 at 5.17 a.m, the same reads in part as follows:-

"..... He brought my receipt for the twelve thousand that we paid and a letter saying one can pay within thirty-six months (3 years). There is Ksh. 10,000/= for the title deed on top of the Ksh. 200,000/=."

Again on Friday 20th September 2013 at 6.30 a.m. the defendant was updating the plaintiff on the progress of the plot in Nairobi and stated as follows:-

"I know some people can take advantage without caring but for me, I always stand on the promises that I made to you over 15 years ago. I keep my word and if you were here, you would commend me for that. Finally, our title deed is out and we are now proud owners of a prime plot within Nairobi. I will collect it after I am through with this launch"

As regards the land in Kirinyaga (Embu), the parties also exchanged correspondences. On Thursday 19th September 2013 at 11.09 p.m, the defendant sent an e-mail to the plaintiff as follows:-

"I first went to see that Mzee coz I don't want anything to delay me next month. On ownership of that land (title deed) leave everything to me if you trust me and are proud of what am doing..... Even the other plot at K.U which we wanted to put our big house, has no title deed upto now. I feel you want to use title as way of delaying me but am determined to finish that house before December"

On Tuesday 15th March 2005 at 8.33 a.m, the defendant sent an e-mail to the plaintiff as follows:-

"..... The title deed shall have both of our names and that was automatic and should not be worried ama unaona kama naweza

kakuruka. I cannot do that coz it makes my heart happy when we have everything jointly”.

From the samples of the e-mails sent by the defendant to the plaintiff, it is instructive that the plaintiff was the sole and major contributor of finance toward the purchase of the plot Number 20727/99 (IR No. 121283) and land parcel No. NGARIAMA/NGIRIAMBUR/3924. It is also clear that the plaintiff was the one who financed the construction of the house in land parcel No. NGARIAMA/NGIRIAMBUR/3924. That can be seen from the e-mail sent by the defendant on Friday 30th September 2005 at 11.17 a.m. which reads in part as follows:-

“..... All is well and here is my budget till the house gets to rinal. Y 10 Chuma 31 at 450 per one, Sand 10,000/= for rental, Concrete 8,000/= for rental cement 30 bags for rental at 17,250, binding wire 10 kg @ 100 per kg. and labour for one week is 8,520 /=. They are doing the 5th and 6th course tomorrow. Total costs for tomorrow is 58,720/=. Next week we only need for labour and add one lorry of stone of 6 inch for the inside rooms. I will also book a tree so that by the time they are through with rinal next week, we can have timber ready for roof top. Two weeks from now is when we need 65 mabati for roofing and nails. Do we go for coloured mabati and if we choose them, tell me which colour you would like best (blue, green or red) or we go for the normal mabati. Coloured one are going for 650 per one and normal ones is 450 per one. I hope it's still within our budget. From there, we can now start water/electricity installation.

Thank you for being with me all the way as we work together”.

Again on Wednesday the 19th October 2005, the defendant sent another e-mail to the plaintiff in the following terms:-

“..... What is stressing me is only that we have expenses to meet on Saturday and I don't have enough but otherwise you have made me so happy and proud with the effort you have put in that building. I hope it will bring so much happiness into our lives. We have to sacrifice a lot since as you can see from the list that I had sent you, we are almost through”.

The e-mails, phone calls and the photograph which the defendant sent to the plaintiff confirmed that the plaintiff was literally the one financing the purchase of the two properties and the construction of the house in Embu land being NGARIAMA/NGIRIAMBUR/3924. The defendant was giving the plaintiff the purchase price in respect of the two properties and pushing to have the payments wired to the last instalment. After the properties were bought, she came up with the Idea of construction and gave him the breakdown of the materials required and their costs and always reminding him that she was a trustworthy and reliable wife and assurance that the two properties will be registered in their joint names.

There is no evidence showing that the defendant made any contribution towards the purchase of the two properties or the construction of the house. The only job the defendant was performing was supervising the construction work and overseeing the purchase of the two properties as can be seen from one of the e-mails she sent to the plaintiff for Saturday 24th September 2005 at 2.16 a.m. where she stated as follows:-

“I am happy it's a Saturday and I will go and see our house. Immediately we are through with the house, you will have to come back and join us coz I also feel lonely and want you by my side. The job that you have given me of supervising is not easy but am strong enough to do it. Thanks for giving it to me. I will not let you down”.

The above e-mail is a clear confirmation that indeed the defendant did not make any financial contribution except supervising the buying and construction of the house(s) in the two properties. The defendant also beside demanding payments for the purchase of the suit properties and the construction of the five-bedroom house kept him up-dated on every step of the transaction including application to the Land Control Board for consent and transfer. The defendant would also acknowledge the payments she was receiving through Money Gram and direct bank transfer and up-date the plaintiff on the utilization of the same.

Though the defendant denied the plaintiff's claim and alleged that her e-mail account was hacked, she did not call any witness to challenge and/or controvert the evidence of the expert witness called by the plaintiff. The Information Technology (IT) witness called by the plaintiff gave clarity how e-mails operate and how hacking can be detected and reported to the relevant authorities. The witness gave the defendant e-mail account a clear bill and ruled out any possible hacking as alleged by the defendant. The entirety of the evidence adduced by the plaintiff clearly shows that he has proved his claim against the defendant to the required standard.

What are the appropriate orders to issue?

having returned with a verdict that the plaintiff has proved his case on a balance of probabilities, I now enter judgment in the following terms:-

(1) A declaration be and is hereby made that the defendant holds land parcel No. NGARIAMA/NGIRIAMBUR/3924 and plot No. 20727/99 (IR No. 121283) solely in trust for the plaintiff.

(2) A mandatory order directing the defendant to transfer the suit properties L.R. No. NGARIAMA/NGIRIAMBUR/3924 and Plot No. 20727/99 (IR No. 121283) to the plaintiff failing which the Deputy Registrar of this Honourable Court do sign the transfer documents in favour of the plaintiff and to dispense with all the statutory requirements and titles.

(3) A permanent injunction be and is hereby issued restraining the defendant, her servants, employees, agents or any person(s) acting under her directions from interfering with the plaintiff's quiet enjoyment, possession and occupation of the suit properties namely L.R. No. NGARIAMA/NGIRIAMBUR/3924E and Plot No. 20727/99 (IR 121283).

(4) In view of the previous relationship between the plaintiff and the defendant which gave rise to a son namely Collins Kimani, I order each party to bear their own costs of this suit.

READ, DELIVERED AND SIGNED IN OPEN COURT AT KERUGOYA THIS 21ST DAY OF MAY, 2021

.....

E.C. CHERONO

ELC JUDGE

In the presence of:-

- 1. Ms Muthoni holding brief for Wanjiru Wambugu*
- 2. Ms Wanjiru Waweru holding brief for Kiplagat*
- 3. Kabuta – Court clerk*
- 4. Plaintiff - absent*
- 5. Defendant – absent.*