



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 110 OF 2009

BRIGITIE KORNPLAINTIFF

-VERSUS-

KAHINDI MSANZU NDURYADEFENDANT

JUDGMENT

(Suit by the plaintiff to be declared owner of the disputed property; claim by the plaintiff that she is owner of the disputed property because she financed the defendant to purchase it and to construct on it; plaintiff thus alleging that the property is held in trust for her; defendant disputing the plaintiff's suit and asserting that the money that was given to him was given as a gift out of love and affection and thus the property wholly belongs to him; defendant also filing a counterclaim alleging that the plaintiff came to the suit property and destroyed his garden and other things; plaintiff not attending court to testify; plaintiff instead donating a power of attorney and the donee being the plaintiff's witness; donee not competent to testify on matters of fact and matters peculiarly within the knowledge of the plaintiff; plaintiff's suit thus not proved on a balance of probabilities; plaintiff's suit dismissed; no evidence tendered to prove the counterclaim; counterclaim dismissed)

A. Introduction and Pleadings

1. This suit was commenced by way of a plaint which was filed on 17 April 2009 and subsequently amended on 25 May 2009. The suit was originally filed in the High Court before it was later transferred to this court upon its creation following the Constitution of Kenya, 2010. In the amended plaint, it is pleaded that between the year 2003 and 2008, the plaintiff and the defendant were lovers, living together as husband and wife most of the time. The plaintiff (who is of Austrian origin), pleaded that she desired to have a residence in Kenya and to build other houses belonging to her and her boyfriend (the defendant) capable of being rented, and for that purpose, purchased a portion of the parcel of land known as plot No. 3847/III/MN (the suit property) and constructed houses on the said land at a cost of Kshs. 4,000,000/= or thereabout. The plaintiff contended that she trusted the defendant to do the construction and pursue the registration of the suit property. The plaintiff claimed that after securing the title to the suit property, the defendant converted the same to be his, for his use, to the exclusion of the plaintiff. The plaintiff averred that if the title to the suit property is in the defendant's name, the defendant holds the same in trust, as the plaintiff was the sole financier. She pleaded that in December 2008 and proceeding to January 2009, the defendant declared himself the sole owner of the property and barred the plaintiff from accessing the property or seeking accounts of the property's income. She pleaded that she fears that the defendant intends to convert the property for his sole use to her exclusion. In the suit, the plaintiff has asked for judgment against the defendant for the following:-

- a. A declaration that the plaintiff is the rightful proprietor of the portion of parcel of land known as 3847/III/MN and that the defendant holds it in trust.
- b. An order directing the defendant to effect transfer of the property to the plaintiff failing which the Deputy Registrar of this court to sign a transfer in favour of the plaintiff.
- c. An order directing the defendant to account for the rentals accruing from the property from the months of October, 2008 to the date of judgment.
- d. Any other and further order this court deems fit to grant.
- e. Cost of this suit.

2. The defendant opposed the suit by filing a defence and counterclaim. In his statement of defence, he pleaded that in the year 2003 he got romantically involved with the plaintiff, but denied that they were cohabiting as husband and wife. He denied that the title of the Plot No. 3847/III/MN is registered in his name and further denied that he holds title in trust for the plaintiff. He also denied that the plaintiff financed

the purchase of the suit property. The defendant stated that the plaintiff is not his business associate in any venture, therefore, he is not obligated to render any accounts to the plaintiff. The defendant averred that the plaintiff is neither a resident nor holder of a work permit and her status is that of a tourist, wherefore, she has no locus to reside, work or operate a business in Kenya. He stated that in the event that the plaintiff resides and works for gain in Kenya, then her actions are illegal and unlawful, and she ought to be prosecuted. The defendant further stated that if at all the plaintiff ever gave him any money, then the same was given as a gift in consideration for the defendant's then love and affection towards the plaintiff and not otherwise. He contended that any property that he possesses belongs to him and further denied that he converted any property for his own use to the exclusion of the plaintiff.

3. In his counterclaim, the defendant prayed for specific damages of Kshs. 50,000/= being the repair costs of what he referred to as "his maliciously damaged fence, gate and flower garden."

4. The matter first came up for hearing on 13 September 2012 in the High Court before Tuiyott J. The plaintiff gave evidence and was cross-examined though it is not very clear whether or not she completed her evidence. It is at this juncture that the case was transferred to the Environment and Land Court and first placed before Angote J on 10 November 2015. On that day, Ms. Nasimiyu, holding brief for Mr. Kenga for the plaintiff, stated that the plaintiff was stood down before Tuiyott J. She then applied for the hearing to start de novo. I have not seen any specific order made on this issue by Angote J, and subsequently the matter was handled by Omollo J. Nevertheless, it appears as if the matter was thereafter conducted as commencing afresh, for a pre-trial was done, and later the first witness for the plaintiff (a person holding a power of attorney from the plaintiff) testified before Omollo J and was noted to be PW-1. Significantly, he never, in his evidence, sought to adopt the evidence that had been given by the plaintiff before Tuiyott J. For all intents and purposes therefore, the matter did start de novo. That being the case, I will therefore not go through the evidence that the plaintiff gave before Tuiyott J.

B. Evidence of the Parties

5. In his evidence, PW-1, Patrick Kea Birya, testified inter alia that he holds a Power of Attorney to testify on behalf of the plaintiff. He had earlier on been engaged as an interpreter when the plaintiff gave evidence in German language before Tuiyott J. He produced the Power of Attorney as Plaintiff's exhibit No. 1. He also wished to adopt a witness statement dated 22 November 2011 that the plaintiff had prepared, though I have not seen any specific order on whether or not his wish was granted. Mr. Birya went on to testify that the plaintiff and the defendant decided to buy the Plot No. 3847/II/MN. He testified that he had evidence that the land was purchased through a sale agreement and that the purchase price was Kshs. 450,000/= for a portion of the land. He produced the sale agreement as Plaintiff's exhibit No. 2. He stated that (in the agreement) the plaintiff is recorded as a witness (not purchaser) because the defendant informed her that being a foreigner, she could not own land in Kenya. He also had a receipt issued (for the purchase of the land) in the names of the defendant and the plaintiff. He testified that the person who gave out the money for the purchase of the land was the plaintiff. He produced the receipt as Plaintiff's exhibit No. 3. He continued to testify that the land was developed by money given by the plaintiff. He stated that he had bank statements and drafts of sending money. The said statements comprised of bank statements from the plaintiff's bank in Austria and the plaintiff's bank statements (to demonstrate receipt of the money sent from Austria). There was however an objection to the production of the plaintiff's bank statements and eventually the production of these was abandoned. What was produced was a translation of one statement of the plaintiff and the bank statements of the defendant. PW-1 also produced photographs of the building made on the disputed property which he stated comprises of six units.

6. Cross-examined, PW-1 testified inter alia that the plaintiff informed him that she met the defendant around the year 2001-2002. He was not present when the two met. He testified that she (plaintiff) told him that they were not married. He stated that the money sent was for construction of a house according to the bank slips. He was not able to tell whether the plaintiff and defendant were lovers. He testified that the plaintiff is of Austrian citizenship and used to come to Kenya as a tourist. He did not however have her visa. He testified that he came to know the plaintiff when she enrolled in his language school. He served as a translator of the plaintiff when she testified. On the sale agreement, he could not say that the defendant procured the agreement by fraud or misrepresentation. He was not aware of any criminal charge having been preferred against the defendant. He stated that the plaintiff was told that she could not be included (in the sale agreement) as a purchaser. He added that the plaintiff has been sending money to the defendant. He did not have the title to the suit property and he did not know if it was in the name of the plaintiff. He also did not have a certificate of official search for the land. He testified further that the plaintiff said that she was chased away from the property. He stated that the bank account referred to in the plaintiff's statement (not clear whether it is plaintiff's or defendant's bank accounts) was where the house rent is deposited. He had no agreement to show that they had agreed to share rent, and if so, by what percentage. He asserted that the plaintiff financed the construction of the house and that the plaintiff used to come to Kenya and go back to Austria. He could not give a breakdown of the cost of building but added that the plaintiff said that she used over Kshs. 4 million. He did not have receipts and further testified that the plaintiff has not demanded for accounts of the construction. He stated that the plaintiff and defendant are no longer friends but that the case was filed before their friendship ended.

7. Re-examined, PW-1 testified that the intention of the plaintiff was to purchase the disputed plot, build (on it) and live with the defendant. He reiterated that the plaintiff was chased away by the defendant and told that she owned nothing there. He claimed that before this time, the plaintiff considered herself as an owner of the house. He did not know if the plaintiff and defendant had an intimate relationship. He claimed that the defendant chased the plaintiff (from the suit property) because the agreement showed him as a purchaser. He stated that the plaintiff was present when the land was bought.

8. With this evidence the plaintiff's case was closed.

9. In his evidence, the defendant testified inter alia that the plaintiff was his girlfriend. He met the plaintiff while he was working as a tour leader and boat operator at one of the beach hotels. He stated that the relationship is now ended. He denied that the plaintiff had entrusted him to buy and develop the suit property on her behalf. He asserted that it was him who purchased and developed the plot. He testified that what happened is that the plaintiff gave him Kshs. 450,000/= to buy a car for taxi business, which car could also be used when the plaintiff was visiting Kenya. This car, he said, was being bought for him out of the love and relationship that they had. However, instead of buying a car, he decided to buy the suit property. He testified that he informed the plaintiff on the change of idea and she had no issue though she wondered how he would develop it. He denied that he cheated the plaintiff so that her name is noted only as a witness in the sale agreement. He testified that the receipt was in both their names and that he agreed to have both their names in the receipt because she was his lover. He denied that he was only facilitating the plaintiff's purchase of the property owing to the fact that she was a foreigner. He insisted that he was

buying the plot for himself. He stated that the land parcel No. 3847/III/MN is not in his name and he is yet to be registered as owner of the portion of the 50X100 feet that he purchased. He denied that the plaintiff sent him money to develop the plot. He testified that even before the plot was bought, the plaintiff routinely used to send him money and this continued even after he purchased the plot. Their relationship continued just as before. He testified that by the time they separated, what had been developed were three double rooms, and he resides in one of them. He testified that he had not yet rented the other two rooms when they separated and they remained unoccupied. He pointed out that the plaintiff cannot therefore claim rent for four apartments (as pleaded in the plaint). He added that what is now developed are seven double rooms.

10. He further testified that their relationship ended after the plaintiff got another boyfriend. He denied that they ever lived together and stated that when the plaintiff was in the country, they would stay in hotels. He testified that after their fall out, the plaintiff, whenever she was in Kenya, would come to his house to harass and abuse him, and that she even threatened to kill him when he went to lodge a complaint at Mtwapa Police Station. He stated that at some point she came with the police and broke into his house, and that she destroyed his garden and household items. He claimed to have spent Kshs. 50,000/= in repairs. He categorically denied buying the plot on the plaintiff's behalf. He reiterated that her intention was to give him money to buy a vehicle but he chose to buy the suit plot. He wondered whether had he agreed to buy a car, she would be claiming to repossess it today, yet the money was given voluntarily, unconditionally, and without duress, the same being a gift on grounds of love and affection. He stated that they never opened a joint account. He pointed out that even after they separated, he continued to develop the plot. He stated that he has many friends of European descent who send him money and also family living in Europe, and that the plaintiff was not the only friend that he had to send him money. He closed by saying that he also gave the plaintiff many gifts in the same way that she also used to give him gifts.

11. Cross-examined, he stated that the offer by the plaintiff to buy a car for him was a gift. He denied that the plaintiff insisted that her name be in the sale agreement. He testified that the plaintiff appeared in the sale agreement as his witness and that it was him who wanted and requested her to appear in the sale agreement as his witness. He stated that it was also him who offered to have her name in the receipt. He insisted that he was the one buying the plot despite the receipt bearing his name and that of the plaintiff. He denied having informed the plaintiff that she could not purchase property in her name because she was a foreigner. Referred to the bank statements, he testified that the plaintiff started sending him money on 12 February 2004, 23 days after the sale agreement, and she continued sending money till 24 April 2008. He testified that the plaintiff sent the money to enable him undertake developments and to also take care of his family. He agreed that some of the money sent was used to develop the plot. His view was the money sent to him by the plaintiff was a gift to him, the same way one can send money to a boyfriend or husband. He denied building the house on the plaintiff's behalf. He asserted to have other sources of income although he conceded that he had not tabled evidence of this. He testified that at the time they separated, only three double rooms had been constructed. He could not tell exactly how much was spent to develop the structures to that level. He stated that the plaintiff used to live in hotels and that it was only on one holiday that she lived in the developed rooms.

12. Re-examined, he pointed out that the other persons noted as witnesses in the sale agreement are not claiming the plot and that nowhere in the agreement does it state that he is buying the plot on the plaintiff's behalf. He stated that nothing stopped this being recorded in the sale agreement if that was the position. He denied having defrauded the plaintiff and reiterated that the plaintiff gave him the money out of her own free will. He did not know what she was recording while sending him the money.

13. With the above evidence, the defendant closed his case. I thereafter gave directions on the filing of submissions, and gave a mention date of 27 April 2021 to confirm the filing thereof. On that day, only Mr. Kenga, learned counsel for the plaintiff had filed his submissions. I declined to extend time to Ms. Shariff, the defendant's counsel, to file submissions, for counsel had more than 3 months to do so and I was not persuaded that this was excusable. I observe that despite my order, counsel for the defendant proceeded to file submissions on 3 September 2021. Such practice must be discouraged. I am afraid I am not going to refer to those submissions filed in defiance of the directions and orders of the court. It is bad practice to proceed to file documents after the court has declined to extend time for doing so. Following the above, the only submissions that I consider properly on record, and the only submissions that I am going to consider, are those of Mr. Kenga, learned counsel for the plaintiff.

14. In his submissions, Mr. Kenga submitted inter alia that the sale agreement and the receipt for the purchase of the suit land prove that the suit land was purchased by the plaintiff. He also claimed that this was confirmed by the defendant in his evidence in court. He referred to the bank statements and submitted that they prove that the plaintiff sent money to the defendant for purposes of construction of a house on the suit land. He averred that the defendant persuaded the plaintiff to buy the suit land. He submitted that the suit land was never bought as a gift to the defendant but that the land and the house constructed thereon are the property of the plaintiff and that the defendant is a trustee. He submitted that the evidence tendered in the case demonstrated the existence of both constructive and resulting trusts. He founded his argument on the submission that the plaintiff gave the defendant money for purchase of the suit land, which land, in his view, should have been purchased in the name of the plaintiff, but because she was a foreigner, the defendant deceived her that she could not own property in Kenya. Counsel further submitted that the plaintiff did not understand English and that is why she was not aware that she has only been listed as a witness.

15. Mr. Kenga referred me to the decisions of the Court of Appeal in the cases of *Juletabi African Adventure Limited & Another vs. Christopher Michael Lockley (2017) eKLR* and *Heartbeat Limited vs Ng'ambwa Heartbeat Community & Another (2018) eKLR*. He submitted that the defendant acquired the suit property through deceit, yet the plaintiff was always aware that the suit property had been purchased in the name of the defendant as trustee. He also referred me to dictum in the case of *Twalib Hatayan Twalib Hatayan & Another vs Said Saggar Ahmed Al-Heidy & Others (2015) eKLR* cited in the *Juletabi African Adventure Limited* case (supra) which dictum explained constructive and resulting trust and when they can arise. He submitted that the money given for the purchase of the suit land was never a gift and neither were the monies sent to construct the house. He submitted that it was immaterial that the plot is yet to be transferred to the defendant. He submitted that there is no evidence that the defendant contributed a single coin to the construction of the house.

C. Analysis and Determination.

16. It is the case of the plaintiff that she fully financed the purchase and development of the suit property, and that the defendant being named as a purchaser in the sale agreement was only doing so as the trustee. There is also the allegation of deceit, that the defendant deceived the plaintiff that she could not be included as purchaser in the sale agreement because of her status as a foreign tourist. The defendant does not

deny receiving money for the purchase of the suit land and for its construction but his core defence is that what he received was a gift from the plaintiff and that the plaintiff has no share in the land.

17. It is instructive to observe that the plaintiff actually never testified in her case. It will be recalled that she did initially testify but the matter had to begin de novo. The fact that the matter started de novo would mean that her earlier evidence cannot be considered. Even if I am wrong on this, the plaintiff never completed her evidence, and one may not know what sort of cross-examination she would have undergone. However, I stand by my decision that once a matter has commenced de novo, and unless the court allows an application to adopt the earlier evidence tendered, then the earlier evidence cannot be taken as the evidence of the party in the determination of the issues in the case.

18. In our case, the plaintiff thus never actually testified, but evidence on her behalf was tendered by a person to whom it is said she donated a power of attorney to. Now, there are several difficulties with this. The fact that the plaintiff donated a power of attorney does not necessarily mean that the person she donated the power of attorney to, would be a competent witness in all aspects. There are some matters which still remain within the exclusive knowledge of the donor of the power of attorney and this knowledge cannot be said to have been transferred to the donee of the power of attorney by the mere registration of a power of attorney. You also cannot transfer, through a power of attorney, feelings, such as pain, disappointment, joy, sadness and such like. There is no way that these can be donated. So too conclusions that you deduce arising from a set of facts and circumstances. What a person concluded in his mind cannot be transferred through a power of attorney. In other words, you cannot transfer thoughts through a power of attorney. These are personal in nature. Only the individual who had the experience can say what he felt after the experience and the conclusions that he drew. In essence, what I am saying is that it is not always the case that a holder of a power of attorney can be a competent witness. Only the person who experienced them is a competent witness. Anything beyond that would be mere hearsay and of little or no evidential value.

19. What happened in this case is that the donee of the power of attorney went at great length to give oral evidence on facts and circumstances that he was never privy to. He was never present when the matters in issue took place. He could not therefore testify on facts which were not within his knowledge but were peculiarly within the knowledge of the plaintiff. As I have taken trouble to explain above, the donation of a power of attorney, did not, with it, donate the competency to testify. The Evidence Act, Cap 80, Laws of Kenya, provides for the nature of evidence that a witness may give orally. Section 63, which applies, provides as follows

63. Oral evidence must be direct

(1) Oral evidence must in all cases be direct evidence.

(2) For the purposes of subsection (1) of this section, "direct evidence" means—

a. with reference to a fact which could be seen, the evidence of a witness who says he saw it;

b. with reference to a fact which could be heard, the evidence of a witness who says he heard it;

c. with reference to a fact which could be perceived by any other sense or in any other manner, the evidence of a witness who says he perceived it by that sense or in that manner;

d. with reference to an opinion or to the grounds on which that opinion is held, the evidence of the person who holds that opinion or, as the case maybe, who holds it on those grounds:

Provided that the opinion of an expert expressed in any treatise commonly offered for sale, and the grounds on which such opinion is held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the court regards as unreasonable.

(3) If oral evidence refers to the existence or condition of any material thing, other than a document, the court may, if it thinks fit, require the production of such material thing for its inspection.

20. In our case, PW-1, the only witness who testified for the plaintiff, did not see, did not hear, did not perceive, and did not form any opinion of his own, regarding the issues in this case. He was thus incompetent to testify. The facts herein were facts within the exclusive knowledge of the plaintiff and it was her to come and testify, unless for one reason or another, it would have been impossible for her to do so. We never faced a situation where the plaintiff was unavailable to attend court and give evidence, and no reason was given as to why she did not come to court to testify. It was her case and it was her duty to attend court and testify in order to prove her case.

21. It follows from the above that the plaintiff has not presented sufficient evidence to prove her case to the required standard. As I have said, the evidence adduced is all hearsay and is unable to prove the facts and issues that are in contention.

22. For the foregoing reasons, it is not necessary for me to delve into the question whether the defendant deceived the plaintiff or whether there was any trust created. These would need to be proved by evidence from the plaintiff which she has failed to present.

23. The upshot of the above is that I hold that the plaintiff's case has not been proved to the required standard and I have no option but to dismiss it with costs.

24. The defendant had a counterclaim for special damages. It is trite that special damages must not only be pleaded but must also be proved. I have no proof that the defendant incurred any of the damages pleaded. It follows that I must dismiss the counterclaim, and it is hereby dismissed with costs.

25. Judgment accordingly.

DATED AND DELIVERED THIS 22ND DAY OF SEPTEMBER 2021

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

In the presence of:

Mr. Kenga for the plaintiff

No appearance on part of Ms. Shariff for the defendant

Court assistant; Wilson Rabong'o