



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MILIMANI

ELC CIVIL CASE NO. 426 OF 2013

BEN DUKE OMWENGA.....PLAINTIFF

-VERSUS-

ABIGAIL BONARERI OMWENGA.....1ST DEFENDANT

PETER ONCHIRI OMWENGA.....2ND DEFENDANT

JUDGMENT

INTRODUCTION

1. Vide the Complaint dated and lodged in Court on the 25th of March 2013, the Plaintiff has sought the following Reliefs;

- i. A declaration that the 1st Defendant bought the suit property Nairobi/Block112/67 for and on behalf of the Plaintiff.*
- ii. A declaration that the 2nd Defendant holds the suit property Nairobi/Block112/67 in trust and as a trustee of the Plaintiff.*
- iii. A declaration that the Plaintiff is the sole real true rightful and beneficiary owner of the suit Nairobi/Block112/67.*
- iv. Permanent mandatory injunction against the 1st defendant his servants, agents and/or employees from selling/transferring, disposing and/or alienating the suit property.*
- v. An order that the registration of the suit property in the name the 1st Defendant be cancelled, revoked and the same be registered in the names of the Plaintiff at the cost of the Defendants.*
- vi. Any other relief that the court deems fit to grant in the circumstances*
- vii. Cost of this Application be provided for.*

2. Upon being served with the Complaint and summons to enter appearance, the 1st & 2nd Defendants herein duly entered appearance on the 17th May 2013 and thereafter same filed separate Statement of Defense, *albeit* filed on the 24th May 2013, respectively, wherein the Defendants, have severally denied and or disputed the claims by and/or on behalf of the Plaintiff.

3. Subsequently, the Plaintiff herein filed a Notice of Motion Application dated 3rd July 2013, through the law firm of M/s Juddy Thongori and Company Advocates, wherein same sought for Leave to amend the Complaint.

4. For clarity, the Application under reference was allowed and the Plaintiff proceeded to and filed the Amended Complaint, on the 9th October 2013.

5. Upon being served with the Amended Complaint, the Defendants herein filed their Amended Statement of Defense on the 6th November 2013, whereby the Defendants, similarly, disputed the claims by and/or at the instance of the Plaintiff.

6. Be that as it may, on the 2nd July 2018, the Plaintiff herein filed a Further Amended Complaint wherein some of the Reliefs which had hitherto been alluded and/or referred to into the Amended Complaint were deleted.

7. Pursuant to the Further Amended Complaint, the Plaintiff now seeks for the following Reliefs;

I. A permanent/mandatory injunction restraining the Defendants servants, agents and/or employees from selling, dealing, transferring, disposing of and/or alienating the suit property.

II. An order canceling and/or revoking all the registration onto the suit property in the name of the Defendants and/or either of them singularly and/or jointly and in place thereof the same be registered in the name of the Plaintiff at the Defendants costs.

III. Any other relief the court may deem fit to grant in the circumstances.

IV. Cost of the suit and other incidental thereto.

8. It is also imperative to note that vide Further Amended Plaint various properties, which were hitherto subject of the suit herein, were removed from the suit and what remains before the Honourable court are as hereunder;

a. NAIROBI/BLOCK 112/63

b. NAIROBI/BLOCK 112/67

c. NAIROBI/BLOCK 82/2549

9. After a delay running up to approximately eight (8) years, the subject matter proceeded for hearing on the 15th November 2021, whereupon the Plaintiff indeed, testified and produced various Documentary Exhibits.

10. On the hand, the Defendants herein, did not tender and/ or adduce any Evidence before the Court. For clarity, when the matter was called out for hearing, the Defendants' Advocate, sought for an adjournment , but which request was declined and thereafter, the Advocate abandoned participation in the subject matter.

EVIDENCE BY THE PARTIES

EVIDENCE BY THE PLAINTIFF

11. The plaintiff herein adduced evidence that same is currently a farmer and a business man. However, the plaintiff testified that prior to being a farmer, same was engaged in employment wherein same worked outside the country for so many years.

12. It was the Plaintiff's further testimony that same was married to the 1st Defendant herein, and in this regard, the 1st Defendant was therefore his Lawful wife.

13. Besides, the Plaintiff testified that during the period or duration of marriage, same were blessed with issues, including Peter Onchiri Omwenga, who is the 2nd Defendant herein.

14. The Plaintiff further testified that the marriage between himself and the 1st Defendant hit a rock and same ceased to reside and/or cohabit together as husband and wife. In this regard, the Plaintiff testified that the cessation of cohabitation commenced and/ or arose in the year 2012.

15. Nevertheless, it was the Plaintiff's further testimony that during the duration that same was working outside the country, same donated a Power of Attorney to and in favor of the 1st Defendant herein. For coherence, the Power of Attorney was dated 4th January 1994, but same was registered on the 23rd January 2006.

16. It was the Plaintiff's further testimony that pursuant to and by dint of the Power of Attorney under reference, the 1st Defendant herein was mandated and/or authorize to transact and/or manage the affairs of the Plaintiff and to acquire various properties, albeit for and on or behalf of the Plaintiff.

17. Further, the Plaintiff testified that during the period between January 1994 and 2007, same transferred to and in favor of the 1st Defendant, various sums of monies, which were meant for purposes of purchase and/or acquisition of assorted properties within the city of Nairobi or elsewhere, within the Republic of Kenya.

18. The Plaintiff further testified that during the period between 1993 up to the year 2007, same facilitated the 1st Defendant herein to purchase and/or acquire various properties and indeed various properties were acquired by the 1st Defendant, albeit, on the basis of monies disbursed by the Plaintiff herein.

19. Further, it was the Plaintiffs testimony that the various properties which were acquired by the 1st Defendant, were supposed to be transferred and registered in the name of the Plaintiff and that was the reason that same procured and donated the power of attorney in favor of the 1st Defendant.

20. Be that as it may, the Plaintiff testified that contrary to the instructions which were given to the 1st Defendant and in violation of the contents of the Power of Attorney, the 1st Defendant herein, proceeded to and caused the various properties, to be registered in her name,

albeit without authority.

21. On the other hand, the Plaintiff further testified that the 1st Defendant, similarly caused other properties, to be transferred to and were registered in the name of the 1st Defendant.

22. However, the Plaintiff averred that when he finally came to Kenya on or about the 14th August 2012, he demanded from the 1st defendant, the handover of the original titles, over and in respect of the various properties, which had been acquired, but the 1st Defendant became adamant and declined to yield.

23. The plaintiff further testified that as a result of the intransigence by and/or on behalf of the 1st Defendant, same carried out official searches at the various land offices, including Nairobi and/or elsewhere and thereafter ascertained that, save for L.R. No. Nairobi/Block 112/63, which was registered in the name of the plaintiff, the rest were registered in the name of the 1st Defendant.

24. Similarly, the Plaintiff further testified that as pertains to L.R. No. Nairobi/Block 112/167, same had been transferred to and in favor of the 2nd Defendant and the said transfer was carried out without the knowledge and consent of the Plaintiff.

25. In short, the Plaintiff testified that the transfer and registration of the properties to and in favor of the Defendants herein, were carried out and/or undertaken in breach of the trust, that was bestowed upon the 1st Defendant.

26. Similarly, the Plaintiff further testified that the transfer and registration of the assorted properties in the name of the 1st Defendant, as well as the 2nd Defendant, were carried out in violation of the terms of the Power of attorney, which was issued in favor of the 1st Defendant.

27. Owing to the foregoing, the Plaintiff testified that same was constrained to and indeed revoked the Power of Attorney, which had previously, been granted in favor of the 1st Defendant. For coherence, the plaintiff testified that the revocation was undertaken on the 25th September 2012.

28. In view of the foregoing, the Plaintiff has pleaded with the Court to allow/ grant the Suit herein and direct that Plaintiff is the lawful and legitimate owner of the properties namely;

a. NAIROBI/BLOCK 112/63

b. NAIROBI/BLOCK 112/67

c. NAIROBI/BLOCK 82/2549

29. Though the plaintiff had sought for costs of the proceedings, in the Further Amended Plaintiff, same, however testified that he was no longer keen to pursue the issue of cost. In this regard, the Plaintiff offered to forego and/ or forfeit Costs.

EVIDENCE BY THE DEFENSE

30. When the subject matter came of for hearing on the 25th November 2021, the Defendants' counsel applied for adjournment on the reason that same had lost contact of the Defendants and as a result of the foregoing, counsel was unable to trace and locate the Defendants.

31. Owing to the foregoing, counsel therefore implored the Court to take out and/or adjourn the matter and to afford him an opportunity to trace and liaise with the Defendants.

32. Suffice it to say, that the Application for Adjournment was vehemently opposed by the Plaintiff's Advocates, namely, Ms Juddy Thongori, Senior counsel.

33. Upon listening to the rivalling submissions by the Parties, the Court found and held that the subject matter was an old matter and in any event, the reasons that were ventilated by counsel for the Defendants, were neither credible nor sufficient, to warrant an adjournment.

34. Owing to the foregoing, the Court declined to grant the adjournment and directed that the matter shall proceed for hearing. Consequently, time was duly allocated for the hearing of the matter herein.

35. Nevertheless, at the appointed time, the Defendant's counsel declined and/or otherwise failed to attend court. In this regard, the hearing proceeded, albeit, without the presence and/or participation of the Defendants or their Advocates.

36. In a nutshell, the Defendants herein did not adduce and or tender any Evidence, whatsoever.

37. Owing to the foregoing, the Plaintiff's testimony, was therefore uncontroverted.

SUBMISSIONS

38. At the close of the Plaintiff's case and upon of an order by the court, closing the Defendants case, the Plaintiff's Advocates sought for

time within which to file written submissions. In this regard, time was indeed granted to and in favor of the Plaintiff's counsel to file Submissions.

39. Suffice it to say, that the Submissions filed by and/or on behalf of the plaintiff, form part and parcel of the Court Record and same have been considered and taken into account.

ISSUES FOR DETERMINATION

40. Having reviewed the pleadings filed by and/or on behalf of the Parties and essentially the Further Amended Plaint, dated the 2nd July 2018, as well as the oral and Documentary Evidence tendered by the Plaintiff, *I am of the considered view that the following issues are germane for determinations;*

I. Whether there existed trust between the Plaintiff and the 1st Defendant.

II. Whether the Trust, if any, was adhered to and/or breached by the 1st Defendant.

III. Whether the suit properties are held by the 1st & 2nd Defendants on Trust for the Plaintiff and if so, whether the Plaintiff is entitled to the orders for Rectification of the Titles.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether there existed Trust between the plaintiff and the 1st Defendant

41. The Plaintiff herein testified that same and the 1st Defendant herein were duly and/or lawfully married and were thus Husband and Wife.

42. On the other hand, the Plaintiff further testified that other than the fact that the Defendant and himself, were lawfully married, same (Plaintiff), went ahead and donated a Power of Attorney to and in favor of the 1st Defendant, which Power of Attorney was registered on the 23rd January 2006.

43. Pursuant to the Power of Attorney, which was donated in favor of the 1st Defendant, same was mandated and/or authorized to transact and/or managed the affairs of the Plaintiff within the republic of Kenya, albeit in the name of the Plaintiff.

44. Owing to the existence of the Power of Attorney, coupled with the marriage of the Plaintiff and the 1st Defendant, it is important to observe that there existed trust and/or Fiduciary Relationship between the Parties, essentially between the Plaintiff and the 1st Defendant.

45. In support of the foregoing position, I adopt and reiterate the Decision in the case of **Peter Ndungu Njenga v Sophia Watiri Ndungu (2000) eKLR**, where the Court of Appeal observed as hereunder;

“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”

ISSUE NUMBER 2

Whether the Trust, if any, was adhered to and/or breached by the 1st Defendant

46. Other than the fact that the 1ST Defendant and the Plaintiff, were lawfully married and thus the 1ST Defendant, was disposed to handle and/or attend to the affairs of the marriage and by extension, the affairs of the Plaintiff with fidelity, same appears to have been distracted by extraneous issues, factors, and/or circumstances.

47. Nevertheless, it must not be lost on the court, that towards defining the manner in which the 1st Defendant was to handle the affairs of the Plaintiff, the Plaintiff herein, procured and donated a Power of Attorney in favor of the 1st Defendant.

48. By dint of the Power of Attorney, the 1st Defendant was authorized and/or mandated to do several things, for and/or on behalf of the Plaintiff. However, the actions, transactions and/or activities, for which the 1st Defendant was authorized, were to be carried out in the name of the Plaintiff and not otherwise.

49. Nevertheless, instead of complying with and/or adhering to the terms of the Power of Attorney, the 1st Defendant breached and/or violated the terms thereof and decided to act outside the Scope of the Power of Attorney.

50. It is imperative to recall that instead of transferring and registering the Purchased and/or acquired Properties in the name of the Plaintiff, the 1st Defendant, decided to transfer and register the Properties in own name.

51. On the other hand, the 1st Defendant also proceeded to transfer and/or cause to be transferred one of the properties namely, L.R No. Nairobi/Block 112/67, to the name of the 2nd Defendant, which was similarly, outside the scope of the mandate conferred by and/or under the Power of Attorney.

52. In my humble view, the extent and/or scope of the 1st Defendant's Powers, were defined and/or circumscribed by the Power of Attorney and therefore, the 1st Defendant, was not at liberty, to act and/or deal, as she pleased.

53. Nevertheless, despite the limitations and/or restrictions, stipulated in the Power of Attorney, the 1st Defendant proceeded and dealt with issues beyond the scope of the Power of Attorney.

54. In the premises, it is my finding and holding that the actions and/or omissions of the 1st Defendant, which were enumerated and/or elaborated in the Further Amended Complaint, as well as the oral testimony of the Plaintiff herein, have established instances of breach of Trust.

ISSUE NUMBER 3

Whether the suit Properties are held by the 1st & 2nd Defendants on Trust for the Plaintiff and if so, whether the Plaintiff is entitled to the orders for Rectification of the Titles.

55. During the Plaintiff's testimony, same testified and adduced evidence, to the effect that while working with the United Nations as a Regional Chief Air Operations Officer, same earned a salary of US Dollars 12, 000 per month and that upon earning the salary, same transmitted substantial amounts thereof to the 1st Defendant, for purposes of the purchase and/or acquisition of assorted Properties.

56. On the other hand, the Plaintiff further testified that the 1st Defendant herein was a Teacher by Profession, but same sought for and obtained early retirement in the year 1989.

57. According to the Plaintiff, all the monies that were used and/or utilized towards the purchase and or acquisition of the assorted Properties between the year 1993 and 2007, were acquired solely and based on the monies that same wired to his (*Plaintiff's account at Kenya commercial Bank*) and for which, the 1st Defendant was granted access and/or had access, on the basis of Power of Attorney.

58. Owing to the fact that it is to the Plaintiff who advanced and/or remitted the monies that were used towards the acquisition of the assorted Properties, it is therefore beyond contest that the assorted properties, which were bought and/or acquired on the basis of the monies sent and/or Disbursed by the Plaintiff, were therefore held on Trust for same.

59. In support of the foregoing position, I adopt and reproduce the Decision in the case of *Twalib Hatayan Twalib Hatayan & Anor vs. Said Saggah Ahmed Al-Heidy & Others [2015] eKLR*, this Court examined and stated the law on trusts as follows:-

“According to the Black's Law Dictionary, 9th Edition; a trust is defined as

“1. The right, enforceable solely in equity, to the beneficial enjoyment of property to which another holds legal title; a property interest held by one person (trustee) at the request of another (settlor) for the benefit of a third party (beneficiary).”

Under the Trustee Act, “... the expressions “trust” and “trustee” extend to implied and constructive trust, and cases where the trustee has a beneficial interest in the trust property...”

In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand. A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing. ... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust. A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit (see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust is thus meant to guard against unjust enrichment. ...

A resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee ... This trust may arise either upon the unexpressed but presumed intention of the settlor or upon his informally expressed intention. (See Snell's Equity 29th Edn, Sweet & Maxwell p.175). Therefore, unlike constructive trusts where unknown intentions maybe left unexplored, with resulting trusts, courts will readily look at the circumstances of the case and presume or infer the transferor's intention. Most importantly, the general rule here is that a resulting trust will automatically arise in favour of the person who advances the purchase money. Whether or not the property is registered in his name or that of another, is immaterial (see Snell's Equity at p.177) (supra).” Emphasis added

60. On the other hand, it is also important to take cognizance of the Decision in the case of *Mwangi Macharia & 87 Others v Davidson Mwangi (2016) eKLR*, where the Honourable Court of Appeal observed as hereunder;

“Article 159 (2) (b) of the Constitution requires that justice should not be delayed. This matter has been in the courts since

1993. The persons or groups interested in the suit property are individuals of different status in the Kenyan society. Article 159 (2) (a) of the Constitution requires justice to be administered to all, irrespective of status; Article 159 (2) (g) of the Constitution stipulates that justice shall be administered without undue regard to procedural technicalities. This Court is a court of law and a court of equity; Equity shall suffer no wrong without a remedy; no man shall benefit from his own wrongdoing; and equity detests unjust enrichment. This Court is bound to deliver substantive rather than technical and procedural justice. The relief, orders and directions given in this judgment are aimed at delivery of substantive justice to all parties having legal and equitable interest in the suit property”.

61. Based on the foregoing Decisions and taking into account the circumstances that were obtaining, during the time when the Suit properties were purchased and/or acquired, I come to the conclusion that the Transfer and registration of the Suit properties in favor of the 1st and 2nd Defendants, was carried out and/ or undertaken in Breach of the Fiduciary responsibilities, which the 1st Defendant owed to the Plaintiff.

62. On the other hand, I further find and hold, that though the suit properties are registered in the names of the 1st and 2nd Defendants, such registration, were done albeit on Trust for the plaintiff.

63. Consequently, the Court Declares that the Plaintiff herein is the lawful and legitimate proprietor of the suit properties, which are currently, registered in the names of the First and Second Defendants.

FINAL DISPOSITION

64. Having considered and addressed the issues for determination, I come to the conclusion that the Plaintiff has proved his case on a Balance of Probabilities as against the Defendants herein.

65. Consequently, I do hereby make the following orders;

I. The registration of the properties, namely NAIROBI/BLOCK 112/63, NAIROBI/BLOCK 112/67, L.R No. 12948/267 and NAIROBI/BLOCK 82/2549, in the names of the 1st and 2nd Defendants, respectively, was carried out in breach and violation of the fiduciary duties, owed to the Plaintiff, by the First Defendant herein.

II. Properties L.R No's NAIROBI/BLOCK 112/63, NAIROBI/BLOCK 112/67, L.R No. 12948/267 and NAIROBI/BLOCK 82/2549, are registered in the names of the 1st and 2nd Defendants respectively, albeit on trust for the Plaintiff.

III. The registration of properties L.R No.'s NAIROBI/BLOCK 112/63, NAIROBI/BLOCK 112/67, L.R No. 12948/267 and NAIROBI/BLOCK 82/2549, in the names of the 1st & 2nd Defendants be and are hereby cancelled and the Register be and is hereby rectified to reflect the name of the Plaintiff as the sole registered proprietor thereof.

IV. An order of permanent injunction be and is hereby issued against the Defendants herein jointly and/or severally, from interfering with, trespassing onto and/or otherwise dealing with the suit properties, in any manner adverse to the rights and/or interests of the Plaintiff.

66. During the hearing of the subject matter, the Plaintiff indicated and/or intimated that same shall not be pursuing the issue of costs as against the Defendants.

67. In any event, the Parties are hugely related, with the Plaintiff and the 1st Defendant being husband and wife, *albeit* estranged, while the 2nd Defendant is their son.

68. Consequently, and in view of the foregoing, the Order that commends itself, is that Each Party shall bear Own Costs.

69. It is so Ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF DECEMBER 2021.

HON. JUSTICE OGUTTU MBOYA

JUDGE

ENVIROMENT AND LAND COURT.

MILIMANI.

In the Presence of;

June Nafula Court Assistant

Ms Juddy Thongori for the Plaintiff.

N/A for the Defendants.