



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 112 OF 2014

CAPTAIN INGO BERND RAUER.....PLAINTIFF

VERSUS

1. TERESIA MURUGI

2. MURAYA WACHIRA ADVOCATES.....DEFENDANTS

J U D G M E N T

1. The suit was initially filed against the 1st defendant only but later the plaintiff was amended to join the 2nd defendant. In the amended plaintiff, the plaintiff seeks, as against the 1st defendant, declaratory orders for the entitlement to possession and ownership of motor vehicle registration KDB 059 W and an injunction to compel handing over of possession and transfer of the motor vehicle to the plaintiff; an order for refund of sums paid to the defendant for purposes of purchase of a house, wedding ceremony, or rentals and wedding items. As against the 2nd defendant, the plaintiff sought the remedy of refund of the purchase price of the house. With the original plaintiff, the plaintiff filed a witness statement and a bundle of documents including email correspondence, log book for the motor vehicle, documents for transfer of funds by the plaintiff and a letter of complaint by the plaintiff against the defendants to the police.

2. When served, the 1st defendant filed a statement of defence, list of witnesses and list of documents and copies of such documents. In the defence the 1st defendant took the position that the two had never been a couple save that the plaintiff did make a proposal to her. To the claim of sums paid to her by the plaintiff, the defendant denied each and every allegation and invited the plaintiff to very strict proof thereof. She denied receiving any money as alleged and on the grounds alleged and in fact denied ever dealing with the firm of Muraiya & Wachira Advocates. Even the particulars of misrepresentation and fraud were all denied. In particular and above the general traverse, the defendant pleaded that she bought the motor vehicle from own resources and that the money for the house she was swindled in her pursuit to buy a house, a fact well known to the plaintiff leading to the termination of the relationship between the two parties. It was also pleaded, without any details, that the suit did not lie under Marriage Act. The list of documents filed included receipt for payment to the firm of Musinga & Co. Advocates, Copies of Certificates and deed plans said to have turned fake, agreement for sale, transfer forms, stamp duty declaration forms and a series of correspondence from Musinga & Co. Advocates to Wachira Muraya & Co. Advocates.

3. After that defense was filled, the plaintiff appears to have gone back to the drawing board and rethought her suit deeming it prudent to amend and introduce the second defendant. The plaintiff as amended said very little as a grievance against the 2nd defendant beyond describing it as a firm of advocate and that it was holding some Kshs.6,500,000/= with a prayer for the refund of that money. The documents and the witness statement remained the same as were filed with the original plaintiff. Some of the documents filed were in German language hence by a supplementary list of documents dated 19/9/2016, an English translation of one such documents was filed.

4. For the 2nd defendant a statement of defense was filed in which a general traverse was advanced. Also filed was a witness statement and a list of some three documents being the sale agreement, RTGS transfer forms and a copy of cheque in favour of one John Nj'enga Kihika. The foregoing was the summary of status of pleadings and documents filed by all sides by the 21/9/2016 when the trial began.

Evidence by the plaintiff

5. In his evidence, the plaintiff adopted the witness statement as evidence in chief and produced the bundle of documents as exhibits. The summary of the said statement was that while in Kenya for some assignment at the port of Mombasa he met the 1st defendant in January 2014, fell in love to the point that he thought of changing his residence to Kenya and hence decided to buy a house at a price of

Kshs.10,000,000/=. He referred the court to the document to evidence transfer of the Kshs.10,000,000/= intended to purchase the house and other payment he said was intended for the 1st defendant's upkeep, car hire, furniture as well as wedding dress and cards. He then added that he and the 1st defendant then decided to buy a family car at 7,000, EUROS which was registered in the name of the 1st defendant.

6. The plaintiff complained that after the 1st defendant had received the money for the house, there was a complete change with her relations towards him. He then visited Kenya to see the house bought and lived therein for one week without the 1st defendant. He said that the house was never transferred to the two of them. The reason the 1st defendant advanced for not being with him during his stay in the house was that she was engaged in some work in Malindi. As against the 2nd defendant, the witness said he saw him first in court and could not say if he had received any money or not.

7. When cross-examined by the advocate for the 1st defendant, the witness confirmed having had a long lasting love relationship with the 1st defendant, gave her the money on account of such love without any arrangement for refund. He admitted that every time he was in Mombasa he would be with her and that at such times he was the only man with her. He however denied possession of any evidence for the payment of 7000 Euros from her.

8. For the house, he said that he personally searched for one in the internet and did identify the one he settled for and at the price quoted in the internet being Kshs 10,000,000. He said that the husband to the seller of the house later told him that the sale was stopped and therefore he could not say whether or not the house had been bought. On the money spent for furniture, the witness said that the house was to be sold with furniture. And that he had not given the authority for part of the money meant to buy the house. He also admitted that he sent 200 Euros to the 1st defendant for food.

9. When cross-examined by the advocate for the 2nd defendant the witness said that he did not know of any transaction between the two defendants and did not know who appointed the 2nd defendant to act as an advocate. He also denied any knowledge if any money was ever released to the seller.

10. On re-examination, the plaintiff said that he was taken to the house by the 1st defendant but did not have any documents for the same just as he was never introduced to the seller. He however denied having intended the money for buying the house to have been a gift to the 1st defendant just as he and the 1st defendant did not agree on payment for the 1st defendant's time spent with him. He denied having been given the information on how the money he sent for the house was spent. When questioned by the court the plaintiff denied knowledge of the status of the house; denied that he paid for the furniture because it would be his and asserted that he thought his money passed to the 2nd defendant through the 1st defendant.

Evidence by the 1st defendant

11. Like the plaintiffs, the 2nd defendant adopted the witness statement dated 3/6/2016 as her evidence in chief and produced the documents in the list of documents dated 26/9/2014 as exhibits. The essence of the evidence in the witness statement was that her and the plaintiff indeed met, became intimate and the plaintiff would then send her money for her use, for food and for transport by taxi. She said that such money was sent and given on account of the love between them and as gifts with no strings attached. She also admitted having received some money for buying the house, furniture, household goods and for watchman from the plaintiff.

12. She then moved into the house she bought in mid May 2014 for three weeks when he was informed by her lawyers that the title upon which Kshs.6, 500,000/= had been paid was a forgery because the title had a court case and could not be transferred. However, by that time the seller's advocate had been paid the purchase price which she had negotiated at Kshs.6,500,000/= 1st defendant also said that he had paid Ms. Musinga & Co. Advocates conveyance fees of Kshs.200,000/=. She blamed the 2nd defendant for having forged the title to obtain the money and Ms. Musinga & Co. Advocates for having paid out the money before transaction was complete.

13. Upon-cross examination by the plaintiff's counsel, he said that after the two became intimate the plaintiff sent her some money and that both decided to get married at a ceremony to be conducted in Kenya. The witness admitted receiving 500 Euros for wedding dress and some 8,300 Euros for her own use but not for purposes of buying a car. She however admitted having purchase a motor vehicle Reg. No. KBX 059W, but out of her own money. She admitted receipt of Kshs.10, 200,000/= towards purchase of a house but only used 6,500,000 and that the plaintiff allowed her to use the difference for own use including assisting her parents. She however admitted there being no document to prove such permission.

14. She said the purpose of purchasing the house was so that it would their local matrimonial home for the times when the plaintiff would be in Kenya and that he had no problem if the sum paid to the 2nd defendant was retrieved. She said the money sent to her by the plaintiff was a gift and expression of love even though she admitted there being nothing to show the intention to make a gift out of the sum sent, USD 85,000. The witness admitted having been charged at Shanzu Law Court with the offence of false pretenses but did not indicate to court the case number and the outcome.

15. When re-examined by her counsel, the witness repeated that the money was sent to her as a lover to the plaintiff and that she in fact bought the house which had issues being a dispute between the seller and a former husband which made the sale incapable of completion. On the breakup, the witness said that she became uncomfortable when the plaintiff told her that they could not get children because he had undergone vasectomy but that it is the plaintiff and not her who broke the relationship.

16. With the plaintiff and 1st defendant concluding the tender of evidence in support of respective cases the tender of evidence ended because the 2nd defendant did announce that he did not intend to call any evidence and closed his case as such. Parties then took time to file written submissions, the plaintiff's submissions were filed on the 17/11/2017, those by the 1st on 19/3/2018 and those by the 2nd defendant were

filed on 16/3/2018.

The submissions offered

17. In his submissions, the plaintiff rehashed the evidence and pleadings and isolated five issues for determination by the court. Those issues sought to establish the purpose for which the money was paid; whether the 1st defendant obtained the money by false pretences; whether there should be made an order for refund and how much refund should be made. Reliance was then placed on the decision in ***Hamm Helment vs Farida Riziki [2011] eKLR, Parliac vs Vogsterberger A. 2d 127*** and ***Samuel Kamau Macharia vs KCB [2003] eKLR*** on when a gift is recoverable and on the application of the doctrine unjust enrichment.

18. For the 1st defendant the submissions were to the effect that the plaintiff has his submissions expanded his claim to include sums not pleaded and that such is not recoverable. It was submitted that parties are bound by own pleadings and the decisions in ***MALAWI RAILSWAYS LTD VS NYASULU [1998] mWSC 3*** and ***IEBC VS STEPHEN MUTINDA [2014] eKLR*** cited to support the submissions. It was then contended that even on the pleaded sum there had not be a discharge of the onus under Section 107 and 108 of the Evidence Act. A position was taken that the duty was upon the plaintiff to prove that the money was sent to the 1st defendant as a condition towards marriage and that in this case the payments were by a man to his lady proposed to make the lady happy and feel loved. The decision on ***PACCININI VS HAJUS 180 Conn 369 [1980]*** was cited to support the submission that only gifts given on condition to marry is recoverable.

19. On whether the sum of money was obtained by fraud or misrepresentation counsel cited to court the decision in ***Eric Juma vs Fredrick Gacheru [2016] eKLR*** where the Court of Appeal said that fraud and misrepresentation connote criminal culpability and demand a much higher standard of proof slightly above balance of probabilities adding that simply raising the issue of fraud in a statement of a defence and counterclaim is no proof of fraud.

20. On whether an order for refund should be made the 1st defendant reiterated that the payment having not been made on condition of marriage the same is not recoverable.

21. On the specific sum of Kshs.10, 200,000/= intended for purchase of the house, the 1st defendant contended that the payment of 6,500,000/= for the house and 200,000/= for legal fees had not been disputed nor evidence led to have been refunded to her by the advocates to which the same was paid. To the contrary it was submitted that the 2nd defendant offered no evidence at all to deny receipt of the sum of Kshs.6, 500,000/=. That leaves a balance of Kshs.3, 500,000/= which it was submitted used to furnish the house which the plaintiff's admits he used while in Kenya for one whole week.

22. For the 2nd defendant, submissions were made to the effect that he was never served with the application to amend and that the amendment to join him was without the leave of the court. That is the kind of submission that is wholly misleading and inconsistent with the record of the file which attest to the fact that leave was granted on the 12/11/2014 for the plaint to be amended for the joinder of the 2nd defendant. That cannot be taken seriously.

23. The other submission offered by the second defendant was that he was an agent acting for a disclosed principle and therefore not liable to be sued as the plaintiff had purported to do. Submissions were made that his disclosed principle, ***Phylis Wairimu Konchella*** was the person liable and not the 2nd defendant. The decision in ***Friendship Container Manufactures Ltd vs Mitchel Cotts (K) Ltd [2001] E.A. 388*** was cited to court.

Issues, analysis and determination

24. I have had the benefit and opportunity of reading the pleadings filed, the evidence led and the submissions offered by the parties. From such material the relationship between the parties does not stir any serious controversy. Even though the 1st defendant's statement of defence denied relationship and receipt of payment, the evidence in the witness statement and cross examination is a clear confirmation of the intimate relationship together with acknowledgment of payment save that the 1st defendant contends that the payment to her were gifts on account of love and affection which were therefore not refundable. The other defence led in evidence and not pleaded in the defence is that the sum of Kshs.3,500,000/= intended as part of the purchase price for the house was in fact used to purchase household goods and to furnish the house with the concurrence and consent of the plaintiff.

25. Even the fact pleaded that the sum of Kshs.6, 500,000/= was paid to the 2nd defendant is not seriously disputed. In fact the 2nd defendant opted not to lead any evidence or produce any document hence the defence filed on its behalf amounted to no more than bare allegations without any probative value and cannot be the basis to make any finding on behalf of that defendant. [1] With that in mind the only evidence this court must analyze to come to its determination is that offered and tendered by the plaintiff and 1st defendant.

26. From the evidence by the two, and as said before, the relationship is confirmed by both sides just as the fact that money was paid to the 1st defendant. The dispute is only on the sum paid and the purpose of the payment. While the plaintiff takes the position that he paid the money for the purchase of a house, a car and wedding costs, the 1st defendant admits payment for the house and assets that she did buy the house but that she was conned, denies receipt of my money for the car and that the rest of the money given to her were for intended personal use and amounted to gifts without any intention or arrangement for a refund.

27. My study and review of the evidence reveal that the various sums of money sent to the 1st defendant from the plaintiff were sent on the basis of the intimate relationship between the two and for specified purposes. The overriding purpose was that of love and the proposal to marry and have a matrimonial home where the parties could live while the plaintiff visited Kenya.

28. When cross-examined by the 1st defendants counsel, the plaintiff readily admitted that every human being is expected to eat hence the reason he sent to the 1st defendant money for food. On the other hand the 1st defendant admits the receipts of Kshs.10, 200,000/= asserts having negotiated and paid Kshs.6, 500,000/=, instead of kshs. 10,000,000, for the house, Kshs.200, 000/= for legal fees and the balance to furnish the house with, she asserts, concurrence of the plaintiff.

29. The other important piece of evidence I have taken note of besides the series of email correspondence and evidence of money transfer is the agreement for sale between the 1st defendant and one Phylis Wairimu Konchella. That agreement is important for my determination because it incorporates the Law Society Conditions of Sale, 1989 Edition, provided the same being not inconsistent with the said conditions. The agreement was deemed important by all the parties because all the three put it in their lists of documents.

30. With above analysis and grasp of the evidence, I now take the view that the issues have isolated themselves for determination as follows:-

- i. How much was pleaded and proved to have been paid to the 1st defendant by the plaintiff?
- ii. For what purpose was the said sums paid?
- iii. Was the purpose met as expected and intended?
- iv. Is any sum due for refund to the plaintiff? If so how much.
- v. What orders should be met as to costs.

31. I have taken the liberty to craft own issues based on the pleadings and evidence because, twice, I directed the parties to settle and file agreed issues but none was filed. Only the plaintiff filed what called agreed issue but that list is not owned by the other parties and is evidently an authorship by the plaintiff alone.

32. The issues as crafted will invariably run into each other with the prospects that a determination of one may be a pointer as to what the other would come out to be. Accordingly the determination may not necessarily be distinctively along the said issued nor in the order set out. However the answer to the questions shall strive to answer if the plaintiff is entitled to the orders sought or any of them.

How much was paid

33. In the words of the amended plaint, the plaintiff alleges to have paid to the 1st defendant sums of money as follows:-

- i. 85,000 Euros for purchase of house
- ii. 7,500 Euros for wedding ceremony
- iii. 800 Euros for car rental
- iv. 500 Euros for wedding gown

Total 93,800

34. Even though the statement of defence by 1st defendants makes a general traverse, the witness statement by same defendant admits receipt of 85,000 Euros. Of these sums the receipt of 85,000 Euros and its purpose to buy a house are not in issue. The issue of the payment of 800 Euros from car hire or rental is also admitted by both sides. That leaves the difference of 8300 Euros to be proved by the plaintiff.

35. In my calculation that sum consists of 7,500 Euros from wedding ceremony, and 500 Euros from wedding gown. These are the sums pleaded and prayed for as to demand determination by the court. The purposes of the two sums which the 1st defendant has denied receiving can only be ascertained from the trail of email correspondence exhibited and the evidence given. The two sums were expressly admitted have been sent save that in the evidence by the 1st defendant in cross examination she said that **7,500 Euros** was indeed sent but for own use. My evaluation of the documents filed does not reveal that the money was for purchase of a car but for car rentals and for food. Without any clear evidence that the sum was purposed for the purchase of a car, the plaintiff has failed in his duty to show that the money was actually sent and used for purchase of a car itself intended for use by the two. However the evidence by both sides agrees that 500 Euros was intended for a wedding gown. There was no proof by the 1st defendant that the money for the wedding dress was ever employed as intended. No dress was alleged to have been bought.

36. Consequently, I do find that the money sent to the 1st defendant for agreed specified use towards the parties' intention to marry if not employed for such intended use is recoverable and refundable to the plaintiff. Such is refundable on the sole basis that it was paid on condition and the sole aim of furthering marriage which never took place. The need and remedy for refund is grounded in good sense and equity's pursuit of good sense as a basis for fairness and justice. The remedy exists to avoid one from reaping a benefit that good sense deems not retainable by him. Here the 1st defendant says and admits that money was sent for the purchase of a house and a wedding gown because the parties intended to marry formally and have for themselves a home in Kenya. The home was never purchase even though some money was paid out to the advocate acting for the vendor. The overriding consideration is whether the purpose was achieved and if the money is traceable. I do find that the 85,000 Euros and 500 euros intended for purchase of the house and wedding gown are due for refund to the plaintiff for failure of the consideration the payment were made.

37. For the 85,000 Euros or Kshs.10, 200,000 I do find that the sum of Kshs.200,000/= was used as intended, paid as legal fees to Ms. Musinga and Company Advocates. That is not refundable as counsel as shown to have done some work. The sum of Kshs.3, 500,000 is admitted by the 1st defendant not to have been used for the intended purpose and is due for refund by the 1st defendant just like the price for wedding dress. For that finding, I do enter judgment for the plaintiff against the 1st defendant for Kshs.3, 500,000/= and 500 Euros respectively.

38. Of the Kshs.10,200,000/= the sum of Kshs.6,500,00/= is indeed accounted for by the 1st defendant to have been paid to the 2nd defendant and evidence of bank transfers exhibited without rebuttal. That sum cannot, in fairness, be demanded from the 1st defendant. In fact that fact is acknowledged by the plaintiff who has singled out a prayer for recovery of the sums held by the 2nd defendant.

39. On the 2nd defendant's part, the clear evidence given by the plaintiff and 1st defendant has not been controverted. The submission put forth, and which submission is not offered on the basis of any evidence, is that it was acting for a disclosed principle and thus not to be liable in person. I did not find such submission to be genuine or made in good faith for two basic reasons. The first reason is that the agreement pursuant to which the 2nd defendant received the payment of Kshs.6, 500,000 was made to incorporate the Law Society Conditions of Sale. Those conditions of sale constitute the advocate for the vendor to be a stakeholder obligated to hold the deposit or full purchase money for the benefit of the parties and only to part with the same upon completion and handover of vacant possession or prior to completion, by written consent of the purchaser. In this matter there was neither completion nor consent to release the funds prior to completion. The 2nd defendant thus remained a stakeholder and with no prospects in sight for completion, he must now surrender the stake to the depositor.

40. The position of the 2nd defendant was both contractual and fiduciary and creates a direct relationship between the stakeholder and the persons in whose account the money is held. It therefore can never be a defence that he was an agent acting for a disclosed principle. In his capacity as a stakeholder, he was acting for both the vendor and purchaser and owed duty to both to hold the purchase money and pay to the vendor in the event of successful completion or to effect a refund to the purchaser, in the event of failure to complete.

41. The second reason that defence cannot hold is the fact that in this matter the 2nd defendant even after filing a defence and bundle of documents opted not to give any evidence. That option rendered the pleadings filed, including the documents, mere and bare allegation. It thus leaves the position of the evidence that the sum of Kshs.6,500,000/= was paid to the 2nd defendant as purchase price for the sale of an identified property and the 2nd defendant was to hold the same pending completion unless there was consent sought and obtained from the plaintiff to release any part thereof prior to completion. This is what the contract of sale bound the 2nd defendant to do. The binding effect of the contract is to be found at Clause 5 of the Law Society of Kenya conditions of sale, 1989 edition.

42. This court in *Alec Roger Agnes Van Wuk & Anor vs Angelo Owino & Co. Advocate* when confronted with similar facts held and said:

“I do find that the Law Society Conditions of sale were expressly made part of the agreement for sale between the parties and that by those conditions of sale deposit paid to an advocate for the vendor is paid to him in the capacity and position of a stakeholder. In that capacity, he remains a trustee for the funds mandated to hold the same pending the happening of an agreed event of completion short of that, the release can only be with the consent of the purchaser.

When so paid as a stakeholder, the defendant had no semblance of any right to release the said sum to his client before completion and without an express authority of the purchaser or his advocate. In failing to do so he breached his professional duty and is bound to make good such breach”.

43. I do find that there being no evidence that the transaction sailed through to merit the purchase price being paid to the vendor, and without permission of the plaintiff to pay prior to completion, the money is deemed to be held by the 2nd defendant. It is being held for a purpose which has turned unachievable, and with the loss of prospects of completion, that sum is due and is refundable because to hold otherwise would be to reward an unjust enrichment.

44. I do order that the 2nd defendant shall pay to the plaintiff the sum of Kshs.6, 500,000/= paid to and held by the 2nd defendant as a stakeholder and accordingly judgment is entered for the plaintiff against the 2nd defendant from that sum.

45. That determination now leads me to the specific prayers made by the plaintiff. Regarding the motor vehicle Registration No. KBX 059W, I have found that there was no proof to the requisite standards that any money was paid to the 1st defendant and specified for employment to buy a family car. What the 1st defendant accepted was payment to be used for car hire or rentals for her transport between work and home. That is the kind of money that is expected by the giver to have been spent irrecoverably. The position does not change that the plaintiff rather than hiring a motor vehicle opted to buy a motor vehicle. I do not find any trust to have resulted in favour of the plaintiff because there was no evidence led to prove the mutual intention to buy a motor vehicle. In the end it is my finding that prayers **a) & b)** were never proved to be merited and the same are hereby dismissed.

46. On prayer C (i), I have held that the money was paid and continues to be held by the 2nd defendant as a stakeholder and cannot be so held in perpetuity but subject to the prospects of completion. Here the uncontroverted evidence is that the title to be sold cannot be sold and therefore there are no prospects of completion. That prayer is granted in the specific sum of Kshs.6, 500,000/=.

47. For prayer C, I have held that only the surplus over the sum paid to the 2nd defendant being Kshs.3,500,000/= and 500 Euros are due for refund to the plaintiff. For that sum, I do enter judgment for the plaintiff against the 1st defendant. In order that the specific sum paid for wedding dress be ascertained, I adopt the current exchange rate of Kshs.115 to the Euro and get the sum of Kshs.57,000/= to be due and payable to the plaintiff.

48. In summary, I do enter judgment for the plaintiff against the defendants as follows:-

- a) Kenya shilling 3,557,000 against the 1st defendant
- b) Kshs.6,500,000 against the 2nd defendant
- c) Costs of the suit jointly and severally against the two defendant.
- d) Interests on the sums awarded at court rates from the date of the plaint till payment in full.

Dated and delivered at Mombasa this 8th day of November 2019.

P.J.O. OTIENO

JUDGE

[\[1\]](#) Cmc Aviation Ltd vs Cruisair Ltd (No. 1) [1978] KLR 103