



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL CASE NO. 207 OF 2016

FPS.....PLAINTIFF

= VERSUS =

SKM.....DEFENDANT

J U D G E M E N T

1. The plaintiff brought this suit against the defendant vide his plaint dated 19th December 2013 seeking the following reliefs;

- a) A Declaration that the defendant holds the Maisonette Number 1 on Plot No. xxxx Section I Mainland North in trust for the plaintiff.**
- b) A mandatory injunction compelling the defendant by herself, her servants or agents or otherwise howsoever to release to the plaintiff the original title documents, sub-lease and other material documents relating to the Maisonette Number 1 on Plot No. xxxx Section I Mainland North to the plaintiff.**
- c) A mandatory injunction to compel the defendant to execute a Transfer of Lease and perform such other material acts necessary for the transfer of the title or Sub-lease over the Maisonette Number 1 on Plot number xxxx Section I Mainland North in favour of the plaintiff.**
- d) Any other further or alternative relief that this Honourable Court may deem fit to grant**
- e) Costs of and incidental to this suit.**

2. The plaintiff pleaded that he had a close relationship with the defendant and due to the nature of this relationship together with representations made by the defendant the plaintiff undertook the following;

- a) The plaintiff let the defendant enter into an Agreement of Sale and assignment dated 29th March, 2007 for the purchase of Maisonette Number I built on Plot Number xxxx Section 1 Mainland North (hereafter referred to as the suit property).*
- b) The plaintiff provided the defendant with the money and allowed the defendant to make payments on his behalf towards the purchase price for the suit property; and*
- c) The plaintiff allowed the defendant to execute the transfer document and execute the sub-lease for the suit property in her names in trust for the plaintiff.*

3. That upon successful transfer of the suit property into the defendant's name, the two moved in together and have remained in possession thereof to date. The plaintiff further pleaded that the defendant is planning to let out or sell the suit property to a 3rd party and has undertaken the following acts of bad faith;

- (i) Offering for sale or let or as security a Maisonette Number I on Plot Number xxxx Section I Mainland North.**
- (ii) Failing to disclose the purported tenancy or sale or security over Maisonette Number I on Plot Number xxxx Section I Mainland North; and**
- (iii) Refusing to hand over to the plaintiff the title documents, Agreement for Sale and original receipts for payment of the**

purchase price for the Maisonette Number I on Plot Number xxxx Section I Mainland North.

4. The suit was defended by defence and counter-claim filed on 20th January 2014. The defendant admitted paragraph 3 of the plaint but added that the relationship resulted in the plaintiff marrying the defendant in the year 2000 and they were blessed with two children. The defendant states that because the plaintiff was on a tourist visa, he came to live with them in April, August and December of every year.

5. The defendant denied the allegations enumerated in paragraph 7(a) – (c) of the plaint and put the plaintiff to strict proof. She accused the plaintiff of failing to disclose the property was purchased as the matrimonial property and they both contributed money for its purchase. The defendant avers the matter should have been filed in the High Court Family Division. In the counter-claim, the defendant accuses the plaintiff of not paying money for upkeep and school fees for the children. She urged the Court to restrain him from disposing the matrimonial property.

6. The defendant prays for the following in her counter-claim;

a) The plaintiff entire suit be dismissed with costs to the defendant and the defendants' defence and counter-claim be allowed as prayed.

b) A declaration that Maisonette Number I on Plot Number xxxx Section I Mainland North is matrimonial property of the defendant and the plaintiff and each have equal share of the said property stated hereinabove.

c) A permanent injunction be issued against the plaintiff restraining himself, his agents, employees, servants, third parties or otherwise from letting out selling disposing off and or causing the Maisonette Number I on Plot Number xxxx Section I Mainland North to be transferred to a third party or in favour of the plaintiff.

d) A mandatory injunction be issued against the plaintiff restraining himself, his agents, servants or otherwise from destroying, demolishing, wasting and or causing the Maisonette Number I on Plot Number xxxx Section I Mainland North to be intermeddled with by a third party or the plaintiff.

e) A declaration that the plaintiff and the defendant, the parties and have equal share parental responsibility over the minors herein NS - 8 years old and NS – 5 years old and the plaintiff be ordered to maintain the minor children and pay their school needs.

f) Cost of the suit

g) Any other relief that this Honourable Court may deem fit to grant.

7. In his oral evidence, the plaintiff adopted his witness statement dated 13/1/2016 and filed on the same date. He stated that he met the defendant in the year 2000 while he was on holiday in Kenya and subsequently developed an intimate relationship with her. That to avoid spending huge sums of money for accommodation in hotels during his trips to Kenya, he requested the defendant to search for him a house to buy.

8. The plaintiff continued that the defendant misrepresented to him that as a foreigner he could not acquire immovable property in his name. Hence they came into a consensus to have the purchased house registered in the defendant's name. The house found was Maisonette No. I on Plot No. xxxx/1/MN. **PW1** stated that on 29/3/2007 the defendant entered into an agreement for sale and assignment to purchase the suit property. They engaged the services of Apollo Muinde to help them with the transaction.

9. The 7th – 10th defendants avers that the plaintiff has pleaded owning Diani Beach Block/xx thus it has no title which is at risk of being deprived. The 7th – 10th defendants also denied this Court has jurisdiction to review grants and dispositions of public land. The 7th – 10th defendants plead that the plaintiff's suit discloses no reasonable cause of action therefore should be dismissed with costs.

10. It is further evidence of the plaintiff that the defendant issued him with a verbal notice to vacate the suit property as from December 2013 after he learnt that the defendant was planning to dispose of the suit property. That these actions by the defendant totally breached the trust he had bestowed upon her. The plaintiff also said the defendant failed to disclose the purported tenancy or sale or the fact that she intended to offer the suit property as security or in any other manner that required his consent. The plaintiff's claim the defendant failed to provide him with copies of receipt for payment of the purchase price. It is his case that the defendant holds the property in trust for him.

11. In cross-examination, the plaintiff said he has known the defendant for 10 – 12 years. That he has been visiting Kenya on and off. **PW1** said he had come from the suit premises that morning. That they have two children with the defendant named N and N; who live with the defendant in the suit house all these period. **PW1** further said that he was unable to provide the money in 2013 because he was sick. He agreed that he did not ask advocate in wiring to have the title in his name. He further admitted that he held a talk with the branch manager of Diamond Trust Bank Ltd, Nyali about selling the suit house but no offer was made. The plaintiff said the house should be registered in a trust that is safe. He had not seen any notice of sale put up by the defendant.

12. The defendant on her part also adopted her witness statement dated 17/1/2014. She said the plaintiff is her husband and father of her two children. They have lived together since August 2000 until now. The defendant said the plaintiff has been a responsible husband and the father paying for bills, school fees and all other duties as head of the family. The defendant stated that they had no agreement that she was to act for him in the sale transaction. She also denied misrepresenting anything to the plaintiff or that she holds the property in trust for him.

13. According to the defendant, they bought the property “for us and the children as hour home”. The defendant further stated that she is the one who furnished the house with air conditioner, fridge, T.V., generator and all necessary household goods. That the plaintiff was in the

country in January and November 2013 and he never paid any bills/schools thus a quarrel ensued. That the plaintiff then suggested they sell the suit property or use it to borrow money which proposal she was against. The defendant prayed to for a declaration that they both equally hold the suit house as their matrimonial home. She also asked the Court for an order to prevent him from selling or transferring the property. The defendant urged the Court to dismiss the plaintiff's suit with costs.

14. During cross-examination, the defendant said she had sued the plaintiff at the children's Court for maintenance of the children. She admitted it is the plaintiff who paid money for the purchase price. That she no longer trust the plaintiff on account of what he has done therefore she had a problem with the title being registered solely in his name. That the house is for the family. In re-examination, **DW1** said the plaintiff is her husband. That they both agreed to have the title registered in her name. She was not ready for an alternative accommodation as this is the only place the children know as their home. That the plaintiff stopped paying for upkeep after he filed this case.

15. The advocates filed written submissions which I have considered. The plaintiff raised the following issues which I choose to adopt in determining the dispute;

(a) *Whether the defendant is holding the suit property in trust in favour of the plaintiff?*

(b) *Who is the true owner of the suit property?*

(c) *Whether the plaintiff is entitled to the orders sought in the plaint?*

16. The plaintiff submitted that the Court of Appeal in the Case of **Jubetaibi African Adventure Limited and Anor Vs Christopher Michael Lockey (2017) eKLR** held that;

"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 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.

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 may be 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."

17. That in this Case, it is evident that a trust arose in the current Case as affirmed by production of the cheques No. xxxx for Kshs.2.3M; No. xxxx for Kshs.1.8M, xxxx for Kshs.36,955 and No. xxxx for Kshs. 6.7M (**Pex 8, 9, 10, 11 and 12 respectively**). He also cited the decision of **Rose Naswa Masinde Vs Lilian Nekesa Simiyu (2014) eKLR** where Munyao J held thus;

"I come to the same conclusion in this Case. As I mentioned earlier, the defendant did not in any way demonstrate that she contributed a cent towards the purchase of the suit land. I am inclined to believe the version of the plaintiff that the suit land was to be held by the defendant, on the understanding that she will later transfer the same to her sister-in-law, VM."

18. I have equally analysed the evidence presented by both sides. The parties have been and are still living together. Whether they are living together as husband or as boyfriend/girlfriend is not for this Court to determine. The plaintiff stated that the defendant has been living in the house together with their two children. The plaintiff said the defendant gave him verbal notice in December 2013 to vacate the house yet in the year 2019 when he was coming to give evidence he was still living in the suit property.

19. In the circumstances I do agree there is a trustee relationship which was created. In my opinion and I so hold that the trustee relationship is between the plaintiff and the defendant and between plaintiff/defendant and their children. Although it is not disputed that it is the plaintiff who paid for the purchase price but he acquiesced to the other three parties living on the suit property as their home from the time of purchase to date. He therefore needed to lay a basis why he wanted this state of affairs changed now. In his attempt to explain this away, the plaintiff stated that the defendant was in the process of letting and/or offering the suit property as security without disclosing to him the details. He however did not lead any evidence to prove this averment.

20. In relation to the trusteeship, I make a finding that both the plaintiff as the person who paid for the purchase price cannot be declared as the sole owner of the suit property having led the defendant by his actions to believe that the suit property was to be used jointly between them. Similarly, the defendant who is the registered owner of the suit property holds the property for her benefit and the benefit of the plaintiff and their two children. The plaintiff cannot be relieved from the obligations bestowed by section 25(2) of the Land Registration Act which states thus;

"(2) Nothing in this section shall be taken to relieve a proprietor from any duty or obligation to which the person is subject to as a trustee."

21. The defendant in her pleadings and submissions urged the Court to find that this is a matrimonial property. Unfortunately, this court is not clothed with such jurisdiction so I will not delve into that subject.

22. As correctly submitted by the defendant, she did not acquire the property by way of any wrongdoing. The plaintiff is still using the suit property and no evidence was provided to show that the defendant was in the process of disposing off the property. I do not find from the pleadings that a cause of action had accrued to the plaintiff. Consequently, I opine that the plaintiff has not proved a Case within the Standards required by law to be entitled to the orders he is seeking. The claim is hereby dismissed.

23. In regard to the prayers sought in the counter-claim, this Court lacks jurisdiction to make the declaration under prayer (b) that this is a matrimonial property and prayer (e) that the plaintiff and the defendant have equal share of parental responsibility over the minors. In respect to prayer (c) and (d) the same is granted in the following terms;

(c) A permanent injunction is issued against the plaintiff restraining himself, his agents, employees, servants, third parties or otherwise from letting out selling, disposing off and or causing the Maisonette Number I on Plot Number xxxx Section I Mainland North to be transferred to a third party.

(d) A mandatory injunction be and is issued against the plaintiff restraining himself, his agents, servants or otherwise from destroying, demolishing, wasting and or causing the Maisonette Number I on Plot Number 8486 Section I Mainland North to be intermeddled with by any third parties.

24. Given the relationship between the parties herein, I order each party to bear their costs of the suit.

Dated, signed and delivered at BUSIA this 12th day of May, 2020.

A. OMOLLO

JUDGE

Judgment delivered electronically through mail this 12th Day of May, 2020 due to Covid-19 pandemic.

A. OMOLLO

JUDGE