

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL SUIT NO. 72 OF 2006

PETER OCHIENG' OKEYA PLAINTIFF

V E R S U S

CARMEL ALMA LAMON DEFENDANT

J U D G M E N T

The plaint dated 20.7.2006 is seeking an order that plot number **KAKAMEGA TOWN BLOCK III/49** be sold at the current market value and the proceeds shared equally between the two parties. In the alternative the plaintiff is seeking to have an order that the defendant pay him half the value of the suit land. The matter proceeded ex-parte as the court waited for counsel for the defendant but she did not turn up although served. The defendant herself was not also in court. The defendant wrote a letter dated 3.4.2014 seeking to discuss with the court about this case but the case had been heard on 20.3.2014 and judgment fixed for 30.7.2014. I expected counsel for the defendant to make an application and arrest the delivery of the judgment but nothing was done for a period of over five months when this judgment has been pending.

The plaintiff's evidence is that he used to run an orphanage home called **ORPHANS HOME OF GRACE** located at Milimani area in Kakamega. He used to preach and travelled to Australia where he would get some offerings after preaching. He raised 30,000 Australian dollars which is about KShs.1.5 million and they agreed to buy land jointly with the defendant. They had a joint account at Barclays Bank and they withdrew some money on 5.6.2002 for purposes of buying the suit land. They paid the seller **KShs.1,449,000/=** and this is the same amount they had withdrawn from their bank account. He has now left the orphanage as a director and he would like to get half a share of the value of the land. He proposes to have the land sold or the defendant be made to buy his share at the current market rate.

Counsel for the plaintiff filed written submissions and narrated the above evidence. Counsel maintains that the two parties are jointly registered as the owners of the land and the issue of trust as raised in the defence cannot stand. Counsel is relying on the case of **SAMUEL NJUGUNA KIMEMIA V ROSE MGENI MTWANA. Mombasa HCCC No. 56 of 2009.**

The defendant filed her defence and counterclaim dated 1.9.2006 and contended that the proceeds that were used to buy the land were solely contributed by the defendant. She used money donated by well-wishers and part of her pension to buy the plot. She would like to have the plaintiff's name struck out of the registry.

The plaintiff produced the title deed for the suit land and the sale agreement. According to the agreement the land was bought by the two parties jointly and there was no mention of the orphanage. It is clear to me that the orphanage is located on the suit land. The land was bought for **KShs.2 million**. The bank account was also in the name of the two parties and there was no mention of an orphanage. The plaintiff produced minutes of the orphanage dated 18.11.2003 and he was listed as the country local director. It is not clear why the bank account was not opened in the name of the orphanage or why the plot was not registered in the name of the orphanage yet there is evidence that the orphanage is a registered institution. I do find that the plaintiff was lawfully registered on the title deed as a shareholder and not as a trustee. The title deed does not show the share of each party or whether it is joint proprietorship or proprietorship in common. I will therefore hold that each of the two registered owners is entitled to a half share of the suit land. I find that the plaintiff has proved his case on a balance of probabilities and do make the following orders:-

1. Plot number KAKAMEGA TOWN BLOCK III/49 be valued so as to establish its current market value.
2. Upon valuation the defendant to pay 50% of that value to the plaintiff within 90 days after the valuation.
3. In default of payment the plaintiff shall be at liberty to execute against the suit land.
4. The plaintiff to meet the costs of the valuation.
5. There shall be no orders as to costs.

Delivered, dated and signed at Kakamega this 8th day of October 2014

SAID J. CHITEMBWE

J U D G E