



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 251 of 2012

ALICE WANJIRU MWAURA.....PLAINTIFF

VERSUS

PETER NJUGUNA MWAURA.....1ST DEFENDANT

ESTHER WAITHAKA MWAURA.....2ND DEFENDANT

JUDGEMENT

The Plaintiffs by an Amended Plaint dated 24/5/2012 sought Judgment for orders that:

- i) The Kabete/Nyathuna/665 be sub-divided into two portions; the Plaintiff and the 2nd Defendant to have one half and the 1st Defendant the other half.
- ii) A declaration that one half of the land belongs to the Plaintiff and 2nd Defendant.
- iii) Ownership and rental income of the six rental houses and shop be divided between the Plaintiff and the 2nd Defendant.
- iv) Any other relief that the Court may deem just and fair.

The Plaintiff stated that she is the mother of the 1st Defendant together with seven other siblings and a co-wife of the 2nd Defendant. Further that she was married to her deceased husband in 1958 and the 2nd Defendant got married to him in 1973. The Plaintiff averred no one took out letters of administration upon their husband's death as his estate had no property for distribution. It was the Plaintiff's averments that in order to finance her co-wife's wedding her deceased husband sold a plot belonging to the Plaintiff which she had purchased in 1960.

The Plaintiff stated on learning that her plot has been sold she reported to the local Provincial Administration when after the deceased was summoned. She averred that the deceased revealed that he had purchased another plot with the proceeds of the sale of the Plaintiff's plot and that he had registered the plot in his name. Further that the deceased was ordered by the local chief to transfer the plot to the Plaintiffs name but that the Plaintiff and her deceased husband mutually agreed to sell the plot and purchase another near their home in Nyathuna.

It was the Plaintiff's averment that sometimes in the year 2007 a parcel of land known as Kabete/Nyathuna/665 was available for purchase at a consideration of Kshs. 500,000/-. She stated that

the same was purchased using the proceeds of the sale of her plot (Kshs.300,000/-) and that the 1st Defendant added Kshs. 200,000/-. Subsequent to the purchase, the said parcel was registered in the name of the 1st Defendant by mutual consent of the Plaintiff and the deceased. The Plaintiff avers that there are six rental houses and a shop built by the deceased currently run and/or managed by the 2nd Defendant.

The Plaintiff's contention is that the 1st Defendant is threatening to sub-divide the said parcel of land to allocate portions of it to the 2nd Defendant, the Plaintiff's children and other persons unknown to her. She contends that she is the major contributor of the purchase price of the parcel of land and therefore has equitable interests in the land which she would like for the same to be divided in to two portions; one part for herself and the 2nd Defendant, and the other portion for the 1st Defendant.

The Plaintiff obtained an interlocutory judgment on 17/10/2012 against the Defendants for the latter failed to enter appearance and file a defence within the prescribed period. The matter was set down for hearing for formal proof on 22/1/2013 and the same proceeded *ex-prate*. This is despite the service of the hearing notice upon the Defendants. There is an Affidavit of Service sworn by a Process Server one Joseph Kangethe on 18/1/2013 to that effect. In essence therefore, the Plaintiff's suit is unopposed.

The Plaintiff testified and reiterated the contents of the Plaintiff. In support of her claim, she produced a certificate of official search in respect of the suit parcel dated 1/3/2012. The search indicated that the parcel is freehold measuring approximately 1.3 acres. Further that the proprietor is Peter Njuguna Mwaura (1st Defendant) and a Title Deed was issued on 21/8/2008.

The issue is whether this Court can issue declaratory orders and proceed to sub-divide the parcel of land subject matter of this suit as prayed for by the Plaintiff. She claims to have contributed to the purchase of the said parcel and that she and the deceased agreed that the title should be registered in the name of the 1st Defendant who is her son. From the pleadings and evidence of the Plaintiff, this Court makes an inference that the Plaintiff claims that the 1st Defendant and herself are tenants in common. However, the certificate of official search shows that the title is registered in the name of the 1st Defendant. The Plaintiff's averments are uncontroverted as the Defendants failed to attend Court or file their defences to thereto. Even if so, the Court must satisfy itself that the Plaintiff has proved on a balance of probability that she is a proprietor in common with the 1st Defendant.

The Courts have held that a presumption of equitable joint tenancy or tenancy in common would arise depending on contribution to the purchase price made by each co-owner. See **Yogendra Purshottam Patel v Pascale Mireille Baksh (nee Patel) & 2 Others (2006) eKLR** "Turning to the present case, it can be readily appreciated that the circumstances pleaded by Y.P. Patel as giving rise to a resulting trust in his favour are both peculiar and unique. It is not the familiar type of cases where property is purchased in the name of another or others the purchase providing purchase money but his name does not appear in the title. Nor is it a case where several people contribute the purchase money in equal or unequal shares the title referring to them as joint owners without specifying their respective beneficial interest in the property. In the latter case, a presumption of equitable joint tenancy or tenancy in common would arise depending on contribution to the purchase price made by each co-owner."

In determining that aforementioned case, Githinji J. (as he then was now JA) referred to **Halsbury's Laws of England – 4th (ed) – Re Issue Vol. 16(2)**

“Joint transactions:

The principle that the property is deemed to be held on resulting trust applies where several persons purchase property in the name of one. Where, however, two or more persons purchase property in their joint names or transfer property in their joint names without making an express declaration as to their beneficial interests and contribute the purchase money or property in equal shares, they hold the property as joint tenants with benefit of survivorship both at law and in equity, unless there is evidence of a contrary intention on their part at the time of purchase or transfer or there are circumstances from

which such intention can be inferred. If they contributed purchase money or property in equal shares, whether the property is purchased in the name of one or in their joint names, there is a tenant in common between them in equity, although even in this case the equitable tenancy in common may be rebutted by evidence or circumstances.”(Emphasis added).

The said Judge also referred to an Australian case Calverley v Green 56 ALR 483

i) *Where a person pays the purchase price of a property and causes it to be transferred to another and himself jointly the property is presumed to be held by the transferees upon trust for the person who provided the purchase price.*

ii) *Where two or more persons advance purchase price of property in different shares, it is presumed that the person or persons to whom the legal title is transferred holds or hold the property upon a resulting trust in favour of those who provided the purchase price in the shares in which they provided it.”*

It is noteworthy to state that the Plaintiff did not furnish the Court with any document such as a receipt or acknowledgement of payment of the purchase price of the suit parcel to support her claim of having contributed toward the purchase of the same. In her Complaint, the Plaintiff stated that the suit property was purchased from her husband's relatives. She however did not call any witnesses amongst these relatives or the local chief to give evidence in support of her claim. The Court is left to make a finding based on the word of the Plaintiff.

The Court is not in a position to find that indeed the Plaintiff made contributions toward the purchase of the suit property. The Plaintiff's word is not sufficient enough to enable this Court make a declaratory order and also order that the suit property be sub-divided as prayed by the Plaintiff.

The Plaintiff did not plead trust. She also did not give any evidence to suggest that the 1st Defendant despite being the registered owner was holding a portion of the same in trust for her. In any event, it is settled that a party relying on the existence of trust must prove through evidence the existence and creation of such trust. See Gichuki v Gichuki (1982) KLR 285. Also see Mbothu & 8 Others v Waitimu & 11 Others (1986) KLR 171

“The law never implies, the Court never presumes, a trust, but in case of absolute necessity. The Courts will not imply a trust save in order to give effect to the intentions of the parties. The intention of the parties to create a trust must be clearly determined before a trust will be implied.”

For a customary trust over land to arise 3 requirements must be met: (I) Existence of a family relationship, (II) Registration of the disputed property on the eldest son or other son's name and (III) a family undertaking or understanding that such registration is made and held for the benefit of the other family members, either by way of express agreement or implied for example by the beneficiaries living and using the disputed property. See the case of Moses Mbugua V Mary Nyambura Ngethe [2012] eKLR

In respect of the rental houses and shops, here again the Plaintiff left this court with no concrete evidence in support of her claim. It was her averment that her deceased husband constructed the rental houses and shops on the suit property. She did not state which year they were put up. She also did not state the year her husband died and in her evidence she testified that she could not recall when her husband died. Hence the Court is left in doubt as to whether indeed these structures were put up by her deceased husband. She averred that the 1st Defendant is her son and that he has 7 other siblings, none of whom were called as witnesses to confirm the Plaintiff's averments.

In the circumstances, I find that the Plaintiff has not proved her claim on a balance of probability and as such I dismiss the suit in its entirety.

Dated, Signed and Delivered this 8th day of April 2013

L.N. GACHERU
JUDGE

In the Presence of:-

.....For the Plaintiff
.....For the 1st Defendant
.....For the 2nd Defendant
..... Court Clerk