



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 201 OF 2012

P R APPELLANT

V E R S U S

W M O RESPONDENT

(Being an appeal against the Judgment/Decree of the Senior Resident Magistrate's Court at Kwale (Hon. A.O. Aming'a dated 28th November, 2012 in SRMCC No. 227 of 2012)

JUDGEMENT

1. This is an appeal against the decision of **SRMCC Kwale No. 227 of 2012** of 28th November 2012. The Court by that judgment dismissed the Appellant's suit. Appellant in that case sought declaratory judgment that motor vehicle Registration No. [Particulars withheld] belonged to her and in the alternative she sought a refund from the Respondent of 816 Euros.
2. This is the 1st Appellant Court in considering this appeal I will be guided by the cases **SELLE & ANOTHER -VS- ASSOCIATION MOTORBOAT COMPANY LTD & OTHERS [1968] EA 123-**

“An appeal from the High Court is by way of a retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particular circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally...”

PETER -VS- SUNDAY POST LTD [1958]E.A. 424-

“Whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide...”

3. Appellant in evidence in chief stated that the Respondent was her boyfriend but that they later separated. That in September 2008 she sent the Respondent 7,500Euros through the Respondent's Bank Account. She produced exhibit No. 2 as evidence of that transfer from her account in Australia. She returned to Diani, Mombasa in November 2008 and she said she found the

Respondent had bought a vehicle [Particulars withheld] (**the vehicle**). It was in the year 2008 that she discovered the car was registered in the Defendant's name. In that same year in January the Appellant discovered that the Respondent was seeing other women and was entertaining them in the Appellant's home in Diani while the Appellant was in Australia. As a consequence the Appellant ended their relationship and the Respondent vacated her house in Diani. He left the house with the vehicle. Appellant said that she again sent the Respondent 300Euros on 21st September 2009 for the Insurance of the vehicle. On 2nd June 2010 she sent 362Euros for the children's upkeep. It was not clear whose children the money was intended because there was no evidence that the Appellant and the Respondent had children.

4. On being cross examined Appellant had this to say-

“I sent the 7500 Euros from abroad. I don’t have any written instructions on the desired goal. I did not write any e-mail. I did call the Defendant on telephone. I did not instruct him on the make and the model of the vehicle I wanted the Defendant to buy. He was to wait for my arrival. I am an experienced driver. I understood ownership procedures. I am not aware of the requirements on transfer in Kenya.

I came back to Kenya to find the Defendant with the car in November 2008. I did not like the car because it is not what I wanted. I wanted a bigger car. The Defendant told me that was the car he had bought with the money I sent him.

It is the Defendant who showed me the car’s documents. They were in the Defendant’s names. I filed this case in November 2011. This was three (3) years down the line. I knew all along the car was in the Defendant’s names. I went back to Australia.”

Appellant denied that the 7,500euros was a gift to the Respondent.

5. On re-examination Appellant stated that she was in constant communication with the Respondent on the intended use of the money but she did not state what the communication precisely was about.
6. The Respondent in evidence stated that he was a waiter at Diani Sea Resort Hotel from 1987. He stated that the Appellant was his lover and that they met at his place of work. He said that he had previous relationship with another woman called **S W J** and they were married in the year 2002. He produced a marriage certificate to prove that marriage. He said that he had his own assets which included a car even before he met the Appellant. That car was registration No. [Particulars withheld]. He produced a photograph of it in evidence and also a sale agreement dated 27th September 2008 in respect of that vehicle. He later sold the car for Kshs. 190,000/-. He produced a copy of the sale agreement evidencing that sale. He said he had that car [Particulars withheld] when he met the Appellant. He later bought another vehicle registration No. [Particulars withheld] which is subject of this appeal. He bought that vehicle on 30th September 2008 for Kshs. 650,000/-. He produced a sale agreement for that sale. The car after its purchase according to his evidence was transferred to his name. He said he had the ability to purchase the vehicle contrary to what was stated by the Appellant. He denied that he and the Appellant had agreed that the vehicle would be registered in her name. He termed the money sent to him by the Appellant as normal remittance. He said that there was no dispute over the ownership of the vehicle between him and the Appellant until their relationship ended.
7. He was cross examined and he was unable to produce his pay slips to prove his ability to purchase the vehicle. He however stated that his salary was Kshs. 20,000/-. Out of that amount he would pay Kshs. 3,500/- as house rent. He also maintained his African wife and three children. All the children were attending school. Further that the sale proceeds of vehicle [Particulars withheld] that is Kshs. 190,000/- went towards the purchase price of the vehicle. He however confirmed that he had not produced documentary evidence to prove the sale of [Particulars withheld]. The Respondent confirmed having received from the Appellant 7,500Euros.

8. Appellant's ground of appeal relate to-

- **The trial Court's assessment of the evidence and**
- **What the Appellant referred to as the Trial Court's error in law in disregarding existence of constructive trust.**

9. The learned Magistrate's assessment of the evidence cannot be faulted. The parties stated that they were lovers at the material time. Appellant who alleged that she instructed Respondent to purchase a car in her name did not prove the same. She did not follow up the sending of the money with any instructions either in writing or by telephone. Although she spoke of being in constant communication with the Respondent she did not allude to the content of that communication. She did inform the Court that she sent to the Respondent money for the support of children and the question then would be whether 7,500Euros was also a similar gratuitous financial support.

10. In considering the Appellant's case the Court needs to examine

whether equity can come to her aid in the form of constructive trust. In the book **MORDERN EQUITY** by Hanbury & Martin – 15th Edition constructive trust is said –

“... to be one which arises by operation of law, and not by reason of the intention of the parties, express or implied. ... The principle is that where a person who holds property in circumstances in which in equity and good conscience it should be held or enjoyed by another he will be compelled to hold the property on trust for that other.”

Lord Denning in the case **HUSSEY -VS- PALMER [1972]3 ALL E.R 70 (CA)** had this to say about constructive trust-

“by whatever name it is described, it is a trust imposed by law whenever justice and good conscience require it. It is a liberal process founded upon large principles of equity, to be applied in cases where the Defendant cannot conscientiously keep the property for himself alone, but ought to allow another to have the property or a share in it. It is an equitable remedy where the Court can enable an aggrieved party to obtain restitution.”

11. In my view from my review of the evidence tendered before the trial Court I find that I cannot deviate from the conclusion of the trial Court even on the finding that there was no constructive trust. There was no evidence that was tendered which can lead this Court to find that justice and good conscience required such a trust to be imposed.

12. Further Appellant stated that she discovered that the Respondent had not registered the vehicle in her name in the year 2008. She did not seek redress from the Court on making that discovery. She even stated that she accompanied the Respondent in the year 2010 when he went to purchase the Insurance cover for the vehicle. Equity does not aid the indolent. Appellant waited until the year 2011 to sue the Respondent before the Chief Magistrate's Court. In my view her claim was caught by the doctrine of laches. She delayed and she cannot obtain equitable relief.

13. It has not escaped my attention that the Appellant in her claim was seeking to recover from the Respondent 362Euros which she allege she sent to the Respondent for the children's upkeep. It is not clear why such an amount which was intended for the children's upkeep should be refunded to the Appellant. The inclusion of that amount leads this Court to accept the Respondent's statement that Appellant only sought to have the vehicle registered in her name after their relationship ended. It would seem that after their relationship ended Appellant was intent on recovering monies she generally sent to the Respondent during the subsistence of their relationship. The Court is alive to its duty to promote honest bargaining and having parties live up to reasonable expectation of the other but having made the finding herein above Appellant cannot benefit from

such duty.

14. In the end I find that there is no merit in the Appellant's appeal. It is dismissed with costs to the Respondent. An order is hereby issued for the Respondent to proceed and obtain possession of motor vehicle Reg. No. [Particulars withheld] from Diani Police Station.

Dated and delivered at Mombasa this 1st day of November, 2013.

MARY KASANGO

JUDGE