



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(Coram: Ojwang, J.)

COMMERCIAL SUIT NO. 27 OF 2010

HAMM HELMUT.....PLAINTIFF

-VERSUS-

FARIDA RIZIKI.....DEFENDANT

RULING

The plaintiff moved the Court by Chamber Summons dated **30th August, 2010** and brought under Order XXXIX, rules 1, 2, 3 & 9 of the Civil Procedure Rules and ss. 1A, 1B and 63 (e) of the Civil Procedure Act (Cap. 21, Laws of Kenya).

The plaintiff's main prayer is that:

“the defendant by herself, her servants, agents be restrained from marketing, disposing, transferring and/or in any other manner alienating plot No. Kwale/Ukunda/4078 pending the hearing and determination of this suit.”

The grounds on which the application is based are set out, for the material part, as follows:

- (i) a verbal agreement had been made between the plaintiff and the defendant that a parcel of land be purchased in the name of the defendant, for use in the construction of a children's welfare centre;
- (ii) the building when constructed, was to be occupied partially by the defendant, and partially by tenants, during the initial period when the plaintiff was processing immigration-permit arrangements;

- (iii) further arrangements were subsequently to be made between the plaintiff and the defendant;
- (iv) the plaintiff set up two bank accounts at Barclays Bank of Kenya Limited, Diani Branch: a/c No. 016-6315492 (in the plaintiff's name); and a/c No. 016-6330009 (in the defendant's name); as regards the first account, the plaintiff made the defendant a recognized agent who could operate the account in the plaintiff's absence — but the defendant was to operate this account only with the express permission of the plaintiff;
- (v) with moneys wholly provided by the plaintiff, the defendant purchased the suit property, L.R. No. Kwale/Ukunda/4078, and constructed a house thereon;
- (vi) between **10th May, 2010** and **9th August, 2010** the plaintiff was away in Germany, and had not authorized the defendant to withdraw any money from the aforesaid a/c No. 016-6315492; but he returned to find that Kshs. 3,000,000/= had been transferred to a/c No. 016-6330009; and besides, Kshs. 300,000/= had been withdrawn;
- (vii) the defendant had betrayed the trust that the plaintiff had reposed in her; and a dispute has arisen in which the plaintiff is claiming —
- a refund of Kshs. 3,300,000/= converted by the defendant;
 - €49,400 which he had invested;
- (viii) the plaintiff apprehends that the defendant, unless restrained, may dispose of the suit property to a third party;
- (ix) if the defendant disposes of the suit property, the plaintiff will suffer irreparable loss and damage not compensable in monetary terms;
- (x) the plaintiff is willing to deposit such security as the Court may order, against any damages such as may be held to be due to the defendant.

The plaintiff swore an affidavit on **30th August, 2010** providing evidence in support of the application and the grounds stated.

The defendant swore a replying affidavit on **4th October, 2010**, for the material part, averring that: the plaintiff who became a close friend of hers, had made no indication he intended to establish a children's home; there had been a relationship of love between the parties which lasted up to **August, 2010**; the defendant is registered as the owner of the suit property with all structures build thereon; the plaintiff had not provided the monies used in the acquisition and development of the suit property; the plaintiff has no stake in the suit property; the defendant is the sole account-holder in respect of a/c No. 016-633009 aforesaid, and so needs no consent from the plaintiff to operate the same; as regards a/c No. 016-6315492, it is the plaintiff who had introduced her to the bank officials and given her express mandate and authority *“to operate the said account and withdraw whatever money that I may need for my upkeep whilst he is*

abroad”; “there was in fact no withdrawal or access limits so as to fetter and/or impede my authority as appertains to the operations of the said account”.

In the submissions, counsel for the plaintiff urged that the plaintiff, who only visits Kenya periodically but otherwise resides in Germany, was apprehensive that the defendant may sell the suit property to a third party, occasioning him total loss, unless the Court grants the restraint orders sought; and the plaintiff was ready and willing to give such security as the Court may order, as to damages. Counsel urged that the applicant had a *prima facie* case with a probability of success, and that he stands to suffer irreparable injury not compensable in damages, unless injunctive orders are granted.

Counsel submitted that the plaintiff’s main case is that he entrusted monies to the defendant, and any properties purchased thereout were to be held in trust, until the happening of subsequent events; but the defendant nullified that intention by withdrawing the monies and using them for her own purposes, to the exclusion of the plaintiff and without his express authority.

Counsel urged that the merits of the case pending, carried a framework showing the plaintiff to be definitely **the one** entitled to the properties in question, as against the defendant, “*by virtue of his having been the sole financier*”. This argument was taken from the principle stated in **Snell’s Equity** (29th Edition) by P. V. Baker and P. St. J. Langan (London: Sweet & Maxwell, 1990), page 177 – 178 (in relation to presumption of resulting trust to real purchaser):

“Another common case of an implied or resulting trust is where on a purchase property is conveyed into the name of someone other than the purchaser. [Quoting *Dyer v. Dyer* (1788) 2 Cox Eq. 92 at 93, *per Eyre C.B.*] ‘The clear result of all the cases without a single exception, is, that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the names of the purchasers and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or *successive*, results to the man who advances the purchase-money. This is a general proposition supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of common law, that where a feoffment is made without consideration, the use results to the feoffor’ That doctrine applies to pure personalty as well as land.”

Counsel submitted that the applicant’s *prima facie* case lay in the fact that “*all money that paid for the consideration [was from the plaintiff], and the defendant having contributed nothing towards the purchase of the property, it therefore goes without saying that the plaintiff is the sole owner of the suit property.*”

Counsel contested the defendant’s position foreshadowed in the replying affidavit, that if the plaintiff made any promises to the defendant, the same were not reduced into writing; for “*the requirement of writing down the intentions of parties in agreements relating to moneys and/or transactions in land is done away with in cases where the agreement creates a trust (s. 3 (4) of the Law of Contract Act (Cap. 23, Laws of Kenya)):*

“(3) No suit shall be brought upon a contract for the disposition of an interest in land unless –

- (a) the contract upon which the suit is founded –**
- (i) is in writing;**

(ii) is signed by all the parties thereto ...

“(4) Subsection (3) shall not apply to a contract made in the course of a public auction by a licensed auctioneer ... nor shall anything in that subsection affect the creation or operation of a resulting, implied or constructive trust.”

Counsel submitted that the parties, in the instant case, had intended to create a trust — and “*the same is therefore not subject to writing*”.

Counsel went on to urge that the applicant stood to suffer irreparable loss, unless injunctive relief was granted at this stage; and that the balance of convenience, too, stood in favour of the plaintiff.

Counsel for the defendant urged that the defendant had the right to draw monies from the bank accounts in question, in the absence of the plaintiff; for “*the plaintiff having given the defendant such express authority ... cannot then turn around and deny the existence of the same ...*” For this point, counsel was relying on the High Court decisions (Mwera, J.) in **Esther Akinyi Odidi & Others v. Sagar Hardware Stores Limited**, Kisumu H.C. Civil Appeal No. 97 of 2005 [2006] eKLR, and **Doge v. Kenya Cannery Limited** [1989] KLR 127 (Shah, CA).

Learned counsel maintained that the defendant is the “*registered and indefeasible owner of all that parcel of land known as lot No. Kwale/Ukunda/4078*”; and that “*the defendant’s ownership rights over the suit land aforesaid are also the subject of [a] first registration, and as such, absolute, indefeasible and immune to any challenge whatsoever save for matters of fraud none of which have been raised or established in the pleadings before the Court pursuant to ... Sections 27, 28 and 143 (1) of the Registered Land Act (Cap. 300, Laws of Kenya).*”

Learned counsel submitted that if the plaintiff had any case against the defendant, then the “*proper recourse is [suit for] damages for conversion*”, and so injunctive relief would be inapposite.

Counsel had, though, to deal with **trust**, which was presented as the crux of the plaintiff’s case. It was urged, in this respect, that the “*intention to create [a] trust as regards [the] property in the [instant] case can only be deemed to be imputed by the law ... in cases where [the] parties ... are in fact married ...*”

By the foregoing argument, learned counsel appears to exclude the non-marital liaison as a category to which the trust concept will ever apply; counsel urged:

“Though it has been admitted that there existed some form of relationship as between the plaintiff and the defendant, at no point did such crystallize into marriage, and neither has that been pleaded or established by the plaintiff in the pleadings. The issue of trust thus cannot be deemed to apply to properties independently owned by the defendant ... In any event the plaintiff’s contribution, interest or stake in the suit property has not been established in any way whether by way of affidavit evidence or otherwise.”

In his last word, counsel ventilated the defendant’s case by the exhortation that this Court do find the plaintiff’s interlocutory case to be “*vexatious, frivolous and an abuse of ... Court process*”, and consequently to dismiss the same with costs.

Every Advocate would have his or her client win, even though the law stand not for it; it's demanded in the cause of Bar image; of perceived professional gravitas; of the client-recompense element, and, in some cases, of commitment to just redress: but it is the last element that must be the guiding light for the Judge. The instant case is by no means unique; but it provides remarkable scope for retrieving goals of justice from the foregoing *mélange*.

Counsel for the plaintiff, in his submissions, has urged the **trust** concept as the basis of both the main cause and the application. The subject of the trust is **immovable property**, and **money**. Counsel for the defendant, by contrast, has questioned the applicability of the trust concept; maintaining that **legal title** in the said property is vested in the defendant, and so the plaintiff ought to confine his claims to the realm of the tort of **conversion**, and seek **damages**.

The defendant rejects the trust concept which she associates with marital unions — unlike the relationship between herself and the plaintiff, which was only one of friendship.

Those are the bases on which the instant application has been argued; and so they will be the reference-points, in disposing of the application.

Since the application falls within the framework of the plaint, and the prayers in the plaint are based on the trust concept, the defendant's position that the plaintiff should claim **damages** for conversion, is not tenable. The plaintiff will, in the main cause, be seeking to prove the existence of an **informal trust**; and as the full evidence in that regard has yet to come forth, the Court can only rely on the depositions filed. In those depositions, the veracity of which is not at this stage seriously tested, the plaintiff avers that he came to know and to associate with the defendant in a condition of **confidentiality and trust, in a family environment**, and that in such a context, he entrusted substantial sums of money to the defendant, to be used in the purchase of the suit property; in the same context, he also set up two bank accounts, both of which the defendant operated with some measure of liberty. The plaintiff has given specific evidence on the financial dispatches, amounting to a total of € 49,400 that he faithfully and methodically dispatched to the defendant, "*to be used for the purchase of a plot and meet the construction expenses for the house to be built.*" The bank accounts which the plaintiff established at Diani, clearly had substantial amounts of money, and it is not disputed that, from one of those accounts, the defendant drew the large amount of Kshs. 3,300,000/= while the plaintiff was away in Europe, over the short time-frame of some three months.

Such sums of money are, quite obviously, not a freely-available resource, and must be recognized to be hard-earned: and this Court takes **judicial notice** that resources of such value will always be regulated and safeguarded by **law**. Which body of law provided the safeguard for those resources? Counsel for the defendant has urged that the statute law, particularly the Registered Land Act (Cap. 300, Laws of Kenya) can only protect the property rights of the holder of first registration, namely the defendant. This, however, would not be inconsistent with the **trust** concept in favour of the plaintiff.

Learned counsel for the defendant did not clearly differentiate the trust relationship as between the plaintiff and the defendant, on the one hand, and as between a husband and a wife, on the other: and the Court cannot, on this point, make any specific finding.

Pending the full trial of the suit, the facts now unfolding before the Court show the plaintiff to have a case of merit — namely, a *prima facie* case. There is in the first place a potential condition of **unjust enrichment** in favour of the defendant; and in the second place, there is an appearance of an **implied**

trust in favour of the plaintiff; the resources of this trust are currently, substantially lodged in the suit property which is registered in the name of the defendant; there certainly is a danger that the main cause could be defeated if the suit property were disposed of, without the orders of the Court.

I hold that the plaintiff has established a *prima facie* case; and that the plaintiff is liable to suffer irreparable injury not compensable in damages, if interim relief is not granted. From this scenario of fact and analysis, it is clear to me that the balance of convenience too, stands in favour of the plaintiff.

I will make orders as follows:

(1) The defendant by herself, her servants and agents are hereby restrained from marketing, disposing of, transferring and/or in any other manner alienating Plot Title No. Kwale/Ukunda/4078 pending the hearing and determination of the suit.

(2) The costs of this application shall be in the cause.

DATED and DELIVERED at MOMBASA this 4th day of March, 2011.

J. B. OJWANG

JUDGE