



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 59 OF 2018

FEISAL FARAJ.....PLAINTIFF

VERSUS

HASSAN MOHAMED OMAR.....DEFENDANT

JUDGMENT

1. The plaintiff moved this court by way of plaint dated 15th March 2018 seeking judgment against the defendant in the following terms:

a. That this Honourable court does make a declaration that 4/293th undivided share of subdivision Number 284 Section III Mainland North registered in the Coast Registry as TITLE NUMBER C.R. 7172/I; and 3 bedroom flat, a 2 bedroom flat and a bedsitter which are situated on PLOT NUMBER MSA/BLOCK XVII/724 are held by the defendant in trust of the plaintiff due to the existence of a constructive trust in favour of the plaintiff ;

b. That the Honourable court does grant an order directing the land registrar to cancel the title and entries of 4/293th undivided share of land of SUBDIVISION NUMBER 284 SECTION III MAINLAND NORTH registered in the Coast Registry as Title Number C.R. 7172/1; and 3 bedroom flat, a 2 bedroom flat and a bedsitter which are situated on PLOT NUMBER MSA/BLOCK XVII/724 which are all registered in the name of the defendant.

c. That the Honourable court does grant an order directing the land registrar to issue the title of 4/293th undivided share of subdivision number 284 SECTION III MAINLAND NORTH registered in the coast Land Registry as TITLE NUMBER C.R. 7271/1; the 3 bedroom the 2 bedroom flat and the bed sitter which are situated on PLOT NUMBER MSA/BLOCK XVII/724 to be registered in the name of the plaintiff.

d. Costs and interest thereon.

2. It is the plaintiff's case that at all material times to this suit, the defendant was and still is the first wife of the plaintiff. That during the marriage the plaintiff who was working purchased the suit properties and caused the transactions to be done in the name of the defendant who was a housewife and always available whereby the properties were registered in the defendant's name. The defendant was to hold the suit properties in trust for the plaintiff. However, the defendant has now held onto the properties to the exclusion of the plaintiff and has illegally evicted the plaintiff from the suit properties claiming that the same belong to her on the basis that they are solely registered in her name. It is therefore the plaintiff's case that the defendant is in breach of trust and has even assumed exclusive possession and control to the exclusion of the plaintiff.

3. The defendant was served with summons to enter appearance but failed to do so. Upon request by the plaintiff, interlocutory judgment was entered against the defendant in default of appearance on 29th June 2018. The matter proceeded for formal proof on 9th October 2018 wherein the plaintiff gave evidence

4. The plaintiff asked the court to adopt his witness statement as part of his evidence together with the list of documents which he produced as p.exhits. 1 -10.

5. The plaintiff stated that during the subsistence of their marriage, he was employed at Shimarc Limited as a marine superintendent and worked there from the year 1979 until 2005 while the defendant was a housewife. That the nature of his work meant that he would be out at the sea for weeks and would therefore entrust the defendant to carry out his business which included conveyancing transactions. He added that in the year 2000 he purchased a 3 bedroom flat, a 2 bedroom flat and a bedsitter which are situated on **PLOT NUMBER MSA/BLOCK XVII/724** for the sum of Kshs.3,500,000/=. He paid the then proprietor Hawlul Bashir Kshs.2,000,000/= vide Cheque No.801471 dated 14th July 2000 and the sum of Kshs.500,000/= in cash while the balance of Kshs.1,000,000/=was paid by his employer on his behalf.

6. The plaintiff stated that despite fully financing the said transactions by himself, the defendant caused the transaction to be done in her name and was registered as the proprietor thereto.

7. The plaintiff further stated that in 1997 he acquired 4/293th undivided share in parcel of LAND SUBDIVISION NUMBER 284 SECTION III MAINLAND NORTH registered in the Coast Registry as **TITLE NUMBER C.R. 7172/1** and the same was also registered in the defendant's name.

8. The plaintiff stated that despite having acquired the suit properties and fully financing them, the defendant has now held onto the said properties to his exclusion claiming they belong to her on the basis that they are solely registered in her name. The plaintiff avers that he has attempted to amicably settle the issue with the defendant and their son to no avail. He added that he is currently suffering from cardiac and breathing problems and therefore unable to work or to purchase medication due to the defendant's action of excluding him from the suit properties.

9. The firm of N. A. Ali and Company Advocates for the plaintiff filed submissions on 17th January 2019.

10. I have considered the submissions by counsel. The plaintiff's case is that the defendant, though registered proprietor of the suit properties, holds them in trust for him. The plaintiff has testified that he was married to the defendant and was working at the seas most of the time. That the suit properties are registered in the name of the defendant is not in dispute. The plaintiff testified that due to his long absence at the sea, he had the defendant carry out the transactions in her name. That the defendant was a housewife.

11. The Plaintiff's claim is based on trust. Trust is an issue both of law and fact which needs to be proved through proper evidence. The onus is therefore on the party alleging the existence to prove that fact. As was held in the case **of Mbothu & Others -v- Waititu & others (1986)KLR 171**, the court never implies a trust save to give effect to the intention of the parties and such intention must be clearly demonstrated before a trust is implied. That is the duty that falls upon the plaintiff in this case.

12. The plaintiff has laid evidence before court showing how he financed and acquired the suit properties. The properties were however registered in the name of the defendant who is his wife and who was available when the plaintiff was away at work. It is now settled that the registration of land in one's name does not relieve the proprietor thereof of his duty as a trustee nor extinguish the rights of other parties who are entitled to it.

13. From the material placed before me, the plaintiff has shown how he acquired the suit property and has explained how the same came to be registered in the defendant's name. There was no evidence challenging the plaintiff's testimony. The plaintiff's evidence remains uncontroverted. This court therefore finds that there is cogent evidence, which has not been rebutted, that there is constructive trust that can be presumed in the circumstances of this case.

14. From the material placed before me, I am satisfied that the plaintiff has proved his case on a balance of probabilities. The upshot of the above is that, upon considering the evidence herein, I enter judgment for the plaintiff against the defendant in terms of prayers (a), (b) and (c) of the plaint. Considering the relationship of the parties, I order that each party to meet their own costs as they are family

DATED, SIGNED and DELIVERED at MOMBASA this 12th day of February 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Hassan for plaintiff

No appearance for defendant

Yumna Court Assistant

C.K. YANO

JUDGE

12/2/19