



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ELC NO 68 OF 2011

JBR.....PLAINTIFF

VERSUS

IMM.....DEFENDANT

JUDGMENT

1. By a plaint dated 19/5/2011 and later amended on 29/1/2018 the Plaintiff sued the Defendant herein seeking judgment to be entered against the Defendant as follows:

- a. A declaration that the Defendant holds parcel No.[xxxx] and ¼ Acres from NYAKI/[xxxx], NYAKI/[xxxx] in trust for the Plaintiff.
- b. An order directing the Land Registrar to amend and/or rectify the register and insert the Plaintiff's name as joint proprietor with the Defendant.
- c. Costs and interest at Court rates.

2.The gist of the Plaintiff's claim is that he and the Defendant are married having celebrated their customary marriage on or about the year 1996 but later separated and the Defendant left their matrimonial home. The Plaintiff claims that he worked at [particulars withheld] while the Defendant was a house wife. That during the subsistence of their marriage the Plaintiff acquired several properties which he caused to be registered in the name of the Defendant to hold in trust for herself, the Defendant and their family. These properties he avers are;

- a. Nyaki/[xxxx] -¼ acre
- b. Ntima/[xxxx]
- c. Ntima/Igoki/[xxxx]
- d. Bus Stop Park Stall Nos. [xxxx]
- e. Kiirua/Naari/[xxxx]
- f. Nyaki/Kithoka-Mwanika.[xxxx]
- g. Motor Vehicle .[xxxx]
- h. Nyaki/Kithoka .[xxxx]

3. The Plaintiff contends that in breach of the said trust the Defendant has disposed off, leased out and transferred to third parties some of those proprietors precipitating the current suit. The Plaintiff claims to have suffered immensely from the said actions of the Defendant as he has lost his properties without cause, his retirement plan has been tampered with and has suffered mental anguish and stress. He is apprehensive that the Defendant is moving with haste to dispose of the remainder of the properties.

4. The Defendant in opposition to the claim filed a defence and Counter claim dated 26/6/2011 in which she admits being the wife of the Plaintiff and that the Plaintiff indeed worked for [particulars withheld]. She claims that she was not a house wife but that she is a well-established business lady with several businesses within Meru Town. She claims to have bought all the properties listed by the Plaintiff with her own money single handedly and that she had caused some of the properties to be registered in the name of the Plaintiff solely which he

disposed off. She claims that if she sold any property it was privately acquired by herself and the proceeds of the sale were to pay school fees for their two children whose responsibility the Plaintiff had neglected. She contends that granting the orders sought by the Plaintiff would amount to infringing her right to ownership of property that she independently acquired.

5. In her Counterclaim against the Plaintiff the Defendant avers that the Plaintiff fraudulently caused the records of the Municipal Council of Meru in respect of Meru Municipal Bus stage stall No.16 to be altered to include the Plaintiff's name as the owner, and has particularized the particulars of fraud to include abuse of powers as an employee of the council, and tampering with the records of the Council. The Defendant further claims that she purchased Land parcel No.NYAKI/KITHOKA/[xxxx] and caused it to be registered in the name of the Plaintiff and seeks the same to revert to her. The Defendant seeks the following in her Counterclaim.

- a. A declaration that Meru Municipal Bus Park Stall No.** is the property of the Defendant.
- b. A declaration that Land Parcel No.NYAKI/KITHOKA-[xxxx]is the property of the Defendant.
- c. An order of the Court directing the relevant Land registrar to rectify the register to reflect the Defendant's name as the proprietor of land parcel No.NYAKI/KITHOKA [xxxx].
- d. An order that the records of the Meru Municipal Council in respect of Meru Municipal Bus Park stall No.[xxxx]be redone to reflect the Defendant as the sole owner thereof.
- e. A permanent injunction restricting the Plaintiff by himself, his employee, agents and/or anybody else acting at his behest from entering taking possession, closing or otherwise interfering with the Defendant's possession and/or ownership of Meru Municipal Bus Park Stall No.[xxxx].

6. PW1 – the Plaintiff testified that he was not married to the Plaintiff in 1996 but that they had cohabited for many years before he paid the dowry in 1996 and swore an affidavit in 2002 that they had 4 other children. When he was recalled to testify he stated that he married the Defendant in 1995 and produced at NHIF card where he included the Defendant to his scheme in the year 1995/1996. In respect to the listed properties he testified that NTIMA/IGOKI [xxxx] was bought jointly but the Defendant sold it alone. In respect to Meru Municipal Bus Park Stall No[xxxx],[xxxx] & [xxxx] she stated that there is a Judicial/Review Petition ongoing, NYAKI/IGOKI/[xxxx] they bought jointly but was sold by the Defendant.

7. DW1 testified that she got married to the Plaintiff in 2002 but had cohabited since 1998, that their son is aged 19 years. That the bus park stalls had a Judicial Review proceedings pending in Court, that she did not buy [xxxx] and [xxxx] jointly with the Plaintiff and claims she bought the two parcels alone and therefore they are not trust properties.

8. The Plaintiff in his submissions maintains that all the properties listed in the amended plaint were acquired during the subsistence of his marriage to the Defendant which he claims commenced in the year 1995. In that regard those properties were held in trust for himself by the Defendant. He faults the Defendant for dealing with the said properties as if she solely owns them. He has since inhibited the said properties and has invited the Court to find that the said properties are encumbered by an overriding trust in his favour.

9. The Defendant submitted that the Counterclaim is unopposed as no reply was filed by the Plaintiff in opposition and has enjoined the Court to find so and enter judgment against the Plaintiff as prayed. In respect of the Plaintiff's claim the Defendant avers that the Plaintiff has presented contradictory evidence in regard to the year when he married the Defendant in that he produced an affidavit of marriage which indicates their year of marriage to be 1996 whilst the NHIF card produced seems to suggest that the marriage begun in 1995. The Defendant maintains that their marriage was solemnized in the 1996 therefore the Plaintiff cannot lay a claim based on trust on properties she acquired before their marriage. To that extent since parcel No.NTIMA/IGOKI/ [xxxx] was purchased in the year 1995 as shown in the sale agreement with the Defendant as the sole purchaser, she believes that cannot fall within the meaning of matrimonial property. She claims to have used the proceeds from her various businesses to acquire the properties in her case and she produced her various bank statements and bank loan statements she acquired from various banks. She claims that the Defendant has failed to establish the conditions required for a claim of trust in that there was no fiduciary relationship between them at the time when the land parcel No.NTIMA/IGOKI/ [xxxx] was acquired, that the Plaintiff has not been in occupation/nor did he contribute in any way towards development of that parcel of land and that the registration of that particular parcel of land in the name of the Defendant was done in the year 2011 after they had separated. She claims that parcel No.NYAKI/KITHOKA/ [xxxx] is registered in the name of the deceased therefore it cannot be a basis of claim in this suit. It is not registered in the name of the Defendant.

10. Parcel number [xxxx] it was submitted that it has an ongoing succession matter and therefore this Court cannot make a determination over it. It was jointly bought by 3 parties.

11. Parcel number [xxxx] – The Plaintiff claims to have bought it with the Defendant however no agreement was produced to support the claim. He states that it is in the name of one William Muriuki who the Defendant submits is deceased.

12. The following issues fall for determination;

- a. Whether the Defendant holds Plot Nos [xxxx], ¼ acre of [xxxx] and [xxxx] in trust for the Plaintiff.
- b. Whether the Plaintiff has proved breach of trust as pleaded.
- c. Has the Defendant proved fraud on the part of the Plaintiff.

- d. Whether the Defendant is the owner of Plot[xxxx].
- e. Whether the Plot [xxxx] should revert to the Defendant's name.
- f. What orders should the Court grant in the circumstances.

13. There is evidence from both parties of cohabitation before the payment of the bride price in 2002 with the Plaintiff placing it at 1995 and Defendant 1996 respectively. The NHIF medical card for the year 1995/1996 indicates the Defendant as the spouse of the Plaintiff. The Plaintiff has relied on the NHIF card to plead that the marriage started in 1995. The card shows it is for the year 1995/1996. The calendar year for the Government of Kenya and its agencies start on 1st July of each year and ends on the 30th June the following year. The card does not show when it was opened. It could then refer to any date between the 1st July 1995 and 30th June 1996. Both parties have sworn a joint affidavit of marriage under oath. In this deponement the Plaintiff and the Defendant have avowed under Para 4 and 6 respectively that they got married to each other in 1996. The Plaintiff has not challenged the affidavit of marriage on record through another affidavit save for the NHIF card aforesaid. The Court takes the evidence adduced in form of NHIF card as an afterthought intended to stretch the commencement of the marriage backwards. Between the NHIF card and the affidavit in support of marriage dated the 18/1/2002, the Court takes the latter as the position of the commencement of the marriage of the parties as at 1996.

14. This marriage took place before the enactment of the Matrimonial Property Act. In any event the claim of the Plaintiff rests on breach of trust in property.

15. The case of the Plaintiff is that he acquired or purchased the properties listed in Para 2 above and caused them to be registered in the name of the Defendant. That the Defendant whom he accuses of having breached the trust has dealt with the properties in a manner contrary to the intentions of the Plaintiff as a donor/settlor, that is to say disposed the properties without his consent and or knowledge as pleaded in the plaint.

16. The Defendant has denied the claims of the Plaintiff and maintains that she acquired the properties on her own, some even before she married the Plaintiff. She led evidence that some of the properties were purchased by herself and got them registered in his name.

17. **Blacks Law Dictionary** defines a constructive trust as an equitable remedy by which a Court recognizes that a claimant has a better right to certain property than the person who has a legal title to it. It is used when the person holding the property acquired it by fraud or theft then a constructive trust may be declared in favour of the victim of the wrong.

18. In the case of implied or resulting trusts, the settlor or donor must prove that there was an intention to have the property result back to him. Additionally, he must prove that the purchase monies were paid by him and the property registered in the name of another as a trustee but with the intention that the legal interest shall at some point revert back, hence the resulting trust. In the case of **Dyer V Dyer 1788 2 cox** the Court held that;

“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 or 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”. (emphasis is mine).

19. Where a husband purchases a property in the name of his wife, there is a presumption of advancement or a gift to her and the onus to rebut the presumption is on the husband. The husband must give evidence to show that he intended his wife to hold the property in trust for him and thus expect the property to revert back to him. If the intention was to be a resulting trust, the Plaintiff must prove that indeed the money that was employed in the purchase of the property came from him.

20. I have perused and carefully considered the evidence and pleadings of the parties and the following are germane;

a). Plot No. [xxxx] which later became [xxxx] was bought by the Defendant from one Joseph Mugiira M'ithinji vide an agreement of sale dated 15/12/95. The property measuring 50 by 100 feet was purchased at the price of Kshs 85,000/-. Save for the agreement of sale none of the parties have tabled evidence before the Court on how the property was paid for. According to the Plaintiff he paid for the property as he was earning a salary at the Meru County Council where he worked. According to the Defendant, she acquired it through her business proceeds which she claims was a successful business woman before she got married to the Plaintiff. The onus is on the Plaintiff to prove how he contributed to the purchase of the property. He led evidence that the property was bought at Kshs 100,000/- while according to the agreement on record it was bought for Kshs 85,000/-. None has been tabled. Even if the Court accepts, which it does not, the proposition of the Plaintiff that they were married in 1995, then if indeed he purchased the property and caused it to be registered in the Defendant's name, then the presumption of advancement is implied. He has not tabled any evidence to rebut the presumption. Implied or resulting trust has not been proved by the Plaintiff. Further more the property was acquired before the marriage and got registered in the name of the Defendant on the 17/5/11 after the separation of the parties. Whichever way the Court declares the property to be owned by the Defendant in her own right.

b). Plot No [xxxx]; according to the agreement of sale on record [this plot was purchased from one William Peter Murugi Rutere on the 8/6/02 by the Plaintiff, the Defendant and another third party namely Henry Kathioni Muratha. The plot measures ¼ acre of the 1.72 acres of the whole land. The Plaintiff has claimed ¼ acre of the land. If the property was acquired by three persons how does he claim 1/4?. He should be claiming 1/3 of the 0.5 acres. The presumption is that he paid for his and the Defendant's share. No evidence of his contribution has been shown to the Court. That be the case, the parties have led evidence that this property is subject to a succession cause. The Court will make no orders as to this property. Let the parties await the outcome of the succession case.

c). Plot No [xxxx]; The Defendant pleaded that the property is registered in the name of deceased person and therefore cannot be

subject to any determination by this Court. The registered owner of this property has not been disclosed. He led evidence that he bought the property jointly with the Defendant from William Muriuki. No agreement of sale was produced. The Court is unable to make any orders in respect to this property. It is not clear how it was acquired and who is the registered owner currently.

d). Plot No [xxxx] & [xxxx] ; the parties have led evidence that these plots are subject to Court proceedings in JR in the High Court Meru. The doctrine of subjudice as enacted under section 6 of the Civil Procedure Act prohibits the Court from entertaining a matter that is before another Court of competent jurisdiction.

e). Plot No [xxxx]; The Defendant pleaded that this plot was registered in the Plaintiff's name but he sold it to one Irene Murega . The new owner is not a party to this suit and therefore the Court cannot make orders in respect to a party not enjoined to the suit. It would be an affront to the right to be heard.

21. Has the Plaintiff proved breach of trust on the part of the Defendant? From the preceeding paras, the Court holds that the Plaintiff has not proved implied or resulting trust, nor offered sufficient rebuttal of presumption of advancement in respect to the properties he is claiming.

22. The Defendant pleaded fraud in the Counterclaim . Fraud must be pleaded and proved to the standards required. None of the particulars of fraud was proved. It is true that the Plaintiff did not file any reply to the defence and defence to Counterclaim of the Defendant and it is save that it was uncontroverted. Nevertheless , the Defendant had a duty to proof her claim in the Counterclaim . To start with plot no [xxxx] and [xxxx] claimed in the Counterclaim is subject to a Judicial Review proceedings in the High Court (as per the admission of the parties in their evidence), and Plot No.[xxxx] was sold to a third party respectively. The third party was not enjoined to the suit and the Court cannot make any orders to affect the title of the third party owner. The Counterclaim is therefore dismissed.

23. Final orders;

- a) the Plaintiff has not proved trust against the Defendant. The Plaintiff's claim is dismissed.
- b) The Counterclaim is dismissed.
- c) I direct that each to bear their own costs of the suit and Counterclaim.

Orders accordingly

DELIVERED, DATED AND SIGNED AT MERU THIS 8TH DAY OF APRIL, 2019.

J G KEMEI

JUDGE

In presence of;

C/A Mutwiri

Ms. Mbiyiwe holding brief for Mwanzia for Plaintiff.