



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CIVIL CASE NO. 450 OF 2017

PAUL KIINGATI GATIU.....PLAINTIFF

VERSUS

SUSAN NDUTA KIMANI.....1ST DEFENDANT

LAND REGISTRAR.....2ND DEFENDANT

ATTORNEY GENERAL.....3RD DEFENDANT

JUDGEMENT

1. The Plaintiff and the 1st Defendant were married under Kikuyu customary law from 1993 until 2016 when they separated. The marriage was blessed with two issues. In the plaint dated 30/6/2017, the Plaintiff contended that he is the beneficial owner of the land known as **Nairobi Block 83/14/436** (“the Suit Property”). He averred that during the pendency of his marriage to the 1st Defendant, he trusted her as his wife to purchase and develop the Suit Property on his behalf using funds he sent to her, which he estimated to be over Kshs.10 Million. He claimed that he sent her the funds for the purchase of the land while he was residing in the United States of America (USA). The Plaintiff contends that the 1st Defendant put up a multi-storeyed building consisting of one and two bedroomed units on the Suit Property, which are currently occupied by tenants who pay rent to the 1st Defendant and that she does not account for the rent collected despite holding the Suit Property in trust for the Plaintiff.

2. The Plaintiff averred that he decided to revoke the trust because the 1st Defendant moved out of the Suit Property in 2016 yet continues to collect rent from the Suit Property thus breaching the trust relationship with the Plaintiff hence the title over the Suit Property should revert to him. He seeks to be declared the registered and beneficial owner of the Suit Property and also seeks an order directed to the 2nd Defendant to rectify its records to indicate that he is the sole registered owner of the Suit Property, together with an injunction to restrain the 1st Defendant, her servants, employees and agents from trespassing, selling, transferring, offering for sale or alienating the Suit Property, mesne profits and costs of the suit.

3. The 1st Defendant denied the Plaintiff’s claim through the defence and counterclaim dated 11/5/2018. She denied the existence of any trust between her and the Plaintiff in the ownership of the Suit Property and contended that the only relationship existing between them is that of husband and wife. She averred that the Plaintiff left her in Kenya on or about April 1998 with two young children to take care of on her own and that the Plaintiff would occasionally send her money for their upkeep, but it was hardly enough to take care of their sons’ growing needs, which prompted her to start a *jua kali* business which enabled her save money in a cooperative society or Sacco and women groups.

4. In her counterclaim, she contended that she purchased the Suit Property on 28/9/2014 at Kshs. 630, 000/= using her savings and loans from a Sacco which she is still servicing to date. She averred that she included the Plaintiff’s name in the sale agreement dated 28/9/2004 as her husband and in the mistaken belief that the Plaintiff would be there to take care of her interest and their children’s interest in the event she was not there. She seeks a permanent injunction to restrain the Plaintiff or his servants or agents from interfering with her peaceful enjoyment and ownership of the Suit Property and an order directed to the 2nd Defendant to rectify the title and issue one solely in her name. She also seeks dismissal of the Plaintiff’s claim against her as well as costs of the counterclaim.

5. The Plaintiff testified that he married the 1st Defendant under customary law in 1993, but left the country in 1998 for the United States of America (USA). He was emphatic that while in the USA, he provided support to his family through the 1st Defendant from 1998 to 2016 by sending money for school fees, medical expenses and the general upkeep of their children and the 1st Defendant herself, as well as money for construction on the Suit Property. He produced copies of email extracts of funds transfer from 2014 to May 2015, a certificate of lease in respect of the Suit Property issued on 9/12/2008 in the name of the 1st Defendant as trustee for the Plaintiff, and photos of the Suit Property. It was his testimony that construction on the Suit Property began in 2005. During re-examination, the Plaintiff admitted that there is no

document to show that he was no longer married to the 1st Defendant. He also admitted that he had no evidence of instructions to the 1st Defendant to purchase for him the Suit Property as his trustee.

6. The 1st Defendant testified that she solely bought and developed the Suit Property from her savings and loans. She produced the sale agreement dated 28/9/2004 for the Suit Property, statement of accounts from standard chartered bank from 29/11/2013 to 29/11/2014, a bundle of receipts for assorted construction materials and her loan statement from Umoja Wendani Sacco Society for the period 21/10/2006 to 21/10/2016 in support of her claim. During cross-examination, she stated that the Plaintiff only came to know that she had bought and developed the Suit Property in 2014.

7. The 2nd and 3rd Defendants filed a joint statement of defence dated 2/2/2018 in which they contended that the plaint did not disclose any cause of action against them. They neither called any witnesses nor did they file submissions.

8. The court has considered the pleadings, exhibits produced, oral testimony as well as submissions by the Plaintiff's counsel. It is not disputed that the Plaintiff and the 1st Defendant were once husband and wife. It would appear that for all intents and purposes, the marriage has ended. The Suit Property was acquired during the pendency of the marriage. In his submissions, counsel for the Plaintiff sought refuge in Section 26(1) of the Land Registration Act, 2012, in support of the position that the Plaintiff is the registered owner of the Suit Property, and that the 1st Defendant did not challenge the certificate of lease over the Suit Property on any of the grounds set out under Section 26 of the Land Registration Act, 2012.

9. The certificate of lease dated 9/12/2008 indicates at the proprietorship section that the 1st Defendant holds the Suit Property in trust for the Plaintiff, Paul Kiingati Gatitu. Counsel urged the court to declare the Plaintiff the owner of the Suit Property on that basis. The court does not agree with the Plaintiff that this matter should be decided solely on the basis of Section 26 of the Land Registration Act only. Taking all the circumstances of this case into consideration, the court has to look into the intention of the parties, because the issue really is whether there existed a trust or not and whether the 1st Defendant was merely a trustee and nothing more.

10. The court finds that the Plaintiff's intention in sending money to the 1st Defendant from USA was not only for the children's upkeep but he also intended to acquire property for his family's use. His intention is buttressed by the fact that in her oral testimony, the 1st Defendant admitted that indeed the Plaintiff sent her money from USA. Further, the sale agreement in respect of the Suit Property dated 28/9/2004 was signed by the 1st Defendant as purchaser and trustee for the Plaintiff. During re-examination, the Plaintiff testified that the 1st Defendant resided on the Suit Property until she left in 2016 without informing him. It would seem that the Plaintiff and the 1st Defendant had established a unit on the property to be their matrimonial home, which the 1st Defendant rented it out when she moved out. The Plaintiff testified that he does not have any other home and he now stays with his brothers when he is in the country.

11. The 1st Defendant has proved that she made monetary contributions towards the development of the Suit Property on a balance of probability. This is demonstrated by the copies of receipts showing purchase of construction materials which were bought between 2006 to 2009, as well as the loan statements from Umoja Wendani Sacco Society for the period 21/10/2006 to 21/10/2016. Construction on the Suit Property is said to have started around 2005. On a balance of probability, the 1st Defendant partly used her loan to develop the Suit Property. In addition to the monetary contribution, the 1st Defendant also made a non-financial contribution towards the acquisition and development of the Suit Property. It is not disputed that she is the one who identified the property, signed the sale agreement, bought construction materials, supervised construction and still took care of their two children during the period when the Plaintiff was residing in the USA. The finding on non-monetary contribution is founded on Section 2 of The Matrimonial Property Act, 2013.

12. The court finds that both the Plaintiff and the 1st Defendant made monetary contribution towards the purchase and development of the Suit Property. The fact that the property was registered in the 1st Defendant's name as trustee for the Plaintiff does not take away the 1st Defendant's rights to the Suit Property. Guided by the decision of the Court of Appeal in **PNN v ZWN [2017] eKLR**, in a matter similar to this where the cause of action accrued before the new Constitution, the Court of Appeal did not fault the High court for seeking guidance of the Constitution and the covenants which Kenya ratified to inform its application of Section 17 of the Married Women's Property Act, 1982. The Court analysed the authorities on distribution of matrimonial property vis a vis the Matrimonial Property Act, 2013 which bases the division of matrimonial property on the contribution made by the spouses to its acquisition.

13. The court directs that the Suit Property be shared equally between the Plaintiff and the 1st Defendant. The property will be valued and sold and the proceeds shared out equally between the Plaintiff and 1st Defendant. In the alternative, either of the parties is at liberty to buy out the share entitlement of the other party should they deem it fit to do so. The Plaintiff's prayer for mesne profits fails. Each party will bear its own costs.

Dated and delivered at Nairobi this 14th day of May 2019

K.BOR

JUDGE

In the presence of: -

Ms. E. Kitololo holding brief for Mr. Nyabena for the Plaintiff

Ms. O. Sinana holding brief for Mr. Anyoka for the 1st Defendant

Mr. A. Kamau holding brief for Ms. Nyawira for the 2nd and 3rd Defendants

Mr. V. Owuor- Court Assistant