



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 95 OF 2010

HIRAM IRUNGU MAINGI..... PLAINTIFF

VERSUS

JOHN IRUNGU JAPHAT.....1ST DEFENDANT

ESTON MAINA.....2ND DEFENDANT

JUDGMENT

On or about 1st April, 1976, the plaintiff and the defendants purchased all that parcel of land known as Plot No. 150, Section 1 Eastleigh, Nairobi (hereinafter referred to as “the suit property”) at a consideration of Kshs.135,000/=. According to the indenture dated 1st April, 1976 made between the plaintiff and the defendants on one hand, and one, Joseph Gikurumi on the other hand, the suit property was conveyed to the plaintiff and the defendants to hold as tenants in common in equal shares. The plaintiff and the 1st defendant had purchased another parcel of land at Kangema in Muranga known as Muranga Loc. 12/Sub-Loc. 3/141 (hereinafter referred to as “Muranga property”). The circumstances under which this property was purchased and the shares each held in the property is contentious. The material placed before the court relating to the acquisition of this property is also scanty. It was however not disputed that the Muranga property was registered in the name of the plaintiff as the owner thereof.

The plaintiff brought this suit against the defendants on 5th March, 2010 seeking the following reliefs:

- i. An order of injunction restraining the defendants from selling, alienating and/or in any other way interfering with the suit property.
- ii. A declaration that the suit property is owned by the plaintiff and the defendants jointly in equal shares.
- iii. A declaration that the plaintiff is entitled to 1/3 of the rent realised from the suit property for 35 years with effect from 1976 at the rate of Kshs.10,500/= per month.
- iv. In the alternative, a declaration that the 1st defendant is only entitled to 1/3 of the sale proceeds of the suit property less 1/3 of the plaintiffs rent earnings/income from 1976 to date; that is 35 years.
- v. Any other or such further relief or orders the court may deem fit or just to grant.

In his plaint, the plaintiff averred that after purchasing the suit property jointly with the defendants in 1976, it was agreed between them that the 1st defendant would be responsible for collecting rent from the tenants on the suit property which initially had a total rent return of Kshs.3,000/= per month. The plaintiff averred that despite several reminders made since 1976, the 1st defendant had not remitted to the plaintiff his share of rent from the suit property. The plaintiff averred that as at the time of filing the suit, the rental income per month from the suit property was Kshs.18,000/=. The plaintiff averred that he was entitled to an average of Kshs.10,500/= per month as his share of rent from the suit property from the year 1976.

The plaintiff averred that sometimes in the year 2009, they agreed to sell the suit property and share the proceeds of sale equally but he came to realise that the defendants had hatched a scheme to deny him his 1/3 share of the proceeds of sale of the suit property through the use of fraudulent documentation.

The defendants filed a joint statement of defence on 7th April, 2010 in which they denied the plaintiff’s claim in its entirety. The defendants denied that there was any agreement between the parties that the 1st defendant would collect rent from the suit property. The defendants

averred that rent from the suit property was being collected by the plaintiff and the 1st defendant and that the same was being used to carry out repairs on the suit property and also to repay the loan which the parties had taken to finance the purchase of the property. The defendants denied that the plaintiff had at any time demanded to be paid his share of the rental income. The defendants averred that the plaintiff had collected rent from the suit property on several occasions which he never utilised to carry out repairs on the suit property or to repay the loan. The defendants averred that the plaintiff was estopped from claiming that the rent collected by the 1st defendant was not remitted to him.

The defendants denied that they had agreed with the plaintiff to sell the suit property or that they had hatched a scheme to deny the plaintiff his 1/3 share of the proceeds of sale of the property. The defendants averred that the only agreement which they had with the plaintiff related to the shares each of them held on the suit property. The defendants averred further that the plaintiff who had relinquished his rights in the suit property in favour of the defendants had no basis for claiming that the defendants had crafted a fraudulent scheme to deny him his right in the property. The defendants averred that in 1995 the plaintiff executed a transfer in their favour transferring all his interest in the suit property to them but the said transfer was not registered. The defendants averred that in 2009, they entered into a humane and gentleman's agreement with the plaintiff under which they allowed the plaintiff to re-acquire 25% of his interest in the suit property.

The defendants averred that this suit is an attempt by the plaintiff to rescind the agreement he had entered into with the defendants in relation to his share in the suit property. The defendants averred that the plaintiff has 25% interest in the suit property in accordance with the agreement that was entered into by the parties on 13th June, 2009 and that they had no intention of interfering with that interest. The defendants urged the court to dismiss the plaintiff's claim.

At the trial, the plaintiff reiterated the contents of the plaint. The plaintiff told the court that the defendants who were brothers were his maternal cousins. He stated that after they purchased the suit property and had the same registered in their names, they agreed that the 1st defendant would collect rent from the tenants who were occupying the property. He stated that the rent payable was then Kshs.1,800/= per month. He stated that since they purchased the suit property, the 2nd defendant and he had not received any rent from the property. He stated that it was the 1st defendant who had been collecting and using the rent from the property. He stated that each of them was entitled to 1/3 share of rent as they owned the property equally. The plaintiff admitted that he signed the agreement dated 13th June, 2009 under which he agreed to pay to the 1st defendant the value of his share in the Muranga property after the sale of the suit property.

The plaintiff stated that he agreed to sign the agreement because he had agreed with the defendants that they would sell the suit property and share the proceeds thereof. With regard to the other agreement of the same date in which he is said to have agreed that the 2nd defendant was entitled to 50% share of the suit property while the 1st defendant and he were entitled to the remaining 50% share, he stated that he did not agree with the contents of that agreement and that he signed the same when he was sick. The plaintiff stated that the documents which he signed to transfer his share of the suit property to the defendants were signed when he was sick with diabetes. He stated that he was made to sign another agreement in which it was said that he was surrendering the suit property in exchange with the Muranga property. The plaintiff stated that he realised later that he had been conned. The plaintiff urged the court to grant an order that they owned the suit property equally and that they were also entitled to share rent from the property equally.

The 1st defendant died on 21st September, 2016 before his evidence was taken and was not substituted by his legal representative. The case against him abated after the expiry of one (1) year from the date of his death in accordance with the provisions of order 24 rule 4(3) of the Civil Procedure Rules.

In his evidence, the 2nd defendant admitted that the plaintiff was his cousin and that the suit property was registered in the names of the plaintiff, the 1st defendant and he. The 2nd defendant denied that they owned the suit property in equal shares. He stated that he was the one who gave out the money which was used to purchase the suit property from the proceeds of the insurance claim which his wife was awarded for an injury which she had suffered. He stated that they purchased the suit property at Kshs.180,000/= out of which he paid Kshs.50,000/= while the plaintiff and the 1st defendant each contributed Kshs.25,000/=. He stated that they borrowed Kshs.80,000/= from a bank to pay the balance of the purchase price. The 2nd defendant stated that the rent received from the suit property was used to repair the house on the property and also to service the loan. He stated that since they were related, all of them were collecting rent from the suit property. The 2nd defendant stated that the plaintiff and the 1st defendant had agreed that the 1st defendant would take the plaintiffs' share in the suit property in consideration of the 1st defendant surrendering to the plaintiff his share in the Muranga property and that they instructed the firm of G. B. M. Kariuki Advocate to prepare an agreement to capture that arrangement.

He stated that the said advocate prepared an agreement which they all signed and left with him together with the title for the suit property so that he could finalise the transaction. He stated that they wrote several letters to G. B. M. Kariuki Advocate but they did not receive any response. He stated that the original title of the suit property was still with the said advocate. The 2nd defendant reiterated that they did not own the suit property in equal shares. He stated that it was agreed that he would have 50% share in the suit property while the plaintiff and the 1st defendant would each have 25% share in the property. He stated that the said agreement was reduced into writing and signed by all of them in the presence of witnesses one of whom was the plaintiff's daughter one, Nancy Waiyego Irungu. The 2nd defendant contended that the plaintiff's claim had no basis and urged the court to dismiss the same with costs.

After the close of the evidence, the parties made closing submissions in writing. The plaintiff filed his submissions on 5th June, 2018 while the 2nd defendant filed his submissions on 29th November, 2018. I have considered the pleadings, the evidence tendered by the parties and the submissions of counsel. The parties did not agree on the issues for determination by the court. From the pleadings, the following are the issues that arise for determination by the court:

1. Whether the plaintiff and the defendants own the suit property jointly in equal shares.
2. Whether the plaintiff had at any time relinquished his share in the suit property or any part thereof.

3. Whether the plaintiff is entitled to the reliefs sought in the plaint.

Whether the plaintiff and the defendants own the suit property jointly in equal shares:

As I have stated earlier in this judgment, according to the indenture dated 1st April, 1976 through which the suit property was conveyed to the plaintiff and the defendants, the suit property was to be held by the plaintiff and the defendants as tenants in common in equal shares. The indenture was signed by the plaintiff and the defendants meaning that the shareholding in the suit property was agreed upon. No evidence was placed before the court of any valid variation of the contents of this indenture of 1st April, 1976 as concerns the manner in which the plaintiff and the defendants were to hold the suit property.

The 2nd defendant led evidence that he contributed more to the acquisition of the suit property and as such he was entitled to hold 50% share in the suit property while the plaintiff and the 1st defendant were to hold 25% share each. This contention is contrary to the express terms of the indenture which I have referred to above. I am of the view that if it was the intention of the parties that the 2nd defendant was to hold more shares in the suit property compared to the plaintiff and the 1st defendant, the parties would have indicated as much in the indenture. Again if the issue had been overlooked, the parties would have executed another indenture varying the terms of the said indenture dated 1st April, 1976. In the absence of any other indenture varying the terms of the said earlier indenture, I find nothing to support for the 2nd defendant's contention that he holds 50% share in the suit property while the plaintiff holds 25% share therein.

The 2nd defendant had contended that the plaintiff had agreed in writing that the 2nd defendant holds 50% share in the suit property while the plaintiff and the 1st defendant hold the remaining 50% share. In support of that contention, the 2nd defendant referred the court to a partnership resolution dated 13th June, 2009 (Defence Exhibit 1, page 5) and an agreement on the Muranga Plot also dated 13th June, 2009 (Defence Exhibit 1, page 6). I am not satisfied that any of these agreements support the 2nd defendant's case. As I have stated earlier, the terms of the indenture dated 1st April, 1976 could only be varied by another indenture. The agreements relied on by the 2nd defendant which have been disowned by the plaintiff could not vary the terms of the said indenture so as to divest the plaintiff of an interest in the suit property which was granted to him under the indenture dated 1st April, 1976. In my view, the so called partnership resolution remained just that; a resolution. The same did not convey to the 2nd defendant any portion of the plaintiff and the 1st defendant's shares in the suit property. I wish to add that the 2nd defendant did not convince me that he paid more for the suit property compared to the plaintiff and the 1st defendant which would have entitled him to 50% share in the suit property. First, the 2nd defendant claimed to have paid Kshs.50,000/= towards the purchase of the suit property. No evidence of such payment was placed before the court save for the mere allegation made at the trial. Secondly, since the purchase price for the suit property inclusive of stamp duty and legal fees came to Kshs.180,000/= according to the 2nd defendant, for the 2nd defendant to claim 50% of the property, he ought to have paid up to Kshs.90,000/= towards the purchase price for the property. The 2nd defendant claimed to have paid Kshs.50,000/=, the plaintiff and the 2nd defendant, Kshs.25,000/= each while the balance in the sum of Kshs.80,000/= was raised through a bank loan that was repaid through rental income from the suit property. If the bank loan was shared equally amongst the plaintiff and the defendants, each would be taken to have paid Kshs.26,666.66 towards the acquisition of the suit property through bank loan. The 2nd defendant's contribution towards the purchase of the suit property would in the circumstances be about Kshs.76,666.66 assuming that he had initially paid Kshs. 50,000/=. This is short of the sum of Kshs.90,000/= which would have entitled the 2nd defendant to 50% share in the suit property.

For the foregoing reasons, it is my finding that the plaintiff and the defendants hold the suit property as tenants in common in equal shares.

Whether the plaintiff relinquished his share in the suit property or any part thereof to the defendants or any of them:

As I have held above, the terms of the indenture dated 1st April, 1976 which provided that the plaintiff and the defendants held the suit property as tenants in common in equal shares could only be varied by another indenture. If at all the plaintiff wanted to transfer his share or any portion thereof to the defendants, that could only have been done through another indenture between them. I believe that that is what the parties had instructed the firm of G. B. M. Kariuki & Company Advocates to do. The intention was however not realised since the said firm did not prepare the necessary documentation which could have conveyed the plaintiff's share in the suit property to the 1st defendant or the defendants. As I have already stated, whatever the parties had agreed on regarding the transfer of the plaintiff's share in the suit property to the 1st defendant remained just an agreement or an intention which did not divest the plaintiff of his interest in the suit property. In the circumstances, it is my finding and I so hold that the plaintiff did not relinquish his share in the suit property to the defendants or any of them.

Whether the plaintiff is entitled to the reliefs sought in the plaint:

The first relief sought in the plaint is an injunction restraining the defendants from selling or interfering with the suit property. I am of the view that this order is unnecessary. It was common ground that the suit property was registered in the names of the plaintiff and the defendants. It follows therefore that the defendants cannot sell the property without consulting the plaintiff and having his consent. Again, the 2nd defendant is a co-owner of the suit property. In the circumstances, the court cannot stop him from selling the suit property if he can do so with the consent of the other owners. As concerns interference, the plaintiff did not lead evidence as to the nature of interference the defendants should be restrained from engaging in.

The other relief that was sought by the plaintiff was a declaration that he owns the suit property jointly with the defendants in equal shares. From my findings above, I am satisfied that the plaintiff is entitled to this prayer. The plaintiff also sought a declaration that he was entitled to 1/3 share of rent from the suit property for 35 years from 1976 at the rate of Kshs.10,500/= per month. This claim was not established. As was rightly submitted by the 2nd defendant, the plaintiff did not place any evidence before the court showing that for the last 35 years, he had demanded rent from the defendants and was turned down. In my view, the plaintiff slept on his rights and this court cannot assist him to maintain a claim which is stale. Furthermore, the plaintiff did not explain to the court how he arrived at the average rent of Kshs.10,500/=

per month which he has claimed. The only declaration this court can make is that the plaintiff is entitled the rental income from the suit property proportionate to his share in the property less expenses. The plaintiff had sought an alternative prayer that was directed against the 1st defendant. Since the case against the 1st defendant abated, the court cannot give any judgment against him. I will therefore not consider this alternative prayer. In conclusion, the plaintiff's suit succeeds in part. I hereby enter judgment for the plaintiff against the 2nd defendant as follows:

1. I declare that Plot No. 150, Eastleigh Section One is jointly owned by the plaintiff and the defendants in equal shares.
2. I declare that the plaintiff is entitled to 1/3 share of the rental income from the Plot No. 150 Eastleigh Section One less his share of any administrative and maintenance expenses.
3. Each party shall bear its own costs of the suit in view of the fact that they are related.

Delivered and Dated at Nairobi this 20th day of June 2019

S. OKONG'O

JUDGE

Judgment read in open court in the presence of:

Mr. Githaara h/b for Mr. Wambugu for the Plaintiff

Mr. Owang for the Defendants

Catherine Nyokabi-Court Assistant