



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BUSIA

ENVIRONMENT AND LAND COURT

ELC NO. 35 OF 2017

STEPHEN NJAU.....PLAINTIFF

= VERSUS =

NANCY WANJIRU WATHEKA..... 1ST DEFENDANT

JAMES KAMAU.....2ND DEFENDANT

ANTONY WATHEKA..... 3RD DEFENDANT

J U D G M E N T

1. This suit is essentially a family dispute. The disputants are members of the same family, with the Plaintiff – **STEPHEN NJAU** – being husband to 1st Defendant – **NANCY WANJIRU WATHEKA** – and father to 2nd and 3rd Defendants – **JAMES KAMAU** and **ANTONY WATHEKA**. The suit was filed on 10/2/2017 vide a plaint dated 9/2/2017. It relates to three properties – LR. No. SOUTH TESO/ANGOROMO/1617, SOUTH TESO/ANGOROMO/1697 and LR. No. SOUTH TESO/ANGOROMO/4087 (suit properties).

2. The suit properties are registered in the Defendant's names but the Plaintiff avers that they were so registered in trust for all the family members. Such trust is said to consist in the fact that the Plaintiff alone bought the suit properties from the initial owners without help from any of the Defendants. Thereafter he extensively developed the properties and is the one collecting rent. The Plaintiff pleaded that he caused the properties to be registered in the Defendants' names because his business activities at the time required constant travel out of the country. He also pleaded that he has other children who depend on the properties.

3. The suit itself was said to have been rendered necessary by the fact that the Defendants had secretly sold another property – LR No. BUKHAYO/MUNIDKA/1537 – similarly registered in their names. There was breach of trust, the Plaintiff pleaded, and there is genuine concern that the suit properties might also be sold. Particulars of breach comprised of selling the property without the Plaintiff's knowledge; taking away documents of title; dealing with the property contrary to the interests of the family; failing to obtain spousal consent from the Plaintiff; transferring the property to a third party; and disrupting the Plaintiff's income by selling the property to a stranger.

4. The Plaintiff desires that the suit properties be registered in the names of **NANCY WANJIRU WATHEKA**, **JAMES KAMAU**, **ANTONY WATHEKA**, **ANN WANJIRU NJAU**, **AGNES WANGECHI NJAU**, **RUTH NYAMBURA**, **BILL KAMAU NJAU** and **SHONAN KAMAU NJAU**. More specifically, the following prayers are made:

(a) An order of cancellation of title to land parcel No. LR. No. SOUTH TESO/ANGOROMO/1617, LR. No. BUKHAYO/MUNIDKA/4087 and LR. No. SOUTH TESO/ANGOROMO/1697 and the same be registered in the joint names **NANCY WANJIRU WATHEKA**, **JAMES KAMAU**, **ANTONY WATHEKA**, **ANN WANJIRU NJAU**, **AGNES WANGECHI NJAU**, **RUTH NYAMBURA**, **BILL KAMA NJAU** and **SHONAN KAMAU NJAU**.

(b) Costs of the suit.

(c) Any other or further relief that the court may deem fit and just to grant.

5. The suit was first responded to by 1st Defendant vide a defence filed on 20/3/2017 and dated 17/3/2017. That defence was later amended and filed on 17/8/2017. The amended defence brought the 2nd and 3rd Defendants on board and added more details. According to the Defendants land parcels Nos 1617 and 1697 were bought from a neighbour and developed by Plaintiff and 1st Defendant as husband and wife using monies borrowed as loan from National Bank of Kenya. The 1st Defendant averred that she was running a family shop and proceeds from that shop were used to repay the loan. After repayment of the loan the Plaintiff and 1st Defendant decided to transfer the properties in

the manner shown or reflected in the land register. Contrary to Plaintiff's allegations, the 1st Defendant averred that she contributed to both acquisition and development of the suit properties by contributing her salary to the family business that in turn generated income used to develop the properties and also repay the loan.

6. The 1st Defendant denied existence of trust between her and the Plaintiff. She instead pleaded that any trust that exists is between her and her children. She also denied that land parcel No. 1537 was sold without the Plaintiff's knowledge. According to her, the Plaintiff knew, consented and participated in the sale. She complained that it is the Plaintiff alone who gets all the income generated by or from the properties. The court was urged to dismiss the Plaintiff's case.

7. The Plaintiff filed a reply to defence on 25/8/2017. He denied and/or controverted the amended defences.

8. The court started hearing the matter on 27/11/2018. The Plaintiff testified as PW1. He said that the Defendants sold land parcel No. 1537 without his consent. He expressed fears that the Defendants might also sell the suit properties yet registration of the properties in their names was in trust for all family members. He said his intention is to protect the properties and not to dis-inherit the Defendants. The Plaintiff adopted his written statement as his evidence. His statement has the substance of his plaint. The Plaintiff was cross-examined and his responses did not reveal any substantial deviation from his evidence and/or pleadings.

9. In the course of hearing, the Plaintiff availed the following exhibits:

- PEX No.1 - Copy of green card for land parcel No. SOUTH TESO/ANGOROMO/1617.
- PEX No. 2 - Copy of green card for land parcel No. SOUTH TESO/ANGOROMO/4087.
- PEX No. 3 - Copy of green card for land parcel No. SOUTH TESO/ANGOROMO/1697.
- PEX No. 4 - (a) Copy of certificate of official search for SOUTH TESO/ANGOROMO/1617.
(b) Copy of certificate of official search for parcel No. BUKHAYO/MUNDIKA/4087.
(c) Copy of certificate for official search for parcel No. SOUTH TESO/ANGOROMO/1697.
- PEX No. 5 - Copy of land sale agreement.
- PEX No. 6 - (a) Originating Summons for ELC No.35/2012.
(b) Supporting affidavit for the Originating Summons.
(c) Verifying affidavit for the Originating Summons.
(d) Copy of judgment in ELC 35/2012.

10. The 1st Defendant gave her evidence in two days – 6/5/2019 and 25/6/2019. Her evidence was adopted by the other two Defendants as their own vide a document of authority filed here on 15/7/2019. She talked of her husband, the Plaintiff, having written to her asking that she give him the title of either parcel No. 1617 or 1697 because he wanted to give land to two children of his other marriage. The 1st Defendant chose not to respond and several other messages followed. These, too, drew a blank. The husband then said that all the children, including those of his second marriage, would be included in the sharing of the property. He then filed this suit.

11. The 1st Defendant denied that land parcel No. 1537 was sold without the Plaintiff's knowledge. According to her, it is the Plaintiff himself who wanted to sell the land without involving them and had even found buyers. Everything flopped however when the buyers conducted a search at the Land's Registry and found that the property was not in the Plaintiff's name. Later on, the property was sold with Plaintiff's knowledge and consent in order to pay tuition fees for one of their daughters who was poised to study abroad.

12. The 1st Defendant mentioned several other properties registered in her name, or in joint names of her children or jointly in both her name and the names of some of her children. It is her position that such registration was absolute and meant for absolute ownership of those registered as owners. It was not in trust for the Plaintiff or anyone else. The properties, she said, are for her and her children. The children of the other marriage are not entitled to any share of the properties.

13. The 1st Defendant was cross-examined and she said, *inter alia*, that there is no property that was acquired by the Plaintiff alone, all having been acquired through joint efforts of herself and the Plaintiff. She reiterated that parcel No. 1537 was not sold without the Plaintiff's consent. She was referred to case No. ELC No. 35/2012 in which the Plaintiff challenged the sale and succeeded. She said she was not told about the judgment in the case and that she was not called to court in relation to that case.

14. Both sides filed written submissions. The Plaintiff's submissions were filed on 11/7/2019. According to the Plaintiff, the suit properties were registered in the names of the Defendants much the same way that parcel No. 1537 was registered in their names. In ELC No. 35/2012,

the court held, *inter alia*, that parcel No. 1537 was registered in the names of the Defendants in trust for the Plaintiff. Further, it was submitted that though the Defendants are the registered owners, it is the Plaintiff who always collects rent from the suit properties. He was said to have exclusive possession of the properties.

15. It was further submitted that the Plaintiff deserves to get the orders sought. The Defendants are said to have breached the trust by selling parcel No. 1537. The Plaintiff is said to be genuinely apprehensive that they might do the same regarding the suit properties.

16. The Defendants' submissions were filed on 15/7/2019. The Defendants gave a snapshot of the case and then posited that the issues for determination are two viz: whether this court has jurisdiction to hear and determine this suit and whether the prayers sought can be granted. On jurisdiction, the Defendants submitted that the suit properties are matrimonial properties. To the Defendants, the law applicable therefore is to be found in Matrimonial property Act, 2013 and the proper forum to determine the matter is the High Court, specifically Family Division of that court.

17. As to whether the prayers sought can be granted, the Defendants submitted that if there was a trust to be inferred or implied in the ownership of the suit properties, then such trust existed for the family members as at the time. The two other children of the Plaintiff's second marriage were said not to have been envisaged by the parties.

18. It was submitted also that the suit properties were transferred as gifts between living persons, or gifts *inter vivos* if you like. The Defendants accepted the gifts and what followed was transfer and registration of them as owners. The Defendants were said to own the suit properties and are therefore entitled to all benefits that go with such ownership. The Plaintiff was said not to have offered justification for cancellation or rectification of titles.

19. I have considered the pleadings, evidence, and rival submissions. The Defendants submissions easily attract curiosity because issues not raised in evidence or pleadings are newly introduced and extensively submitted on. One such issue is jurisdiction. According to the Defendants the court should down its tools because the matter before it relates to matrimonial property and only the High Court has jurisdiction to handle it. It was submitted that the suit should be struck out on this ground. What is curious is the belated manner in which the issue is raised.

20. Ordinarily, and as a matter of sound procedure, the issue of jurisdiction is raised in the pleadings. And where jurisdiction is denied in the pleadings, the court is always interested in handling the issue first. In the pleadings and evidence however, the Defendants passed over this issue in silence. They then proceeded to actively participate in the trial only to bring up the issue as a surprise in the submissions. The issue was not raised timeously. The Plaintiff was ambushed and had no time to respond to it. It should have been raised in the pleadings. That would have made the Plaintiff know beforehand how to confront it. It would have served as sufficient notice to the Plaintiff in order to adequately respond.

21. In any given case, the pleadings filed always give a pointer as to whether the court has the requisite jurisdiction. The Plaintiff's case is founded on trust, more specifically the possible breach of it. There is no reference at all to matrimonial property. The defence of the Defendant is essentially a denial of the existence of trust or its breach. There is not even a fleeting reference of the suit properties as matrimonial properties. Quite clearly, the Defendants are introducing new things in the submissions.

22. But that is not all. The Defendants also introduced the legal concept of gifting. To them, the Plaintiff gifted the suit properties to them. They submitted extensively on what would constitute successful gifting. This is an issue again only raised in the submissions. It is not in the pleadings; it is not in evidence. But even if one were to be minded to accept it, it is trite that successful gifting requires the donor to put the donee into possession of the gifted property. In this particular case, it is clear from evidence from both sides that it is the Plaintiff, not the Defendants, who is in possession and control of the suit properties. He derives full benefits from the properties and is not shown to have manifested any intension of parting with the properties. How then can the Defendants allege gifting when the Plaintiff has not put them into possession of the properties? So, like the issue of jurisdiction aforesaid, the issue of gifting does not wash. It was not raised timeously. It was not adequately demonstrated.

23. It is also clear that the Defendants submissions suffer another glaring weakness. The Plaintiff made reference to parcel No. 1537 which was the subject matter in ELC No. 35 of 2012. In all appearance, or likelihood if you like, the suit properties were registered in the names of the Defendants much the same way as parcel No. 1537 was. Like in this case, the Plaintiff had averred that the Defendant held parcel No. 1537 in trust for him. The court agreed with him. There is no evidence that there was an appeal. The Plaintiff submitted, *inter alia*, that **“the registration of land parcel BUKHAYO/MUNDIKA/1537 in the names of the 4th and 5th Defendants in the said case is in every respect similar as the parcels in contention in this suit”**.

24. The Defendants decided to pass over this fact in silence. The established truth then is that parcel No. 1537, which was registered in the names of the Defendants herein in the same manner as the suit properties was so registered in trust for the Plaintiff. How then can registration of the suit properties be different? The Defendants needed to say something and show the court why it should take a different position regarding the suit properties. They did not do this. If there was trust in parcel No. 1537, there is also trust in the suit properties. There cannot be two ways about it.

25. Overall therefore, the Plaintiff demonstrated well the merits of his case. The Defendants failed to displace the merits. It does not appear to me that the Plaintiff is out to disentitle the Defendants of ownership. He proposes their inclusion in his proposed registration. I therefore find for the Plaintiff and grant him prayer (a) in the plaint. As regards costs (prayer (b)), the court is of the view that this is a delicate family matter. Each side therefore should bear its own costs.

Dated, signed and delivered at Busia this 10th day of September, 2019.

A. K. KANIARU

JUDGE

In the Presence of:

Plaintiff: Absent

1st Defendant: Absent

2nd Defendant: Absent

3rd Defendant: Absent

Counsel for the Plaintiff: Present

Counsel for the Defendants: Present

CA: Nelson Odame