



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND

AT NAIROBI

ELC CIVIL SUIT NO. 270 OF 2017

PAUL JAMES SAVAGE.....PLAINTIFF

VERSUS

LES BELLES SAUVAGES LIMITED (IN LIQUIDATION).....1ST DEFENDANT

MONA HUSSEIN DUALE.....2ND DEFENDANT

JUDGEMENT

1. The Plaintiff filed suit on 21/4/2017 seeking a declaration that the 1st Defendant holds the land known as Kwale/Diani Beach Block/ 783/3 (“the Suit Property”) in trust for him and an injunction to restrain the 1st Defendant from dealing with the Suit Property. The Plaintiff and the 2nd Defendant were married. The marriage was dissolved in 2009. The Plaintiff and the 2nd Defendant were the only shareholders and directors in Les Belles Limited (the Company) which they incorporated for investment purposes. The Plaintiff claimed that the Suit Property was purchased from funds which he solely provided from his inheritance and that while they were married they agreed to have the Suit Property registered in the name of the 1st Defendant.

2. The 2nd Defendant petitioned for the Company to be wound up after the divorce and it was wound up on 21/10/2010. The Plaintiff contends that the liquidator has no power to take possession of the Suit Property because the Company does not have any beneficial ownership in the Suit property and that the Company held the land in trust for the Plaintiff. The Plaintiff seeks to have the Suit Property transferred to him.

3. The Liquidator of the Company filed a defence on 4/7/2018 disputing the Plaintiff’s claim and averred that it was the Company that purchased the Suit property and not the Plaintiff. The 1st Defendant denied that the Company held the Suit Property in trust for the Plaintiff and averred that the Official Receiver had the legal right to dispose of the assets of the Company in his capacity as the appointed liquidator. The 1st Defendant further contended that the proceeds from the liquidation should be divided between the Plaintiff and the 2nd Defendant since each of them held 50 shares in the Company.

4. The Plaintiff gave evidence. He stated that when his parents died, his parents’ house in England, which he inherited with his sister, was sold for £160,000 in 2007 and he shared the sale proceeds with his sister. He stated that he used his share of the inheritance to purchase the Suit Property. He attached copies of his bank statements showing the deposit of £78,337.50 into his account held at Halifax Bank on 30/11/2007. He also produced bank statements showing the withdrawal of £69,017.50 from this account on 3/1/2008 and an international payment he made to his former wife of £69,000.00 on 3/1/2008.

5. The Plaintiff produced a copy of the agreement for the sale of the Suit Property dated 15/1/2008 drawn by Anjarwalla & Khanna Advocates between the Plaintiff and the 2nd Defendant as purchasers and Utunzi Limited as the vendor. The suit land was purchased for Kshs. 8,500,000/=. He produced copies of the cheques for payment of the purchase price drawn from the 2nd Defendant’s account on 13/12/2007 and 13/3/2008 as well as evidence of the payment of the stamp duty. Utunzi Limited and Les Belles Sauvages Limited executed a lease dated 27/3/2008 over the Suit Property, which was registered on 21/4/2008. A certificate of lease was issued to Les Belles Sauvages Limited on 21/4/2008. The Company was incorporated on 11/2/2008 with its main objectives being to provide accommodation to tourists and to carry out the business of safaris, tours and camping among other objects. The Plaintiff and the 2nd Defendant each held 50 shares in the Company. The Plaintiff produced copies of the Company’s financial reports for 2009 and stated that the Company had not operated since 2009. The Plaintiff claimed that he incorporated the Company in 2008 and enlisted his former wife as a co-subscriber to manage the Company’s investments.

6. The Plaintiff produced a copy of the judgement in **Nairobi High Court Commercial Division, Winding Up Cause No. 23 of 2009** dated 21/10/2010, in which the court found that a case had been made for the winding up of the Company and directed the parties to appoint a suitable person as Receiver for the court’s approval. The Plaintiff unsuccessfully challenged the winding up order but eventually the Official

Receiver was appointed as liquidator of the 1st Defendant. The Plaintiff was granted leave by the High Court, Commercial Division to pursue his claim for beneficial ownership of the Suit Property.

7. He gave a history of the organisations he worked for while in Kenya and elsewhere and explained that when they were married, he agreed with his former wife that his salary and consultancy fees would be paid into his former wife's bank account. The parties also had a joint bank account during the marriage and the 2nd Defendant managed payments from their common resources. The Plaintiff maintained that he had superior resources when they were married and that he expressed interest in the Suit Property and visited it when he learnt that it was up for sale. He stated that he informed his wife that he would buy it with his inheritance because she was opposed to its purchase. The Plaintiff gave evidence of the proceedings in **HCCC No. 50 of 2008 (O.S)** in respect of the distribution of the matrimonial property upon the dissolution of his marriage to the 2nd Defendant, which have no relevance to this suit.

8. The Company was incorporated after the Suit Property had been purchased. The Plaintiff claimed that the cottage on the Suit property was not running at a profit and that he was managing the cottage because it was his. He confirmed that the Suit Property was the only asset held by the Company.

9. The 1st Defendant did not call any evidence. Despite filing a witness statement in court on 14/3/2019, the 2nd Defendant did not testify in court. She did not file a defence to the Plaintiff's claim.

10. Parties filed submissions which the court has considered together with the authorities relied on. The Plaintiff submitted that his evidence was uncontroverted and that he had proved on a balance of probabilities that the Suit Property was purchased solely from his inheritance.

11. The Plaintiff submitted that the Winding Up Cause did not deal with the issue of the contribution made by the parties towards the purchase of the Suit Property, which they registered in the Company's name. The Plaintiff contended that the winding up of the Company extinguished the Company without dealing with the question of ownership of the assets transferred to the Company to hold in trust for the purchaser. The Plaintiff added that the basis for having the 2nd Defendant as a shareholder in the Company was to comply with the requirements of the Companies Act as at 2008 and it was expected that the 2nd Defendant would help in the establishment and running of the Company as the Plaintiff's wife then.

12. The Plaintiff submitted that the burden to prove that they made contributions towards the purchase of the Suit Property shifted to the Defendants and urged that the Defendants failed to discharge this evidentiary burden. The Plaintiff submitted that his evidence that he purchased the Suit Property from its previous owner and arranged for it to be transferred to the Company with the intention that he would be the beneficial owner was not challenged by the Defendants.

13. The Plaintiff submitted that under terms of the sale agreement, the purchaser could transfer the Suit Property to a nominee but maintained that the transfer of the Suit Property did not divest him of his beneficial interest in the suit land considering the fact that he solely paid the purchase price. The Plaintiff urged that ownership depends entirely on a party's contribution and relied on Snell's Principles of Equity, 28th edition page 179 on purchases in the name of another. The book gives the case of an implied or resulting trust as an instance where on a purchase, property is conveyed into the name of someone other than the purchaser, and that the trust of a legal estate whether leasehold or freehold or whether taken in the name of purchasers and others jointly or in the names of others, without the purchasers results to the man who advances the purchase money. Further that where a feoffment is made without consideration, the use results to the feoffer and that the doctrine of a resulting trust applies to pure personalty and to land.

14. According to Snell, in the case of land, evidence of the advance of purchase money by the real purchaser is admissible. The actual or presumed intention of the parties at the time of the acquisition of the property is important. To raise a resulting trust, the claimant must show his contribution and the agreement that he was to have an interest in the property which is not conveyed to him. That agreement need not be express, it can be inferred from the conduct of the parties, especially from the contributions made towards the price.

15. The Plaintiff relied on the decision in **Twalib Hatayan & Another v Said Saggar Ahmed Al-Heidy & 5 Others [2015] eKLR** in which the court stated that a resulting trust is a remedy imposed by equity where property is transferred under circumstances which suggest that the transferor did not intend to confer a beneficial interest upon the transferee. The court noted that as a general rule, a resulting trust will automatically arise in favour of the person who advances the purchase money whether or not the property is registered in his name.

16. The 1st Defendant submitted that the intention of the Plaintiff was that the Suit Property was an investment undertaken for his benefit and that of the 2nd Defendant when they were both happily married. Further, that if a resulting trust were to be inferred then it was for their common and equal benefit. The 1st Defendant maintained that the intention of the Plaintiff in incorporating the Company was to run a business and he should not be allowed to deny the 2nd Defendant as his business partner her rights under the law. Further, that the Plaintiff could not have foreseen the divorce and did not therefore intend for the Suit Property to solely belong to him. The 1st Defendant argued that had the winding up been commenced by a creditor or the tax authorities the Plaintiff would not have claimed beneficial ownership of the Suit Property.

17. The 1st Defendant contended that if a resulting trust was created, it was due to the incorporation of the Company by both the Plaintiff and the 2nd Defendant as shareholders in the Company. The 1st Defendant conceded in its submissions at paragraph 18 that by the 1st Defendant holding the Suit Property for the benefit of and in trust for its shareholders, a resulting trust would arise. The 1st Defendant maintained that if the Plaintiff contributed to the purchase of the Suit Property then his contribution was an investment towards growing the business.

18. The 1st Defendant contended that the Company having been wound up and as the liquidator of the Company, it was empowered by Sections 239 and 241 of the Companies Act to take into his custody and control property to which the Company is entitled and to sell the Suit Property or transfer it. The 1st Defendant relied on the Company's memorandum and articles of association on the point that upon

winding up, the assets remaining after payment of debts and liabilities and the cost of the liquidation of the Company would be applied to repay the members the amounts paid up or credited for the shares they hold and the balance would be distributed among the members in proportion to the shares they held.

19. The 2nd Defendant filed submissions on 15/7/2019 and contended that the issue of ownership of the Suit Property was already determined in **Re matter of Les Belles Sauvages Limited [2010] eKLR** where Lady Justice Mugo stated that the asset in issue belonged to the Company and not to either contestant and that the Petitioner had not proved the trust he alleged existed in his favour. The 2nd Defendant submitted that this court has no power to interfere with that decision.

20. The 2nd Defendant submitted that the question of contribution did not arise since the Plaintiff had admitted that his salary and consultancy fees were paid through her account. She relied on the decision in **Matrimonial Cause No. 50 of 2008 (O.S)** where the court directed that the Plaintiff and the 2nd Defendant were to share the property in that cause on a 50:50 basis. In that judgement, the court observed that the Plaintiff made the bigger contribution to the acquisition of the assets having been in a superior financial position.

21. The 2nd Defendant denied that there was a resulting trust in favour of the Plaintiff and urged that following the winding up of the Company, the assets ought to be distributed in accordance with the shares held notwithstanding how the shares were acquired. She relied on the case of **Heartbeat Limited v Ng'ambwa Heartbeat Community Children's Home & Rescue Centre [2018] eKLR** in urging that courts will not imply a trust except to give effect to the intention of the parties. In that decision the court adverted to the definition of a resulting trust under Snell's Equity and the principles for establishing the intention to create a trust and noted that no contribution had been made by the respondent. The court found that more was needed to establish a trust while noting that the respondent did not contribute any amount towards the purchase of the land. The land in question was occupied by a children's home and the court found that the land was bought entirely for the benefit of the children.

22. The main issue for determination in this case is whether the court should grant the orders sought by the Plaintiff. It is necessary to first deal with the issue as to whether this suit is *res judicata* based on the decision made in the winding up cause. The 2nd Defendant filed **Nairobi High Court Winding Up Cause No. 23 of 2009- In the Matter of Les Belles Sauvages Limited** seeking to have this Company wound up citing the reason that it had become impossible to conduct the affairs of the Company due to the disagreements and acrimony between the shareholders and directors following the dissolution of their marriage. The issue for determination in that cause was whether or not the Company was to be wound up and no determination was made as to whether or not there was a resulting trust over the Suit Property in favour of the Plaintiff. The court only wound up the Company and made an order for the appointment of a receiver. In the court's view, the issue as to whether or not a resulting trust in favour of the Plaintiff was not determined by the Commercial Court which is why it was referred to the Environment and Land Court.

23. In determining whether or not the Suit Property ought to be sold by the Official Receiver and the proceeds shared equally between the Plaintiff and the 2nd Defendant as submitted by the Defendants, the court needs to first ascertain whether the Plaintiff has proved that a resulting trust over the Suit Property was created in his favour. The twin issues that would confirm that there was a resulting trust are the intention of the parties and the contributions made by the parties.

24. The Plaintiff and 2nd Defendant entered into the sale transaction over the Suit Property and paid part of the purchase price before the Company was incorporated. They then incorporated the Company and got the suit land registered in the name of the Company which was to undertake the investment venture in hotel, tours and travel. This happened while they were still married. The intention of the parties was for the Company to carry out the business for the benefit of both the Plaintiff and the 2nd Defendant while they were married. At the time the parties did not contemplate that their marriage would end and they did not therefore address their minds to the issue as to what would happen to the Company and the Suit Property if their marriage were dissolved.

25. The 2nd Defendant did not call any evidence to rebut the Plaintiff's evidence on the financial contribution he made towards the purchase of the Suit Property. She did not provide evidence of the contribution she made towards its purchase but only contended in her submissions that it was not clear which monies went into the purchase of which asset since they were using a joint account during the marriage. This issue was dealt with in the divorce case.

26. The court is satisfied on a balance of probabilities that the Plaintiff solely paid the purchase price for the Suit Property and that there is a resulting trust therefore in favour of the Plaintiff.

27. The Plaintiff has proved his case on a balance of probabilities. The court grants prayers (a), (b), (c) and (d) of the plaint. Each party will bear its own costs.

Dated and delivered at Nairobi this 11th day of November 2019.

K. BOR

JUDGE

In the presence of: -

Karanja Munyori for the Plaintiff

Ms. S. Githungo holding brief for B. Osicho for the 1st Defendant

J. Wachira holding brief for Kounah for the 2nd Defendant

Mr. V. Owuor- Court Assistant