



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 657 OF 2017**

**(Formerly Machakos ELC No. 27 of 2016)**

**R K.....PLAINTIFF**

**VERSUS**

**S N M.....1<sup>ST</sup> DEFENDANT**

**ROBERT KANYENJE GICHOHI.....2<sup>ND</sup> DEFENDANT**

**HELLEN BIYAKI.....3<sup>RD</sup> DEFENDANT**

**JUDGEMENT**

By a Plaint dated the 26<sup>th</sup> April, 2016, the Plaintiff seeks for Judgement against the Defendants for:

- a) A declaration that the Plaintiff is solely entitled to ownership and possession of title number KAJIADO/ KITENGELA/ [.....];
- b) An order directing the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to effect transfer of title number KAJIADO/ KITENGELA/ [.....] to the Plaintiff ;
- c) Costs of this suit

The Defendants filed a joint Defence where they denied that the Plaintiff solely entered into an agreement with the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants for the purchase of land title number KAJIADO/ KITENGELA/ [.....], hereinafter referred to as the ‘ suit land’ and paid for the purchase price alone but the 1<sup>st</sup> Defendant was a mere signatory. The 1<sup>st</sup> Defendant claims at the time of purchase of the property, he lived together with the Plaintiff as husband and wife. Further, that together with the Plaintiff, they purchased the suit land as family property from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants on 29<sup>th</sup> September, 2013 after going through the necessary conveyance process. The Defendants insist the suit land is co- owned by the Plaintiff and the 1<sup>st</sup> Defendant and what is remaining is just the transfer of the same from the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants to their joint names. The 1<sup>st</sup> Defendant contends that he gave the Plaintiff Kshs.354,000/= towards the purchase of the suit land and this was done on a regular basis over a period of time to cater for half of the agreed purchase price of Kshs. 750,000/=. He states that after the payment of the entire purchase price, which was done by way of a Bankers Cheque from Barclays Bank, the property was to be transferred in the joint names of Plaintiff and 1<sup>st</sup> Defendant. The 1<sup>st</sup> Defendant reiterates that he is not able to transfer the suit land to the Plaintiff as he is also a co – purchaser. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants aver that they have been willing to transfer the suit land to the Plaintiff as well as the 1<sup>st</sup> Defendant in furtherance of the contract for sale of the said suit land. The Defendants insist it is the Plaintiff who has frustrated and breached the terms of the contract and the principle of utmost good faith in demanding the suit land be transferred to her solely. The Defendants challenged the jurisdiction of the honourable Court.

The 1<sup>st</sup> Defendant filed a Counterclaim where he sought for the Plaintiff’s suit to be dismissed with costs and Judgement entered against the Plaintiff for:

- a) A declaration that the 1<sup>st</sup> Defendant and the Plaintiff are entitled to ownership, use and possession of land title number KAJIDO/ KITENGELA/ [.....] in equal shares;
- b) Costs and interests of this suit;
- c) Any other order as may be deemed fit and just in the interest of justice.

The Plaintiff filed a Reply to the Defendants' Defence and the 1<sup>st</sup> Defendant's Counterclaim where she reiterated her claim and stated that the said Defence is invalidly filed and served out of time without leave of the court. The Plaintiff insists that the 1<sup>st</sup> Defendant executed the agreement but did not in any manner contribute to the purchase of the suit land. Further that the 1<sup>st</sup> Defendant did not give her the alleged Kshs. 354,000/= as a contribution towards the purchase of the suit land. The Plaintiff admits that the 1<sup>st</sup> Defendant cannot transfer the suit land to her but authorize its transfer to her. The Plaintiff avers that she is the sole owner of the suit land by virtue of her contribution. She reiterates that the Defendants Defence and Counterclaim be struck out with costs and interest. Further, that judgment be entered for the Plaintiff against the Defendants jointly and severally as prayed in the plaint.

All the parties filed their respective witness statements and list of documents and the matter proceeded to full hearing.

### **Evidence of Plaintiff**

PW1 R K adopted her witness statement dated the 26<sup>th</sup> April, 2016 and her list of documents as exhibits. She stated that she decided to buy land parcel number KAJIADO/ KITENGELA/ [.....], in 2013 for the price of Kshs. 750,000, through a loan from Barclays Bank of Kenya. She confirmed that during that period, she was cohabiting with one Samuel Machuki and that she took out a Banker's Cheque of Kshs. 750,000 from her account in the name of Hellen Biyaki, and paid for the land. She averred that together with Samuel Machuki they signed the Sale Agreement as purchasers while the Vendors were 2<sup>nd</sup> and 3<sup>rd</sup> Defendants respectively. She claims she was given the title deed but the vendors have refused to transfer the land to her while the 1<sup>st</sup> Defendant has declined to sign for the transfer to be effected in her name and insists that at the time of the purchase they were living together hence he co owns the suit land. She denies that Samuel Machuki assisted her to purchase the suit land as she is still repaying the loan, in respect of the same.

The Defendant's Counsel declined to cross examine the Plaintiff who thereafter closed her case.

### **Evidence of Defendant**

DW1 S N M who is the 1<sup>st</sup> Defendant herein confirmed he had filed a Counterclaim in the suit and relied on his witness statement as evidence in court. He claims the Plaintiff R K is his ex wife and they were married under customary law in 2011. He produced an affidavit as his exhibit to prove there was a marriage. He stated that at the time of marriage, they jointly bought a piece of land from Robert Kanyange and Hellen Biyaki for Kshs. 750,000 and entered into an agreement dated the 29<sup>th</sup> September, 2013, but the land is yet to be transferred into their names. He denies being a mere signatory to the agreement but claims he is the first owner while the Plaintiff is the second one. He contends that he contributed Kshs. 354, 000 as part of the purchase price he produced his bank statement showing withdrawal over time that he made and gave the monies to the Plaintiff. He insists they bought the land jointly with the Plaintiff and wishes the Court to confirm him as a co – owner.

During cross examination he confirmed that the bank statement and sale agreement did not indicate that the withdrawals he made were given to the Plaintiff. He further confirmed that the Plaintiff got the money from the bank as a loan and he has not contributed towards the repayment of the same.

In reexamination he insisted he contributed towards the purchase of the suit land and it was not a must to indicate it in the Sale Agreement. Further that they had agreed she would take a loan and that he honoured his part of the agreement.

DW2 Robert Kanyenje Gichohi confirmed he is the 2<sup>nd</sup> Defendant herein and was the seller of the suit land. He relied on his witness statement as evidence in court. He stated that he sold the suit land together with his wife to the Plaintiff and the 1<sup>st</sup> Defendant. Further, that they entered into an agreement dated 29<sup>th</sup> September, 2013, to sell the suit land that was measuring an eighth (1/8) of an acre, for the purchase price being Kshs. 750,000. He stated that they handed over the original title deed to the purchasers and asked them to organize for the transfer. He averred that the buyers paid the full purchase price and that in March 2016 he received a call from the Plaintiff claiming the suit land belonged to her but this was contrary to the Sale Agreement. Further, that she was demanding that they transfer the suit land to her but he objected as they were two buyers and he did not want to breach the Sale Agreement. He contends that the Plaintiff and her lawyer threatened him demanding that the suit land be transferred to the Plaintiff but he declined to do so. He requested the Court to dismiss the suit against him and order for his expenses to be paid. He insists that he can only transfer the suit land as per the Sale Agreement unless the Court directs to the contrary.

During cross examination he confirmed the purchase price of Kshs. 750,000 was paid through Banker's Cheque. He denied knowledge of the Plaintiff's and 1<sup>st</sup> Defendant's bank. He stated that the Cheque was written in favour of his wife and the purchasers paid the whole purchase price using the said Banker's Cheque.

In re examination he said it was not his business to know how much each of the buyer's contributed.

DW3 Hellen Biyaki Nyaundi confirmed she is the 3<sup>rd</sup> Defendant herein and a wife to the 2<sup>nd</sup> Defendant. She adopted her witness statement as evidence in Court. She contended that she has not refused to transfer the suit land to the Plaintiff and confirmed that a cheque in settlement of the purchase price for the said suit land, which was bought by the Plaintiff as well as the 1<sup>st</sup> Defendant, was written in her name.

In cross examination, she stated that she did not know the Plaintiff and the Defendant's bank. She confirmed that it is the Plaintiff who gave her the banker's cheque written in her name but she did not know who paid the money.

In re examination she clarified that the banker's cheque did not indicate the Plaintiff nor the 1<sup>st</sup> Defendant's name.

The Defendants thereafter closed their case and the parties filed their respective written submissions.

The Plaintiff submitted that the Environment and Land Court has jurisdiction to hear and determine this suit herein and relied on the ELC Act, Section 101 of the Land Registration Act and the case of **Jane Wambui Ngeru V Timothy Mwangi Ngeru (2015) eKLR** and **L.N Vs S.M.M (2013) eKLR**; to support her argument. She further submitted that the suit property does not meet the definition of Matrimonial Property as espoused in Section 6 of the Matrimonial Property Act. The Defendants in their submissions reiterated their respective responses and relied on **Sections 62 & 107 of the Evidence Act, Sale Agreement** as well as **Bank Statement**.

### **Analysis and Determination**

Upon perusal of the pleadings filed herein including oral testimonies, written submissions as well as the exhibits, the following are the issues for determination:

- Whether there was a valid contract between the Plaintiff and the Defendants.
- Whether the suit land should be deemed as matrimonial property.
- Whether there is a presumption of trust between the Plaintiff and the 1<sup>st</sup> Defendant in relation to the suit property.
- Whether the Plaintiff is entitled to the Orders sought.
- Whether the Defendants are entitled to the Orders sought.
- Who should bear the costs of the suit?

As to whether there was a valid contract between the Plaintiff and the Defendants, I note there was a Sale Agreement dated the 29<sup>th</sup> September, 2013 for the purchase of land parcel number KAJIADO /KITENGELA /[.....]. From a cursory look at the said Sale Agreement, I note the Plaintiff and the 1<sup>st</sup> Defendant were indicated as the purchasers' whereas the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants were vendors respectively. Further that the buyers had been paid the purchase price amounting to Kshs. 750,000 vide a Barclays Bank Cheque No. 183068. I note the Sale Agreement was signed by all the parties and witnessed by one Julius M. Kambi.

Section 3(3) of the Law of Contract provides that: **'No suit shall be brought upon a contract for the disposition of an interest in land unless—**

**(a) the contract upon which the suit is founded—**

**(i) is in writing;**

**(ii) is signed by all the parties thereto; and**

**(b) the signature of each party signing has been attested by a witness who is present when the contract was signed by such party.'**

In relying on the facts as presented and the above cited legal provision, It is my finding that there was indeed a valid contract between PW1, DW1 and DW2 including DW3 respectively.

As to whether the suit land should be deemed as matrimonial property.

DW1 contended that at the time of the purchase of the suit land, he was married to PW1 in accordance with the Kamba Customary Law. This position is confirmed as per paragraph 2 of the Affidavit dated the 8<sup>th</sup> October, 2012 which was produced as exhibit 'D1', which stated as follows: **'That I got married to S N M ID No. [.....]in the year 2011 under Kamba Customary Marriage.'** This evidence was corroborated by the Defendants who all testified that at the time of entering into the Sale Agreement, the Plaintiff and 1<sup>st</sup> Defendant were husband and wife. It is hence my finding that the Plaintiff and the Defendant were at one time husband and wife. On the 1<sup>st</sup> Defendant's contention that the suit land should be deemed as matrimonial property and registered in their names as he also contributed Kshs. 354,000 towards its purchase, I note that Section 6 (1) of the Matrimonial Property Act, defines Matrimonial Property as follows:

Section 6 (1) of the Matrimonial Property Act, defines it as follows:

**'(1) For the purposes of this Act, matrimonial property means— (a) the matrimonial home or homes; (b) household goods and effects in the matrimonial home or homes; or (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.'**

**Section 7** of the Matrimonial Property Act provides:

**“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”**

**Further Section 2 of the Matrimonial Property Act defines** contribution to mean monetary and non-monetary contribution. Non-monetary contribution includes:

**a. Domestic work and management of the matrimonial home;**

**b. Child care;**

**c. Companionship;**

**d. Management of family business or property; and**

**e. Farm work**

It was DW1’s evidence that he contributed Kshs. 354,000 towards the purchase of the suit land by giving PW1 monies. Further, that he also used to cater for household expenses as well as give PW1 fare to go to work. He produced his bank statements to confirm that he made periodic withdrawals from the bank to give PW1 money. PW1 insisted she purchased the suit land and solely paid the purchase price through a loan from Barclays Bank hence the suit land should be transferred to her. From PW1’s Bank Statements from Barclays Bank, it is evident that on 30<sup>th</sup> September, 2013, a Bankers Cheque for Kshs 750, 000 was issued therefrom. DW3 confirmed in her testimony that it was PW1 who gave her the Bankers’ Cheque for payment of the purchase price. The Defendant’s contended that it is the Plaintiff who was in breach of the contract and that DW2 as well as DW3 respectively, were ready to transfer the suit land to PW1 and DW1 who were the vendors as per the agreement but could not do so to PW1 alone as demanded. I note from the evidence adduced by DW1, except for the Bank Statements, which cover several years and show withdrawals at different intervals, he did not adduce any evidence to confirm the exact dates he gave the monies to the Plaintiff to purchase the suit land. On perusal of the said statement, I note in the month of September, 2013, alone when the suit land was purchased, he only made two ATM withdrawals on 24<sup>th</sup> September, 2013 for Kshs. 20,000 and Kshs. 9,000 on 25<sup>th</sup> September, 2013 respectively. DW1 admitted during cross examination that the bank statements and sale agreement did not indicate that the withdrawals were given to the Plaintiff. He further confirmed during cross-examination that the Plaintiff got the other money from the bank as a loan and he has not contributed towards the repayment of the same. From the foregoing, it is evident that even though the 1<sup>st</sup> Defendant claims the suit land is matrimonial property, from the definition above, it cannot be deemed as matrimonial property as it was yet to be registered in the names of the Plaintiff and 1<sup>st</sup> Defendant. Further that as an ELC I am not vested with the jurisdiction to make a determination for declaration of matrimonial property, as sought by the 1<sup>st</sup> Defendant in his Counterclaim, as this is a preserve of the High Court.

The Plaintiff submitted that an implied and resulting trust was created because she provided the entire funds to purchase the suit land and that the 1<sup>st</sup> Defendant should be prevented from being registered as its owner because this would amount to unjust enrichment. The Plaintiff relied on various judicial authorities including the case of **L.N. Vs S.M.M (2013) eKLR**; **Arumba Vs Mbega & Another (1988) KLR 121** and the case of **Yogendra Pusshotam Patel Vs Pascale Mireilla Baksh & 2 Others (2006) eKLR to support her arguments.**

The Plaintiff submitted that inasmuch as the 1<sup>st</sup> Defendant signed the sale agreement with the Plaintiff, she paid the purchase price and in essence the 1<sup>st</sup> Defendant signed the said Sale Agreement in trust for her and his interest ‘results’ back to her, as she is the one who provided the money. The 1<sup>st</sup> Defendant admits he did not pay the purchase price but had been giving the Plaintiff monies towards it, periodically. He however did not provide the exact dates when he gave the Plaintiff the said monies but only presented his bank statement to Court.

In the case **L.N. Vs S.M.M (2013) eKLR** it was held that :’..... **Resulting trusts are normally imposed by the Courts when a person receives property but the person who transfers the property did not have the intention of transferring his beneficial interest in the property unless there is some objective manifestation of consent to do so. As was held by the House of Lords in the case of Gissing Vs Gissing (1971) AC 886, a resulting trust is created when a property is purchased by one party and the purchase price is paid in whole or in part, by another person on the understanding that the person paying the money will receive an interest in the property. The paper title is held by one party with a trust that “results” back to the person who provided the money. To understand the principle of a resulting trust in the present context, it would be necessary that I reproduce the holding of the House of Lords in the case of Oxley Vs Hiscock (2005) 3 WLR 715 where it was held as follows: “When money is provided by two or more parties on the basis that they should have a shared interest in the property, and if there is an agreement on how each party should have in the property, that is conclusive. But if there is no agreement their beneficial interest is based on the parties contributions to the purchase price and the whole course of dealing between them in relation to the property.”**

**Resulting trusts are legal presumptions where an intent to create a trust is presumed by the person who buys the property in the name of another. The property is deemed to be held in trust for the purchaser. This presumption is applicable to both personal property and real estate. Indeed ‘resulting’ and ‘constructive’ trusts have been imposed by the courts the world over to cure injustices where someone has benefited or has been enriched at the expense of another and the enrichment is unjust and without legal justification.’**

Further, in the case of **Arumba Vs Mbega & Another (1988) KLR 121**, the Court of Appeal held that a resulting or constructive trust proportionate to the appellant’s expenditure was created where such person spends his money on building and improvements on another person’s land with the agreement of that person but without the intention of a gift or a loan. ’

In another case of **Yogendra Pusshotam Patel Vs Pascale Mireilla Baksh & 2 Others (2006) eKLR**, Justice Githinji held as follows:’ **Parole evidence is admissible to show the purchase price of a property and if provided by several people to show their proportionate**

**share of contribution. Parole evidence is admissible to rebut presumptions whenever they arise.**

**The Court in *Yogendara (supra)* further held that the doctrine of resulting trust is said to be based on the unexpressed but presumed intention of the true purchaser or purchasers of the property. The purpose of parole evidence is to show the intention of the purchasers that they intend to create a trust....'**

From the evidence presented, and in relying on the judicial authorities cited above, I find that since there was no agreement between the Plaintiff as well as the 1<sup>st</sup> Defendant in respect of the purchase price, their beneficial interest should be based on what each of them contributed towards the same in relation to the acquisition of the suit property. I further find that there was indeed an element of constructive and resulting trust created by the 1<sup>st</sup> Defendant in signing the Sale Agreement but not paying for the purchase price. It is against the foregoing that I hold that the Plaintiff is solely entitled to ownership and possession of land parcel number

KAJIADO/ KITENGELA/ [.....] and that the 1<sup>st</sup> Defendant's interest in the suit land was only held in trust for the Plaintiff

The 1<sup>st</sup> Defendant filed a Counterclaim seeking that he be registered a co-owner of the suit land. Based on the evidence presented, the burden of proof was upon him to prove he indeed contributed towards the payment of the purchase price. The statements he provided as evidence are not conclusive proof that he indeed paid the Kshs. 354, 000 as claimed. From a glimpse of his bank statement, as I have stated above, in the month of September, 2013 alone, he only withdrew Kshs. 29, 350, which he had claimed in his evidence was also used in catering for the household expenses and paying fare for the Plaintiff to work.

In the circumstances I find that the 1<sup>st</sup> Defendant did not contribute towards the payment of the purchase price and hence is not entitled to the orders sought in the counterclaim which I proceed to dismiss.

As for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, I will exonerate them from this suit, and since they expressed their willingness to transfer the suit land to the purchasers, I will direct them to transfer the suit land to the Plaintiff within 90 days from the date hereof, failure of which they refund the purchase price including interest to her.

Who should bear the costs of the suit?

Since this suit emanated from two parties who were initially married but now separated, I find that it would be pertinent if each party bore their own costs.

In the circumstances, I find that the Plaintiff has proved her case on a balance of probability and proceed to make the following order:

- a) The Plaintiff be and is hereby solely entitled to land parcel number KAJIADO/ KITENGELA/ [.....] .
- b) The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants do proceed to effect transfer of land parcel number KAJIADO/ KITENGELA/ [.....] to the Plaintiff within ninety (90) days from the date hereof, failure of which the Plaintiff will be entitled to a refund of Kshs. 750,000 with interest at court rates as from September, 2013 until payment in full.
- c) Each party to bear their own costs

**Dated signed and delivered in open court at Kajiado this 30<sup>th</sup> day of July, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**