



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

CIVIL SUIT NO.8 OF 2015

K H.....PLAINTIFF

-VS-

M M.....DEFENDANT

JUDGMENT

1. By a Plaint dated 15th January 2015, the Plaintiff instituted this suit against the defendant seeking the following reliefs;

- a) A declaration that the suit parcels of land (suit property) belongs to the plaintiff solely.**
- b) An order that the name of the defendant be expunged from the entries in the lands office.**
- c) A permanent injunction be issued restraining and/or barring or prohibiting the defendant whether by herself, her servants, her agents, relatives from entering, claiming and/or interfering with the Plaintiffs possession of the suit property.**
- d) Damages.**
- e) Interest on (d) above.**
- f) Costs**
- g) Any other relief the court deems fit to grant.**

2. The plaintiff's case as pleaded is that by a contract in writing dated 29th May 2009, the plaintiff and the defendant agreed to purchase all those pieces of land known as **SUBDIVISION NUMBER [Particulars withheld](ORIGINAL NO. [Particulars withheld]) SECTION III MAINLAND NORTH** ("the suit property") from Suleiman Athman and Dhahabu Shadrack Chondo at a price of Kshs.9,000,000.00. That pursuant to the said agreement the plaintiff and the defendant agreed to pay Kshs.4,500,000.00 each and have the property registered in their joint names. The Plaintiff avers that on date of completion, the defendant claimed not to have enough money in her possession and requested the Plaintiff to pay the entire amount and undertook to refund him the half portion she was to pay.

3. The Plaintiff states that acting on the faith and trust of the defendant's representation, he paid a total sum of Kshs.81,326,350.00 The plaintiff further states that he has since discovered that the said representation was untrue in that the defendant has refused and/or ignored to reimburse the said amount to him and now claims ownership of the property yet she never contributed towards its purchase. The plaintiff avers that the suit property has been registered in both their names jointly which is unjust and/or unfair as there was no consideration on the part of the defendant. It is the Plaintiff's contention that the defendant made the said representation fraudulently and either well knowing that it was false and untrue or recklessly not caring whether they were true or false. The Plaintiff accuses the defendant of fraudulently executing a contract drafted in English without explaining the terms to the defendant who can only speak German language and inducing the plaintiff to pay entire amount of the purchase price by promising to refund the amount equivalent to her contribution.

4. The Defendant in opposing the suit filed her amended defence and counter-claim dated 29th July 2015. The gist of the defendant's case as pleaded is that at all material times to this suit, the Plaintiff and the Defendant were husband and wife having married under Kamba customary law. That they both agreed to purchase the suit property on 29th May 2009 and instructed their lawyers M/s Omondi Waweru and Company Advocates to represent them in the transaction and the said firm prepared a Sale Agreement which was translated into German at the request of the Plaintiff.

5. The Defendant states that on 26th May 2009, the Plaintiff deposited the sum of Kshs.8,377,200 into the Defendant's account at Equity Bank for purpose of payment of the purchase price and incidental costs and the defendant thereafter transferred the sum of Kshs.8,326,350.00 to the firm of M/s Omondi Waweru & Company Advocates. The defendant denies that there was an agreement for cost sharing with the Plaintiff in the purchase of the property and denies the particulars of fraud pleaded in the plaint.

6. In her counter-claim, the defendant avers that as a wife and joint purchaser of the suit property, the same was bought with the intention that the same was to be held jointly as part of matrimonial property and that both the plaintiff and the Defendant have equal rights to the property. The Defendant seeks an order of declaration that the suit property be sold and the proceeds shared equally between the Plaintiff and the Defendant.

7. In his reply to defence and defence to the counter-claim, the Plaintiff denies that they were husband and wife and denies marrying under Kamba customary law and avers that he never took any dowry to the Defendant's home. The Plaintiff admits that they both agreed to purchase the suit property but states that he raised the money to purchase the property without any contribution from the Defendant but allowed the money to be sent to the defendant's account in Kenya while the Plaintiff was still in Austria. The Plaintiff avers that he does not understand English and was not in Kenya when the Defendant instructed M/s Omondi Waweru & Co Advocates to represent them in the purchase and denies the translated sale agreement which he describes as a red herring and an attempt by the defendant to avoid giving back what is rightfully his. The Plaintiff avers that he deposited the sum of Kshs.8,326,350.00 into the defendant's account for purposes of payment of the purchase price since he did not have an account in Kenya as he was a foreigner. He maintains that the Defendant and the Plaintiff were to share the cost of the suit property. The Plaintiff denies the counter-claim and avers that the defendant was never his wife and avers that the property was not part of matrimonial property.

8. At the trial, the Plaintiff adopted his written statement as part of his evidence testifying that he is a citizen of Austria but residing in Mtwapa, Mombasa Kenya. That he is a pensioner having retired in the year 2000 and that he is a widower. He first met the defendant online and later met her in Germany in 2008. That the Defendant was operating a curio shop selling curios imported from Kenya. They developed a romantic relationship and in 2009, they came to Kenya for a holiday with each one meeting his/her own expense. He stated that at first they stayed in the Defendant's house in Shanzu, Mombasa. That the defendant was staying alone having explained to him that she was a divorcee, though she was in another relationship with one Mr. Eberhart. That in 2009, he transferred money to the Defendant's account as they agreed to buy a house at Mtwapa. The Plaintiff stated that he saw the house but did not meet the seller. The Plaintiff further stated that they agreed to engage the services of the defendant's advocates, M/s Omondi Waweru & Company Advocates who they met at their offices. That the purchase price was agreed at Kshs.900,000.00 a figure that was arrived at by the defendant and the lawyer. The Plaintiff paid the money into the Defendant's account and the sum Kshs.8,326,350.00 was transferred into the account of M/s Omondi Waweru & Co. Advocates who issued a receipt produced as P.Exhibit 1 and prepared the Agreement for sale dated 29th May 2009 which was executed by both the Plaintiff and the Defendant. The Agreement for sale date 29th May, 2009 which was executed by both the Plaintiff and the Defendant. The Agreement for sale was produced as P.Exhibit 2. The Plaintiff stated that he explained to the lawyer that he did not understand English and since there was no interpreter, he requested for the agreement to be translated into German and the translation was to be done by an institution. That he was given a translated copy of the agreement by the lawyer which, however did not bear a stamp of any institution. He produced the translated version of the agreement as P.Exhibit 3. As he had paid the purchase price alone, the Plaintiff stated that he wanted to buy the house alone and asked the lawyer why he included the Defendant's name in the agreement and was told that a foreigner could not own any property alone in Kenya. The Plaintiff went and lived in the house bought and the defendant would join him whenever she came for holiday which would last about 3 to 4 weeks before she would go back to Germany. That there was a houseboy who used to take care of the house and they both used to pay him. The Plaintiff stated that he used to pay for electricity and is still paying to date. The Plaintiff testified that he moved out of the house about three (3) years ago because it was too big for him, leaving the houseboy who is still in the house.

9. The Plaintiff further testified that in 2009, they made a visit to Shimba Hills where they met the defendant's mother and brother. That they stayed in Shimba Hills for about 12 years. He denied paying any money as dowry and was not told and was not aware that they were going to discuss customary marriage. He stated that currently, they are no longer in any romantic relationship with the Defendant. That their relationship ended about five (5) years ago when the Defendant returned to Germany. They do not have any children together and the Plaintiff does not consider the suit property as matrimonial property. The original documents are with the Defendant and urged the court to grant the orders sought and is against the division of the property as pleaded by the defendant. This is because the property was purchased with the Plaintiff's money alone with no contribution from the defendant.

10. The Plaintiff was put to cross-examination by Mr. Matheka Adovate for the Defendant. He answered that they first met with the defendant online before meeting physically in Germany in 2009 where they developed a romantic relationship. That he used to send the defendant some money while she was in Germany. He claimed that the defendant stole and used his credit card though he did not report the matter to the police. That they came to Kenya in the year 2009 for a holiday and visited the defendant's family in Shimba Hills where he gave out some money for purchase of a goat which was slaughtered. That it was upon coming back from Shimba Hills that they came and purchased the suit property. He however denied that during that visit, the Defendant's mother gave him permission to stay with the defendant. He stated that he came with 80,000 Euro in cash from Germany which he deposited into the defendant's account. The Plaintiff admitted signing the sale agreement together with the copy translated in German and that both agreements stated that the purchasers were both the defendants and the plaintiff. He had no problem with the agreement except the purchase price which he had been told was kshs.9,000,000.00. He stated that they stayed together in the house for 8 weeks and were paying the houseboy jointly. That the houseboy and the defendant's cousin are still staying in the house. He further stated that he no longer pays for the houseboy but he pays for the electricity. That when they bought the house, they were planning to live therein together and even imported furniture from Germany and Austria. He stated that he knew the defendant had a daughter in Germany. He stated that he left the house because the defendant found him in the company of another woman. He disagreed with the sharing of the suit property because he solely paid for it. He stated that he complained when he was made to sign an agreement written in English which he did not understand and also complained that the defendant failed to pay her contribution of the purchase price. He added that the lawyer did not include that they were each to contribute towards the purchase price and that he trusted and hoped the defendant would refund him the contribution she was to pay. He complained that the original title document were given out to the defendant by the lawyer.

11. The defendant testified that she resides and works in Germany. She met the Plaintiff around 2008, initially online before they decided to meet face to face and that they were both looking for a long term relationship. That when they met, the plaintiff introduced himself as a

widower while she was a divorcee. The plaintiff who was based in Austria visited her frequently in Germany and contributed to the payment of her apartment and that he even gave her his credit card. That their relationship got serious and her custom required her to introduce him to her family. That the plaintiff had never visited Kenya and they agreed to come to Kenya in January 2009 and went and saw the defendant's mother in Shimba Hills. That the plaintiff gave out money for traditional ceremony and for purchase of three goats, two of which were slaughtered. The defendant produced photographs taken during the said visit. That after the visit, the Plaintiff and the defendant returned to Shanzu, Mombasa where the defendant owned a house which they were staying in. That upon their return, the plaintiff told her that he could sell his house in Austria and buy property in Mombasa. They looked for a house and went back to Europe but later came back and found the suit property which they purchased jointly. That they had carried with them the sum of 80000 euros in cash which they deposited in the defendant's account and purchased a Banker's cheque which they took to M/s Omondi Waweru & Co. Advocates who acknowledged receipt and prepared the Sale Agreement which was also translated in German at the request of the Plaintiff. They signed both agreements. The Defendant admitted that she did not contribute the purchase price as the same was not discussed. That the property was bought by them as husband and wife and that it would be unfair not to share it equally now. That they bought some furniture from Europe to furnish the house but she returned to Europe before they arrived, leaving the plaintiff to repair the house while awaiting the furniture. The defendant stated that she later learnt that the Plaintiff was selling some items in the container and was also bringing some women to the house. The defendant testified that she came back and found some ladies in the house on three occasions and left after telling the plaintiff that what he was doing was not right. The defendant stated that she went to M/s Omondi Waweru & Co. Advocates and took the original title documents because the plaintiff was trying to sell the house secretly. The defendant further stated that since the plaintiff left, she has been paying for maintenance of the house as well as the houseboy. She denied that there was an agreement that they contribute 50% each for the purchase of the property but wants it shared equally.

12. The defendant was put to cross-examination by Ms Omollo Advocate for the plaintiff. She answered that when she met the plaintiff, he told her that he was a widower and they went and conducted marriage ceremony under Kamba Customary Law, though he did not come with people from his side to negotiate dowry. That she told the plaintiff that if they have to stay together they had to start with introduction to the defendant's family. The defendant stated that she still stays in Germany and that their relationship broke down when the plaintiff was found with other women. She further stated that she owns the house in Shanzu jointly with her previous boyfriend from England who has since died. She also stated that she knew one Mr. Eberheart who was her longtime friend. The defendant stated that she got divorced in 2005. She denied that half of the money to buy the suit property came from the Plaintiff's son. She also denied that the plaintiff sold the containers which cost 3530 Euros to recover his money. The defendant produced the documents in her list as Defence exhibits 1-16.

13. Parties filed written submissions which elaborate on their evidence. The plaintiff submitted that the ceremony held at Shimba Hills did not amount to Kamba customary marriage and that the relationship between the parties was that of casual sexual relationship. Counsel for the plaintiff relied on the case **of Kimani –v- Gikanga (1965) EA 735, Anna Munini & Another –v- Margaret Nzambi (1984) eKLR, Hortensiah Wanjiku Yawe –v- The Public Trustee, Civil Appeal No.13 of 1976 and Mwagiru –v- Mumbi (1967) EA 639**. The Plaintiff also submitted that in the absence of presumption of marriage, the suit property cannot be regarded as matrimonial property. The plaintiff further submitted that the defendant is not entitled to any share of the suit property as she contributed nothing. Relying on the case of **N.L.S –v- B.R. P (2016) eKLR** the plaintiff submitted that the court should issue an order for removal of the name of the defendant from the title.

14. On his part, Counsel for the defendant submitted that the Plaintiff is estopped from claiming non-contribution as a factor in evicting the defendant and cited the case **of Benjamin Ayiro Shiraku –v- Fozia Mohamed (2012)eKLR and Titus Muiruri Doge –v- Kenya Cannery Ltd (1988)KLR**.

15. I have carefully considered the pleadings, the evidence adduced and the submissions by the parties. The issues for determination are:

- i. Whether or not the Plaintiff and the Defendant were husband and wife;**
- ii. Whether or not the subject property can be regarded as matrimonial property and can it be shared equally or whether the defendant's name should be removed from the entries in the lands registry;**
- iii. Whether or not an injunction order be granted and the plaintiff be awarded damages;**
- iv. Who pays the costs**

16. Regarding the issue whether or not the plaintiff and the defendant were husband and wife, I begin by looking at the definition of marriage as defined by the Black's Law Dictionary, Tenth Edition as "the legal union of a couple as spouses. It also elaborates the essentials of a valid marriage as (1) parties legally capable of contracting to marry, (2) mutual consent or agreement and (3) an actual contracting in the form prescribed by law. The parties allegedly began their relationship in 2008 hence the marriage Act 2014 would not apply for the purposes of determining their union or relationship save for the transitional provision in Section 96. Section 3 (1) of the Marriage Act defines marriage as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. Article 45(2) of the Constitution of Kenya provides for the right to marry a person of the opposite sex based on the free consent of the parties.

17. Both parties agree that they met in 2008, the first time online and later met face to face when the plaintiff who was based in Austria visited the defendant who resided and worked in Germany. Their friendship blossomed and they came to Kenya in 2009 and stayed in the defendant's house in Shanzu, Mombasa. They visited the defendant's family in Shimba Hills where they stayed for about 12 hours before returning to Mombasa. It was while at Shimba Hills that the defendant states that customary marriage was discussed and dowry paid. The plaintiff disputes this. Was there a marriage?

18. The Court of Appeal in **Phyllis Njoki Karanja & 2 Others –v- Rosemary Mueni Karanja & Another (2009)eKLR** held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows:

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long

cohabitation is not mere friendship or that the woman is not a mere concubine but the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed ” (own emphasis)

19. In the present case the parties met in 2008. It is part of their evidence that the plaintiff would visit the defendant in Germany and go back to Austria. They came to Kenya together in 2009 where they stayed for a few weeks before the defendant returned to Germany. She would return to Kenya only to find the plaintiff in the company of other women in the house. In my view, the short period they lived together cannot be considered a long cohabitation. The defendant has testified that the Plaintiff visited her relatives to ask for her hand in marriage and that a traditional marriage in accordance with Kamba customs were done and dowry paid. The plaintiff has denied this, though he agrees that they visited the defendant's relatives in Shimba Hills where they stayed for some hours. Photographs taken during the said visit were produced as exhibits. However, the photographs did not show anything that can be regarded as a ceremony. They simply showed people who were gathered in a place and no more. There was no expert in Kamba customs called as a witness to confirm that what took place was part of their marriage custom. The defendant has not given evidence to prove that the alleged dowry was paid or that such a ceremony took place at all. No other persons including their relatives were called to prove that they were married. Moreover, no person who was present in that meeting was called to give evidence of what transpired. What we have is the plaintiff's word against that of the defendant. Given the evidence herein, I am not satisfied that a presumption of marriage can be made. There was no long period of cohabitation and the parties did not take themselves to be married. What existed was a simple friendship which may have led to sexual relationship. The relationship cannot be held to be a marriage.

20. It is clear that no presumption of marriage and therefore no matrimonial property can be considered. The defendant admitted that she did not make any contribution towards the purchase of the suit property. On what basis therefore should it be divided equally? Even under the matrimonial Property Act, 2013, ownership of Matrimonial Property rests in the spouses according to the contribution of either spouses towards its acquisition, and shall be divided between the spouses if the divorce or their marriage is otherwise dissolved. (see section 7 of the Matrimonial Property Act, 2013). Even if the property were found to be matrimonial property, the law requires that the same be divided according to each spouse's contribution. The Court of Appeal has stated so in the case of **P.N.N – v- ZWN (2017)eKLR**.

21. The defendant having admitted that she contributed nothing towards the acquisition of the suit property, she is not entitled to any share in it. She cannot harvest where she has not sown. The plaintiff, however, did not prove that general damages accrued to him. The injury he suffered is not pleaded or proved or demonstrated in evidence or even submitted.

22. The upshot of this is that the plaintiff has proved his claim. I do hold that the suit property belongs to the plaintiff exclusively. Judgment is entered for the plaintiff in terms of prayers (a), (b) and (c) of the plaint. The defendant's counter-claim is hereby dismissed. The circumstances of the case do not call for award of costs. Each party shall meet his/her own costs.

Delivered, signed and dated at Mombasa this 20th September, 2018.

C. YANO

JUDGE