



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC CASE NO. 181 OF 2015

JANEPHER KASIMIYU GREEN.....PLAINTIFF

-VERSUS-

ESTHER MUKOYA WEKESA.....DEFENDANT

JUDGEMENT

1. The plaintiff brought this claim vide her plaint dated 4th August 2015 and filed in Court on 6th August 2015. In the plaint, she prayed for judgement against the defendant for ;

- i) A declaration that the transfer of the ½ of the property known as Kwale/Diani Complex /360 to the Defendant is illegal, null and void.**
- ii) An order to expunge the name of the Defendant from the register of Plot No. Kwale/Diani Complex 360 and to register the same in the name of the Plaintiff as sole proprietor.**
- iii) Costs of the suit.**
- iv) Any other and further relief this Honourable Court deems fit to grant.**

2. The suit is defended. The defendant filed her defence on 7th September 2015 which was later amended with leave of the Court granted on 24th February 2016. She filed a counter claim and sought the following orders ;

- a) A declaration that ½ share of parcel known as Kwale/Diani Complex/360 the suit property herein belongs to the defendant.**
- b) An order of survey and demarcation of the suit property and further order that the defendant fence of the combined ½ share of the suit property.**
- c) A mandatory injunction restraining the plaintiff from denying the defendant access to the suit property.**
- d) Costs of the counterclaim and interest thereupon at such rate as this Honourable Court may deem fit to grant and ;**
- e) Such further or other reliefs as the Honourable Court may deem appropriate in the**

circumstances.

After parties exchanged documents, the matter was listed for hearing on 18th July 2016.

3. The plaintiff testified as the sole witness. She told me that she lives in the U.S and is a designer. The defendant is her younger sister. The plaintiff stated that when she wanted to purchase land in Kenya, she asked her sister/the defendant to look out for one. The defendant identified the suit property Kwale/Diani Complex/360. The witness continued that she met the owner and agreed at the purchase price of Kshs 2 Million.

4. The witness continued that she asked the defendant to identify an advocate and Ms Janet Katisya advocate was identified. She also opened an account with Housing Finance Co of Kenya (HFCK) in their joint names. Later the advocate prepared a Power of Attorney that was mailed to her. She signed the same on 10.9.2009 while in the U.S and mailed it back to their advocate. The power of attorney gave the defendant authority to act on her behalf. She produced the Power of Attorney as Pex 1. The agreement prepared & dated 8.9.2009 was produced as Pex 2. Later the defendant informed her the land was bought and title deed issued.

5. The plaintiff continued that in 2013 the defendant wanted her to give out some money for fishing but she did not have. The same year, she received a call from a cousin alerting her that the defendant had sold one of the pieces of land she (the plaintiff) held in trust for one of her brother for the benefit of his children. That she had given the defendant all the title deeds to keep as she was nearer home. But she had not given her permission to sell.

6. It is on learning of this that she sought for paper work on the land she had purchased. The defendant declined to show her any. The plaintiff decided to put restrictions on all the titles and in the process she discovered the suit plot was jointly registered in their names. She stated further that the defendant had signed the transfer (Pex 3) on her behalf. According to the plaintiff, the defendant never contributed any money for the purchase of the suit land. That she has taken care of the defendant & her children in terms of rents, education, medical and food expenses.

7. The plaintiff denied the averment that the defendant was ever her partner in the business. She said that she together with her husband purchased the business in 1995 in the U.S. That she would pay for the shipment of the curios. She urged the Court to find that the land is wholly hers.

8. On cross – examination by Ms Athman advocate for the defendant, she said the defendant would collect the curios for her. That the defendant only worked for two years between 1990 – 1992. That she gave the defendant Power of Attorney but she did not take to their advocate. Further that the defendant was a co – account holder at HFCK & Barclays Bank before 1990 but there was no money in those accounts. That she gave the defendant credit cards for purchasing food and medication and she paid all the bills. She discovered in 2013 that the suit property was registered in joint names. When she asked, the advocate told her to prove she had paid the money 100% before she could make the changes. She denied receiving Kshs 1 Million from the defendant’s husband. The plaintiff denied the money used to purchase the land was obtained from the sale of the curios. In re – examination, she said the Power of Attorney was to enable the defendant transfer the land to her. She closed her case.

9. The defendant testified as DW 1. She lives in Likoni. She used to sell curios but now she does general duties. She said she was a salonist in Nairobi between 1993 – 1995. She said the plaintiff was living in Germany and she had difficulty acquiring curios. That she requested the defendant to leave her job and help her collect the curios because they would both benefit from the business.

10. The defendant continued that she was doing the work of raising orphans of their siblings. That she would send the curios through friends and the airport while the plaintiff is the one who would make the deposits into the account. She continued that in 2009 they reached an agreement to buy land and build their house. She looked for the land and the plaintiff negotiated the price to Kshs 2 Million. Further the plaintiff asked her to get an advocate. That it is the plaintiff who told their advocate to register the land

into their joint names. After one month, the advocate called her when the title deed was ready for collection.

11. The defendant stated that the problem began when she sold some land in Bungoma on behalf of the plaintiff. It is her evidence that she sold this land for 1.2 Million but someone informed the plaintiff it had been sold for 2 Million. She told Court that they had a joint account which was running. She lost some of her documents as per the police abstract dated 7.8.2015 and produced as Dex 1. She also produced Bank statement as Dex 2 to show she sent the plaintiff Kshs 1 Million. She produced receipts she used to send curios to the U.S as Dex 3. She denied the fact/averment that the plaintiff used her own money to buy the suit property.

12. In cross – examination by Mr Khatib advocate for the plaintiff, she said she has never travelled to the U.S.A. She did not know that the business was registered in the U.S and that the business did not belong to the plaintiff only. She said she was doing her part in Kenya while the plaintiff was doing her part in the U.S. She agreed that she did not make any monetary contribution as capital. That the plaintiff would send money and she would do the purchases. Some of the receipts were stolen from the house and she discovered this in 2015.

13. The defendant stated that she sent the Kshs 1 Million because the plaintiff had instructed her to sell the land in Bungoma. That the plaintiff allowed her to withdraw certain amounts after they had reached a budget. That the plaintiff sent Kshs 3 Million to the HFCK account. Kshs 2 Million was for buying the land while the Kshs 1 Million she deposited in her account in KCB. According to her 1 Million was sent by her husband although there was nothing written to confirm.

14. That the advocate only gave her copy of the bankers cheque paid to the vendor. The Kshs 2 Million was sent to her via money gram. She withdrew it and deposited in the account at HFCK. That the plaintiff cannot claim the whole land because she has worked for 17 years. In re- examination, she said the plaintiff had no problem with the credit cards until 2013 when she blocked them. That sometimes she would book for the goods & the guests would pay for themselves. She denied the plaintiff gave her Kshs 1 Million to start the business.

15. DW 2 Simon Simiyu Muchelesi lives in Nairobi and is a businessman. He is a brother to the plaintiff and the defendant. He said the plaintiff was working in Germany while the defendant worked as a salonist. Later when the plaintiff moved to U.S.A they began doing curio business. That the plaintiff would send money to the defendant to buy the curios. He continued that both the defendant and the plaintiff have each bought a plot at home.

16. DW 2 stated further that he was invited to view the suit plot. He came viewed the land and encouraged them to build it. He never followed up what happened but as far as he knows the land was bought by both his sisters. In cross – examination, he denied he had been sick recently. He said even his wife also helped in collecting the curios. That the plaintiff was a house wife in Germany. Further the defendant sold the plaintiff's plot in Bungoma on instructions but he did not know for how much. In re – examination, he said the business was joint. That the plaintiff and the defendant at one point stayed in a rented house in Shelly beach. The defendant also closed her case.

17. Both parties filed their written submissions. I will make references to them where necessary in the course of this determination. From the pleadings and evidence adduced, the following are not in dispute.

- i) The plaintiff executed a Power of Attorney giving the defendant to act on her behalf**
- ii) The land in dispute was identified by the defendant and the price negotiated by the plaintiff.**
- iii) The plaintiff sent the money that was used to pay for the land.**
- iv) The defendant identified the advocate who drew the sale agreement and processed the title**

deed from the name of the vendor to “their” names.

18. The issues in dispute and for my determination are;

i) Whether the money sent by the plaintiff was obtained from the joint business thus if the purchase price was contributed by both.

ii) What was the intention of the parties at the time when the land was bought.

iii) Whether the plaintiff is entitled to the prayers sought in the plaint

Or

iv) Judgement should be entered in favour of the defendant as contained in the counter – claim.

19. The title deed for Kwale/Diani Complex 360 was issued in the joint names of the defendant and the plaintiff on 4th November 2009. The transfer of land dated 23rd October 2009 also shows both as transferees. The defendant admits that the plaintiff sent her Kshs 3 Million around about the time this land was being bought. She also admitted that Kshs 2 Million was for the purchase of the suit land. However it is her case that although the money was sent by the plaintiff, her share was in this money which was derived from the joint business they operated of buying and selling curios.

20. It is at this point in my view where the burden shifts on her (the defendant) to demonstrate that indeed from the money sent her contribution was in it. I take this view on the basis of the provisions of section 107 & 108 of the Evidence Act that he who alleges must prove. I state she is alleging because having admitted that the plaintiff sent the money, she has to show contrary evidence that not all the money belonged to the plaintiff. In an attempt to show this, she said that it is the plaintiff who asked her to leave her work as a salonist and join her in the business of selling the curios. That she has done this work for 17 years from 1995 until 2013 when they started having problems.

21. The defendant went further to produce receipts to confirm shipment of goods to the U.S. She said she discovered some of her documents were stolen in 2015 and among the lost documents were some of these receipts. I have looked at some of the receipts that she produced. The receipts are dated 2005, 2003 and 2007. The receipts originated from her to the plaintiff. In her own evidence and that of her witness (DW 2), they told the Court that the plaintiff would send the money then she buys the curios. If this was the case the production of these receipts did not add any value to claim. These transactions were also done long before the sale took place.

22. The defendant also stated that she operated credit cards and she produced copies thereof as exhibits. She did not however provide any link on how these cards would help raise the money for purchase of the suit land. The plaintiff on her part explained that she allowed the defendant to operate the cards to take care of her food, medical and education expenses and those of her children. The plaintiff then would settle the bills incurred. The defendant did not deny this averment.

23. There was nothing shown whether in writing or by conduct of the parties to demonstrate that indeed the plaintiff and the defendant were partners in business. I am alive to the fact that this is not a question that is for determination. Taking into account the defendant’s admission that she did not contribute monetary capital to the business then it cannot be open for her to say that indeed they were entitled to equal benefits from the business. She did not also lay a basis to show that the money the plaintiff sent for the purchase of the land was directly removed from the business.

24. The money sent to the plaintiff (Kshs 1 Million) on 8th April 2013 has no relevance to this case. This is because the suit land had been bought and fully paid for by this time. Secondly, the defendant told this Court that this money was proceeds from a land sold in Bungoma on instructions of the plaintiff. I am therefore not satisfied that the defendant contributed any money towards the purchase of this land.

25. The second issue is what was the intention of the parties when the land was being bought? Was it intended for joint proprietorship or otherwise? I find this as an important question to determine whether a trust could be presumed to have been created in the circumstances of this case. The Court of appeal in **Stephen Mkare Mulewa vs Linda Newman (2015) eKLR** took this quote in the holding in **Gissing vs Gissing (1970) 2 ALL ER 780** while establishing a donor's intention;

“Where a beneficial interest in land is claimed by a person, whether spouse or stranger in whom the land is not vested, a common intention has to be inferred from the parties conduct as to how the beneficial interest is to be held. The relevant intention is that which a reasonable man would draw from the parties conduct or words. The Court must determine what inferences can reasonably be drawn in each case.”

26. The defendant has always lived in Kenya and during the period relevant to this case, Mombasa. The plaintiff testified that she wanted to buy land. She asked the defendant to identify one. Once the land was identified, she came viewed it and negotiated the price. She went back and sent the money for the entire purchase price. She went ahead and executed a power of attorney to enable the defendant to execute the transfer documents in her name. The defendant does not dispute these facts. If the plaintiff intended to have the property to be jointly owned then probably she would have written such an authority at the time of giving the power of attorney.

27. The evidence of DW 2 is more of hearsay. He was invited to view the land. He said he knew his two sisters were buying the land jointly but did not say who among the two told him so. After viewing the land, he never followed up yet he knew it is the plaintiff who sent the money for purchasing the land. From 1995 to 2009, the evidence does show that the plaintiff was financing the upkeep of the defendant and her orphaned siblings. If she has done all these, then there is nothing that would suddenly turn against her sister if her intention was that they own the property jointly. I find her conduct does not demonstrate such an intention.

28. In my opinion, the relationship created between the plaintiff and the defendant was that of a fiduciary trust where the defendant owed the plaintiff obligation to act in her best interest by having the suit land being registered wholly in the name of the plaintiff. The question of proof of fraud therefore does not arise as is submitted by the defendant.

29. Further the defendant referred to section 102 of Cap 300. Cap 300 is already repealed. The relevant law as deduced from her submission is section 91 of the Land Registration Act. The defendant submit that where there is no express declaration of trust, the general presumption in equity is that the parties hold the property as joint tenants in equal shares. The same equity allows the Court to presume constructive trusts where the evidence and circumstances point to that end. This was the holding in the case of **Stephen Mulewa vs Linda Newman supra** and the case of **John Gitiba Buruna & Another vs Jackson Riora Buruna (2003) EKLR & Kanyi vs Muthiora (1984) KLR 712**.

30. The purpose of equity is to remedy a wrong where someone wants to take unfair advantage or to reap where she has not sowed. If the defendant feels that she is entitled to benefit from their “joint business”, then she is at liberty to commence proceedings accordingly. However in this instance she has not produced any evidence in her contribution made towards purchase of the suit land. Consequently she holds the half share in the property in trust and for the benefit of the plaintiff and not for her own benefit and not as joint tenants.

31. Having found as above on the two issues, I now come to the conclusion that the plaintiff is entitled to the whole land parcel number Kwale/Diani Complex/360. Consequently I do make an order that the defendant's name be and shall be removed from the register of the said parcel leaving the plaintiff as the sole registered owner. The defendant's prayers as contained in the counter – claim be and is hereby dismissed. The plaintiff is also awarded costs of this suit.

Dated and delivered in Mombasa this 8th day of February 2017

A. OMOLLO

JUDGE