



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT KISUMU

ELC CASE NO.261 OF 2013

NIZAR HASHAM VIRANI.....PLAINTIFF

VERSUS

SHAMSUDIN G. NANJI.....DEFENDANT

JUDGMENT

1. **Nizar Hasham Virani**, the Plaintiff, commenced this suit against **Shamsudin G. Nanji**, the Defendant, through the plaint dated 26th September 2013 seeking for the following prayers;

”a) A declaration that the Defendant’s entitlement from the suit property is half (½) share of the initial 3.8 hectares i.e. 1.9 ha only and an order directing the District Land Registrar, Kisumu, to effect the said subdivision as appropriate.

b) Refund or compensation on account of various bills and expenses incurred for and on behalf of the Defendant for a period of over 30 years the Defendant has been owner in absentia together with administrative costs incurred by the Plaintiff on behalf of and for the Defendant’s share of the property and any other related relief.

c) The sum of kshs.19,780,000/= being the estimated costs of management, expenses, for bill in respect of water, electricity (installation) and consumption, salaries and sundry.

d) Costs of the suit together with interest on (b) and (c) above from the date of filing suit to the date of realization in full.

e) Any other relief the Honourable court may deem fit and expedient to grant”

2. The Plaintiff avers that the Defendant and himself were and are still jointly registered as co-owner of land parcel known as **Kisumu/Kogony/2642**, located within Kisumu County which consists of Kogony Adjudication Section plot numbers **2637 to 2644** which they had bought before adjudication. That they had agreed that each owned half share and would be subdivided as appropriate. That the Plaintiff at his expense had the pre-adjudication plots consolidated to constitute **Kisumu/Kogony/2642** measuring approximately 3.8 hectares. That the Plaintiff warded off the Government’s attempts to compulsorily acquire the land and the locals illegitimate claim over it. That through his efforts, the Plaintiff had the land resurveyed and its acreage increased to 7.2 hectares. That the Plaintiff has expended his resources to improve the suit property in, for example, establishing a recreational facility, fencing, leveling, planting trees and grass paying for rates, rents, electricity, water and other bills.

3. The Plaintiff's claim is denied by the Defendant through his filed further amended statement of defence and counterclaim dated 17th December 2015. The Defendant avers that before adjudication, they jointly acquired the suit property which comprised of the initial parcels **Kogony Adjudication numbers 2637 to 2644**. That the parcels were 17 (seventeen) in total and not 8 (eight) as alleged by the Plaintiff. That he had paid for the purchase price at Ksh.5000/= per acre. That the land measures 7.2 hectares and not 3.8 hectares. Further, the Defendant avers that he carried out the fencing of the property, connected water, paid Ksh.30,000/= to Kondele Construction for leveling materials, paid labourers for leveling the ground and paid Ksh.18,000/= for digging of fish ponds. That as the Plaintiff had not consulted him for the alleged improvements and payments made in respect of the suit property, he is therefore not liable to make any refund or compensation to the Plaintiff.

That alternatively the Plaintiff has made huge profits out of the suit property by letting it to Kisumu Beach Resort and the Defendant is therefore entitled to a 50% share of the rent. That the Plaintiff's claim for refund or compensation on account of various bills incurred on behalf of the Defendant for a period of over 30 years is time barred under the statute of Limitation and therefore the Plaintiff's suit should be dismissed with costs.

4. In the counterclaim the Defendant prays against the Plaintiff for Ksh.24,326,821.71 which is the rent for the suit property at Ksh.50,000/= per month with a 10% increment every two years from January 1997 to 2012 which the Plaintiff has been receiving from the tenant, Kisumu Beach Resort. The Defendant also prays for interest, costs and an order directing the dissolution of the partnership and/or joint ownership in the suit property between the Plaintiff and the Defendant and the disposal and/or sale of the suit property on the open market and the equal sharing out of the proceeds between the parties.

5. The plaintiff replied to the further amended statements of defence and counterclaim through his filed statement dated 9th February 2016. He disputed the Defendant's claim that the parcels were 17 and that he had paid Ksh.5000/= per each acre. He further denied that he had made huge profits and that the Defendant is entitled to 50%. That the Defendant is not entitled to the prayers sought in his counterclaim and should therefore be dismissed with costs.

5. The hearing took place on the 22nd November 2016 with Mr. Kimanga and Mr. Taib, learned counsel for the Plaintiff and Defendant respectively present. The Plaintiff testified as PW1 while the Defendant testified as DW1.

A: SUMMARY OF THE PLAINTIFF'S EVIDENCE;

- That in 1982 February, the Defendant and himself jointly bought eight (8) parcels of land that were consolidated into parcel **Kisumu Kogony/2642** measuring 3.8 hectares and registered in their joint names on 7th February 1992.
- That after purchasing the eight parcels, the Defendant left to do business in Nairobi.
- That the Commissioner of Lands gazetted the intention of the government to compulsorily acquire under the Land Acquisition Act, 3.2 hectares of **Kisumu/Kogony/2642** under gazette notice No.732 of 23rd February 1990. That through the Plaintiff's intervention the Commissioner of Land withdrew the intention to compulsorily acquire the land under gazette notice No.3766 of 30th August 1991.
- That the Plaintiff reclaimed some land from the swamp and after causing a resurvey of the land, the acreage grew to 7.2 hectares and the land registry records were amended accordingly.
- That since acquiring the bushy and marshy land, the Plaintiff has planted trees and drained it.

- That he did letters to the Defendant on the 18th September 1992 and 11th February 1993 about his intention to put up a hotel on his portion of the land and offering him an opportunity to be a partner but he did not respond. The Plaintiff nevertheless proceeded with the hotel development on his portion of the suit land where Kisumu Beach hotel now stands. That the Plaintiff applied for electricity connection to the land on the 16th July 1989 and paid Kshs.350,000/=.
- That in 2002, the Plaintiff learnt that the Defendant had moved to Canada. That after many years without getting any communication from the Defendant, the Plaintiff filed Kisumu H.C. Civil Application NO.394 of 2011 seeking for among others, an order of presumption of the Defendant's death. That the Defendant surfaced a year after the filing of the application. That they have held some arbitral meetings through their Ismail Community Organization without a compromise over the suit land.
- That two valuation reports done during that time gave the suit land's value as Ksh.150,000,000/= and 250,000,000/=.
- That the initial 3.8 hectares of the suit land should be shared equally between the Defendant and himself while the acreage that increased after the resurvey should be given to him alone. That he be compensated for looking after the suit land at Ksh.30,000/=, 40,000/= and 50,000/= for each of the first 10 years respectively he took care of the land without the Defendant's assistance.
- The Plaintiff disputed the Defendant's claim of Ksh.35,654,000/= for the use of the land saying he had only been using his portion of the property for the hotel business and the Defendant is not entitled to a share of the profits.
- That each of the eight parcels costed Ksh.6000/= making a total of Ksh.48,000/=. That the Defendant and himself met the purchase price at 50% each. That the initial acreage of 3.8 hectares reflected on the title deed was from the information obtained from the sellers of the eight parcels.
- That the initial title of 3.8 hectares had indicated that each of the proprietors owned ½ share but that for 7.2 hectares did not indicated the percentage shareholding.
- The Plaintiff said that in case the land is subdivided into two, he should be the first to pick his half share.
- That he used about 35,000,000/- to develop the hotel on his half of the land but had no documentary evidence to confirm it. That the Kshs.16,800,000/= he had claimed through his advocate's letter dated 30th May 2013 was for his salary which he is yet to receive and therefore has not paid income tax on it. That the documents he availed for electricity connection do not total Ksh.350,000/= he was claiming and that he had no receipts for payment of water, land rates, rent, tree planting, fencing, legal expenses and back filling of the land.
- That he would offer ksh.50,000,000/= for the Defendant's half of the 3.8 hectares.

B: DEFENDANT'S EVIDENCE SUMMARY;

- That the Plaintiff and himself had bought eight (8) parcels of land estimated at 17 acres. That he paid for the purchase and the Plaintiff refunded to him his share of the purchase price slowly.

That after they were issued with the title deed dated 7th February 1992, they noted it had indicated the acreage as 3.8 hectares.

- That they had instructed Acromap Company to conduct a survey of the land in the letter dated 6th November 1990. That they used the survey report to petition the Land Registrar to correct the acreage of the land to read 7.2 hectares instead of 3.8 hectares that was initially reflected on the title deed.
- That in 2011, the Plaintiff contacted a brother to the Defendant and made an offer for the half share. That the two engaged valuers to establish the land's worth. That the Plaintiff called the Defendant, who was then in Canada, and offered to purchase his half share at Ksh.20,000,000/=. The Defendant declined informing the Plaintiff that the land value was over Kshs.100,000,000/=. The Plaintiff promised to get back to him in a month or two but did not. That before a year passed, he learnt that the plaintiff had filed an application to have him declared dead.
- That the initial acreage of 3.8 hectares had been a mistake as there has been no swamp reclaimed or change of the land boundaries.
- That they had bought the land for speculation and not to develop. That their joint ownership should be dissolved, the property sold and proceed shared between them. That the Plaintiff should pay him half the Ksh.450,000/= he had obtained from Kenya Pipeline Company Limited and half of the rent the company operating on the land has been paying as rent over the years.
- That it was the Plaintiff that was following up on the Land's documentations.
- That the Defendant left for Nairobi in the 1990 while the processing of the documents of ownership were ongoing.
- That the Plaintiff connected electricity and water to the plot to service his hotel business and should not ask for compensation.
- That he never received any invitation from the Plaintiff to join him in the development of the hotel on the plot. That the Plaintiff's hotel is developed on about 2 hectares of the plot while the rest is vacant land.
- That the Plaintiff has also developed a jetty on the land but does not share the income he gets with him.

6. The counsel for the Plaintiff and Defendant filed their written submissions dated 2nd March 2017 and 21st March 2017 respectively.

7. The following are the issues for the determination by the court;

- a) Whether the acreage of the land bought by the Plaintiff and Defendant and registered as **Kisumu/Kogony/2642** was 3.8 or 7.2 hectares.
- b) Whether there is any portion of land parcel **Kisumu/Kogony/2642** that was reclaimed from the swamps through the sole efforts of the Plaintiff and if so, what acreage.
- c) Whether the Plaintiff has expended his resources in managing the said land and if so, whether the Defendant should compensate him.
- d) Whether the Plaintiff has been carrying out economic activities on the land if so whether the Defendant is entitled to a share of the profits thereof.
- e) Whether the parties registration with the suit land was as tenants in common in equal shares or different percentages.

- f) Whether each of the two registered owners share of the suit land is identifiable on the ground.
- g) What orders to issue.
- h) Who pays the costs.

8. The court has carefully considered the pleadings, evidence adduced by both parties, written submissions by both counsel and come to the following determinations;

a) That both the Plaintiff and Defendant exhibited the eight copies of documents in respect of the same objection proceedings results in respect of land parcels 2637 to 2644. The documents confirm that the Plaintiff and Defendant had filed the objection proceedings which were conceded to by John Ouko Otieno, Jacob Ayugi Diero, Peter Airo Ajul, Martin Orwa Opiyo, Lucas Pius Yier Opiyo, Odengo Agwambo, John Onyango Riario and Leonidus Mathonye Agwambo, who admitted to have willingly sold parcels **2637, 2638, 2639, 2640, 2641, 2642, 2643, and 2644** to the objectors. That the said documents confirm that the parcels the Plaintiff and Defendant had acquired were eight (8) and not seventeen (17) in number as the Defendant's pleadings had suggested.

b) That the said objection proceedings result for parcels **2638 to 2644** indicates that the objectors had bought the whole parcels and the decision to transfer and combine were arrived at. That in respect of parcel 2637, the sale was for a portion of the parcel and the decision arrived at allowed subdivision of the parcel and combination.

c) That the parties herein did not avail any documentary evidence that would shed light as to the acreage of each of the eight portions described as parcels **2637 to 2644** in the documents of objection proceedings results referred to above.

d) That the first documentary evidence that gives the acreage of the land that the Plaintiff and Defendant acquired was the title deed issued after registration of **Kisumu/Kogony/2642** on the 7th February 1992, which gave the size as 3.8 hectares. That the title deed was in the names of the Plaintiff and the Defendant and indicated each held ½ share interest.

e) That whether or not the Plaintiff and the Defendant paid their respective half share of the purchase price of each of the eight parcels/portions at the same time or whether the whole amount was paid by the Defendant with the Plaintiff making a refund later does not change the right of each of the party to the land. The court notes that none of the parties is claiming refund of purchase price from the other. That it is therefore the finding of the court that the Plaintiff and Defendant contributed equally for the purchase of the eight parcels/portions of land registered as **Kisumu/Kogony/2642** and they have equal entitlement thereof.

f) That though the Plaintiff has claimed that through his efforts, he reclaimed additional portions of land from the swamp that had the effect of increasing the acreage of **Kisumu/Kogony/2642** from 3.8 to 7.2 hectares, he did not exhibit any documentary evidence from any relevant public office in support. The question that remains unanswered is if indeed the Plaintiff reclaimed any land from swamps, then in which title were those swamps? Were the swamps already part of **Kisumu/Kogony/2642** or some other public/community or private land? That in case the swamps were part of **Kisumu/Kogony/2642**, their acreage was already part of the title and growth in acreage would not arise. That if the swamp was part of another privately registered land, then it belonged to that other land and there is no way it could be annexed and consolidated to **Kisumu/Kogony/2642** without the consent of that other owner(s). That in case the swamp was part of a public/trust land, then the land reclaimed could only be alienated through a different letter of allotment in accordance with the law.

g) That in the absence of any documentary evidence by the Plaintiff on any independent acquisition of additional land, the explanation given by the Defendant appears more plausible. That the

Plaintiff and himself had noted that the land they had purchased had been understated and they engaged Acromap Company in the 1990 to do a topographical survey of the land and prepare a plan containing the features on it and its acreage. That the report thereof was used to petition the Land Registrar, who in their letter dated 9th April 1990 to the District Surveyor, requested for a resurvey.

h) That a subsequent title deed for the same land, **Kisumu/Koghony/2642**, with the acreage of 7.2 acres was issued on 26th May 2005 maintaining the date of first registration as 3rd February 1992. The title deed of 26th May 2005, and which both parties are in agreement is the most current one, does not indicate the share of each of the registered proprietors and they are therefore tenants in common in equal shares.

i) That though the Plaintiff exhibited two letters that he alleged he had done to the Defendant about developing the suit land, there is no way of telling whether the Defendant ever received them. This is especially so when the Defendant denies having received the said letters.

That it follows therefore that the Plaintiff and the Defendant have never discussed and agreed which party would take possession of which specific portion of the land. That notwithstanding, it is conceded by the Defendant that after he left Kisumu for Nairobi in the 1990, he later proceeded to Canada where he now resides. That it is equally conceded by the Plaintiff that he has since erected a hotel and jetty facility on a portion of the land. That those developments needed services like electricity, water, ground leveling and greening among others. The plaintiff claims for a refund of the expenses he has incurred in providing those services to the suit land from the Defendant. The Defendant in turn claims for his share of the profits and rent of the land for all that period the Plaintiff has been using it.

j) That the Plaintiff as the proprietor who was in the Country for the period the Defendant has been in Canada must be commended for warding off potential trespassers. He must have incurred some expenses in doing so. The Plaintiff must also be commended for the greening ventures he has undertaken on the land at his expense. That the values of those expenses have not been given and are nevertheless difficult to assess and confirm from the available evidence. The Plaintiff must nevertheless have benefitted from the hotel and jetty enterprise that he has been carrying out on a portion of the land which he established without the Defendant's concurrence. The court is of the considered view that the Plaintiff's profit from the economic enterprises he has been carrying out on the land is more than the expenditure incurred in form of greening and in taking care of the land over the years.

k) That having established that the eight parcels/portions of land numbers **2637 to 2644** acquired jointly by the Plaintiff and Defendant was ascertained and registered as land parcel **Kisumu/Kogony/2642**, measuring 7.2 hectares, and noting that each of the parties have a prayer in their respective suits for their shares to be determined, the provision of **Section 91(2)** of the Land Registration Act No.3 of 2012 is relevant. The section states as follows;

“ 91 (2) except as otherwise provided in any written law, where the instrument of transfer of an interest of land to two or more persons does not specify the nature of their rights there shall be a presumption that they hold the interest as tenants in common in equal share.”

The Plaintiff and Defendant are therefore tenants in common in equal shares of land parcel **Kisumu/Kogony/2642**. The plaint and counterclaim filed by the Plaintiff and Defendant respectively, contained a prayer for sharing of the suit property and the prayer is hereby allowed in the terms indicated hereinbelow.

l) That all the other prayers in the plaint and counterclaim are not allowed.

m) That as each party has partially succeeded in their claims, each will bear his own costs.

9. That having come to the fore going findings, the court enters judgment for the Plaintiff and the Defendant in the following terms:

a) That the parties do engage a licensed property valuer to establish the market value of land parcel **Kisumu/Kogony/2642** in 30 (thirty) days. That upon the market value of the suit property being established, the Plaintiff be given the first opportunity to make an offer to purchase the Defendant's half share interest within 30 days (thirty) days. That in default, or if the offer made is not accepted, the Defendant do make an offer to purchase the Plaintiff's half share interest of the suit property in 30 (thirty) days.

b) Alternatively, the parties do share land parcel **Kisumu/Kogony/2642** equally and each be registered as proprietor of their respective half share.

c) That alternatively, the parties do engage a licensed property agent to sell their land parcel Kisumu/Kogony/2642 and share the proceeds thereof equally.

d) That each party to bears his own costs in the suit and counterclaim.

e) That all the other prayers in the plaint and counterclaim are hereby dismissed.

Orders accordingly.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

DATED AND DELIVERED THIS 24TH DAY OF OCTOBER 2017

In presence of;

Plaintiff Absent

Defendant Absent

Counsel Mr. Onsongo for Kimanga for Plaintiff

Mr Indumuli for Taib for Defendant

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/10/2017

24/10/2017

S.M. Kibunja Judge

Oyugi court assistant

Parties absent

Mr. Indumuli for Taib for the Defendant

Mr. Osongo for Kimanga for Plaintiff.

Order: Judgment dated and delivered in open court in the presence of Mr. Indumuli for Taib for the defendant and Mr. Onsongo for Kimanga for the Plaintiff.

S.M. KIBUNJA

ENVIRONMENT & LAND – JUDGE

24/10/2017