



**REPUBLIC OF KENYA**

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

**CIVIL SUIT ELC NO. 1479 OF 2005**

**GS.....PLAINTIFF**

**VERSUS**

**AB.....DEFENDANT**

**JUDGEMENT**

1. The Plaintiff who is of Greek origin was married to the Defendant, a Belgian. They came to Kenya in 1990. The Defendant was allowed entry into Kenya as the Plaintiff's dependant. The parties got two children who were aged 14 and 6 at the time this suit was filed.

2. The Plaintiff sued the Defendant seeking a permanent injunction to restrain the Defendant from selling, transferring, mortgaging or in any way adversely dealing with L.R. No. [Particulars Withheld] situated in Kitisuru, Nairobi ("the Suit Property"). He also seeks an injunction to restrain the Defendant from denying him access to the Suit Property; a declaration that she never contributed towards the purchase of the Suit Property; a declaration that he solely paid the purchase price for the Suit Property; and an order compelling the Defendant to execute a transfer of the Suit Property to him failing which the Registrar of the High Court should execute the transfer. He also seeks the costs of the suit.

3. The Plaintiff is a businessman. He set up three companies in Kenya dealing with diagnostics and medical supplies. He claims that he allowed the Defendant to hold 40% shares in his three companies to hold in trust for him since he intended to retain control of the companies within the family.

4. The Plaintiff amended the Plaintiff on 4/11/2015. The amendment altered the description of the Suit Property from L.R. No. [Particulars Withheld] to L.R. No. [Particulars Withheld] (I.R. Number [Particulars Withheld]) and sought an order that the Defendant pays the Plaintiff the entire sum paid as rent by the tenants from 2/12/2005 up to 2015 computed at Kshs. 23,040,000/=. The Plaintiff also sought to have the orders enforced by the OCS Spring Valley Police Station.

5. The Defendant filed her defence on 22/3/2017. She admitted that they were common law husband and wife. She states that the two children she had with the Plaintiff are now aged 24 and 16 respectively. She maintains that she is the one who sourced funds for the purchase and construction of the Suit Property. She went back to Belgium in 2006 and has been residing there with her daughter. She denied the allegations made in the Amended Plaintiff and urged the court to dismiss the Plaintiff's suit with costs to her.

6. The Plaintiff avers that he bought a house in Kyuna Estate in Nairobi being maisonette number 9 on Arrow Court on L. R. No. [Particulars Withheld]. He states that the funds for the purchase of this property came from his company known as BBL and that he borrowed 2.8 million Francs using his house in Belgium as collateral. He claims to have later paid 300,000 to reduce this loan sum from the benefits he

received from Becton Dickinson. He continued paying monthly instalments until 2000 when he was able to pay off the loan after he got a World Bank contract.

7. The Plaintiff maintains that the Defendant did not contribute anything towards the purchase of that house in Kyuna. The couple decided to sell off the Kyuna property in 2003 for Kshs. 7 Million and moved to Kitisuru. The sale proceeds realised from the Kyuna property were used to purchase L.R. No. [Particulars Withheld] which was purchased at Kshs. 10 Million. The Plaintiff claims that the difference of Kshs. 3 Million was provided by his companies and that the Defendant never made any contribution towards the purchase of the Suit Property.

8. Both the Kyuna property and the Suit Property were registered in the Defendant's name. The Plaintiff asserts that the Defendant held these properties in trust for him. He also claims that the Suit Property was their matrimonial home and that they stayed there as husband and wife with their children.

9. The Plaintiff learnt that the Defendant intended to sell the Suit Property and had advertised it for sale. He was apprehensive that the Defendant intended to keep the sale proceeds and filed this suit.

10. The court has looked at the documents which the Plaintiff filed in court. On 10/3/2000 the Plaintiff forwarded a cheque for Kshs. 3,250,000 to the firm of Mohammed Madhani and Company Advocates being payment for maisonette number 9 on L.R. No. [Particulars Withheld] Nairobi. The letter is on the note paper of Belgafrique Consultant Ltd. The cheque appears to have been drawn on a joint account held by the Plaintiff and the Defendant. The Plaintiff also relied on credit advice notes sent by Standard Bank Ltd to Belgafrique Consultant Ltd advising it that the bank had received telegraphic transfer and credited its account with USD 22,000 from Meadgrove Kenya Ltd on 30/10/2001. The other credit advices informed Belgafrique Consultant Ltd that its account had been credited with USD 20,000 on 10/12/1999; USD 5,000 on 27/3/2000 and USD 2650 on 15/11/2000 on the instruction of the Defendant herein. The credit advices state that the telegraphic instruction was given by order of the Defendant.

11. The Plaintiff wrote to the purchaser of the Kyuna house on 2/7/2003 on the letterhead of [Particulars Withheld] Systems Ltd, another of his companies; confirming that they had received a total of Kshs. 10 million to complete the sale of the property in Kyuna. There is further correspondence on this company's letter head regarding the Kyuna house. The Plaintiff also annexed a bank statement for Belgafrique Consultants for the period running from 2/5/2003 up to 16/5/2003. There is a credit of Kshs. 7 million on 16 May 2003 which seems to be the balance of the purchase price paid for the Kyuna house.

12. The Defendant denies the allegations made by the Plaintiff. She states in her witness statement filed in court that she left Kenya and relocated to Belgium in 2006. She states that while in Kenya, she obtained a loan on 18/2/2000 from ING Bank in Belgium for Euros 74,368 in her name and offered her property in Belgium as security for the loan. She claims to have used the funds from the loan facility to purchase the Kyuna Property which she later sold for Kshs. 5 million and paid this sum to the Holy Spirit Association for the Unification of World Christianity as the purchase price for L.R. No. [Particulars Withheld] (Original [Particulars Withheld]). She claims in her witness statement that the purchase price for the Suit Property was 5 million and that this is what she sold the Kyuna Property for.

13. When the Defendant decided to go back to Belgium she rented out the Suit Property to a tenant who was paying a monthly rent of Kshs. 120,000. The Suit Property has had two other tenants subsequently. The Defendant claims that the rent is paid to her for the maintenance of the Suit Property and that she also applies part of this income to service the loan in Belgium. She claims that she carries out all the repairs and improvements on the Suit Property including paying the insurance premiums.

14. The Defendant also claims that she obtained custody and maintenance orders from a Belgian Court in which the Plaintiff was required to pay Euro 200 per month which he has never paid. She claims that the Plaintiff abandoned his children and stopped paying for their upkeep and education solely leaving this responsibility to her.

15. The issues for determination are:

- i. Did the Defendant make any payments towards the purchase of the Suit Property?
- ii. Was the Suit Property the matrimonial home of the Plaintiff and Defendant?
- iii. Was the Defendant registered as the owner of the Suit Property in trust for the Plaintiff?
- iv. What reliefs should the court grant?

16. The Defendant admits that she and Plaintiff were common law husband and wife and that they got two issues, A S and A S who are now aged 24 and 16 respectively.

17. The Defendant did not testify in court. She filed a witness statement which states that the rental income from the Suit Property has always been paid to her for the maintenance of the property, servicing the loan in Belgium as well as payment of rates and land rent.

18. The court has looked at the list of documents filed in court on 22/3/2017. The documents emanating from ING Bank in Brussels Belgium are in a foreign language and the court is unable to establish their meaning. It would have been helpful if the Defendant had arranged for it to be translated in English.

19. There is also a document titled 'Attestation' in which the File Administrator of ING Bank in Belgium confirms that they granted a mortgage loan of Euro 74368.06 to the Defendant for 20 years and that this loan was intended to buy maisonette no. 9 on L.R. No. [Particulars Withheld] in Nairobi. The attestation is dated 4/2/2008.

20. The Defendant also annexed a copy of a transfer of the Suit Property stamped at the Lands office on 28/1/2004 together with the copy of the title. The Suit Property was transferred to the Defendant on 28/1/2004. The Defendant attached copies of the leases over the Suit Property that she entered into with three different tenants. The current lease was entered into on 22/11/2015. The rent payable is Kshs. 186,300 and is paid to the Defendant's account in Belgium. The rates demand note that the Defendant annexed in her list of documents still reflects Holy Spirit Association for Unification of World Christianity as the rate payer. The documents confirm the payment of rates on various dates. There is also bankers cheque issued payable to the City Council of Nairobi on 11/5/2010 for Kshs. 75,000. It is difficult to tell who paid the rates and other outgoings from the documents.

21. The Defendant annexed a tabulation of the repair costs undertaken on the Suit Property from 2007 until 2016 at the total cost of Kshs. 1,504,226 together with the quotation for the insurance of the Suit Property. The Defendant also annexed court decisions in which the Plaintiff's companies [Particulars Withheld] Ltd and the Plaintiff were parties. It is not clear why the Defendant attached the two decisions in her list of documents.

22. She has attached the court order made by the Belgian court terminating the relationship between the parties while giving her the right of parental authority for the two children dated 11/5/2007.

23. The Plaintiff called Margaret Chepkurui Kitur as a witness who stated that she knew the Plaintiff and Defendant and that they lived as wife and husband. Her children were friends with the Plaintiff's children as they attended [Particulars Withheld]. They used to visit her as a couple. She stated that while in Kenya, the Defendant was not working but was a house wife just like she was and that they were friends.

24. The second witness the Plaintiff called was an employee who worked for his company known as [Particulars Withheld] Ltd. The witness stated that the Plaintiff taught him the business of health care and laboratory business. He stated that he knew the Plaintiff and Defendant were husband and wife.

25. The court is unable to attach much weight to the assertion by this witness that the Defendant did not have any other source of income. Having worked as a Customer Service Officer and Sales Manager the court doubts that this witness would have had knowledge of the Defendant's sources of income.

26. The Plaintiff attached a copy of the email dated 11/8/2006 addressed to Simon Mutua Musau on the rental agreement. It states “An agreement made this 7/7/2006 between Ms. A-M B & Mr. G S of the one part and Mr. Pedro Espinosa Cardero, United Nations of the second part...” And goes ahead to give the other terms of the agreement.
27. The Defendant’s email to Simon Mutua Musau asks him if he is still working for the Plaintiff. She also asks whether the Plaintiff has the 50 million to build houses.
28. In **Stack v Dowden** [2007] AC 432 the court observed that where there is a sole legal owner the court must search for the parties’ intentions as to beneficial ownership. It stated that the effect of the presumption that beneficial interest should follow the legal interest is to place the onus of proving otherwise upon the Defendant. In order to do so the Defendant would need to establish on a balance of probabilities primary facts from which it would be right to infer a contrary intention.
29. The court summarised the principles applicable to determine the extent of a beneficial interest under a constructive trust by stating that the court is entitled to undertake a survey of the whole course of dealings between the parties in assisting the court to arrive at a fair result. If no inference can be drawn as to the probable common understanding about the amount of shares, then the court is driven to apply as a rule of law the maxim equality is equity.
30. The court stated the essential matters to be taken into account as (i) legal ownership of the property; (ii) the nature of the parties’ relationship; (iii) cash contributions to property purchase, whether direct or indirect; (iv) the undertaking to pay the mortgage; (v) substantial direct contributions to mortgage payments; (vi) one party paying household expenses so that the other can pay the mortgage; (vii) child bearing and rearing contributions which should not result in a reduced share; (viii) sharing funds; (ix) contributions by way of labour; and (x) the entire course of conduct.
31. The Defendant is registered as the legal owner of the Suit Property. From the bank statements and other documents relied on by the parties, it is difficult to tell what each party contributed towards the purchase of the Kyuna property and the Suit Property. It can be inferred that the Plaintiff’s intention was for the Suit Property to be the matrimonial home. No evidence was led on who was paying the household expenses. The court must also take into consideration the role played by the Defendant in child bearing and rearing. The entire course of the parties’ conduct including the registration of the Defendant as the legal owner in the court’s view shows that the parties intended to own the Suit Property jointly.
32. The evidence adduced shows that the parties handled their finances together even though the Plaintiff maintains that the Defendant was a housewife with no income. He did not lead any evidence to rebut the Defendant’s allegation that she had an asset in Belgium or that she took a loan from a bank in Belgium. The Defendant moved back to Belgium in 2006. The documents she placed before the court show that she took a loan from ING Bank. Unfortunately, the documents from the Belgian Bank were not translated to English for the court to understand the transactions recorded.
33. The court went further to state in **Stack v Dowden** that ownership depends on intention. Where parties have agreed, their beneficial interest will be conclusive. Where there is no agreement the court will have to attribute to the parties a particular intent which may arise by presumption or inference. A good starting point is that the beneficial interest mirrors the financial contributions of the parties. Based on the nature of the relationship of the parties, an expectation based approach rather than a contribution based approach may be appropriate.
34. The court observed that under a resulting trust the beneficial shares are proportionate to the direct contributions made towards the purchase price. The resulting trust may be displaced or modified by evidence of a contrary intention. The Plaintiff seeks to have the court declare that the Defendant never contributed towards the purchase of the Suit Property and that he solely paid the purchase price for the Suit Property.
35. Lord Hope stated in **Stack v Dowden** that cohabiting couples are in a different kind of relationship

from married couples. The place where they live together is their home. Living together is an exercise in take and give, mutual cooperation and compromise.

36. Since the title to the Suit Property is registered in the Defendant's name, the presumption is that she is the sole owner. The onus is on the Plaintiff to show that he has a beneficial interest in the Suit Property and if so, what interest.

37. The Defendant held 40% shares in the Plaintiff's three companies. The Plaintiff claims that the funds he used to purchase the Kyuna property came from his company known as BBL. Which means that the funds from the company that went into buying this property was from both the Plaintiff and Defendant since they held equal shares in the Company. The Plaintiff did not produce any evidence of the 2.8 million Francs that he says he borrowed using his house in Belgium as collateral to pay for the Kyuna property.

38. The Plaintiff has not proved on a balance of probabilities that the Defendant never contributed towards the purchase of the Suit Property; nor did he prove that he solely paid the purchase price for the Suit Property. What the court infers from the conduct of the parties when they cohabited and lived together in the Kyuna house and later in the Suit Property is that their common intention was to own the property jointly even though it was registered in the Defendant's name. The court finds that there was a resulting trust in favour of the Plaintiff for half share in the Suit Property.

39. This court sitting as the Environment and Land Court cannot go into the issues of whether the Plaintiff paid the sums ordered by the Belgian court and whether the rent the Defendant has been collecting from the Suit Property ought to have been applied towards the maintenance of the two issues of the parties. That would best be handled by the Family Division of the High Court.

40. The Defendant being registered as the owner of the Suit Property collected rent from 2005. Having found that the Plaintiff is entitled to half share in the Suit Property, the court declines to grant the sum sought by the Plaintiff on account of rent which the Defendant claims to have applied towards repayment of her loan, maintenance of the house and the upkeep of their two children.

41. The court finds that the parties own the Suit Property jointly. The Plaintiff is to be registered as a co-owner of the Suit Property and is to be allowed access to the Suit Property. The other prayers in the Amended Plaint fail. Each party will bear its own costs.

Dated and delivered at Nairobi this 14<sup>th</sup> day of December 2017.

**K. BOR**

**JUDGE**

In the presence of: -

Mr. Maina for the Plaintiff

Mr. Kuloba for the Defendant

Mr V. Owuor- Court Assistant