



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI
ELC CIVIL CASE NO.482 OF 2009

ALBERT KANAKE KARIUKI.....PLAINTIFF

=VERSUS=

WINNIE KARIMI NJUGUNA.....DEFENDANT

J U D G M E N T

Introduction

1. In his Complaint dated 23rd September 2009, the Plaintiff averred that sometimes in the year 1985, he was engaged in a business partnership with the Defendant while he was working as a Deputy Secretary, office of the President while the Defendant was working as a school teacher in Embu.
2. The Plaintiff averred in the Complaint that during the said partnership, him, together with the Defendant, invested their earnings in acquisition of land known as Nairobi/Block 97/1641, Fedha Estate, at a cost of Kshs.1,500,000 which was substantially financed by the bank; that they bought the said property through a mortgage and that he is the one who issued a cheque of Kshs.150,000 in favour of East African Building Society being the deposit of the said mortgage.
3. It is the Plaintiff's averment that he is the one who guaranteed the loan of Kshs.1,350,000 and that both of them used to collect rent from the suit premises at diverse times.
4. According to the Complaint, the Plaintiff paid a total of Kshs.4,321,083 towards the loan and incurred a further Kshs.1,513,928.80 towards improvement, maintenance, repairs and miscellaneous expenses in respect of the suit property.
5. It is the Plaintiff's case that he contributed 80% towards the acquisition, development and improvement of the suit premises; that the Defendant has on many occasions neglected or refused to service the mortgage and that as a result, she has caused him to suffer loss and damages.
6. The Plaintiff has averred in his Complaint that he is an equitable owner of the suit property and that there exists a constructive trust in his favour.
7. The Plaintiff is praying for a declaration that the Defendant holds the parcel of land number Nairobi Block 97/1641 (the suit property) in trust for herself and him and for an order that the suit property be sold and the proceeds of the sale be shared between himself and the Defendant in the ratio of 4:1 respectively.
8. The Plaintiff is also praying for an order compelling the Defendant to account for all the rent collected by her in respect of the suit property with effect from January 2009 until the date of sale.
9. The Defendant filed a Defence and Counter-claim in which she averred that save for the intimate

- relationship that she had with the Plaintiff between the years 1985 and 2007, she did not do any business with the Plaintiff as alleged in the Plaintiff.
10. The Defendant stated in her Defence that in order to secure the suit property, she gave to the Plaintiff the sum of Kshs.150,000 which was required as deposit, for onward transmission to the vendor; that a substantial balance of the mortgage was repaid with the rents generated out of the property and that she diligently repaid the loan amount together with interest at the monthly installment of Kshs.23,200 until it was fully repaid.
 11. In the Counter-claim, the Defendant has claimed for a permanent injunction restraining the Plaintiff from interfering with the suit property and for the dismissal of the entire suit with costs.
 12. This matter proceeded for hearing on 21st January, 2016.

The Plaintiff's case:

13. The Plaintiff, PW1, adopted his statement dated 25th July 2015 in his evidence in chief.
14. According to PW1, while working as a Deputy Secretary in the Office of the President in 1985, him, together with the Defendant, entered into a business relationship. At that time, the Defendant was a school teacher in Embu and were having a casual intimate relationship.
15. PW1 informed the court that during the period of his employment, he was earning a salary that was five times more than the Defendant's and that he invested his earnings in the acquisition of parcel of land number Nairobi Block 97/1641 (the suit property).
16. According to PW1, he purchased the suit property with the Defendant through a mortgage that was offered by East African Building Society (EABS) which it charged in June, 1993.
17. PW1 stated that he is the one who paid the deposit of Kshs.150,000, vide cheque number 1270160 dated 23rd September 1992 and continued to repay the loan, much more than the Defendant did.
18. PW1 stated that although both of them used to collect rent from the premises, it is the Defendant who collected more rent than him.
19. According to PW1, he paid to the chargee a total of Kshs.4,321,083.40, of which Kshs.3,796,583.40 was paid by way of cheques while Kshs.324,500 was in cash. In addition to the said amount, PW1 informed the court that he incurred Kshs.1,513,929.80 towards improvement, maintenance and repairing of the suit premises.
20. PW1 informed the court that he had to save the premises from auctioneers at least four times; that his contribution towards the purchase of the suit premises is 80% while that of the Defendant is 20% and that the suit property should be sold and the proceeds be shared in the ratio of 80:20 in his favour.
21. PW1 stated that it is the Defendant who has been collecting rent from the suit property since the year 2009 when the court ordered that the status quo should be maintained.
22. It was the evidence of PW1 that he agreed to have the suit property registered in favour of the Defendant although he is the one who guaranteed and paid the purchase price.
23. According to PW1, he agreed to have the suit property registered in the name of the Defendant because he trusted her and they were running other small businesses together.
24. In cross examination, PW1 stated that he had a very long relationship with the Defendant; that out of the relationship they had a daughter who was born in 1994 and that it is the Defendant who used to collect rent from the premises.
25. It was the evidence of PW1 that at the time of the purchase of the suit premises, the Defendant was a P1 teacher and her salary could not have enabled her raise the deposit of Kshs.150,000.
26. PW1 informed the court that he retired from the public service in 1994, a year after the purchase of the house and that even after retiring, he continued paying for the mortgage.
27. PW1 denied that the mortgage was repaid using the rental income. According to PW1, the rental income that was used to repay the loan was only for a few months.
28. PW1 admitted that the final repayment of Kshs.525,000 was made by the Defendant whereafter the property was discharged.
29. PW1 produced in evidence the bundle of documents that were filed in this court on 9th November, 2009.

The Defendant's case:

30. The Defendant, DW1, adopted her statement dated 16th January, 2016.
31. DW1 informed the court that she cohabited with the Plaintiff as man and wife from 1985 until the year 2007.
32. According to DW1, when she met the Plaintiff, she was a P1 teacher whereafter she rose through the ranks to the level of a college tutor.
33. The evidence of DW1 was that in 1992, she was an ATS 1 graduate approved tutor teaching at Kagari Teachers College and was also running a hotel business in Embu, amongst other businesses.
34. According to DW1, it is her brother-in-law, who was then a manager with the Kenya Commercial Bank, who informed her about the suit premises.
35. DW1 stated that because the Plaintiff was living and working in Nairobi, he agreed to assist her acquire the house that had been identified by her brother-in-law.
36. DW1 informed the court that he gave to the Plaintiff the deposit of Kshs.150,000 which he banked in his account before issuing a cheque of the same amount to EABS.
37. After the purchase of the house, DW1 informed the court that the house was rented out by the Plaintiff for Kshs.25,000 per month; that the Plaintiff used the rental income to pay the mortgage and that the Plaintiff would occasionally delay in making payments to the bank.
38. DW1 testified that she decided to take an early retirement and used her retirement benefits to clear the outstanding loan. According to DW1, she made a lump-sum payment of Kshs.1,700,000 to the bank to have the property discharged.
39. The Defendant denied that the Plaintiff invested any of his money in the suit premises.
40. In cross examination, DW1 denied that they stayed in the suit premises with the Plaintiff. DW1 informed the court that the Plaintiff could not have stayed in the house because he had his own houses in South B and Kileleshwa. According to DW1, it was not until the year 2013 that she moved into the suit premises with her daughter.

Submissions:

41. The Plaintiff's advocate submitted that the suit is based on the doctrine of constructive trust and beneficial interest and not contract as alleged by the Defendant.
42. Counsel submitted that based on the documents produced by the Plaintiff the Plaintiff's contribution towards acquisition of the suit premises is 80%.
43. Counsel relied on the case of **Macharia Mwangi Maina & 87 Others Vs Davidson Mwangi Kagiri, Nyeri Civil Appeal No. 26 and 27 of 2011 and Peter Mburu Echaria Vs Priscilla Njeri Echaria, Nairobi Civil Appeal No. 75 of 2001** to buttress his arguments.
44. The Defendant's advocate on the other hand submitted that an agreement based on love, good-faith and total trust cannot give rise to an intention to create legal relations as envisaged by the law of trust.
45. Counsel submitted that the Plaintiff was present during the registration of the suit property in the Defendant's name. However, it was submitted, the Plaintiff never asserted any claim to the suit property during their relationship.
46. The Defendant's counsel submitted that the Plaintiff has always held the view that the suit property belonged to the Defendant, amongst other properties.
47. Counsel submitted that on the basis of the decision in the cases of **Gissings Vs Gissings (1970) 2 ALLER 780 and Echaria Vs Echaria (2009) 2 EA**, the Plaintiff must establish two things: evidence of contribution and evidence of intention that the contributions were to enable the contributor to acquire a beneficial interest in the disputed property.
48. The Defendant's counsel submitted that the Plaintiff has failed to prove that he made contributions totaling to Kshs.5,835,013.20; that all the receipts are in the name of the Defendant and that the loan was repaid from the rental income.
49. The Defendant's counsel finally submitted that the suit is time barred in view of the provisions of Section 4(1) and 7 of the Limitations of Actions Act.

Analysis and findings:

50. The Plaintiff herein is seeking for a declaratory order that the Defendant is holding parcel of land

number Nairobi Block 97/1614-Fedha Estate 1 in trust for herself and himself in the ration of 20:80% respectively.

51. On the other hand, the Defendant's claim is that she is the absolute owner of the suit property having purchased it through a mortgage by the East African Building Society (EABS).

52. The issues for determination, in my view, are as follows:

(a) Are the Plaintiff and the Defendant joint owners of the land premises known as parcel of land number Nairobi Block 97/1641 Fedha Estate?

(b) Is the Defendant holding a portion of the suit property in trust for the Plaintiff?

(c) Is the Plaintiff entitled to the reliefs sought? and

(d) Who is to bear the costs of the suit?

53. It is not in dispute that the Defendant was registered as the proprietor of the suit property on 10th June 1993.

54. According to the Certificate of Lease that was produced by PW1, the said property was charged to East African Building Society for Kshs.1,350,000 on 10th June 1993.

55. The charge document that as produced by both PW1 and DW1 shows the Defendant was the chargor while the Plaintiff was a surety.

56. The letter of offer by EABS dated 8th December 1992 shows that it is the Defendant who bought the suit property which was being sold by EABS for a sum of Kshs.1,500,000. The Defendant was required to make a deposit of Kshs.150,000 before the execution of the agreement dated 5th February 1993.

57. The agreement of sale of 5th February 1993 was indeed signed by the Defendant as a "purchaser" after a deposit of Kshs.150,000 was paid. EABS, who were the vendors paid the balance of the purchase price and charged the suit property.

58. The evidence of PW1 was that he is the one who paid the deposit of Kshs.150,000, and agreed to have the suit property registered in the name of the Defendant.

59. According to PW1, he used his own resources to pay a substantial amount to offset the mortgage.

60. The Plaintiff produced in evidence a copy of his cheque dated 23rd September 1992 for Kshs.150,000 which was the amount that settled the deposit that was required by the vendor.

61. Although the Defendant's case was that she gave to the Plaintiff an equivalent amount of Kshs.150,000 which he deposited his account before issuing his cheque to EABS, no evidence was produced in court to show that indeed that is what happened.

62. According to the letter dated 8th October 1993, the EABS informed the Defendant, who was the chargor, that the mortgage monthly installment in respect of the suit property was Kshs.28,452.95.

63. DW1 informed the court that because she was working and running her businesses in Embu, and considering that she was at the time having an intimate relationship with the Plaintiff whom they had known each other since 1985, she allowed the Plaintiff to rent out the suit premises and use the proceeds to offset the monthly mortgage repayments.

64. The Plaintiff, PW1, produced in evidence copies of cheques to show that the monthly mortgage repayments were paid by him and not the Defendant.

65. Although the Plaintiff informed the court that he stayed with the Defendant in the suit premises between the year 1993 -1999, the Defendant maintained that she was all along working as a teacher at Kigari Teachers College, Embu and running her businesses in Embu and was not staying in the said premises.

66. According to DW1, the house was being rented to tenants during the said period while the Plaintiff was staying in his houses in South B and Kileleshwa.

67. The water and electricity bills produced in evidence shows that it is the Plaintiff who was managing the suit property from the time the same was purchased by the Defendant.

68. However, there was no evidence placed before this court to show that the Plaintiff lived in the suit property with the Defendant between the years 1993 and 1999 as claimed by the Plaintiff.

69. Although the Plaintiff claimed that he used his own resources to repay the mortgage between the year 1993-1999, the Plaintiff did not produce his bank statements to show that the money he paid to off-set the mortgage during the said period did not emanate from the proceeds of rent.
70. The Plaintiff admitted in his evidence that there were occasions when he rented the suit premises and used the proceeds to repay the mortgage. The Plaintiff produced in evidence a few lease agreements for the year 1999 and 2000. The three Tenancy Agreements show the Plaintiff as the landlord. The tenants in the three Tenancy Agreements were paying the Plaintiff a monthly rent of Kshs.30,000, which was almost the same amount that was required to off set the mortgage on a monthly basis.
71. The Tenancy Agreements produced by the Plaintiff confirms the Defendant's evidence that indeed the Plaintiff used to collect rent from the suit premises which he deposited in his account and then issued cheques to EABS to offset the mortgage. That position is confirmed by copies of the cheques that were drawn by one of the tenants, Miss F. N. Kachari in favour of the Plaintiff and produced by the Plaintiff in his evidence.
72. The repayment of the mortgage to the tune of Kshs.3,796,583.40 between the year 1993 until the year 2003 as indicated in the schedule prepared by PW1 must have therefore come from the proceeds of the rent and not from the Plaintiff's own resources. If that was not the case, nothing would have been difficult than the production of a statement showing the bank account that the rent used to be paid into viz-z-viz the Plaintiff's personal bank account.
73. Although the Plaintiff's evidence was that he also made cash payments to EABS of Kshs.534,500, no evidence was produced in this court to show that the payments were not part of the rent that the Plaintiff was collecting from the tenants who were staying in the suit property.
74. In his own affidavit sworn on 15th September 2008 in CMCC NO. 522 of 2008, the Plaintiff deponed that he has always been responsible for the management of the suit premises by entering into agreements with tenants.
75. The evidence before me shows that other than the Kshs.150,000 that was paid towards the purchase of the suit premises, the Plaintiff did not use his personal resources to offset the mortgage amount to the tune of Kshs.4,321,083.80 as claimed by him.
76. It is not in dispute that when the Defendant purchased the suit property from EABS in 1992, the Defendant and the Plaintiff were in an intimate relationship, although not married.
77. Indeed, out of the said relationship, they were blessed with one daughter who was born in 1994, the same year that the Plaintiff retired from the civil service.
78. It is therefore not in dispute that the Plaintiff and the Defendant were in love in 1992 when the Plaintiff agreed to pay for the Defendant the deposit of Kshs.150,000 to enable her acquire the suit property.
79. There is no evidence that was produced in this court to show that the Plaintiff's intention while paying the Kshs.150,000 was to acquire a beneficial interest in the suit property.
80. Having identified the suit property by herself, and having signed the letters of acceptance, the Sale Agreement and the charge document with the Plaintiff's knowledge, the payment of Kshs.150,000 for a property that was by then valued at Kshs.1,500,000 was in my view a gift by the Plaintiff to the Defendant.
81. It is trite law that a "Resulting" and "Constructive" trust arise to reverse unjust enrichment or to correct a wrong.
82. Where a property passes between individuals who are in love with each other the law presumes that the relationship between them makes it an outright gift and thus not a subject of a resulting trust.
83. As was held by the House of Lords in the case of **Gissing vs Gissing (Supra)**, 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 understanding that the person paying will receive an interest in the property is a question of fact which must be proved.
84. Resulting and constructive trusts have been imposed by the courts to cure injustice where someone has benefited at the expense of another, and where the enrichment is unjust and without legal justification.
85. The evidence before me does not show that there was an understanding either expressly or impliedly, that the Plaintiff will receive an interest in the suit property.

86. I do not see any form of unjust enrichment on the part of the Defendant in this matter.
87. The evidence before me shows the purchase price was paid by the proceeds of the rent that was collected from the suit property and the Defendant personally paid in excess of Kshs.1,700,000 to have the suit property discharged.
88. Indeed, the payment of Kshs.150,000 by the Plaintiff can only amount to a gift and or an advancement in the circumstances of this case.
89. The “presumption of advancement” is available as a defence where a person, due to the relationship he has with another person, “gifts” property to that other person.
90. Of course, such a defence is not regarded as officious where it is made under a mistake or compulsion.
91. The relationship between the Plaintiff and the Defendant in 1992 when the payment of Kshs.150,000 was made by the Plaintiff was cordial to the extent that they begot a daughter in 1994. The payment of Kshs.150,000 by the Plaintiff in 1992 was purely a gift by a man to a woman that he loved. The same was not made under mistake or compulsion.
92. The Plaintiff cannot, having had no intentions of acquiring a beneficial interest in the suit property, turn around, two years after parting ways with the Defendant, to claim that he is entitled to a share of 80% or at all in the suit property. In fact, in his affidavit of 23rd November 2007, the Plaintiff admitted that it is the Defendant who is the owner of the suit property.
93. It is for those reasons that I find that the Plaintiff has not proved that the suit property is being held by the Defendant in trust for him and herself in the ration of 80:20.
94. Consequently, I dismiss the Plaintiff's Plaint dated 23rd September 2009 with costs and allow the Defendant's counterclaim dated 7th January, 2010 as prayed.

Dated and signed in Malindi this 29th day of February, 2016.

O. A. Angote

Judge

Dated and delivered in Nairobi this 4th day of March, 2016

L.Gacheru

Judge