



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. NO. 94 OF 2001

LOISE WANJA KIBUTIRI.PLAINTIFF

-VERSUS-

JAMES NJORO KIBUTIRI1ST DEFENDANT

DAVID KIBUTIRI NJAU.....2ND DEFENDANT

JUDGMENT

This suit was commenced by way of Originating Summons dated 19th January 2001 by the Plaintiff, Loise Wanja Kibutiri, who claimed to be entitled to a share of the parcel of land known as Land Reference Number 165/1/3 (hereinafter referred to as the “suit property”) by reason of her contribution of the purchase price for determination of the following questions:

1. Whether the 1st Defendant, James Njoro Kibutiri, and the 2nd Defendant, Eliud Njau Kibutiri, who are the registered proprietors as tenants in common in equal shares of the suit property, hold the same in trust for themselves and for the Plaintiff.
2. Whether the Plaintiff is entitled to a share of the suit property commensurate with her monetary contribution of Kshs. 12,000/- towards the purchase price thereof.
3. Whether the said trust, if found to exist, should be brought to an end and the share found to belong to the Plaintiff be transferred to her.
4. Whether the Defendants should render an account to the Plaintiff for the proceeds they have exclusively received from the suit property.
5. Whether the costs of this suit should not be paid by the Defendants.

The Originating Summons is premised on the Plaintiff’s Supporting Affidavit sworn on 18th January 2001 in which the Plaintiff averred that the Defendants are her brothers and the registered proprietors of the suit property measuring about 127 acres as tenants in common in equal shares. She further averred that the purchase price for the suit property was contributed by herself as well as the Defendants in the following ratio:

0. James Njoro Kibutiri	Kshs. 118,900/-
0. Loise Wanja Kibutiri	Kshs. 12,000/-
0. Eliud Njau Kibutiri	Kshs. 9,000/-

She annexed an Agreement dated 7th July 1971 as proof of this ratio. She averred further that it was an express agreement or understanding between the three of them that the suit property would be registered in their three names and that each of them would be entitled to a share of the suit property commensurate with their respective contributions. She averred that despite demand, the Defendants had refused to give her, her share of the suit property. She averred further that the Defendants have been in exclusive possession and use of the suit property and she has never benefitted from it in anyway notwithstanding her contribution to the purchase price thereof. She then disclosed that in the year 1983 she filed by way of a Plaint **High Court Civil Case No. 3610 of 1983** seeking a declaration that the Defendants hold the suit property in trust for themselves and for her which suit was dismissed on 29th November 2000 on the ground, inter alia, that she approached the court by way of plaint rather than by way of originating summons. She averred that the court did not rule on the merits of her case and that she was desirous of having the questions set out herein substantively determined.

The Originating Summons is contested. The 1st Defendant filed his Replying Affidavit sworn on 6th March 2001 in which he conceded that the Plaintiff's total contribution to the purchase price of the suit property was Kshs. 12,000/- while the 2nd Defendant's contribution was Kshs. 9,000/- while he contributed the remainder of the purchase price for the suit property and stated that no trust exists as these contributions were fully documented in the Agreement dated 7th July 1971. He emphasized that the interest that the Plaintiff has in the suit property is not a beneficial interest as alleged but was an interest based on the Agreement dated 7th July 1971. He further averred that the said Agreement specified the acreage due to each part which is 5.19 acres to the Plaintiff, 3.89 acres to the 2nd Defendant and the remaining acreage belonged to him. He then stated that the issues raised by the Plaintiff were res judicata as they had been raised in previous proceedings and that this suit should therefore be struck off. He then stated that he has been ready and willing to carry out partition of the suit property in the said manner but that the Plaintiff and the 2nd Defendant had obstructed his intention by expressing a desire to wrongfully acquire acreage far in excess of their entitlement.

The Originating Summons was further contested by the 2nd Defendant who filed his Replying Affidavit sworn on 27th February 2001 in which he averred that by an Indenture of Conveyance dated 12th August 1964 (hereinafter referred to as the "First Indenture"), one Peter Njoroge Kinuthia, Kamau Kinuthia, the 1st Defendant and himself became the registered proprietors of the suit property as tenants in common in equal shares. He further averred that it was stated in the First Indenture that the suit property was bought at a consideration of Kshs. 140,000/- paid to the vendor by the four purchasers in equal shares. He further averred that for the purpose of managing and running the farm on the suit property, the Defendants together with the said Peter Njoroge Kinuthia and Kamau Kinuthia formed a partnership known as Kiambaa Young Farmers by way of a Deed of Partnership dated 10th September 1964 which was registered under the Business Names Act. He further averred that the capital of the said partnership was Kshs. 180,000/- which was provided by the said partners in equal shares. He further averred that by an Indenture of Conveyance dated 30th September 1967 (hereinafter referred to as the "Second Indenture"), the said Peter Njoroge Kinuthia and Kamau Kinuthia sold and conveyed the suit property to himself and the 1st Defendant as tenants in common in equal shares at a consideration of Kshs. 44,169.80, secondly by the Defendants assuming the liability for the debt due to the Land and Agricultural Bank which then stood at Kshs. 72,262.62 and thirdly by the Defendants assuming the liability of the debt to the Agricultural Finance Corporation which then stood at Kshs. 41,245.30. He further averred that the said Peter Njoroge Kinuthia and Kamau Kinuthia also retired from Kiambaa Young Farmers leaving only the 1st Defendant and himself in the partnership. He then pointed out that the Plaintiff was not a member of the partnership of Kiambaa Young Farmers and was therefore not entitled to a share of the proceeds from the suit property. He added that the Defendants were also under no obligation whatsoever to render to the Plaintiff the accounts of the partnership of Kiambaa Young Farmers. He further denied the Plaintiff's claim that she contributed Kshs. 12,000/- towards the purchase price for the suit property pointing out that this alleged contribution was not captured in the First Indenture and the Second Indenture. He further stated that the Agreement of 7th July 1971 relied upon by the Plaintiff in making claims over the suit property is unacceptable because it was conditional, was not properly drawn, attested or registered and could not vary the First Indenture and the Second Indenture. He further averred that since the Plaintiff's claim was based

on the Agreement of 7th July 1971, the same was time barred under the law of contract which requires that a cause of action based on contract be brought prior to the expiry of 6 years from the date it was made. He further pointed out the finding of the court in **HCCC. 3610 of 1983** that the Plaintiff's claim is based on the Agreement of 7th July 1971 which was unmaintainable as it was time barred and that the Plaintiff had not proved the existence of any trust in her favour.

EVIDENCE

At the hearing of this suit, the PW1, David Muthee Kibutiri, testified that he was the Plaintiff's son who was enjoined in this suit as her next friend. He testified that his mother was now 84 years old, was suffering from dementia and was in hospital. He confirmed that the Defendants were his uncles and that the suit property was under coffee, tea and grazing areas. He confirmed that the 1st Defendant lives on the suit property and further that his mother has never benefitted from it since it was purchased. He testified that his mother was claiming her rightful share of the suit property according to her contribution of Kshs. 12,000/- thereto. He confirmed that the 1st Defendant had offered his mother a portion measuring 5.19 acres of the suit property which he confirmed was in dispute. He stated that his mother wanted the suit property to be apportioned out according to one's contribution thereto.

DW1, James Njoro Kibutiri, testified that he was the 1st Defendant in this suit and 87 years of age. He confirmed that the Plaintiff is his younger sister while the 2nd Defendant was his elder brother, now deceased. He confirmed knowing the suit property and further confirmed that the Plaintiff contributed Kshs. 12,000/- towards its purchase. He further stated that his own contribution towards the purchase of the suit property was Kshs. 118,900/- while the 2nd Defendant refused to contribute money but gave him coffee which he sold at Kshs. 9,000/-. He further testified that he has all along been willing to give the Plaintiff her commensurate portion of the suit property but she refused, claiming a bigger portion. He confirmed that the suit property was purchased in the year 1964 by four partners including one Peter Njoroge Kinuthia, one Kamau Kinuthia, the 2nd Defendant and himself. He further testified that at the time of purchasing the suit property, it had nothing except 50 acres of coffee, one cow, a mabati house and a few trees. He testified that the farm was making losses and that his partners asked him they sell off the suit property. He testified that he decided to buy out the Kinuthias and that using a title deed to another property, he borrowed Kshs. 44,000/- and bought out the Kinuthias. He further testified that he then began to plant tea and that right now he has 23 acres of tea. He further stated that there are 30 acres of bush in the suit property and that he is ready and willing to give the Plaintiff her 5 acres. He further stated that a person who has only contributed Kshs. 12,000/- cannot be given 50 acres. He added that there is no dispute on how much each party contributed. During cross-examination, he confirmed that the suit property cost Kshs. 140,000/- of which they took at loan of Kshs. 80,000/- from the Land and Agricultural Bank and also Kshs. 43,000/- from the Agriculture Finance Corporation. He confirmed further that he is the one who paid off these bank loans. He confirmed the existence of a partnership known as Kiambaa Young Farmers which did not work out. Upon further cross-examination by the 2nd Defendant's counsel, he confirmed that he holds the original title deed for the suit property and that it is in his name and the 2nd Defendant's name as joint proprietors. He denied that the loans were serviced with proceeds from the suit property. He stated that the suit property was not earning anything at the time. He insisted that the loans were paid off using funds from his other businesses. He further confirmed that the Plaintiff was never a partner of Kiambaa Young Farmers. He confirmed that all the loans were paid off and the charges against the title were discharged. He added that the Plaintiff was his employee and that he approached her to contribute some money towards the purchase of the suit property with a promise that when the suit property was free from all encumbrances, he would apportion to her a part thereof. He further stated that he did not include the Plaintiff in the title of the suit property because she had no money. He confirmed that the Plaintiff gave him Kshs. 12,000/- for the suit property after the Kinuthias left, which he used to service the loans. He further stated that the Plaintiff first paid him Kshs. 5,000/- in 1964 and Kshs. 7,000/- in 1968, all totaling up to Kshs. 12,000/-. He confirmed that his sister gave him this money when he was in trouble. He confirmed that he used this contribution from the Plaintiff to pay off part of the loan with the Agricultural Finance Corporation. He confirmed that even after this contribution by the Plaintiff, no fresh transfer was drawn and no one filed suit for the specific performance of the agreement. He further confirmed that after 1971, he never received any further

contributions from either the Plaintiff or the 2nd Defendant but that he struggled to pay off the outstanding loans all by himself. He confirmed that he collected the title deed for the suit property in 1978 after all the loans were repaid. He confirmed that he was ready and willing to sign a transfer of 5 acres to the Plaintiff as this was commensurate to her contribution towards the purchase thereof.

DW2, David Kibutiri Njau, stated that he was the son of the late 2nd Defendant and an administrator of his estate jointly with his sister Margaret Wambui Maina. He testified that the Plaintiff is his aunt and the 1st Defendant is his uncle and that they are both younger than his late father. He testified that in 1964, he was 17 years old and that his whole testimony was what he was told as he was not of age at that time. He confirmed that the suit property was bought in the year 1964 by 4 partners, namely the 1st Defendant, his late father, Peter Njoroge Kinuthia and Kamau Kinuthia. He stated that the value of the suit property was Kshs. 140,000/- and that the 4 partners held the same in equal shares as tenants in common. He confirmed that by the Second Indenture, the Kinuthias sold their share in the suit property to the two Defendants. He further testified that at the time the Land and Agriculture Bank was owed Kshs. 72,262/- while the Agriculture Finance Corporation was owed Kshs. 41,345/-. He testified further that those loans were paid off from proceeds from the suit property. He testified that on the suit property there were cattle and milk sold to Kenya Co-operative Creameries, there was tea, black water trees, pigs and vegetables which were sold at a nearby market. He further testified that there was machinery on the suit property including tractors, a coffee mill and a farm house. He further testified that the sum of Kshs. 12,000/- purportedly paid by the Plaintiff for the suit property was not paid to his late father. He further denounced the Agreement of 7th July 1971 stating that his late father did not sign it. He further stated that no transfer of the suit property was made pursuant to that agreement. He further stated that he was not aware of any contribution of Kshs. 118,900/- by the 1st Defendant towards the purchase of the suit property. He further stated that they tried to get into the suit property in the year 1976-77 but they were chased away by the 1st Defendant. He stated further that they preferred to leave rather than stay and fight. He confirmed that the charge over the suit property was discharged in the year 1977 and that the title deed is in the custody of the 1st Defendant. He testified that the loans were paid off from proceeds of the suit property. He confirmed that Kiambaa Young Farmers was dissolved in Civil Suit No. 717 of 2001. He confirmed that the Plaintiff was not involved in the partnership and that she was not included in that suit. He stated further that the Plaintiff did not sign the Partnership Deed for Kiambaa Young Farmers and was therefore not entitled to the accounts of the partnership. He further stated that the Plaintiff is not entitled to a portion of the suit property. He pointed out that the Agreement dated 7th July 1971 upon which the Plaintiff was relying was not registered and the parties did not apply for Land Control Board consent to transfer the suit property. He further stated that his late father never received any contribution from the Plaintiff and that he did not promise the Plaintiff a portion of the suit property. He further stated that the 1st Defendant built a permanent house on the suit property and lives there while his late father never lived or benefitted from that land. He further added that there was no proof of the Plaintiff assisting in paying off the loans of the suit property. He further stated that the Plaintiff is not entitled to the prayers sought and that her suit should be dismissed with costs. Upon cross-examination, this witness confirmed that his late father signed the Agreement of 7th July 1971 and stated that the Plaintiff paid Kshs. 12,000/- to the 1st Defendant but that the sum was not a contribution towards the purchase price of the suit property. He further confirmed that his late father only contributed Kshs. 9,000/- towards the purchase price of the suit property.

ISSUES FOR DETERMINATION

1. Whether the 1st Defendant, James Njoro Kibutiri, and the 2nd Defendant, Eliud Njau Kibutiri, who are the registered proprietors as tenants in common in equal shares of the suit property, hold the same in trust for themselves and for the Plaintiff.

The term “trust” has been defined in **Underhill, A and Hayton, D, Law of Trusts and Trustees 16th Edn** as follows:

“A trust is an equitable obligation, binding a person (called a trustee) to deal with property

over which he has control (which is called the trust property) for the benefit of persons (who are called the beneficiaries or *cestuis que trust*) of whom he may himself be one, and any one of whom may enforce the obligation.”

In order to ascertain whether a trust has been created, the ‘three certainties’ test has been applied namely:

- i. Certainty of intention (words)
- ii. Certainty of subject-matter
- iii. Certainty of objects (beneficiaries)

If I may narrow down to certainty of intention, the requirement is whether the obligations of trusteeship were intended in respect of the suit property. This issue is determined by reference to all the circumstances of the case. Thus, oral and written statements as well as the conduct of the parties are construed by the courts to determine whether a trust relationship has been created.

In **Mumo –vs- Makau (2004) 1 KLR 13** the court held that trust is a question of fact and has to be proved by evidence. Further in **Mbotu & 8 others –vs- Watimu & 11 others (1981) KLR 173** the court held that,

“The law never implies, the court never presumes a trust but in case of absolute necessity. The court will not imply a trust save in order to give effect to the intention of the parties to create a trust and it must be clearly determined before a trust will be implied.”

In this particular case, it has been proved to my satisfaction that the suit property was purchased by four young men in the year 1964, namely the Defendants and Peter Njoroge Kinuthia and Kamau Kinuthia and this is supported by the First Indenture which was produced in evidence at the hearing of this suit. Further to this, it has also been proved that by way of the Second Indenture, the Defendants bought out the Kinuthias and had the suit property transferred to them as tenants in common in equal shares. In these two important transactions, the Plaintiff did not feature at all. It has also been proved that to this day, the suit property remains registered in the joint names of the Defendants. It cannot therefore be said that the suit property is held by the Defendants in trust for the Plaintiff. Further to this, the Plaintiff’s evidence is that she contributed Kshs. 12,000/- to the 1st Defendant to assist in purchasing the suit property. This assertion is admitted by the 1st Defendant and he has further admitted his willingness to apportion to her 5 acres out of the suit property for the same. However, the 2nd Defendant’s evidence is that he was unaware of any such arrangement between the 1st Defendant and the Plaintiff and asserts that no such contribution was made by the Plaintiff. Being a co-owner of the suit property, the 2nd Defendant’s position is strong as he would be required to sign on the dotted line to apportion to the Plaintiff a portion of the suit property. The fact that the Plaintiff was transacting with only one of the two owners of the suit property points to the fact that no trust was intended to be created. My finding on this point is that no trust was created in the arrangement between the Plaintiff and the 1st Defendant. I do, however, find that the Plaintiff did enter into an oral agreement with the 1st Defendant for him to apportion to her a part of the suit property commensurate with her contribution of Kshs. 12,000/-.

In light of the foregoing, my finding is that no trust was created in the arrangement between the Plaintiff and the 1st Defendant but instead, they entered into an oral contract for the Plaintiff to be given a portion of the suit property commensurate to her contribution of Kshs. 12,000/-.

2. Whether the said trust, if found to exist, should be brought to an end and the share found to belong to the Plaintiff be transferred to her.

Having found that no trust was created between the Plaintiff and the 1st Defendant, then this issue is determined.

3. Whether the Plaintiff is entitled to a share of the suit property commensurate with her monetary contribution of Kshs. 12,000/- towards the purchase price thereof.

From the evidence brought before this court, I am convinced that indeed the Plaintiff contributed Kshs. 12,000/- to the 1st Defendant for the purpose of paying off the loans owed to the named financial institutions for the purchase of the suit property. The Plaintiff relies on an Agreement dated 7th July 1971 entered into by herself and the two Defendants. Though the 2nd Defendant disputed that agreement, his personal representative finally conceded that the 2nd Defendant did sign that agreement. However, that agreement is time barred as actions based on contracts must be brought within 6 years.

On the other hand, the 1st Defendant plainly admitted during the hearing of this suit that he did receive the Plaintiff's contribution of Kshs. 12,000/- towards defraying the loans taken to purchase the suit property. The 1st Defendant emphasized his willingness to sign a transfer conferring upon the Plaintiff 5 acres of the suit property which, according to him, was commensurate to that contribution. The 1st Defendant further testified that he personally contributed Kshs. 118,900/- towards the purchase of the suit property while the 2nd Defendant contributed Kshs. 9,000/- worth of coffee. Though the 2nd Defendant's personal representative admitted that the 2nd Defendant contributed coffee worth Kshs. 9,000/- towards the purchase price of the suit property, he disputed the 1st Defendant's claim of having contributed Kshs. 118,900/-. It is noteworthy that the Plaintiff admitted in her pleadings that the 1st Defendant did contribute Kshs. 118,900/- towards the purchase price of the suit property. My finding on that issue is that indeed, the contributions by the Plaintiff and the Defendants towards the purchase price of the suit property were as follows:

0. James Njoro Kibutiri	Kshs. 118,900/-
0. Loise Wanja Kibutiri	Kshs. 12,000/-
0. Eliud Njau Kibutiri	Kshs. 9,000/-

In that regard, I do find that the suit property which measures 127 acres be subdivided in the following percentages:

0. James Njoro Kibutiri	85%	108 acres
0. Loise Wanja Kibutiri	8.6%	11 acres
0. Eliud Njau Kibutiri	6.4%	8 acres

4. Whether the Defendants should render an account to the Plaintiff for the proceeds they have exclusively received from the suit property.

On this issue, my finding is that the Plaintiff has only herself to blame for taking many years to pursue her rightful share of the suit property. It cannot be said that the Defendants were in wrongful occupation of the suit property. The Plaintiff's claim over the suit property has only been saved by the express admission by the 1st Defendant that indeed the Plaintiff did contribute towards the purchase of the suit property and is indeed entitled to a portion thereof. In the circumstances, I find that the Plaintiff is not entitled to an account of the proceeds of the suit property.

In light of the foregoing, I hereby find in favour of the Plaintiff who is entitled to receive 11 acres of the suit property while the 1st Defendant is entitled to receive 108 acres and the 2nd Defendant is entitled to receive 8 acres of the suit property. I order that the suit property be subdivided in this manner. Each party shall bear their own costs.

DELIVERED AND SIGNED AT NAIROBI THIS 31ST DAY OF JULY 2015.

MARY M. GITUMBI

JUDGE