



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MALINDI**

**HCCC NO. 66 OF 2005**

**E C W.....PLAINTIFF**

**=VERSUS=**

**S M M.....DEFENDANT**

**J U D G M E N T**

1. This suit was commenced by way of a Plaint dated 5<sup>th</sup> July, 2005.
2. In the Plaint, the Plaintiff averred that in September 2002, during a holiday visit in Watamu with her family, the Plaintiff, a spinster, met the Defendant, a bachelor beach operator; that an intimate relationship developed between them and that in July 2003, the Plaintiff gave up her job in London, UK , sold her house and her personal effects which she shipped to Kenya to start a new life with the Defendant.
3. The Plaintiff averred in the Plaint that she opened a bank account at Barclays Bank Kenya, Malindi and remitted substantial funds of her own from the UK and that the funds were applied for the purchase of land and construction of a house on parcel of land known as Kilifi/Jimba/[Particulars Withheld] which was in excess of Kshs.9,000,000 among other properties listed in the Plaint.
4. According to the Plaint, the relationship between them deteriorated so badly and the Defendant physically assaulted her.
5. The prayers that the Plaintiff is seeking in the Plaint are for a declaration that she is solely entitled to ownership and possession of parcel of land known as Kilifi/Jimba/[Particulars Withheld] and a plot of land at [Particulars Withheld] village, Watamu; a declaration that the agreement of 22<sup>nd</sup> June 2005 which the Defendant coerced her into signing is void ab initio and an order of permanent injunction.
6. The Defendant filed a Defence and counterclaim. In the Defence, the Defendant averred that indeed the Plaintiff opened an account with Barclays Bank at Malindi; that on some occasion, he deposited in the account his money and that the Plaintiff is not the sole legal and equitable owner of the suit property.
7. In the counterclaim, the Defendant has averred that he is entitled to ½ interest in the suit property; that he is legally registered as a joint owner with the Plaintiff of parcel of land Kilifi/Jimba/[Particulars Withheld] and that the same should be sold and the proceeds thereof shared equally.
8. Both the Plaintiff and the Defendant amended their pleadings.

**The Plaintiff's case:**

9. The Plaintiff, PW1, relied on the statement she filed in this court on 16<sup>th</sup> February 2012.

10. PW1 informed the court that she met the Defendant while on holiday in Kenya in September 2002. She returned to Kenya in the year 2003 and lived with the Defendant at [Particulars Withheld] Villas.
11. It was the evidence of PW1 that after selling her house in the UK, she opened a bank account at Barclays Bank Malindi, bought a Toyota Caldina and started looking for land to buy.
12. It was her evidence that they identified parcel of land number Kilifi/Jimba/[Particulars Withheld] which she bought by paying Kshs.1,000,000.
13. According to PW1, the parcel of land was registered in their joint names. It was her evidence that she paid for the construction of a house on the suit property and she regularly transferred money from her UK account to the Kenyan account.
14. It was the evidence of PW1 that the Defendant informed her that as a foreigner, she could not acquire land in her name and that is why the suit property was registered in their joint names.
15. According to PW1, when she met the Defendant, he was working as a beach boy and living hand to mouth. It was the evidence of PW1 that she built a modest house for the Defendant's mother at the family's village land that after she bought a van, the Defendant's character changed.
16. PW1 informed the court that the Defendant sold the van she had purchased for Kshs.650,000 and used Kshs.66,000 to purchase the land in [Particulars Withheld]; that she built rental houses on the land at [Particulars Withheld] that the Defendant frequently assaulted her and that she realised she could not continue staying with him.
17. PW1 denied that he gifted any of the immovable properties or vehicles to the Defendant. It was the evidence of PW1 that the Defendant's name appears in the agreement and the title deed as a result of his fraudulent and false misrepresentation.
18. The Defendant did not testify.

#### **Submissions:**

19. The Plaintiff's advocate submitted that it is not in dispute that the parcel of land known as Kilifi/Jimba/[Particulars Withheld] was purchased with funds provided by the Plaintiff; that the Defendant did not contribute a cent toward the purchase of the suit property; that the evidence by the Plaintiff and the documents are unchallenged and that when parties acquire property when they are neither married nor in a registered business partnership equity steps in when the relationship, comes to an end.
20. The Plaintiff's counsel submitted that the Defendant assaulted the Plaintiff and thereby compelled her to sign an agreement that required her to pay the Defendant Kshs.300,000; that the Plaintiff suffered severe depression and had to be treated and that as a consequence, she is entitled to general damages of Kshs.500,000.
21. The Defendant's advocate submitted that the suit property was registered in the joint names of the Plaintiff and the Defendant because they were in love; that she gave the Defendant half a share of the suit property as a gift and that the issue of fraud and misrepresentation do not arise.
22. The Defendant's counsel submitted that where property is already registered in the joint names of the parties, the property is shared equally without going into the question of who contributed how much.
23. Counsel submitted that while the Defendant may not have contributed much in terms of cash, but he contributed his love and affection; that at the time the gift was made, there was no promise of marriage and that this was a relationship of love during which some gifts were exchanged.

#### **Analysis and findings:**

24. The Plaintiff is seeking to be declared the sole owner of parcel of land known as Kilifi/Jimba/[Particulars Withheld] Watamu and an unregistered parcel of land in [Particulars Withheld].
25. According to the Amended Plaintiff and the evidence of PW1, she was duped by the Defendant into registering the suit property in their joint names.
26. According to the particulars of fraud in the Further Amended Plaintiff and her evidence, the Defendant fraudulently informed her that she could not own property in Kenya in her sole name since she is not a Kenyan citizen when he knew that it was false; that the Defendant falsely induced her by misrepresentation to purchase and register the suit property in their joint names and

- that the Defendant caused her to spend a large sum of money for the purchase and registration of the suit property in their joint names.
27. Although the Defendant averred in his Defence that he made contribution towards the purchase of the suit property and the construction of a house thereon, he did not testify.
28. The Plaintiff produced in evidence the Title Deed in respect of the suit property. The title deed shows that the suit property was registered in her name and the Defendant's name on 18<sup>th</sup> November 2003. It is not clear whether the two were registered as joint proprietors or tenants in common.
29. The documents before this court and the Plaintiff's testimony shows that she solely contributed towards the purchase of the suit property. That evidence was not controverted by the Defendant.
30. Although the Defendant's advocate submitted at great length that the suit property was jointly registered in favour of the two because they were in love and that the Defendant's share was a gift inter vivos, the Defendant never testified that indeed that was the position.
31. It is trite law that matters to do with love, affection and gifts are very personal in nature and the Defendant's counsel cannot, by way of submissions, attest to what actually transpired before the Plaintiff agreed to have the suit property registered in her name and the Defendant's name.
32. In order for a gift to be legally effective, it is crucial that the donor's intention to give the gift to the donee is clear (**See Gissing Vs Gissing (1970) 2 ALLER 780**). In the case of **Stephen Mkare Mulewa Vs Linda Newman, Malindi Civil Appeal No. 32 of 2013**, the Court of Appeal held as follows:

**“It is unlikely that the respondent would have gone to such great lengths to obtain money including mortgaging her house and borrowing from the bank and friends merely to keep the appellant happy.....”**

33. That is the same scenario in the instant case. Evidence was produced in this court showing how the Plaintiff sold her house in UK to come and buy land in Kenya and construct a house thereon.
34. In the absence of evidence, this court is not convinced that the Plaintiff's intention was to shower the Defendant with gifts notwithstanding that they were in love.
35. Consequently, I am in agreement that the suit property was fraudulently and or by misrepresentation registered in the joint names of the Plaintiff and the Defendant, the Defendant having not contributed even a cent towards its purchase.
36. Having not made any contribution, and in the absence of evidence that the Plaintiff's intention in having the suit property partly registered in favour of the Defendant was a gift, I find and hold that the suit property should revert back to the Plaintiff.
37. For those reasons, I allow the Plaintiff's Further Amended Plaint in the following terms:

**(a) A declaration be and is hereby issued that the Plaintiff is solely entitled to ownership and possession of parcel of land Number Kilifi/Jimba/[Particulars Withheld]. at Watamu and also to the plot of land at /[Particulars Withheld] Village.**

**(b) A declaration be and is hereby issued that the agreement dated 22<sup>nd</sup> June 2005 between the Plaintiff and the Defendant is void ab initio and of no legal effect.**

**(c) An order be and is hereby issued directing the District Land Registrar, Kilifi to rectify the relevant land register by cancelling the registration of the Defendant as a joint owner of Kilifi/Jimba[Particulars Withheld].**

**(d) A permanent injunction be and is hereby issued restraining the Defendant from entering into, remaining upon and or interfering with the Plaintiff's possession and quiet enjoyment of parcel of land number Kilifi/Jimba/[Particulars Withheld] and the plot of land at [Particulars Withheld] village, Watamu.**

**(e) The Defendant's counterclaim is dismissed with costs.**

**(f) The Defendant to pay the costs of the suit.**

Dated and delivered in Malindi this 23<sup>rd</sup> day of **October** 2015.

**O. A. Angote**

**Judge**