



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO. 14'B' OF 2013
(Consolidated with ELC Civil case No. 15 of 2013)

ABDUL JALIL YAFAI.....PLAINTIFF

=VERSUS=

FARID JALIL MOHAMED.....DEFENDANT

J U D G M E N T

Introduction:

1. This matter was consolidated with Malindi Civil Suit Number 15 of 2013. In this suit, the Plaintiff, Abdul Jalil Yafai, has averred in the Plaint that during the years 2004 and 2008, while working and living in the United Kingdom, he sent to the Defendant, who is his nephew, money to purchase for him plots in Malindi and that the Defendant, Farid Jalil Mohamed, did purchase two plots known as land parcel number Kilifi/Jimba/992 and Kilifi Jimba/374 (the suit property).
2. However, it was averred, the Defendant registered the said properties in the joint names of the Plaintiff and himself as opposed to registering them in the Plaintiff's name.
3. The Plaintiff averred that he orally agreed with the Defendant before the purchase of the suit property that he (the Plaintiff) would be the sole registered owner of the property and the Plaintiff would develop the property and share with the Defendant the business income from the property in equal shares.
4. According to the Plaintiff's Plaint, he commenced developing the property known as Kilifi/Jimba 992 but stopped halfway after the Defendant failed to account for funds sent to him for the development of the said plot.
5. It is the Plaintiff's averment that the Defendant unjustly registered the said property in their joint names with the sole intention of fraudulently acquiring for himself a half share proprietary interest in the property.
6. On or about 18th December 2008, the two parties entered into a written agreement. According to the Plaintiff, the two agreed to sell the property and the purchase price was to offset all costs, fees and charges incurred before and the balance was to be applied towards liquidating an outstanding facility that the Plaintiff had obtained for the development of the property which stood at 277,000 Starling pounds as at 31st December 2012. However, it was averred, the Defendant has on several

- occasions thwarted the Plaintiff's efforts to sell the said property.
7. The Plaintiff is seeking for the following reliefs: General damages; an order that the Defendant do pay him half of the aforesaid loan and that failure to do so do result in the automatic renunciation of his interest in the property and in the alternative, the property be valued and the parties to have an option to purchase each other's net share of the sale proceeds.
 8. In his Defence, the Defendant, Farid Jalil Mohamed, stated that it is him who suggested to the Plaintiff that they could construct a complex fishing club which would attract tourists; that they orally agreed to have a joint business venture and that since he had already acquired a plot, he decided to register the same in the joint names of the Plaintiff and himself.
 9. According to the Defence, the Plaintiff started sending to the Defendant money in installments for the purpose of purchase of construction materials and the actual construction until the Plaintiff stopped sending any more money. According to the Defendant, the total amount that the Plaintiff sent to him was Kshs.9,000,000 and that he spent all that money on clearing the plot and construction.
 10. The Defendant denied that he entered into an agreement with the Plaintiff to repay a loan save for the agreement related to Kilifi/Jimba/374 which agreement the Plaintiff secretly attempted to alter to read Kilifi/Jimba/992.
 11. In HCCC NO. 15 of 2013 (OS), the Defendant herein is the Plaintiff. In the said suit, the Defendant herein is seeking for a declaration that Kilifi/Jimba/992 is jointly owned by the Plaintiff and the Defendant; that the said land be sub divided equally amongst them and in the alternative the court do order that the parcel of land be valued and sold and the proceeds be shared equally and that the Defendant herein be allowed to pay the Defendant a sum of Kshs.4,500,000 being half of 9,000,000.

The Plaintiff's case

12. Abdul Jalil Yafai, PW1, informed the court that when he visited Kenya, his nephew, the Defendant, informed him of the possibility of investing in Kenya and in particular building of residential houses to lease to tourists.
13. According to PW1, the Defendant did not have any money and he wanted him to finance the whole business and then offer him 50% of the net profits for the effort he would put in the business.
14. A joint account number 01501965-95600 was then opened at the Standard Chartered Bank. PW1 produced the bank statement in respect to the joint account as PEXB1.
15. According to PW1, he transferred the money for the purchase of the suit property while in the UK as indicated in PEXB2 and 3. The total sum deposited was approximately Kshs. 9,000,000.
16. PW1 informed the court that the first payment that he made in the account was for Kshs.850,000 and Kshs.600,000.
17. PW1 informed the court that after depositing Kshs.9,000,000 in the joint account, the Defendant sent to him photographs of the ongoing construction. In the year 2008, the Plaintiff came to Kenya with his daughter and that is when he realised that the Defendant had nothing to show for the money that he had sent to him to buy the suit property and develop it.
18. It was the evidence of PW1 that he also realised that the suit property had been registered in the joint names of the Defendant and himself and that the Defendant was claiming for a half a share of the developments. The title deed in respect of Kilifi/Jimba/992 was produced as PEXB 4. It was the evidence of PW1 that he was surprised that the title deed was issued in their joint names in the year 2001.
19. PW1 stated that while in Kenya, the Defendant demanded to be paid Kshs.20,000,000 so as to release parcel number Kilifi/Jimba/ 992 and Kilifi/Jimba/ 394. It was the evidence of the Plaintiff they went to Mombasa and met Mr. Busieka advocate, PW2, who, after visiting the suit property in Watamu, drew the agreement of 18th December 2008. The agreement was produced as PEXB 5.
20. PW1 stated that in the agreement, there are amendments which were done by Mr. Busieka advocate on the same day they signed the agreement. According to PW1, the amendments that were made on 18th December 2008 were in respect of his address at paragraph 1, paragraph (f), (e) and (h). The second set of amendments were done on 15th July 2009 by Mr. Busieka advocate in

- respect to paragraph 2 in which the words “and 992” were added and at pages 2 and 3.
21. It was the evidence of PW1 that he had borrowed money from his bank in the UK and the schedule of the said loan was annexed on the agreement that both parties signed. According to Pw 1, the agreement was meant to have the suit property sold and the proceeds thereof used to off-set the said loan.
 22. PW1 stated that they informed Mr. Busieka advocate the terms of the agreement and he travelled from Mombasa to Malindi with a copy of the drafted agreement on a Thursday. They then visited the two plots, that is, plot numbers 992 and 374 whereafter he looked at the drafted agreement. The agreement, according to PW1, had many mistakes which were amended by hand and counter-signed. The Plaintiff and the Defendant then signed the amended version on 18th December, 2008 and the Plaintiff flew out the following day.
 23. It was the evidence of PW1 that while in the UK, the Defendant called him and informed him that he (the Defendant) had duped him (the Plaintiff) into signing the agreement because the developed plot was number 992 and not 374 as shown in the agreement and that is when he came back to Kenya and visited Mr. Busieka advocate in his office to complain about what he believed to be a collusion between the advocate and the Defendant in the preparation of the agreement of 18th December 2008. Mr. Busieka advocate then amended the agreement by adding plot number 992.
 24. PW1 stated that plot number 374 is neither registered nor is it developed. The said plot could also not be legal encumbered and that the agreement actually referred to plot number 992 and not 374.
 25. PW1 then started looking for somebody to purchase plot number 992 as per the agreement. However, the Defendant later on informed him that he had charged the said plot to a bank and therefore the same could not be sold.
 26. PW1 informed the court that his prayers are to have the property sold and the net profit or loss be shared equally; damages of approximately 1.5M and the costs of the suit. PW1 also wants the Defendant to pay half of the loan that he owes the bank in UK.
 27. In cross-examination, PW1 denied that the Defendant owned any other land other than where he was staying and that he never discussed the issue of the loan with the Defendant. PW1 further stated that he never discussed with the Defendant before he obtained the loan in the UK.
 28. It was the evidence of PW1 that he did not know how much was used to purchase the suit property and that he had agreed with the Defendant that the property should be registered in his name alone and not jointly. Pw 1 denied that he colluded with Mr. Busieka advocate to change the plot number from 374 to 992.
 29. The Plaintiff's daughter, PW2, stated that when she came to Kenya with her father in the year 2008, the Defendant showed them a title deed which had the joint names of PW1 and the Defendant. They then visited the plot and saw buildings on the land.
 30. It was the evidence of PW2 that she accompanied her father to Mr. Busieka advocate's offices and they instructed him to draft the agreement. According to PW2, the advocate was to get the details of the property from the Defendant.
 31. Mr. Eric Busieka, PW4, informed the court that he is an advocate of the High Court. According to PW4, the Defendant was known to him before the issues in this matter arose having acted for him previously.
 32. PW4 stated that prior to drafting the agreement that was produced as PEXB 5, he visited the locus quo and was shown plot numbers 374 and 992. According to the witness, plot number 374 was not registered and had squatters while plot number 992 was registered and partially developed. The two plots were adjacent to each other.
 33. PW4 stated that while drafting PEXB5, he was under the impression that he was drafting an agreement in respect to one plot and that it is the Defendant who gave him the details about the plot number in respect to the transaction.
 34. PW4 stated that the agreement referred to the developments on the plot and it also barred parties from subjecting the property to any encumbrances.
 35. According to PW4, clause 2 of the agreement was to deal with how the proceeds from the plot were to satisfy the loan and a schedule was annexed on the agreement showing how the loan was to be liquidated. Counsel stated that the schedule was part of the agreement.
 36. After the agreement was executed, it was the evidence of PW4 that PW3 went to see him later and informed him that they had noticed that the agreement did not include plot number 992 which was registered and developed. That is when Mr. Busieka advocate called the Defendant and informed

- him that he was proceeding to effect the amendments by hand. PW4 stated that he could not remember if he forwarded to the Defendant a copy of the amended agreement.
37. PW4 stated that he then prepared an affidavit to validate the amendments. Counsel stated that paragraph 3 of his affidavit has a statement of fact which is not true. It was the evidence of PW4 that he made the amendment to the agreement to include plot no. 992 in the absence of the Defendant but with his approval.

The Defendant's case

38. Mr. Farid Jalil Mohamed, DW1, informed the court that he is involved in deep sea fishing business and that he owns boats.
39. According to DW1, the Plaintiff wants him to pay for a loan that he is not aware of.
40. According to the evidence of DW1, the land which is the subject of these proceedings is plot number 992. It was his evidence that in 2001, he called him the Plaintiff and informed him that he wanted to buy a plot for the purpose of putting up cottages. That is when the Plaintiff told him to include him in the project after acquiring the plot.
41. It was the evidence of DW1 that when the Plaintiff came to Kenya, he showed him the plot he had purchased. After seeing the plot, it was the evidence of DW1 that the Plaintiff promised to send money for the purpose of putting up cottages on the said land.
42. DW1 informed the court that after the Plaintiff went back to the United Kingdom, he sent him Kshs.9,000,000 in installments. It was his evidence that that money was used for planning purposes after the contractor gave him the quotation for the construction of the cottages. Although the Plaintiff was to finance the construction of the cottages, he stopped sending any more money.
43. It was the evidence of Pw 1 that he had many problems with the squatters who were on the land and he had to file a case in the Tribunal over the issue. He later on paid off the squatters and the caretaker. Dw 1 stated that he was not aware of the loan that the Plaintiff says he acquired in the United Kingdom.
44. It was the evidence of Dw 1 that the original Title Deed for plot number 992 is with First Community Bank who charged the land for a loan he took from the bank. A copy of the Title Deed was produced as DEXB1. The proceedings in the Provincial Land Appeal Committee were produced as DEXB2. The Development plan for cottages was produced as DEXB3.
45. Although the construction of the cottages commenced, it was the evidence of Dw 1 that the same stopped after the Plaintiff stopped sending money. According to Dw 1, the Plaintiff called him and suggested that they sell the plot together with the developments thereon to a Mr. Smith who was interested in the plot.
46. Upon being informed about Mr. Smith, it was the evidence of DW I that his advocate authored a letter dated 5th February, 2012 which he produced as DEXB4. However, after he realized that the Plaintiff's intention was to pocket all the purchase price, he stopped the deal.
47. It was the evidence of Dw 1 that when the Plaintiff came to Kenya and told him about the loan in he had taken in the UK, he agreed that they sell plot number 374 to offset the said loan. That is when they instructed Mr. Busieka advocate to draft the agreement of 18th December, 2008 in respect to plot number 374.
48. According to Dw 1, the Plaintiff, after signing the agreement before Mr. Busieka advocate came back to Kenya without his knowledge. It was the evidence of Dw 1 that the Plaintiff then went to see Busieka advocate and had the plot number in the agreement changed from Plot 374 to 992 without his knowledge.
49. The Defendant finalized his evidence in chief by stating that he was willing to sell plot number 992 and refund to the Plaintiff the money that he sent to him, that is Kshs.9,000,000/-.
50. In cross-examination, Dw 1 stated that he had averred in his pleadings that he was willing to refund to the Plaintiff Kshs.4.5 Million being half of the 9,000,000 that was sent to him. However, he clarified and stated that he was willing to refund to the plaintiff Ksh.9,000,000.
51. According to Dw 1, he purchased plot numbers 992 and 374 at the same time. It was his evidence that he started receiving money from the Plaintiff from the year 2003 although he acquired the plots in the year 2001.
52. Dw 1 stated that he included the Plaintiff's name as a joint proprietor in respect to plot number 992 because that is what was agreed upon on phone. According to Dw 1, the Plaintiff informed him

- that he could not give him the proceeds of the sale of the plot because he was to repay the loans he had taken from the UK.
- 53.Dw 1 stated that the plot he was to sell to Mr. Smith was plot number 992. According to Dw 1, he signed the agreement that was produced as PEXB5 although some of the terms in the agreement were later on changed by Mr. Busieka and the Plaintiff in his absence.
- 54.Dw 1 stated that the only complaint he had in respect to PEXB5 is the substitution of plot NO. "374" with plot no.992 by Mr. Busieka advocate.
- 55.It was the evidence of Dw 1 that he invested the money that was sent to him by the Plaintiff on both plots. According to him, he used the money to clear plot number 374 and built a wall around it.
- 56.Dw 1 stated that he did not know how much he spent to develop plot number 992. He concluded his evidence by stating that he is ready to sell both plots and have the proceeds shared equally.
- 57.In re-examination, Dw 1 stated that the agreement drafted by Busieka advocate was for plot number 374. At that time, he was willing to have plot number 374 sold to repay the Plaintiff's loan and that is why the loan schedule was attached on that particular agreement.

Submissions

- 58.The Plaintiff's counsel submitted that the Defendant received money from the Plaintiff in the year 2004 and not before the year 2001. By the time the property is purported to have been jointly registered, it was submitted, the Defendant had not received any money from the Plaintiff; that the Defendant admitted in his Defence that the discussions between the two were in the year 2004 and not in 2001 and that he changed what he had pleaded in his suit when he was confronted with the truth.
- 59.The Plaintiff's counsel submitted that Mr. Busieka advocate informed the court that the agreement he drew was in respect to plot number 992 and not 374 because it was the only developed and registered plot and that the parties entered into the agreement to solve a disagreement over the developed land that he had visited.
- 60.The Defendant, it was submitted, should not be allowed to benefit so immensely from a project he contributed nothing. Counsel submitted that this court should find that a valid agreement was executed by the parties which changed the joint ownership status.
- 61.The Defendant's counsel submitted that the Plaintiff's allegations that the Defendant defrauded were not proved to the required standards; that both parties breached the agreement of 18th December, 2008 in terms of item g. According to counsel, the Defendant breached the agreement by giving up the title deed for plot number 992 as security for a loan he borrowed without the Plaintiff's consent while the Plaintiff converted the said property with a loan which was to be redeemed upon the sale of the plot.
- 62.Counsel finally submitted that the amended agreement was not enforceable because it was not signed by both parties. The Defendant's counsel submitted that it was not right for the Plaintiff to claim that the Defendant should service half of his loan yet he was not a party to the transaction.

Analysis and findings

- 63.The admitted facts by the Defendant, Mr. Mohamed Farid Jalil, in his pleadings and evidence is that he received Ksh.9,000,000 from the Plaintiff who is his uncle. According to the Defendant, the said amount was meant to develop plot numbers Kilifi/Jimba/992 and 374.
- 64.It was his evidence that indeed he used the said money to clear the two properties, have the plans approved, prepare the designs of the cottages that were to be put up on the said plots and even commenced the actual construction on plot number 992.
- 65.In view of the fact that the project of putting up cottages on plot number 992 flopped after the Plaintiff stopped sending money, it is the Defendant's position that he is willing to have the suit properties, that is Kilifi/Jimba/ 992 and 374 sold and then refund the Plaintiff the Kshs.9,000,000 and keep the balance thereof.
- 66.The Plaintiff's position is that having borrowed money from his bank to develop the suit property, the Defendant should pay half of the borrowed amount and if he fails to do so, then he should automatically renounce his interest in the two properties. In the alternative, the Plaintiff is praying

- that the suit properties should be sold and the proceeds thereof shared between the two of them equally.
67. The agreement between the Plaintiff and the Defendant to purchase a plot for the purpose of building residential buildings and to share the profits (or losses) thereof was purely on trust and was made orally.
 68. According to a letter that was produced as PEXB3, a joint account was opened with Standard Chartered Bank in which the Plaintiff is said to have remitted some money for the said project.
 69. According to the Defendant, he had already purchased plot number 992 by the time the Plaintiff started remitting the money in January 2004. The money, according to him, was used to clear the land, prepare the designs of the cottages and to commence the project. It was the Defendant's evidence that he also used his own money in the process and that the project stopped when the plaintiff stopped sending any more money.
 70. Other than the Ksh.9,000,000 that the Plaintiff deposited in the Standard Chartered Bank account, no evidence was placed before me to show that the Plaintiff sent any more money to the Defendant. On the other hand, the Defendant did not produce any evidence to show how much of his own money was used in the purchase of plot number 992 or 374 and the construction of the existing buildings on plots number 992 or 374. In a nutshell, none of the parties placed before this court documentary evidence to show their actual contribution in the buying of plots 992 and 374 and the developments on the said plots. In fact, no valuation report was produced to show the value of the land and the developments thereon.
 71. The agreement that was entered into by the parties on 18th December, 2008 does not help matters because initially it was only in respect of plot number 374 alone.
 72. According to the initial agreement, the Defendant agreed to sell plot number 374 and the sale proceeds to be applied towards liquidating an outstanding loan facility owned to the Plaintiff's bankers. The schedule of the loan amounting to 455,100.42 Sterling pounds as at 31st December, 2015 was annexed on the said agreement. It was the evidence of the Defendant that he had no problem with that arrangement as at that time.
 73. However, it was the Plaintiff's evidence that after a while, he realised that they had indicated the wrong parcel number in the agreement. According to him, the land that should be sold and the proceeds applied to offset his loan of 455,100 Sterling Pounds(approximately Ksh.54,600,000) was plot number 992 and 374 and not plot number 374 alone. It was his evidence that if the agreement is read as a whole, it is clear that it is plot number 992 which was to be sold considering that it was registered and developed unlike plot number 374. This evidence was supported by the testimony of Mr. Busieka advocate. Consequently, the Plaintiff, in the absence of the Defendant, caused Mr. Busieka advocate to amend the agreement of 18th December, 2008 at a later date to include plot number 992.
 74. The amendments of the agreement of 18th December, 2008 by Mr. Busieka at the behest of the Plaintiff was improper. It may be true, as stated by Mr. Busieka advocate, that the Defendant authorized him on phone to effect those changes, a claim which the Defendant denied. However, it is trite law that changes to a written agreement can only be amended by the parties who signed it and not by any other person or by one party. The changes which were made by Mr. Busieka in the agreement of 18th December 2008 introducing plot number 992 in the agreement are therefore inconsequential.
 75. I have been asked by the Plaintiff to read the whole agreement and come to the conclusion that indeed the plot that was to be sold to offset the Plaintiff's loan was plot number 992 and not 374. According to the Plaintiff and Mr. Busieka advocate, the agreement refers to a developed plot which was not to be encumbered by any party.
 76. It was the evidence of the Plaintiff and Mr. Busieka that the only plot that was developed and which could be encumbered because it is registered is plot number 992 and not 374.
 77. That may be true. However, it is trite law that courts cannot re-write contracts for parties and the court cannot start speculating about the intention of the parties to the contract.
 78. In any event, no evidence was placed before me to show that plot number 374 was not developed at all or what the word "development" entailed for the purpose of that agreement. As to whether an unregistered plot can or cannot be encumbered, that can only be left to conjecture because the word "encumbered" has no hard and fast definition. The Black's law dictionary, 9th edition, has

defined the word “encumbrance” as follows:-

“A claim or liability that is attached to property or some other right and that may lessen its value, such as a lien or mortgage”.

79. From the above definition, it follows that a property may be encumbered by way of a lien or mortgage and it need not be registered. An unregistered piece of land can also be owned jointly depending on the arrangement that the two parties have parties in respect to such a property.
80. This court cannot therefore speculate that because the agreement stated that none of the parties shall subject the property to any encumbrances, or that the plot in question was jointly owned and developed, then that should have meant that the property in question was certainly plot number 992 and not 374.
81. The only conclusion that I can arrive at for the purposes of enforcing the agreement of 18th December, 2008 is that the property that should be sold to off-set the Plaintiff’s loan as per the schedule attached on the agreement is Kilifi/Jimba/374 and not Kilifi/Jimba/ 992.
82. Parcel of land known as Kilifi/Jimba/992 was jointly registered on 27th July, 2001. The circumstances under which the property was jointly registered in the year 2001 even before the Plaintiff started remitting money to the Defendant is unknown to this court.
83. However, it is not in dispute that the property has been partly developed by both the Plaintiff and the Defendant. I say both because although the Plaintiff proved that he sent to the Defendant Ksh.9,000,000 for that purpose, the Defendant showed that he was in the business of deep sea fishing and was not a pauper.
84. The Defendant even managed to acquire Kilifi/Jimba/992 and had it registered in their joint names before the Plaintiff started remitting money to him from the UK. The Defendant must have invested his time and resources in the purchase and clearing of Kilifi/Jimba/992 and 374 and in the development of the said plots.
85. None of the parties produced before this court a valuation report to show the value of plot number 992 or 374. In fact, none of the parties produced any evidence to show their actual monetary contribution in the purchase of plot number 992 and 374 and the developments thereon.
86. The Plaintiff did not adduce evidence to show that the money he purports to have acquired as a loan from his bank in the UK is the money that was used to purchase or develop the two plots. Indeed, the Plaintiff never discussed the issue of the loan with the Defendant during the purchase and development of the plots.
87. In the circumstances, and considering that the parties have decided to part ways, the only just order to make is to have Kilifi/Jimba/992 sold to a third party and the proceeds thereof shared equally amongst them.
88. The Defendant had already agreed vide the agreement dated 18th December, 2008 to have Kilifi/Jimba/374 sold and the proceeds used to offset the Plaintiffs loan and for the balance to be shared equally. That is the agreement that this court shall enforce.
89. None of the parties has succeeded or failed in the two consolidated matters. Indeed, none of the parties has proved that the other party is the one in breach of the contract that they had. In the circumstances, I make the following orders;
- a. **The Plaintiff, Abdul Jalil Yafai, to sell parcel of land number Kilifi/Jimba/374 and to utilize the proceeds in liquidating the loan facility owed to his bankers and any balance of the said proceeds to be shared equally between him and the Defendant.**
 - b. **The Plaintiff and the Defendant to jointly sell land known as Kilifi Jimba/992 after conducting a valuation and the proceeds of the sale to be shared equally between themselves.**
 - c. **The costs of valuing and selling of Kilifi Jimba/992 to be shared equally by both parties.**
 - d. **Each party to bear his own costs.**

Dated and delivered in Malindi this 12th day of **September**, 2014.

O. A. Angote

Judge

