



IN THE COURT OF APPEAL

AT MALINDI

(CORAM: OKWENGU, MAKHANDIA & SICHALE, J.J.A)

CIVIL APPEAL NO. 32 OF 2013

BETWEEN

STEPHEN MKARE MULEWA.....APPELLANT

AND

LINDA NEWMAN.....RESPONDENT

*(Being an appeal from the judgment and decree of the of the High Court of Kenya at Malindi (Angote, J.)
dated 19th April, 2013*

In

H.C. C.C. No. 21 of 2011)

JUDGMENT OF THE COURT

[1] The proceedings leading to this appeal were commenced by **Linda Newman**, who is now the respondent, through a plaint dated 18th March 2011 filed in the High Court at Malindi and amended on 19th September 2011. The suit was against **Stephen Mkare Mulewa**, who is now the appellant. The reliefs sought by the appellant included *inter alia*: a declaration that she was solely entitled to ownership and possession of a property known as sub-division number 815 (original No. 814/2) registered as CR. 27980/1 (hereinafter “**the suit property**”); a declaration that the appellant was holding the suit property in trust for her; an order for a mandatory injunction directing the appellant to transfer the suit property to her; and a permanent injunction restraining the appellant from interfering with her quiet enjoyment and occupation of the suit property.

[2] According to her amended plaint, the respondent who is a British national, while on a visit to Kenya in 1998 met and got involved in an intimate relationship with the appellant. This relationship lasted for a number of years, during which period the respondent visited the country severally. In July 2003 the respondent being desirous of purchasing a property in Kenya, opened two joint bank accounts with the appellant at Barclays Bank Malindi. On diverse dates between August 2003 and July 2007, the respondent identified a suitable property, transferred a total of sterling pounds 70,600 from her accounts in the United Kingdom, to the joint accounts in Kenya to which the appellant had direct access. Within the same period, the respondent also remitted a total of sterling pounds 18,926 to the appellant through Western Union. According to the respondent the money remitted to the joint accounts and to the

appellant directly, was for purchasing and developing the suit property.

[3] The development of the suit property commenced in the year 2003. In 2007 the respondent took an early retirement package from her employment in the United Kingdom. She got a lump sum of US \$21,916 as part of her retirement benefit which money she also channeled towards the development of the suit property. In 2009, having run out of funds for her project she borrowed Sterling pounds 5,000 from her bank in the United Kingdom. This was in addition to a friendly loan of Sterling pounds 7,000 that she had obtained from two friends.

[4] By the year 2010, her relationship with respondent had completely deteriorated, and she became suspicious when the appellant failed to show her the documents for the suit property, she made inquiries and discovered that the appellant had registered the suit property in his sole name. Realizing that the appellant had falsely induced and misrepresented the nature of the purchase transaction and fraudulently registered the suit property in his name, the respondent filed a suit seeking the aforementioned reliefs.

[5] In his defence filed on 18th April 2011, the appellant admitted his intimate relationship with the respondent, and the opening of the joint accounts, but denied that the amounts received from the respondent were for the purposes of purchasing the suit property, or that there was any agreement between him and the respondent for the purchase or development of suit property. The appellant maintained that all the monies received by him from the respondent were a gift to him owing to their relationship. An attempt by the appellant to file another defence was unsuccessful when the court expunged the latter defence from the record holding that the same had been irregularly filed.

[6] In his judgment, the learned Judge (*Angote, J.*) who heard the respondent's suit found in favour of the respondent, and issued the reliefs as sought. Being dissatisfied with the judgment, the appellant lodged an appeal before this Court. In his memorandum of appeal the appellant has raised nineteen (19) grounds. In summary the appellant is aggrieved that the learned Judge caused him prejudice and injustice, by failing to comply with rules of procedure such as **Order 11** of the Civil Procedure Rules; disregarding his defence filed on 19th October 2011; wrongly invoking the principle of resulting trust; failing to note that there was no agreement for purchase of the suit property or any contractual engagement between the respondent, vendor or the appellant; ignoring the evidence regarding the appellant's investments in the development of the suit property; and failing to appreciate the appellant's evidence that all the money sent to him was a gift.

[7] Pursuant to directions given by the court, parties filed written submissions upon which this court has to determine the appeal. In his written submissions dated 25th November, 2013, the appellant who was in person consolidated some of his grounds. The highlight of the submissions were as follows: that the learned Judge contravened **Article 159(d)** of the Constitution by rejecting the appellant's latter defence filed on 19th October 2011 purely on technicality, on the ground that it was not entitled 'Amended defence'; that the defence which was disallowed raised concrete and elaborate issues and the failure to serve the respondent with that defence could easily have been cured; that **Order 11** of the Civil Procedure Rules was not complied with as issues for determination were not agreed upon, nor was a pre-trial conference held to address the preliminary issues.

[8] Further the appellant asserted that his defence was not appropriately considered by the learned Judge nor did the Judge address the issue of the gift as a substantive principle, which defeated the presumption of a resulting trust in regard to the monies remitted to the appellant by the respondent; that the monies remitted to him were a gift in consideration for love and affection, and that there was sufficient evidence that he had other sources of income from which he could have purchased and developed the suit property; that there was a presumption of marriage arising from the intimate relationship during which the appellant had invested cash, time, energy and other resources in the relationship for a period of ten years; and that the suit property having been acquired during this period, the same should be treated as matrimonial property, entitling the appellant to a portion thereof as part of his contribution towards acquisition and development.

[9] The respondent filed her written submissions through her advocates **Chepkwony & Associates**

Advocates in which the Court was urged to dismiss the appeal. It was contended that despite having been given adequate time, the appellant failed to file his list of documents or statements; nor did the appellant seek to stay the proceedings. That notwithstanding the fact that the appellant's statement of defence dated 18th April, 2011 was filed out of time after interlocutory judgment had been entered, the court bent backwards and allowed this defence in the interest of justice without the appellant having applied to set aside the interlocutory judgment; that the latter defence dated 18th October 2011, was properly struck out as the same was not served on the respondent nor did it comply with order **8 Rule 7** of the Civil Procedure Rules;

[10] It was further argued that the evidence adduced by the respondent was sufficient to prove a resulting trust; that in any case, the appellant did not dispute receiving the money; that the respondent is the sole owner of the suit property as all the money that was paid as consideration for the suit property was from the respondent and the appellant contributed nothing; that the law provides for remedies for unjust enrichment or unjust benefit to prevent a person from retaining money or benefit, obtained improperly at the expense of another; that there was fraud and breach of trust and therefore **section 3(3)** of the Law of Contract Act is excluded by virtue of **section 3(4)** of the same Act which recognizes a resulting, implied or constructive trust; that the relief of restitution is available to the respondent under **section 13(7)** of the Environment and Land Court Act 2011 and finally, that the issue of matrimonial property does not arise as the issue was neither pleaded nor canvassed in the trial court. Several authorities were cited in support of the respondent's submissions which authorities we have considered but do not find it necessary to reproduce herein.

[11] In reply to the respondent's submissions, the appellant relying on ***Shah v Mbogo [1968] EA 93*** and ***Pithon Waweru v Thuka Mugiria [1983] eKLR***, reiterated his earlier submissions urging the court to administer justice, take into account the prejudice and injustice likely to arise to the appellant, and not to punish him for inadvertence or mistakes on the part of his advocate. The appellant asserted that the respondent's claim against him was an afterthought, a suit borne out of anger and intended simply to settle scores after falling out with him, that the appellant having raised the defence that the monies forwarded to him were a gift the onus was on the respondent to establish otherwise.

[12] This being a first appeal, this court is under an obligation to reconsider and evaluate the evidence and come to our own conclusion bearing in mind that the trial Judge had the advantage of seeing and assessing the demeanour of the witnesses (***Selle & Another v Associated Motor Boats Company Limited [1968] EA 123***). We are also alive to the fact that as an appellate court, we ought to pay homage to the findings of the trial court unless such findings are based on no evidence or misapprehension of the evidence or the trial Judge is shown to have acted on wrong principles in reaching the findings (***Jabane v Olenja [1986] KLR 664***).

[13] With the above in mind, we have reconsidered and evaluated the evidence which was adduced before the trial Judge. It is not disputed that the respondent remitted substantial amounts of money directly to the appellant through Western Union, and indirectly through a local bank to two accounts to which the appellant had full access. It is also not in dispute that the appellant and the respondent were in an intimate relationship during the period the monies were forwarded. Nor is it disputed that the appellant acquired the suit property and commenced developing the same during the same period. It is further evident that upon purchase of the suit property, the appellant had the suit property registered in his name. The issue is whether the monies remitted to the appellant were an absolute gift from the respondent to the appellant to use as he pleased, or whether the monies were for the specific purpose of purchase and development of the suit property, and if so whether a resulting trust arises in favour of the respondent in regard to the suit property.

[14] 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. In this regard, the following holding from ***Gissing v Gissing [1970] 2 All ER 780***, is instructive:

"...where a beneficial interest in land is claimed by a person, whether spouse or stranger, in whom the land is not vested a common intention has to be inferred from the

parties' conduct as to how the beneficial interest is to be held. The relevant intention is that which a reasonable person would draw from the parties' words or conduct. The court must determine what inferences can reasonably be drawn in each case."

Therefore, in this case, the answer as to whether the said monies were remitted as a gift or in trust for the respondent can only be deduced from the circumstances of the case and the conduct of the appellant and the respondent.

[15] In her evidence the respondent maintained that she opened a joint account with the appellant to which she transferred money with the intention that the appellant whom she trusted and loved would purchase the suit property and develop the same as she intended to settle permanently in Kenya. While the appellant admitted in his defence that the respondent did send monies to him, he maintained that the monies were in the form of gifts for his personal use and holiday expenses, and that there was no agreement for purchase of any land. The money forwarded to the appellant by the respondent was a colossal amount adding up to a total of 70,600 Sterling pounds plus another 18,926 Sterling pounds. The respondent testified that in order to send the money to the appellant, she utilized all her savings, remortgaged her house and obtained a loan from her bankers. In addition, the respondent stated that she even took part of her retirement benefits and borrowed from friends to further the development. The respondent produced appropriate documents to confirm the transfer of the money from her UK account, the remortgaging of her house, the obtaining of a loan and the receipt of her retirement benefit. As was stated by **Ojwang, J. (as he then was)** in ***Hamm Helmut v Farida Riziki [2011] eKLR:***

"such sums of money are quite obviously not a freely available resource and must be recognized to be hard earned."

[16] 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. Further, the fact that the account to which the respondent remitted money was in the parties' joint name and not in the name of the appellant only connotes an intention on the part of the respondent to exercise some control over the funds. This was not consistent with an intention to gift the monies to the appellant. The money remitted by the respondent could only have been for a serious purpose, and not just leisure or to please her lover.

[17] We are satisfied that the respondent painstakingly raised this substantial amount of money for the purpose of purchase and development of the suit property with the intention of settling in Kenya. The appellant purchased the suit property and had it registered in his name shortly after the respondent remitted Sterling pounds 11,000 on 19th August, 2003 and Sterling pounds 18,000 on 1st September 2003. He has admitted that the development of the suit property, commenced and continued during the time of his relationship with the respondent. Although, the appellant contended that he bought the suit property from his own resources, the appellant did not produce any evidence in support of his alleged income from employment or business other than his oral assertions. Nor did the appellant adduce any evidence to show that he remitted any funds to the joint account or that he held any other bank account on his own.

[18] In the circumstances, we come to the conclusion that the appellant bought the suit property from the monies remitted to him by the respondent. Although he registered the suit property in his own name, the beneficial owner of the suit property was actually the respondent who not only advanced the money for purchasing the suit property but also the money for developing the property. In ***Halsbury's Laws of England 5th Edition Volume 72*** at paragraph 280 it is stated:

"Subject to any express declaration of trust where property is purchased in one party's name but both parties contribute to the purchase price, the other party acquires an interest under a resulting trust proportionate to his or her contribution to the purchase price..."

[19] In this case the respondent solely contributed the money for purchasing the suit property, therefore

the registration of the suit property in the appellant's name gave rise to a resulting trust in favour of the respondent.

[20] Further, the appellant's assertion that he had acquired an interest in the suit property as there was a presumption of marriage between him and the respondent fails as he did not provide any facts upon which such a presumption could be based. His submission before us that the suit property is a matrimonial property fails as this is an afterthought, such an issue not having been pleaded, nor raised or canvassed in the trial court.

[21] The appellant also took issue with the order of the High Court rejecting the latter defence filed on 19th October, 2011. In this regard, we note that the appellant did not lodge any specific appeal against the order made by the court on 23rd November, 2012 that the valid defence which was on record was the one dated 18th April, 2011. Nor can the appellant rightfully complain about failure to comply with the pre-trial procedures provided under **Order 11** of the Civil Procedure Rules 2010. This is because it is evident from the record of appeal that the suit was adjourned several times to enable the parties comply with the pre-trial procedures. For instance, on the 19th March, 2012 when the hearing of the suit first commenced, the hearing was adjourned the court making the following orders:

“Let witness be stood down so that Mr. Muoko can take instructions in mortgage documents and defendant's statements. Also the plaintiff to serve additional list of documents. Hearing on 4th June 2012. All witness statements and documents to be filed and served not later than 30th April, 2012”

Mr. Muoko was the appellant's then counsel. The record of appeal reflects that thereafter despite several adjournments no documents were filed by the appellant, nor did the appellant raise any objection to the hearing of the suit on the ground that the pre-trial procedures were yet to be finalized.

[22] The upshot of the above is that having reconsidered and appraised the evidence, and the law, we come to the conclusion that the learned Judge properly addressed and applied the law and was right in upholding the respondent's suit and granting the reliefs claimed. The order for costs in favour of the respondent was also in order as costs follow the event. Accordingly, we find no merit in this appeal and do dismiss the appeal with costs.

Dated and delivered at Malindi this 30th day of October, 2014

H.M. OKWENGU

JUDGE OF APPEAL

ASIKE-MAKHANDIA

JUDGE OF APPEAL

F.SICHALE

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR