



**Kimemia v Mtwana (Environment and Land Appeal 8 of 2017)
[2023] KEELC 18296 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18296 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 8 OF 2017**

**NA MATHEKA, J
JUNE 21, 2023**

BETWEEN

SAMUEL NJUGUNA KIMEMIA APPLICANT

AND

ROSE MGENI MTWANA RESPONDENT

RULING

1. On the April 30, 2012 judgement was delivered by Justice RM Mwongo in this matter in which he analysed and determined the following issues;
 1. Whether Kimemia and Rose were husband and wife at the time of purchase
 2. Whether Rose was to hold, or holds, a half share in the suit property on trust for Kimemia.
 3. Whether Rose misrepresented to Kimemia that she had to be included in the purchase as a local person because Kimemia was a non-local and not from that area.
 4. Whether Kimemia is entitled to an account of rent collected for the suit property from 2009
 5. Whether Kimemia is entitled to an injunction restraining Rose from dealing with the Suit Property.
 6. Whether Rose's name should be cancelled from the property owner's records.
2. As to whether Kimemia and Rose were husband and wife at the time of purchase of the suit property. The court found that Rose was not, by any definition, the wife of Kimemia, although they were, at some time, intimate lovers. The court also found that no trust has been proved, That the inclusion of Rose's name as a purchaser was purely gratuitous on the part of Kimemia. Having done the act, he cannot now reverse the proffered gift and obtain an injunction to prevent her from enjoying the same. Similarly, having proffered the gift, Kimemia cannot now obtain a cancellation by court of Rose's



name from the landlord's records in absence of a contractual pre-condition, except with her consent. As a joint owner, she instantly entered, and is now in, the position of proprietor of that which was proffered her.

3. As to whether Rose misrepresented to Kimemia that she had to be included in the purchase as a local person because Kimemia was not from that area, the court did not see on record any evidence led at all by the Plaintiff to prove this point. Indeed, from the record of proceedings, that there was no pre-purchase agreement or communications, either between the parties or with the vendor, from which a misrepresentation could be construed. Nor is it alleged, or shown, that there was misrepresentation by conduct, the issue was dismissed without the need for further consideration.
4. The final issue was whether Kimemia is entitled to an account of rent collected from 2009. The court held that Rose and Kimemia jointly hold the suit property in undivided, indistinct shares. On account of that, and the suit property being for letting, as a business, it is incumbent that both parties are clearly in the picture of what goes on, what comes in and goes out in form of revenues and expenses. Such joint ownership places a mutual right and expectation of transparency upon each party to account to the other, in the same way in which an unarticulated partnership creates a presumption of fair dealing. The final orders of the court were as follows;

“On this point, therefore, I find in favour of Kimemia. I would order that Rose shall give to Kimemia an account of all income received and true expenses reasonably paid out for the period from 2009 to date. Rent is a right to each joint owner of the suit property, and Kimemia is entitled to a share thereof.

In this case, I will order the parties to agree on the extent of each party's share in the rent earned by the property. Failing agreement, I shall allow the parties to make submissions before me on the extent of their respective percentage interest in the suit property including detailed submissions on the rental income and expenses”.

5. In this matter the parties were to agree on the share on rent and the property but they have failed to do so. the Plaintiff filed submissions on the October 4, 2012 and the Defendant did the same on the October 30, 2012. Parties appeared in court on the October 30, 2012 and a consent was recorded on valuation to ascertain the rental income and the value of the property. The valuation report was filed in court on the December 14, 2012. This court is now asked to make a ruling on each parties share of the property and secondly rent collected and each parties share to the rental income.
6. The Plaintiff submitted that they obtained a loan of Kshs. 650,000.00 to purchase the suit property and the sum of Kshs 535,000.00 was used towards the purchase of the property. The balance of Kshs 115,000.00 was used to renovate the house. He used a total of Kshs 292,918 for the renovation by also withdrawing all his shares with Mwalimu Co-operative Society. Further, he solely contributed to the purchase price of Kshs 535,000.00. The Defendant on the other hand alleges that she contributed Kshs. 100,000.00. No documentary evidence has been tendered in court. Therefore, urged the court to award her at most a share of 5% while the Plaintiff ought to be awarded the share of 95%. On Rent received and reasonable expenses paid out from 2009 to date by the Defendant vide a letter dated June 18, 2012, the Defendant provided an alleged statement of account. The receipts dates are altered and no explanation has been given for the alterations. Whereas the Defendant states that the rent collected is Kshs 132,300.00, the Plaintiff has established that the rent collected is Kshs 291,000.00
7. The Defendant submitted that the suit property is jointly owned by the parties herein as indicated in Plaintiff's exhibit number 1 and as correctly held by the court in the judgment delivered on the April 30, 2012. In this regard is that since the court held that the suit property is jointly owned by the



parties herein, it is only reasonable and just that the property be shared 50:50 (equally) between the parties herein. on the Rent received and reasonable expenses paid out from 2009 to date by Defendant submitted that she started collecting rent solely after the July 19, 2009. That vide a letter dated June 18, 2012 addressed to the Plaintiff's Advocates and copied to the court, they gave a detailed breakdown of the rental income collected by the Defendant from tenants in the suit house from August 2009. On the rent the total amount collected by the Defendant since August 2009 is Kshs 160,265.00 less than the Kshs 27,965.00 being expenses of renovations which were offset as rent which comes to Kshs 132,300.00. The expenses of Kshs 27,965.00 deducted from the total rent received by the Defendant since August 2009 are proved by the Defendant's exhibit number 2 which was an agreement dated May 15, 2009 between the Defendant and Geoffrey Mkaya a tenant in the suit premises in 2009.

8. This court has considered the submissions therein. This court having come in at the tail end of this matter did not have an opportunity to hear the witnesses nor write the judgement and will go by the judgement of Justice Mwangi and his findings. On the issue of ownership of the suit premises the court found that nothing in the evidence suggests a predisposition of a trust that necessitates a presumption of one. In view of the foregoing, the court was unable to find and hold that Rose was holding any shares, in the property, or is holding any part of the property as a trustee for Kimemia. That indeed, no shares exist, the parties are joint and inseparable owners of the suit property. No shares have been distinguished in the agreement and none are distinguishable in interpretation.
9. On the issue of rent collected the court found that Rose's approach to the rents received and monies spent, was unfortunately casual. She could not say for sure how much she had been paid since she started collecting rent. She could not say how many tenants there were at various times, and she kept no records. She was asked to present a statement of accounts which she did. Whereas the Defendant states that the rent collected is Kshs 132,300.00, the Plaintiff states that the rent collected is Kshs 291,000.00. No evidence has been adduced to controvert the Defendant's evidence and the court will go by her statement of account. I find that the rent collected and in contention is Kshs 132,300.00. The court held in this matter that Rose and Kimemia jointly hold the suit property in undivided, indistinct shares. There was no trust established. In the circumstances, I find that the Plaintiff and the Defendant are to share the rent and suit property 50:50 (equally).

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 21ST JUNE 2023.

N.A. MATHEKA

JUDGE

