



SAMUEL NJUGUNA KIMEMIA.....APPLICANT

VERSUS

ROSE MGENI MTWANARESPONDENT

JUDGMENT

1. Every judge on his first posting in Mombasa, is instantly confronted by an unnerving legal situation unknown in all his years of learning. She or he has been schooled in the Common Law traditions and land tenure systems that declared the principle:

“cujus est solem ejus et usque ad coelum et ad inferos”

(to whomsoever the soil belongs, he owns to the sky and the depths below to an indefinite extent)

Upon this principle, the country’s substantive land law and registration systems are based. The jurist in Mombasa is, however, ambushed by a land system or phenomenon in the Coast known as:

“Ownership of house without land”

Judicial notice has long been taken of this strange system in the Coast, and there is substantial case law on it. But scholarship and legislation have lagged behind. This case is about a dispute relating to a property under the “house without land” system.

Relationship Background

2. The Plaintiff, Samuel Kimemia was a teacher at Saint Georges High School, Kaloleni, from 1995 up to the time this suit was heard. Around the year 2000, he met the Defendant, Rose Mtwana, a Matron at Coast General Hospital. They struck a relationship – whether boyfriend and girlfriend, or husband and wife – is not clear. She was staying in Hamisi and he, at Magongo. In any event, they appear to have cohabited intermittently until about 18th July, 2009 when they had a major altercation in his house in the school compound. Kimemia’s wife had visited and was staying in his house, when Rose also visited. In the throes of surprise, betrayal and envy, a scuffle thereupon ensued and the scorned Rose suffered injuries which she reported to the police. A formal complaint was filed and a prosecution commenced. Kimemia pleaded guilty to assault and was fined Kshs. 2,000/= . The evidence is in the proceedings in Criminal case Number 270 of 2009 produced as DExb 1. The facts of the criminal charge are:

“Accused person is a teacher at St. Georges High School where he resides. Complainant is a girlfriend. On 19th July, 2009, the complainant visited the accused and found wife to accused present. There was a disagreement...Accused person assaulted complainant.....”

3. Rose alleges that she and Kimemia were married under Kikuyu Customary Law and that there was

a child, one I.K, born of the union. However, no evidence was produced of the dowry paid, or anything else to show existence of the said marriage. Nor were documents evidencing the birth or existence of the said child produced at trial. Since the altercation at Kimemia's house in July 2009, the parties have not had a good relationship. This dispute arose soon after that.

The foregoing paragraphs summarise the parties' relationship from the perspective of family.

Purchase of Suit Property

4. On 5th July 2007, Kimemia and Rose entered into a sale agreement to purchase a **“House without land on Plot Number 350 MN, Bokole, Magongo.”** The agreement was produced as PExb 1. The vendor was one Amina Mohamed and the purchasers are indicated as Kimemia **“jointly with Rose Hereinafter referred to as the purchaser of one part.”** The house was a **ten roomed Swahili house without land** and the consideration was Kshs. 535,000/= only. The conditions of sale included full payment of the purchase price on signing the agreement, and transfer of all documents to the purchaser.

5. In her statement of defence, Rose asserts that she and Kimemia were living together as husband and wife at the time of purchase of the property. She also alleges that she contributed Kshs. 100,000/= to the purchase and also to renovation of the property, and thus, that the suit property was jointly purchased by them. Leaving the question of marriage aside for a while, the evidence availed indisputably shows that the purchase price for the suit property was raised solely by Kimemia. He produced satisfactory evidence showing he had taken a loan from Kenya Commercial Bank, and made the payment for the property. PEXB 2 is a loan application for Kshs. 647,881.00, duly signed by him on 2nd April, 2007; PExb 3 and PExb 4 are Kenya Commercial Bank cheque issue voucher and copy of a Banker's cheque, respectively, both dated 5th July, 2007. They are for Kshs. 535,000 – the purchase price – drawn in favour of Amina Mohamed, the seller. PExb 4 is a copy of Kimemia's salary slip showing the monthly loan deductions of Kshs. 16,900/=, and PExb 7 is his Kenya Commercial Bank statement, which shows his regular salary after loan deductions.

Renovation to Suit Property

6. Kimemia (PW1) gave evidence that from the balance of the loan money, he purchased materials to repair the suit property which was hardly habitable. He said he spent about Kshs. 292,918/- for materials and labour. He provided a bundle of receipts as PEXB 7, but for the labour component, Kimemia provided a schedule prepared by himself but no receipts. As far as he was concerned, Rose did not spend any money on repairs and renovations.

On her part, Rose (DW1) gave evidence that in 2008 when they started repairs to the houses, she led the renovations, and whenever materials would run out, she would purchase more and use them in the renovations. In particular, she produced DEXb 2 an agreement dated 15th May, 2009 between a builder and one of the tenants Geoffrey Mkaya, in which he paid Kshs. 27,965/- to refurbish the ceiling. The amount was to be set-off from his monthly rent payable to the owners as guaranteed by Rose. What is very clear from all the evidence adduced is that although both parties participated in the renovations, Kimemia bore the lion's share of the financial burden of renovations.

The issues

7. No issues were formulated by the parties prior to trial. In their written submissions, however, each party has identified issues, of which two are common. They are as follows:

a) Whether Kimemia and Rose were husband and wife at the time of purchase

b) Whether Rose was to hold, or holds, a half share in the suit property on trust for Kimemia.

From an analysis of the pleadings and the other issues which were framed but not agreed, I find the other

issues to be:

c) 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.

d) Whether Kimemia is entitled to an account of rent collected for the suit property from 2009

e) Whether Kimemia is entitled to an injunction restraining Rose from dealing with the Suit Property.

f) Whether Rose's name should be cancelled from the property owner's records.

I will now deal with each of the issues.

Issue a: Whether Kimemia and Rose were husband and wife at the time of purchase of the suit property

8. In his plaint, Kimemia alleges only that the two were "involved in a relationship." In evidence in chief, he said she was a "friend", who "never spent more than a day with me in a week", and "we never cohabited." In cross-examination, he was unable to say for how long they had been friends. However, in his evidence in cross-examination of how Rose barged into his house; rushed to the bedroom and violently threw his wife out of bed; how his wife sought refuge in a neighbour's house; to me discloses the fury of a jilted lover on finding another woman in "her" man's bed.

When confronted with the allegation of fathering a son with Rose, he did not violently object. In fact, he was hardly surprised and wondered where the child was, and if the child had died at birth, why he "**was not invited to the funeral as he had no opportunity to burry (sic) my child.**" This appears to me the stance of a person who had been engaged in intimate relations in which he expected offspring, and so is flummoxed when an offspring is alleged but not presented.

9. On her part, Rose's evidence is that she was married to Kimemia under customary law. She says she went to Kamwangi in Thika, with Kimemia where she met his parents. They did not travel with anyone else. A goat or cow were, she alleges slaughtered in her welcome. She, however, said that no bride price was paid and she could not remember the dates of this event. She says he fathered her son I.K who was born in 2008. She, however did not produce documents evidencing the birth of the child, because, she said that issue was not on trial.

DW2, Wycliffe Akute, a long-time tenant at the Suit Property said that Kimemia and Rose came to the suit property at some point, and were introduced as husband and wife. He said that Kimemia told the tenants to be paying rent to Rose, his wife. That is what Wycliff had been doing since then.

10. From the evidence, I do not get the impression that Kimemia and Rose were married. I see a close relationship, a companionship of intimacy or occasional consort, deep enough to draw out the jealousy of a spurned lover when Kimemia's "real" wife came calling. If there was cohabitation at all, it is not shown to have been continuous as there is little evidence of the things they did together, or jointly other than the purchase of the suit property, and renovations.

I therefore find that Rose was not, by any definition, the wife of Kimemia, although I have no doubt that they were, at some time, intimate lovers.

Issue b: Whether Rose holds, or was to hold, a half share in the suit property on trust for Kimemia.

11. The allegation in the plaint, denied in the defence, is that during discussions it was agreed between the two that the suit property would be conveyed into their joint names, although Kimemia would solely contribute to the purchase price. Further, in paragraph 5, the plaint asserts:

“ a)

b) That the Defendant’s name would only be included as a purchaser since the Defendant had misrepresented to the Plaintiff the fact that he could not be allowed to own a property in that area because he was not a local person but from upcountry.

c) That the Defendant would hold the half share of the suit property on trust for the sole benefit of the Plaintiff.”

Rose, of course denied these allegations. What is most unusual in the plaint, though, is the statement at paragraph 5(b) that it was agreed during the pre-purchase discussion between the parties that the Defendant would be included as a purchaser since she had made misrepresentations to the Plaintiff. If the Plaintiff knew of the alleged misrepresentations, why then did he proceed to include the Defendant in the purchase?

12. I have carefully perused the Sale Agreement (PExb1). It identifies Kimemia and Rose as “joint purchasers of one part.” There is no indication in the Agreement, or in any other writing or communication between the parties, to suggest that Rose’s name was to feature in the Agreement on any condition or subject to any trust or other understanding. No reading of the document suggests such trust or condition.

In this case, even subsequent actions of the parties after the purchase do not evince any intention on the part of Kimemia that Rose’s inclusion in the purchase was done on trust for him. That is, that issue did not arise at all, until after the two had fallen out, and criminal proceedings were instituted. It was then that this suit was filed.

13. In my view, It was for Kimemia to prove the existence of a trust. A mere allegation of its existence cannot create one. It is trite law that a trust, by definition, arises when a donor or grantor reposes a confidence in a person, who is termed a trustee, for the benefit of another who is called a *cestui que* trust, respecting property which is held by the trustee for the benefit of the *cestui que* trust. The essential elements of trust are, according to Blacks Law Dictionary, as shown in the description of trust:

“A trust, when not qualified by the word “charitable” “resulting” or “constructive”, is a fiduciary relationship with respect to property subjecting the person by whom the title to the property is held to equitable duties to deal with the property for the benefit of another person, which arises as a result of manifestation of an intention to create it.”

Nothing in the purchase transaction manifests any intention on the part of Kimemia that Rose should hold a share of the property for him or anyone else. Indeed, the purchase is indicated to have been made “jointly”. There are no distinct and separable shares indicated or identified in the purchase agreement. And even if there were, no direction is given as to how to treat them.

14. This court is bound, in circumstances where it is sought to imply a trust, to follow the case of **Mbothi and 8 Others vs Waitimu and 11 Others** [1986] KLR 171, where the Court of Appeal held:

“The courts will not imply a trust save in order to give effect to the intentions of the parties and such intention must be clearly determined before hand. Trust was not pleaded and from the evidence, the parties did not intend to create a trust. The court could not imply a resulting trust.” See Cork vs Fountain (1676) 36 ER 984, 987; Marie Ayoub and Others vs Standard Bank of South Africa Limited and Another [1963] EA 619, 622; Joseph Kamau Kameni vs Ndungu Kiiru C.A EA Civil Appeal 43 of 1976.

In **Marie Ayoub vs Standard Bank of South Africa and Another** [1963] EA 619 the Privy Council affirmed the statement of the law to be as follows as stated in **Cook vs Fountain (1)** (36 ER at Page 987):

“... so the trust, if there be any, must either be implied by the law, or presumed by the court. There is one good, general, and infallible rule that goes to both these kinds of trust; it is such a general rule as never deceives; a general rule to which there is no exception, and that is this; the law never implies, the court never presumes a trust, but in the case of absolute necessity.”

15. Nothing in the evidence suggests a predisposition of a trust that necessitates a presumption of one. In view of the foregoing, I am 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. Indeed, I do not see that any shares exist, the parties being joint and inseparable owners of the suit property. No shares have been distinguished in the agreement and none are distinguishable in interpretation. Lovers, in their passion are wont to do unusual things, and in this case there is no evidence that the purchase was dictated by anything less or more than lovers' fancy.

16. The issue I have just dealt with on trusts, also disposes of the two other issues, (e) and (f), which is were follows:

(e) Whether Kimemia is entitled to an injunction restraining Rose from dealing with the suit property, and

(f) Whether Rose's name should be cancelled from the property owner's records.

Having found, as I have that no trust has been proved, I can only conclude 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.

Issue c: **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.**

17. I think that the situation that emerges from the evidence, looked at as a whole, does not impute blame on Rose for misrepresentation. I have carefully looked through all the evidence, and have taken appropriate precautions because I did not see and hear the first two witnesses in this case who were led, not before me, but before Hon. Justice Ojwang now elevated to the Supreme Court.

This was a part heard case where the parties consented to its continuation, and I have relied on the written record. A misrepresentation in law is an assertion or manifestation by words or conduct that does not accord with the facts or with the truth. I, quite frankly, have not seen on record any evidence led at all by the plaintiff to prove this point. Indeed, from the record of proceedings, I have not seen any 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. Accordingly, I dismiss this issue without need for further consideration.

The final issue is: **whether Kimemia is entitled to an account of rent collected from 2009.**

18. I have already 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 inarticulated partnership creates a presumption of fair dealing.

In my view, 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. This cannot augur well for the joint ownership arrangement.

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.

19. In summary, I find as follows on each of the issues set out in paragraph 6 hereof. On each of issues (a), (b), (c), (e) and (f) I find in the negative.

On issue (d) I find in the affirmative, subject, thereafter, to ascertainment of each party's share of rent. I order a mention within thirty (30) days of the date hereof for further directions thereon, should the parties be unable to agree, outside court, on their respective shares and rents.

Orders accordingly.

SIGNED BY:

.....
R.M. MWONGO
JUDGE

Read in open court on this...30th day of April 2012

(BY HON. JUSTICE JOHN MWERA)

Coram:

1. Judge: Hon. John Mwera

2. Court clerk: T. Furaha

In Presence of Parties/Representative as follows:

- a)
- b)
- c)
- d).....