



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

**CIVIL SUIT NO. 26 OF 2011**

**KUSI MUKAMI KIMANI.....PLAINTIFF**

**- VERSUS -**

**MERCY SYONG'OMBE KITHEKA.....DEFENDANT**

**JUDGEMENT**

1. The plaintiff has sued the defendant through her plaint dated 17<sup>th</sup> February 2011 seeking the following reliefs:

- (a) A declaration that the plaintiff is entitled to exclusive unimpeded right of possession and occupation of the suit property.**
- (b) A declaration that the defendant, whether by herself or her servant(s) agent(s) or otherwise howsoever is wrongfully in occupation of the suit property and is accordingly a trespasser on the same.**
- (c) A declaration that the defendant, whether by herself, or her agent(s) or servant(s) or otherwise howsoever, is not entitled to remain on the suit property.**
- (d) A permanent injunction restraining the defendant whether by herself or her servant(s), agent(s) or otherwise howsoever from remaining on or continuing in occupation of the suit property.**
- (e) Vacant possession of the suit property.**
- (f) General damages for trespass.**
- (g) Costs of this suit with interest thereon at such rate and for such period of time as this honorable Court may deem fit to grant.**
- (h) Any such other or further relief as this honorable Court may deem fit to grant.**

2. The plaintiff pleaded that in or about the year 2000, the defendant without any colour of right entered and took possession of the suit premises and has wrongfully remained in possession. That the defendant has misused, damaged, wasted, *et al* the suit property be reason of which the plaintiff has been deprived of the use and enjoyment of the suit property and has also suffered loss and damage. The plaintiff gave

the particulars of loss as:

- (a) The plaintiff has been deprived of the use of the use and quiet enjoyment of the suit property.**
- (b) The defendant's misuse of the suit property including failure to carry out repairs and/or pay electricity bill to the tune of Kshs. 297,991.59 has occasioned detriment to the plaintiff.**
- (c) Further the defendant has prevented the plaintiff from accessing the suit property to erect a perimeter boundary and/or carry out the urgently needed repairs thereon.**
- (d) The defendant has threatened the plaintiff's agents with physical violence whenever the agents attempt to enter the suit property.**

3. The suit is defended via statement of defence filed on 26<sup>th</sup> May 2011. In it, the defendant denies the plaintiff's claim and pleads that she has been in occupation of the suit land since 1998 as owner and not as a tenant and that she has never paid a single penny as rent to the registered owners at the time because she purchased the house. The defendant pleads that all she wants is the property to be transferred to her. She denied being served with any demand notice. She asked that the plaintiff's suit be dismissed with costs.

4. Each of the parties filed separate lists of agreed issues and their documents together with their witnesses' statements in support of their cases together with the pretrial questionnaire. After the close of pleadings, the hearing commenced on 28<sup>th</sup> October 2015.

5. **ANNE W. KIMANI** testified on behalf of the plaintiff as her attorney. She stated that the plaintiff is her daughter and she owns the suit plot Kwale/Ukunda/2860. That before the transfer to KUSI, the suit property was registered in the joint names of **PW 1** and Rama Matano who is Kusi's mother and father respectively. She produced in evidence a copy of the title deed issued to them in 1992. The witness said she has never sold this plot or given anyone consent to sell. **PW 1** continued that they have a home on the front of the plot and the other half has rental houses giving a total of 3 houses on the suit plot.

6. **PW 1** stated that she lived on the suit plot from 1991 – 1997 before moving out to Nyali and leaving Rama Matano in the house. She was not aware the property was sold as she still pays rates for the plot as per the rates clearance certificate annexed at No 3 of her list of documents. That Rama died on 1.8.2010 as per death certificate produced. It is **PW 1**'s evidence that she learnt that the defendant entered the house in the year 2000 but as a tenant. That even Rama wrote a letter dated 6.9.2003 authorising the defendant to open the electricity account in her name but as a tenant. She also served the defendant with eviction notice via a letter they jointly signed with Rama on 2.10.2009 and that the defendant never contested although the defendant never moved out.

7. **PW 1** testified further that the suit property was transferred to the plaintiff pursuant to a trust deed made in 2006 between **PW 1** and Rama. That **PW 1** visited the house several times during the years 2005, 2007, 2009 & 2011. She did not know how the defendant owns the house. Her claim is that she wants her home back in the state she left it in. The witness does not know who Bent Kock is. She saw the letter where Rama was acknowledging payments of Ksh 730,000= . In cross – examination **PW 1** stated that they heard Rama was intending to dispose off the house in 1999. They lived with Rama as husband & wife and they were joint owners of the suit property. That she had no tenancy agreement with the defendant. That the dealings between Bent Kock & Rama were not in respect of the suit property. She denied offering to refund the defendant any money or buying her a Swahili house. That the transfer to the plaintiff's name was done after the death of Rama. The plaintiff then closed her case with this evidence.

8. The defendant opened her case on the 11<sup>th</sup> April 2016 as **DW 1**. She said she is a farmer and currently lives in Sagana. That in 1997 while living in Ukunda, she met and got married to a Bent Leo Kock. First they lived in a guest house before moving into Rama Matano's house as tenants in late 1997. **DW 1**

stated that the rent was agreed at Kshs 8000= per month and they paid rent for one year. DW 1 continued that Mr Bent wanted to buy her a car but Rama advised her to be bought a house instead. The plot available to be sold was Kwale/Ukunda/2860 which was different from the one they had rented.

9. DW 1 testified that Rama showed her the house which had household things in it. She asked and Rama told her that they had disagreed with PW 1 who had since gone abroad. That all the houses were being sold at a price of Kshs 2.5 Million. The witness stated that after Mr Bent returned abroad, he sent half the purchase price of 75000 Danish Krone on 7.1.1998 to Rama's account. Again on 21.7.1998, a sum of Kshs 730,408= and on 27.8.1998 Kshs 73,356= was also deposited in Rama's account No 811937 held with Barclays bank, Diani. She referred to a bank statement which she stated was given to her by Rama. DW 1 testified further that Rama was paid in excess with Kshs 100,000= which he refunded. That DW 1 used this sum to purchase L.R No Mulongo/Wikilimye/1868 on 30.1.1998. That on payment of the deposit, Rama removed the things from the house and they took occupation.

10. DW 1 continued that they did not have a written sale agreement. That they have stayed in the house for about 10 years before PW 1 & Rama came claiming the house on 2.10.2009. She produced the letter written by Anne (PW 1) as Dex 3. PW 1 informed her that she had not given Rama a consent to sell the house. Later she was given an agreement to sign to vacate but she refused to sign. DW 1 also said that the two offered to give her a Swahili house which She was agreeable to as long as it was of equivalent value to what she had bought. But she was never shown the house. She was also not given a title deed by Rama. She denied owing any electricity bill and stated her account had a bill balance of Kshs 1000= as shown in Dex 5 & 6 dated 16.9.1998 and 12.5.2011. Bent died on 3.9.1998.

11. In cross examination, DW 1 said the house was bought with money paid through Bent. That she had neither document describing the plot sold nor a document identifying her as a beneficiary of Bent's estate. PW 1 was not present when they entered into the agreement with Rama to sell/buy. She also did not know if the payment made reached Kshs 2.5 Million. She did not sue Rama & Anne upon being served with eviction notice. DW 1 said she never saw the letter Rama wrote to Kenya Power nor did she follow up on the Swahili house because Rama was to call her. Currently the house is occupied by her cousin.

12. **Fatuma Rama Matano** testified as DW 2 on 24<sup>th</sup> June 2016. She knew DW 1 who was her tenant and Rama was her husband. She also knew PW 1 as she had a relationship with her husband (Rama). That Rama told her the defendant had bought the suit house from him and Anne (PW 1). After the house was sold, she never entered that house. That the defendant moved out of her (DW 2) house towards the end of 1997 into the suit house and lived there until 1.8.2010 when Rama died. DW2 admitted listing the suit property in the succession in respect of Rama's estate. Later Anne (PW 1) changed the title into her name. According to her, the house belongs to the defendant.

13. In cross examination, DW 2 said she did not have a sale agreement in Court. She admitted the plot was jointly owned by Rama & Anne and that it is not possible for one person to sell without involving a co-owner. DW 2 was not shown proof of payment nor was she involved in the sale transaction. She is the one who included the suit plot in the succession cause because it had Rama's name and that the succession cause is still on-going. The defendant then closed her case on 13.9.2016 being unable to present to Court her remaining witness (DW1's father) due to illness.

14. Both parties then filed written submissions which were highlighted on 26<sup>th</sup> September 2017 which I have read and will make references to as appropriate in the body of this judgement. From the evidence adduced by both parties, it is not in dispute that the defendant has been in occupation of the suit premises for quite some time (from 1999 – 2009). This is confirmed by the evidence of the plaintiff that in 1999 she heard Rama was disposing off the house and when she made enquiries, she was told it was a tenancy. Further the letter done by Rama authorizing the defendant to have the electricity in her name was done in 2003 and that when the PW 1 and the plaintiff visited the house during the specified periods, it is the defendant who was in possession. PW 1 seems not to have objected to this possession until 2009 when they decided to serve her with vacation notice.

15. The key question for determination is **whether the defendant was occupying the suit premises as a tenant or as a purchaser**. The title deed was previously in the name of PW 1 and Rama before it was transferred to the plaintiff on 6<sup>th</sup> Dec 2010. **The plaintiff's case is that there was never a sale that took place between Rama & the defendant regarding the suit property on account that PW 1 did not give her consent as a co-owner. Secondly that there was no contract drawn in compliance with the provisions of section 3 (3) of the Law of Contract Act.** The defendant on her part averred that although there was **no written agreement, the same did not invalidate the sale**. She **also submitted that section 3 (3) came into operation in 2003 and cannot therefore be applied retrospectively to agreement which took place in 1998**. She however conceded that the co-owner was not a party to the sale transaction whether between Rama and Bent or with the defendant.

16. The defendant in her evidence in chief stated that the agreed purchase price for the suit plot together with the 3 houses standing on it was Kshs 2.5 Million. The money was to be paid by Bent Kock who was her boyfriend turned husband. The defendant produced a bank statement which she said was given to her by Rama to confirm that the following sums of money was paid to him Kshs 730,408/=, 75000 Danish Krone and Kshs 73,335/=. The exchange rate for Danish Krone is given in the submissions when they stated that a sum of Kshs 1,125,000= was paid as deposit. These sums if added together according to the defendant there was an excess payment of Kshs 100,000 over and above the Kshs 2.5 Million paid. **It was incumbent upon the defendant to demonstrate that the whole total purchase price was paid.**

17. I have added the monies mentioned as paid to Rama giving the sum total of about **Kshs 1,928,764=** which falls below the agreed purchase price as per the defendant. The defendant submitted that Bent made a deposit of Kshs 1,125,000 to the deceased. This did not come out in the evidence of the defendant that it was separate from the 75000 DKrone. If it was separate then the defendant failed to show how the said 1,125,000 was paid to the late Rama. What I deduce from the defendant's testimony is that upon return to his home country, Bent sent 75000 DKr which appears to me to be the first payment. If he paid Kshs 1,125,000 plus 730,408= plus 73,335= and the 75000 DKRrone then the sums paid will total close to Kshs 3 Million thus an excess of Kshs 500,000=.

18. I therefore come to the conclusion that there was indeed a sale transaction entered into between Rama and Bent whether for the benefit of the defendant or otherwise but which transaction was not completed probably as a result of the death of Bent in September 1998 and the defendant was probably unable to pay the balance of the purchase. As correctly submitted for the Defendant, section 3(3) of CAP 23 had not been operationalized therefore the oral agreement is not invalid. **This scenario in my view that denies the defendant the right to claim the property as purchaser for value is the absence of consent of Anne Kimani (PW1) the other co-owner which she became aware of but did not pursue.**

19. Upon the death of Rama in 2010, the property in law was now the sole property of Anne Kimani. PW 1 stated that upon presenting the death certificate of Rama Matano to the lands office, she was registered as the owner therefore and thereafter transferred the property to the plaintiff as per their trust deed of 2006. DW 2 did not claim any interest in the property and the only reason she included it in the succession cause was because it had not been transferred to the defendant. The interest of PW 1 or the plaintiff cannot be challenged given the sale transaction between Rama and the defendant was a nullity hence it is incapable of creating a trust resulting or implied as put forth in the defendant's submission.

20. In conclusion, I find that the defendant's initial entry into the suit premises was with the consent of Rama Matano – deceased as a buyer and not as a tenant. This permission was withdrawn on 2.9.2009 when she was served with eviction notice. Her continued stay on the land after this date constituted acts of trespass which acts have continued even after this suit was filed. However on the basis that the letter of 2<sup>nd</sup> September 2009 did not offer to refund the defendant any monies paid to Rama, I find she is not liable to pay any damages in favour of the plaintiff who acquired interest on the land while aware of the defendant being in possession. Further, the Plaintiff's right if any accrued to her from the date of registration of the title into her name i.e. from 6<sup>th</sup> Dec 2010 and not earlier.

21. Accordingly I find that the consent of Anne Kimani cannot be assumed to have been given merely because Rama Matano stated so and there was nothing to corroborate. Rama share in law could not be

defined in a joint ownership thus incapable of passing any interest in the suit land to the defendant that can be enforced. Consequently the defendant cannot continue to remain on the suit land. The result is that the prayer for **vacant possession is allowed** and prayer (c) of the plaint thereof. The Defendant is ordered to surrender vacant possession within 45 days of the judgement. In default, eviction to issue.

22. The defendant is at liberty to pursue her claim for refund if at all against the estate of Rama – deceased separately. Each party to bear their costs of the suit given the background of this case.

**Dated, signed & delivered at Mombasa this 16<sup>th</sup> November 2017.**

**A. OMOLLO**

**JUDGE**