



**Angwenyi v Angwenyi (Civil Suit 39 of 2019)
[2023] KEELC 570 (KLR) (31 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 570 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 39 OF 2019
M SILA, J
JANUARY 31, 2023**

BETWEEN

NICHOLAS GICHANA ANGWENYI PLAINTIFF

AND

PETERSON SIRO ANGWENYI DEFENDANT

RULING

1. The application before me is that dated 20 September 2022 filed by the plaintiff. It seeks the following orders :-
 1. That pending the hearing and determination of this application the rental proceeds of the suit property known as LR Central Kitutu/Mwamosioma/1231 be deposited by the tenant in a joint interest earning account belonging to the Advocates of the parties.
 2. That pending the hearing and determination of the main suit the rental proceeds of the suit property known as LR No. Central Kitutu/Mwamosioma/1231 be deposited by the tenant in a joint interest earning account belonging to the Advocates of the parties.
 3. That where orders 1 and or 2 are granted, leave do issue for the said order(s) to be served on the current tenant or future tenants of the property pending the hearing and determination of this application.
 4. That where orders 1 and 2 are granted, leave do issue for the said order (s) to be served on the current tenant or future tenants of the property pending the hearing and determination of the suit.
 5. That pending the hearing and determination of the application the respondent does pay the applicant the sum of Kshs. 361, 500/= being his share in the rental proceeds from the months of May – June 2022 and the quarter of July-August-September 2022.



6. That pending the hearing and determination of the application, the respondent does furnish the applicant with the new lease.
 7. That this honourable court be pleased to issue such further orders as it may deem fit.
 8. That the costs for this application be provided for.
2. The application is opposed.
 3. To put matters into context, the applicant commenced this suit through a plaint filed on 20 November 2019. He pleaded to be the joint registered proprietor of the land parcel Central Kitutu/Mwamosioma/1231 (the suit land) which was inherited from their late father. He pleaded that when they were young, the property was being managed by their mother and the rent proceeds was used for their welfare. He averred that on 4 February 2016, the defendant took over management of the property by evicting the tenants therein and that he leased the property to a new tenant without the consent of the applicant. He contended that his entry to the property has been restricted and that he has been denied an equal share of the rent. In the suit, he has asked for a full account of the rental income; that he be given his share of the income; that the property be registered in common in accordance to their respective shares; that the defendant be restrained from disposing of the suit land or the fixtures therein without the consent of the applicant. The respondent filed defence where he admitted that they are jointly registered as proprietors of the suit land. He denied denouncing the applicant's interest in the property and contended that he has been reaching out to the applicant on how best to manage the property. He admitted taking possession of the property but averred that this was because he was not benefiting from the rent being received by the plaintiff and their mother over the years. He admitted leasing out the property and stated that he was ready and willing to give an account. He denied barring the applicant from the property and mentioned that he has been inviting the applicant to discuss but the applicant has at all times declined. He also lodged a counterclaim where he pleaded that up to January 2016, the applicant received rent at Kshs. 335,000/= of which he claims half of it. He also seeks an order that should the plaintiff wish to sell his share in the property he should be granted the right of first refusal or purchase. A reply to defence and defence to counterclaim was filed with the applicant reiterating that he is entitled to an order for full accounts of the rental income from the respondent.
 4. The plaintiff subsequently filed an application dated 17 October 2019 seeking orders that pending hearing and determination of the suit, a temporary injunction be issued to stop the respondent from disposing of the suit property and an order for the rent proceeds to be deposited in a joint interest earning account of the Advocates of the parties. There was also a prayer seeking an order to have the respondent render an account of rent proceeds. Nothing was filed to oppose the motion and on 27 February 2020, the application was allowed with the court basically allowing the prayer to stop the respondent from disposing the suit land and the order to have rent deposited in a joint interest earning account of the Advocates of the parties. The applicant was also allowed unrestricted access to the suit property. The prayer for an account to be rendered from the date the respondent leased the suit property was however rejected, with the court directing that this prayer be canvassed at the hearing of the suit.
 5. I have seen on record an application dated 22 February 2022 filed by the respondent seeking orders to have declared that the orders of 27 February 2020 have lapsed and for an order to restrain the applicant from interfering with the tenancy of Tugende Limited. The respondent also sought orders to release to the plaintiff 50% of the rental earnings less any maintenance costs pending hearing of the case. In a short ruling delivered on 16 May 2022, the court (Onyango J) found that the interim orders had lapsed by dint of Order 40 Rules 4 and 6, as they had been in place for more than one year. She also



ordered that the rent be shared equally between the two parties less any maintenance costs. The court specifically rendered itself as follows :-

- a. The rent in respect of the suit premises shall be shared equally between the plaintiff and the defendant. In order to facilitate this a copy of the lease in respect of the suit premises shall be furnished to the respondent forthwith. The defendant shall disclose to the plaintiff the cost of repairs or any necessary maintenance to the suit property in advance so that the same are shared equally between the parties pending the hearing of the main suit. The defendant shall continue receiving the rent but ensure that the plaintiff's share of 50% is remitted to him promptly without fail.
6. It will be observed that not too shortly thereafter, this application was filed. In the application, the plaintiff refers to the orders of 16 May 2022 and states that through a letter dated 13 June 2022, the defendant forwarded to him a copy of the expired lease stating that it is yet to be renewed and he would advise on the rent proceeds. Subsequently, through a letter dated 22 July 2022, the defendant forwarded to him a schedule of expenses together with a cheque of Kshs. 21,120/= stating that it was what was due to the plaintiff after deducting maintenance charges. He has averred that in the ruling of 16 May 2022, the court directed that any expenses be raised with prior consultation and approval of himself. He contends that the quarterly rent is charged at USD 3600 and he thus returned the cheque.
7. In his reply to the application, the defendant has desposed inter alia that prayer 2 of the application is res judicata and that prayer 5 is subject to the consent order of 17 May 2022 and if entertained, it will mean that the court will have to engage in the exercise of taking accounts, which is a matter for full trial. On the order of 16 May 2022, he has deposed that the only thing he has not done is furnish a copy of the lease to the plaintiff as it is yet to be renewed but the terms of the lease remain the same as the old lease. He states that he prepared a schedule of costs and sent it to the plaintiff and sent a cheque of Kshs. 57,145/= to cover the current period. He also sent to the plaintiff the cheque of Kshs. 21,120/= that had been returned. On the issue raised about the expenses, he stated that he asked for a meeting to explain them but the plaintiff's counsel reverted with a response that the plaintiff was not interested in a discussion. He stated that he hired local labour to clear debris on the premises for which one does not get receipts. He has added that they had agreed with the plaintiff to sink a borehole and subsequent expenses have been geared towards developing the property. He contends he has not disobeyed the order. He has pointed out that the case has a date for full trial on 13 February 2023 and if the plaintiff feels that he is getting less than he is entitled, that can easily be determined during trial, so as to avoid a situation where the court conducts a trial within a trial.
8. I have gone through the submissions of both counsel for the plaintiff and defendant and I have given them due consideration before arriving at my decision. I will actually not give a very lengthy ruling as I do not deem it necessary.
9. It is unfortunate that the parties herein are brothers but they cannot seem to agree on how to manage the suit property. I will agree with the defendant that the issue of whether rent should be deposited in a joint interest account of the advocates on record pending hearing of the suit has already been dealt with. The court, through the order of 16 May 2022, did order that the defendant can continue receiving the rent but he should share it equally with the plaintiff. The cost of repairs and maintenance was also to be shared. The plaintiff of course complains that this has not been done. The defendant on the other hand asserts that he has done so and that he has paid the plaintiff his share after deducting the expenses. Well, if it is the contention of the plaintiff that the defendant is in contempt of the orders of 16 May 2022, what the plaintiff needs to do is to file a contempt application. A contempt application requires a different type of approach and inquiry. What is before me is not a contempt application but an application seeking orders for payment of some money claimed to be the rightful share of the



plaintiff. I cannot tell, without going into deep inquiry, which in my view can only be done at trial, whether what the plaintiff has received so far is his rightful share of the rent proceeds. I cannot go into the issue whether the defendant should pay the plaintiff the sum of Kshs. 361,500/= without the benefit of taking evidence. Maybe the plaintiff has been shortchanged, but maybe he has not, and that can only come out after a full hearing. Doing so at this stage will be conducting a mini trial within a trial, which in my view would be misplaced. For the above reasons, I see no merit in this application and it is hereby dismissed.

10. The hearing of this case is barely a month away. Let parties prepare themselves for trial on that day. My heart of course hopes that given that they are brothers, they will, on that day, record a consent settling the matter.
11. I make no orders as to the costs of this application given that the parties are brothers.
12. Orders accordingly.

DATED AND DELIVERED THIS 31 DAY OF JANUARY 2023

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

