



REPUBLIC OF KENYA



**KENYA LAW**  
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**RNM v FM (Matrimonial Cause 64 of 2018)  
[2023] KEHC 21585 (KLR) (Family) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21585 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY**

**MATRIMONIAL CAUSE 64 OF 2018**

**MA ODERO, J**

**JULY 28, 2023**

**BETWEEN**

**RNM ..... PLAINTIFF**

**AND**

**FM ..... RESPONDENT**

**RULING**

1. Before this court is the Notice of Motion dated 21<sup>st</sup> September, 2022 by which the Applicant RNM seeks the following orders:-

- “1. Spent
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3. That the Respondent be ordered to transfer the property being Title No. Naivasha/Maraigushi Block xxxx (Particulars Withheld)] to the Applicant within thirty (30) days from the date of determination of this Application.
4. That an independent surveyor registered with and through the Institute of Surveyors of Kenya be appointed to carry out the sub-division of the property being Title No.Kajiado/Dalalekutuk/xxxx measuring approximately ten (10) acres to separate, petition and or subdivide the interest of the Applicant and the Respondent within thirty (30) days from the date of determination of this Application.
5. That the Respondent to transfer the Applicant’s share measuring approximately five (5) acres arising from the subdivision of the property being



Title No. Kajiado/Dalalekutuk/xxxx within thirty (30) days from the date of issue of the title deeds arising from the sub-division.

6. That an independent surveyor registered with and through the Institute of Surveyors of Kenya be appointed to carry out valuation of the immovable property known as L.R NO.xxxx contained in Grant No.xxxx measuring approximately 0.3394 Hectares and all developments thereon within thirty (30) days from the date of determination of this Application.
  7. That upon valuation and presentation of the valuation report of the immovable property known as L.R No.xxxx contained in Grant No.xxxx;
    - (a) The Respondent be at liberty to buy out the one third (1/3) share entitlement due to the Applicant within thirty (30) days; or
    - (b) In the alternative, an independent estate agent registered with and through the Estates Agents Registration Board be appointed to advertise the said immovable property for a consideration within the assessed value in the event the Respondent fails to buy out the Applicant's entitlement in 7 (a) above; and the sale proceeds be shared between the Applicant and the Respondent on a 30:70 ratio.
  8. That the costs of the valuation, survey, sub-division, advertisement and incidental be shared between the Applicant and the Respondent on a 30:70 ratio.
  9. That in default, the Deputy Registrar of the Family Division, High Court of Kenya be authorized to exclusively sign any transfer documents or execute any other relevant documents in place of the Respondent or any other person holding any title on behalf of the Respondent to effect all the orders of this Honourable Court in favour of the Applicant.
  10. That the Respondent be condemned to pay costs of this Application.
2. The application is premised upon Section 1A, 1B, 3A and 98 of the *Civil Procedure Act*, Cap 21 Laws of Kenya; Order 40 and Order 51 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the Law and is supported by the Affidavit of even date sworn by the Applicant.
  3. The Respondent FM opposed the Application through the Replying Affidavit dated 9<sup>th</sup> November, 2022. The Application was canvassed by way of written submissions. The Applicant filed the written submissions dated 17<sup>th</sup> November, 2022 whilst the Respondent relied upon his written submissions dated 7<sup>th</sup> November, 2022.

## Background

4. The Applicant herein had filed the Originating Summons dated 22<sup>nd</sup> October, 2018 seeking division of matrimonial property. The matter was referred to mediation and the parties reached an agreement vide the Mediation Settlement Agreement dated 10<sup>th</sup> September, 2019 which was adopted by court on 11<sup>th</sup> November, 2019.
5. The parties did not however, agree on the mode of division of the property known as LR No.xxxx – Grant LR No.xxxx measuring approximately 0.3394 hectares situated in the Karen area of Nairobi.



The question of division of this property was heard by the Court which vide a ruling delivered on 4<sup>th</sup> March, 2022 made the following orders:-

- (i) That declaration do and is hereby issued That the immovable property known as LR No.xxxx contained in Grant LR No.xxxx and all developments therein comprises matrimonial property.
  - (ii) That the Applicant is entitled to one-third (1/3) share of the property known as LR No.xxxx LR No.xxxx.
  - (iii) That the immovable property LR No.xxxx contained in Grant LR No.xxxx and all development thereon be valued and the Respondent be and is at liberty to buy out the 1/3 share entitlement due to the Applicant.
  - (iv) In the alternative the said immovable property known as LR No.xxxx (LR No.xxxx) and the developments thereon be valued, and/sold and it proceeds be shared between the Applicant and the Respondent on a 30:70 ratio.
  - (v) This being a family matter each side shall meet its own costs.
6. The Applicant then filed this present application effectively seeking to enforce the Mediation Settlement Agreement as well as the Judgement of the Court.
  7. The Applicant avers that upon adoption of the Mediation Settlement Agreement the Respondent was required to release to her the Original Title Document and all documents in respect of the property known as Naivasha/Maraigushi Block xxxx (Particulars Withheld)].
  8. That the parties were jointly to appoint a surveyor and share the costs of sub-division of the property known as Title No. Kajiado/Dalalekutuk/xxxx and it was further agreed in event of default by any parties the Hon. Deputy Registrar would sign the requisite documents to effect the sub-division and transfer of this Kajiado property.
  9. The Applicant complains that since the court delivered its Judgement on 4<sup>th</sup> March, 2022 the Respondent has been unco-operative in complying with the terms of the said Judgement. That it is now five (5) months since the Judgement was delivered and the Respondent was not given any cogent reasons for her failure to comply with the same.
  10. The Applicant states that she is desirous to have the properties transferred to herself and new Title Deeds issued. She states that the laxity by the Respondent is denying her the fruits of the Judgement whilst he continues to have full control of the suit property to her exclusion.
  11. As stated earlier the Respondent filed a Replying Affidavit dated 15<sup>th</sup> March, 2022 opposing the Application. The Respondent vehemently denies the allegations that he has deliberately refused to comply with the orders made by the Court in the Judgment of 4<sup>th</sup> March, 2022.
  12. The Respondent states that being aggrieved with the said Judgement he has purposed to appeal against the same and to that end he has filed a Memorandum of Appeal dated 20<sup>th</sup> April, 2022.
  13. That his advocate has been pursuing the release of certified proceedings in order to enable him file the appeal.
  14. The Respondent submits that if the prayers in this application are allowed then his appeal may be rendered nugatory. He prays that the application be dismissed in its entirety.



## Analysis and Determination

15. I have carefully, considered the application before this court, the reply filed thereto as well as the written submissions filed by both parties.
16. It is common ground that the matter herein was referred to Mediation and that Mediation Settlement Agreement dated 10<sup>th</sup> September, 2019 was reached. The Mediation Settlement Agreement which was adopted by the court on 11<sup>th</sup> November 2019 binds both parties and indeed the Respondent has made no attempts to repudiate the same.
17. It is also common ground that this court did on 4<sup>th</sup> March, 2022 deliver a Judgement giving orders with respect to the property known as LR No.xxxx (the ‘Particulars Withheld’).
18. The Applicant complains that five (5) months after delivered of the judgement and three (3) years after the Mediation Settlement Agreement was reached the Respondent has taken no steps to comply with the same. Annexed to the Applicant’s Supporting Affidavit is a letter dated 16<sup>th</sup> June, 2022 (Annexure RNM-4) written by her Advocate to the Respondent’s Advocate giving proposals on the way forward. There was no response to the said letter.
19. As stated earlier the Mediation Settlement Agreement having been adopted by the court on 11<sup>th</sup> November, 2019 is binding on both parties. That Settlement Agreement provided for the mode of distribution of several assets. According to the Settlement Agreement the property known as Title No. Naivasha/Maraigushi Block xxxx (Particulars Withheld]) was to go entirely to the Applicant. Therefore, the Respondent was obliged to take all necessary steps to ensue that this parcel of land was transferred to the Applicant. He has failed to act almost three (3) years after the Settlement Agreement was reached.
20. Likewise, five (5) acres out of the property known as Title No. Kajiado Dalalekutuk/xxxx was also under the terms of the Settlement Agreement to be vested entirely to the Applicant. Once again more than three (3) years after the Settlement Agreement was reached no action to transfer this property has been taken.
21. With respect to the Karen Property the court delivered a Judgement in March, 2022. Once again to date the Respondent has taken no steps to comply with the court’s Judgement. The fact that the Respondent intends to appeal that Judgement is not sufficient. The Respondent has not bothered to apply for a stay pending appeal. He cannot purport to seek a stay of execution through his Replying Affidavit.
22. I find that the Respondent has in fact been dragging his feet in an obvious attempt to frustrate the Mediation Settlement Agreement and to deny the Applicant the fruits of the Judgement delivered by the court which Judgement remains binding and enforceable.
23. The fact that the Respondent intends to appeal the judgement of 4<sup>th</sup> March 2022 is not a bar to execution of the court’s orders. In the case of *Shivji Niran Virji -vs- Olga Jemeli Barngetuny* [2021] eKLR the court states as follows:-

“(f) ... The only way to stop the execution of a decree is in filing an application for stay of execution. That Order 42 Rule 6 of the Civil Procedure Rules, specifically provides that;

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except



in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by a an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

- (i) ...The court agrees with the Applicant and find that the proper process that the Respondent ought to have used to stay the execution of the court’s decree, and the Court of Appeal’s judgement, was by filing an application for stay of execution in the appropriate court...” [own emphasis]

24. Finally, I find merit in this present application. I do allow the same and make the following orders.

1. The Respondent be and is hereby ordered to transfer the property known as Title No. Naivasha/Maraigushi Block xxxx(Particulars Withheld)) to the Applicant within forty (40) days of the date of this ruling.
2. An independent surveyor registered with the Institute of Surveyors of Kenya to carry out the sub-division of the Property known as Title No. Kajiado/Dalalekutuk/xxxx in order to sub-divide the interests of the Applicant and the Respondent within thirty (30) days.
3. If the parties are unable to agree on a surveyor then the Hon. Deputy Registrar will appoint the Chief Government Surveyor to complete the task in (2) above.
4. The Respondent is hereby ordered to transfer to the Applicant her five (5) acre share arising from the sub-division of Title No. Kajiado/Dalalekutuk/xxxx within forty (40) days of the date of this ruling.
5. The parties to agree on an independent surveyor registered with the Institute of Surveyors of Kenya to be appointed to carry out a valuation of the property known as LR No.xxxx containing in Grant No.xxxx measuring approximately 0.3394 hectares and all developments thereon within thirty (30) days of the date of this ruling.
6. If parties are unable to agree on a valuer then the Hon. Deputy Registrar will appoint the Chief Government valuer to conduct the valuation of this Karen Property.
7. Upon valuation the Respondent to pay the Applicant a thirty percent (30%) of the assessed value of the property within Sixty (60) days of the date of this ruling.
8. In the alternative the property to be sold at the best possible price and the thirty percent (30%) of the assessed purchase price to be paid to the Applicant.
9. The costs of the valuation to be met by the Applicant and the Respondent on a 30:70 ratio.
10. In default of action by the Respondent in respect to any of the above orders the Deputy Registrar of the Family Division, High Court of Kenya is hereby authorized to sign any transfer document and/or execute any other relevant documents in place of the Respondent so as to give effect to the orders of this court.



11. Each party to meet its own costs for this application.

**DATED IN NAIROBI THIS 28<sup>TH</sup> DAY OF JULY, 2023.**

**MAUREEN A. ODERO**

**JUDGE**

