



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wangonde v Kanyi (Petition 18 of 2018) [2022] KEHC 10815 (KLR) (25 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 10815 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAJIADO  
PETITION 18 OF 2018  
SN MUTUKU, J  
MAY 25, 2022**

**BETWEEN**

**VIRGINIA WANGECHI WANGONDU ..... PETITIONER**

**AND**

**JOSEPHAT GITHAIGA KANYI ..... RESPONDENT**

**RULING**

**The Application**

1. Virginia Wangechi Wangonde (the Applicant) brought this application through a Notice of Motion (the Application) dated 16<sup>th</sup> June, 2021 under section 1,2,3 of the *Civil Procedure Act*; Order 50 Rule 1,2, 3, Order 40 Rule 1, Article 159(2)(d) for orders;
  - (i) That the Honourable Court certify the application urgent, the same proceeds *ex-parte* and orders 1 and 2 herein be issued pending hearing and determination of the application.
  - (ii) That pending the hearing and determination of this application inter-partes the Honourable Court do suspend/stay the warrants issued on 9<sup>th</sup> June, 2021 to Vintage Auctioneers and their agents, servants, officers or anyone purporting to act on their behalf be restrained from executing the warrants and or harassing the petitioner in any other manner.
  - (iii) That the warrants issued on 9<sup>th</sup> June, 2021 without an order/judgement/decree of the court are irregular, unlawful, and null and void and of no consequence and the same be hereby expunged from the court record.
  - (iv) That the valuation report by Nile Real Appraisers EA Valuers Limited irregularly filed in the court by the Respondent be expunged from the record.
  - (v) That the Chief Land Registrar Kajiado County do remove caveat filed by the respondent on the suit property LR Kajiado/Kaputei North/10297.



- (vi) That the costs of this application be borne by the firm of Kang'oli & Co. Advocates.
2. The Application is supported by an Affidavit sworn by the Applicant on 16<sup>th</sup> June, 2021. She has deposed that this Honourable Court issued judgement in the matter on 23<sup>rd</sup> April, 2020 declaring the ratio of contribution as 85% to herself and 15% to the Respondent; that the parties chose the Institute of Surveyors to conduct a valuation for purposes of quantum; that this court firmly held that the matter of valuation was between parties and court would not intervene on the same; that Nile Real Valuers who were seconded by the Institute of Surveyors of Kenya (I.S.K), upon invitation by the Respondent through their advocates, visited the suit property on 15<sup>th</sup> September, 2020 and came up with a report.
  3. It is her averment that the process was done to the exclusion of the Applicant and her counsel and that the same was not done professionally, in just, fair, open, neutral or transparent manner; that the Respondent's advocate incited the valuers not to heed to her pleas and that if any concerns should ensue, the same should be taken to court; that the Respondent's counsel through a letter dated 11<sup>th</sup> February, 2021 to the registry extracted warrants for Kshs. 1,275,000/- without order or direction of court and that this action was unconstitutional, unlawful, null and void and counsel is bestowing himself judicial powers.
  4. She deposed further that at no time had she refused to pay the Respondent his share however the same must be fair and mutually agreed. She urges that the caveat maliciously filed by the Respondent be removed.
  5. The Respondent filed a Replying Affidavit dated 22<sup>nd</sup> June, 2021 contesting the application and terming it as unmerited, unjustified, untenable, an afterthought and merely intended to defeat the judicial process in this matter and meant to bar him from enjoying the fruits of the judgement granted by this court. He has averred that the judgement ordered that the matrimonial house be shared in the ratio of 85:15 in favour of the petitioner and that they moved to court whereby they agreed on a joint valuation by Institute of Surveyors; that the parties consented to have the chairman of the Institute of Surveyors of Kenya appoint a valuer; that the suit property was valued at Kshs. 8,500,000/ and that he vacated the house on the same day but the petitioner has not made any payment towards the refund of the 15% which translates to Kshs.1,275,000/. It is his contention that the actions by the petitioner are clear disobedience of the court's orders.
  6. It is His contention that after giving the petitioner ample time to refund his contribution without success, he obtained a decree for purposes of execution; that if the petitioner was dissatisfied with the valuation report and the manner in which it was conducted, she should have filed a formal application to vacate the consent order dated 26<sup>th</sup> August, 2020. Further that if the petitioner is willing to pay, then the court should direct that the same be deposited as security pending determination of this matter and that the caveat over the property is valid since he still holds a stake in the house developed on the parcel of land.

### **Submissions**

7. Parties canvassed the application by way of written submissions. The Petitioner/Applicant filed her submissions dated 4<sup>th</sup> November, 2021. She reiterated the contents in her supporting affidavit and submitted that a person who approaches the court owes the court a duty to bring out all the facts and refrain from concealing any material facts within their knowledge.
8. It was her argument that the Deputy Registrar cannot purport to exercise the powers of the High Court in an attempt to admit the valuation report and judgement of Kshs. 8.5 million and issue the impugned warrants; that these actions were wrong, unconstitutional, unlawful and tantamount to



the usurpation of judicial powers. She relied on *Mumo Matemu -vs- Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and *Samuel Kamau Macharia & Another-vs- Kenya Commercial Bank & 2 others*, Application 2 of 2011 [2012] eKLR. It is her contention that the warrants are a nullity in law and cannot stand.

9. The Respondent filed his submissions dated 16<sup>th</sup> November, 2021. It is his case that the application is frivolous, vexatious, and scandalous and an abuse of court process only intended to derail the course of justice. He argued that prayers 2 and 3 of the application are not merited since there is a proper judgement of this court which has not been appealed, vacated, reviewed and or set aside hence still binding on the parties; that the Deputy Registrar only gave effect to the judgement, hence his issuance of the warrants of attachment; that the Deputy Registrar wrote to both parties vide a letter dated 21<sup>st</sup> June, 2021 and explained his reasoning behind his actions; that the Petitioner invited this court to expunge a valuation report from the court record without having been moved to first vacate the consent order that settled for appointment of joint valuer.
10. He argued further that Petitioner duly participated in the appointment of the Institute of Surveyors and further benefited by the Respondent moving out of the property on the basis of the same valuation report having been prepared; that the present application has not met any conditions for the setting aside of the consent order and that the petitioner has misapprehended the provisions of the constitution she has relied upon in the application in light of the facts of this matter.
11. The Respondent argued further that the Petitioner's actions are clear acts of fraud and intention to overreach, intended to dissuade the court into setting aside proper and just valuation done after the Respondent had moved the court to have the joint survey order actualized. He relied on the case of *Philip Chemwoto & another-v- Augustine Kubebe* (1982-88) and submitted that an Advocate is a mere agent of the litigant and that seeking them to personally pay costs of the application is witch-hunt.
12. He argued that it has not been demonstrated what the Law Firm has done to warrant such grave orders being made. They submitted that Articles 40,47,48 and 50 of the Constitution comes into play in this matter as litigation must come to an end and that he should be allowed to enjoy the fruits of the judgement; that the only pending issue is the refund of the 15% value of the house by the petitioner; that its trite law that Equity does not aid the indolent but the vigilant and that he who comes to equity must do so with clean hands. He urged that this application be dismissed.

## Determination

13. This application emanated from a matrimonial dispute from which judgement was delivered on 23<sup>rd</sup> day of April, 2020. The court ordered in order (c), which is relevant here, that:
  - (c) An order is hereby issued directing the parties to have the house, excluding the land valued by a joint professional valuer to determine the value of the house and thereafter the petitioner do refund to the respondent 15% of the value.
14. The record shows that parties entered into a consent, signed by both advocates, agreeing to a joint valuation to be done by a valuer appointed by the chairman, Institute of Surveyors of Kenya. This consent was adopted by the court (I will revisit the issue of the procedure in adopting that consent order in this ruling).
15. It is clear to me that following the consent order, the Institute of Surveyors of Kenya appointed Nile Real Valuers to conduct the survey and present a report. The valuation report is dated 15<sup>th</sup> September, 2020. I have seen the proceedings of 18<sup>th</sup> September 2020 during which both counsel informed the court that valuation had been done and the report emailed to both parties through their counsel. There



is no indication that any party had issues with that valuation report. The Applicant did not raise any issues regarding how the valuation was done or her and/or her advocate's lack of participation during the valuation process.

16. I have read the report. It shows that the land on which the house stands was valued at Kshs 7,500,000 while the house was valued at Kshs 8,500,000. It seems that using these figures as the basis, counsel for the Respondent wrote to the Deputy Registrar of this court *vide* the letter dated 11<sup>th</sup> February 2021 asking him to extract and issue Auctioneers, namely M/s Vintage Auctioneers, with warrants of attachment and sale of judgment debtor's properties in execution of the judgment in this matter. An application for execution of the decree was attached.
17. I have also noted that by a Proclamation of Attachment dated 11<sup>th</sup> June 2021, the properties proclaimed are listed as Sofa set, TV set, Fridge, Cooker, MV Registration No. KCS xxxx, among other household items.
18. It seems that the Respondent was motivated in extracting the warrants of attachment by the failure of the Petitioner to refund him 15% of the value of the house as ordered by the court. According to the valuation report the house was valued at Kshs 8,500,000 giving 15% of that figure at Kshs. 1,275,000/-. This is what is been contested by the applicant who claims that there was no order that the petitioner pays this amount and that the extraction of the warrants was unlawful and irregular since the Deputy Registrar lacked jurisdiction.
19. Contrary to that argument, the Respondent argues that there exists a judgement which is still binding on the parties as no review or appeal has been filed and that the Deputy Registrar's role was to give effect to the judgement whose wording was express and unambiguous.
20. Order 22 Rule 6 and Rule 7 (1) and (2) of the [Civil Procedure Rules](#) provides for the procedure of execution of the decree in the High Court. These provisions are clear that the role of issuing formal orders for attachment and sale of property and notices to show cause on application for arrest and imprisonment in execution of a decree of the High Court is the Registrar's unless there is an objection.
21. In the instant case the Respondent extracted a decree and thereafter made an application under Order 22 for execution of the 15% contribution owed to him as per the valuation report dated 15<sup>th</sup> September, 2020. The above provisions provide that the Deputy Registrar may hear and determine applications brought under order 22.
22. It is clear to me that the Petitioner/Applicant is seeking orders, *inter alia*, to expunge the valuation report by Nile Real Valuers Limited for being irregularly filed in court by the Respondent. The basis of that valuation is a consent of both parties that was signed by counsel of both parties herein and adopted in court as a court order. This led to the calculation of the amount sought to be settled through warrants of attachment and sale of the Petitioner's movable properties. The Petitioner is not happy with that valuation for the reasons that it was done, according to her, without her participation or that of her counsel.
23. I have noted that after the consent was adopted in court, the parties appeared before the judge (Mwita, J) on 18<sup>th</sup> September 2020 for mention and that both counsel informed the court that valuation had been done and a report emailed to both of them. At that time, there was a pending application by the Petitioner dated 14<sup>th</sup> July 2020 seeking stay of the orders of the court dated 23<sup>rd</sup> April 2020; review and setting aside of orders (c) and (d) of that judgement delivered on 23<sup>rd</sup> April 2020.
24. Both Mr. Okemwa, learned counsel for the Petitioner, and Mr. Omondi, learned counsel for the Respondent, unanimously told the court on that date (18<sup>th</sup> September 2020) that given that the



valuation had been done and a report sent to both parties, the application dated 14<sup>th</sup> July 2020 had been spent. The court marked that application as withdrawn with no order as to costs.

25. Consent orders are protected and cannot be interfered with unless within the dictates of the law and circumstances of the case. In the Court of Appeal in the case of *Brooke Bond Liebig Ltd V Mallya* [1975] EA 266 at 269, the court stated, in respect to consent orders, that:

“A court cannot interfere with a consent judgment except in such circumstances as would afford good ground for varying or rescinding a contract between the parties.”

26. Further, in *Kenya Commercial Bank Ltd V Specialized Engineering Co. Ltd* [1982] KLR 485, it was held *inter alia*, that –

- (i) A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts in general for a reason which would enable the court to set aside an agreement.
- (ii) A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side.

27. Still on the issue of consent orders, the Court in *Hirani V. Kassam* [1952] 19 EACA 131 the Court of Appeal held;

“It is now well settled law that a consent judgment or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out: see the decision of this court in *J. M. Mwakio v Kenya Commercial Bank Limited Civ Apps 28 of 1982 and 69 of 1983*. In *Purcell v F.C. Trigell Ltd* [1970] 3 All ER 671, Winn LJ said at 676:-

“It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with the knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract.”

28. Without belabouring the point, it is clear to me that the consent signed by the two parties through their respective counsel is binding on each party. But there is a problem with the consent order filed in this matter. It was adopted as a court order but the procedure in doing so is improper and irregular. The record of the court file shows that the consent order signed by both counsel was filed in court on 18<sup>th</sup> August 2020. On 25<sup>th</sup> August 2020, the consent was recorded in the court file and signed by the Deputy Registrar. There is no signature of the Judge who is the one in charge of that judicial function.

29. The irregularity I refer to is that the consent order becomes a court order upon the signature of a judge not that of the Deputy Registrar. *In re Estate of Ibrahim Sakwa Ambani (deceased)* [2019] eKLR, the Deputy Registrar adopted a consent order consolidated two files in that matter. In dealing with that issue, the court had this to say in respect thereof:

“The other issue that has exercised my mind is the adoption, by the Deputy Registrar, of the consent comprised in the letter of 27<sup>th</sup> September 2013. Adoption, by a judicial officer, of a



consent arrived at by the parties is a judicial function, it is not an administrative function. The adoption of a consent, therefore, must be by the judicial officer with the jurisdiction to make the orders the subject of the consent. The adoption of a consent makes it an order of the court, and for it to have the strength of such an order, it must be done by the judicial officer who would in the first place have the jurisdiction to make the order sought to be made by consent. The order proposed in a consent in effect becomes the order of the judicial officer adopting or recording the consent.

The Deputy Registrar acts as an administrative officer within the scheme of things at the High Court. He or she handles the administrative functions, or the administrative side of things, at the High Court. He or she has a limited judicial mandate with respect to High Court judicial functions. The principal judicial functions remain the preserve of the Judge of the High Court of Kenya, who cannot delegate them to the Deputy Registrar. It would appear to me that where a Deputy Registrar purports to adopt a consent which results in the making of court orders that he or she would not have had the power or jurisdiction to make in the first place would result in a consent order that is invalid or null and void.

30. That is the position I take in this matter. By signing that consent order and thereby adopting the same as a court order, the Deputy Registrar was not performing administrative function but a judicial one. To my mind, he had no jurisdiction to perform a judicial function in the manner he did. Therefore, the consent order adopted wrongly by the Deputy Registrar in this matter and all consequential action resulting from that order becomes invalid, null and void. While I find no fault in the extraction of the decree and issuance of warrants of attachment, this being within the ambit of the jurisdiction of the Deputy Registrar, I cannot say the same in respect of the consent order.
31. The effect of the consent order is to have parties choose a neutral valuer to value the suit property for the purposes of implementing the orders contained in the judgment of this court (Mwita, J) delivered on 23<sup>rd</sup> April 2020.
32. For clarity's sake, I wish to state here that the judgment of the court was clear that the Applicant was to get 85% worth of the value of the house and the Respondent 15%. My quick calculation gives me Kshs 1,275,000 as the 15% of the value of the house given at Kshs 8,500,000. That was the only way the percentage was to be converted into implementable figure that the Applicant can refund the Respondent.
33. It is also clear to me that the Respondent has complied with the court order and has vacated the matrimonial home. It is for the Applicant to make good that order and refund the Respondent 15% of the value of the house.
34. Given that the issuance of the warrants of attachment are based on the amount that has its basis on the valuation report affected by the consent order that is null and void for the reasons given above, it seems that the parties have to go back to the drawing board and either adopt, properly, their already filed consent or vacate it and come up with another consent agreeable to all the parties so that this matter can be settled.
35. I have given this application, rival submissions and all cited authorities considerable attention. In my view and for ends of justice to be met, I make the following orders:
  - (i) That prayer two (2) of the Notice of Motion dated 16<sup>th</sup> June 2021 is hereby allowed. The warrants of attachment issued on 9<sup>th</sup> June 2021 to Vintage Auctioneers are hereby suspended and the said auctioneers, their agents, servants, officers or anyone purporting to act on their behalf are restrained from executing the said warrants.



- (ii) That the warrants issued on 9<sup>th</sup> June 2021 are hereby expunged from the court record.
- (iii) That this court declines to grant prayer 4 of the application. However, parties are liberty to pursue another valuation or use the valuation report by Nile Real Appraisers EA Valuers, which as far as the consent signed by both counsel show, was acceptable to both parties.
- (iv) That this court declines to grant prayer 5 of the application until the Applicant complies with the court orders contained in the judgment of this court dated 23<sup>rd</sup> April 2020.
- (v) Each party shall bear own costs of this application.

36. Orders shall issue accordingly.

**DATED, SIGNED AND DELIVERED THIS 25<sup>TH</sup> DAY OF MAY 2022.**

**S. N. MUTUKU**

**JUDGE**

