



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

DIVORCE CAUSE 31 OF 2015

EMP.....APPLICANT

VERSUS

FNM.....RESPONDENT

RULING

1. Vide a divorce petition dated 20th May, 2015, the petitioner /respondent a wife to the respondent/applicant then, moved the court seeking dissolution of their marriage. In the same divorce petition, she sought a declaration that she had equal rights to the listed properties alleged to have been acquired during the subsistence of their marriage.

2. After hearing the case fully, the court delivered its judgment on 5th May, 2020 thus dissolving their marriage and distributed their matrimonial properties as follows;

(a) the petitioner is not entitled to any share in the properties listed in her petition namely

(i) Plot No XXXX

(ii) [Particulars withheld] Bar and Lounge Limited

(iii) Plot No XXXXX Mainland North (subdivision from CR No. XXXXX)

(iv) [particulars withheld] Constructions

(v) The respondent's shares in [Particulars withheld] Mechanical and Engineering works Limited

(vi) Motor vehicle Reg No. KBV XXXX

(b) for the avoidance of doubt, the respondent is not entitled to any share in the properties in the name of the petitioner, listed in his cross petition namely

(i) Plot No XXXX Mtwapa

(ii) Plot No XXXX Kiembeni

(iii) Pinky salon

(iv) 1 Share in [[particulars withheld] Mechanical and Engineering Works Limited.

3. Subsequently, the petitioner /applicant sought to stay the orders of the court but the same was dismissed vide a ruling delivered on 9th October, 2020. Apparently, one of the grounds for dismissal of the stay application was that a notice of appeal to the court of appeal was filed out of time before seeking leave to appeal out of time. Consequently, the respondent decided to execute the orders of the court as per the judgment and decree extracted.

4. In the absence of any stay orders whether from the High court or Court of Appeal, the respondent/applicant one FM moved this court on 5th February, 2020 vide a notice of motion of even date seeking orders;

(1) That this application be certified as urgent and be heard ex-parte in the first instance.

(2) That this honorable court be pleased to issue an order of forceful eviction of the petitioner and/or her agents, servants and or employees from the decree holder /applicant's properties known as Plot No XXXX Mainland North (Subdivision from CR No. XXXX) and Plot No 6283/1MN and the same be delivered up in vacant possession to the decree holder /applicant forthwith.

(3) That in the alternative, this honorable court be pleased to issue an order in such other manner as the nature of the relief granted may require for forceful eviction of the petitioner and /or agents, servants, and or employees from the decree holder/applicant's property known as Plot No XXXX Mainland North (Subdivision from CR No. XXXX) and Plot No XXXX/MN and delivery up of same in vacant possession to the decree holder/applicant by the petitioner forthwith.

(4) That an order of delivery up and eviction issued above to be executed by the court bailiff/auctioneer by opening any lock or bolt or break open any door or do any other act necessary for putting the decree holder in full possession under the supervision of the OCS Bamburi police station.

(5) That costs of this application be provided for by the respondent

5. The application is premised upon grounds set out on the face of it and an affidavit sworn by FNM in which he averred that; he is entitled to enjoy occupation of the properties allocated to him just as the petitioner /respondent is enjoying hers; he is entitled to enjoy the fruits of his judgment; the petitioner /respondent has locked some shops in Plot No XXXX and has refused to move out of Plot No XXXX/1/MN where she is operating a saloon.

6. He further stated that in the absence of any stay order, the petitioner/respondent is illegally occupying his property.

7. In response, the respondent filed a replying affidavit sworn on 2nd March, 2021 admitting that the subject plots were awarded to the respondent/applicant and that there is no stay. She averred that she had lodged an appeal to the Court of Appeal and that there was an application pending before the Court of Appeal for leave to file the intended appeal out of time.

8. She claimed that whereas the respondent was allocated Plot No. 13578, she was awarded pinky saloon which business is situated within the same premises hence she cannot move without affecting her business.

9. It was further claimed that the respondent /applicant has illegally dismantled her equipments from her salon and instead stored them carelessly in the living room. She averred that she has been attending to the respondent who suffered amputation of his toe hence a sign that they were not enemies.

10. When the matter came for hearing, M/s Osino for the respondent/applicant reiterated the averments contained in the affidavit in support of the application. Learned counsel submitted that the respondent /applicant is entitled to the fruits of his judgment and that there is no appeal currently pending before the court of appeal. M/s Osino contended that the petitioner /applicant can move her salon business to any other premise and not necessarily within the respondent/ applicant's premises.

11. On her part, M/s Memie holding brief for M/s Kipsang for the petitioner /respondent also adopted the content contained in the affidavit in reply. Counsel submitted that they had lodged an application to appeal out of time which was scheduled for directions on 13th February, 2020 before the Court of Appeal. According to learned counsel, the petitioner/ respondent is desirous of prosecuting the intended appeal and therefore the need to be given time to exhaust the process.

Determination

12. I have considered the application herein, affidavit in support and the response thereto. I have also taken into account the oral submissions by both counsel. There is no dispute that there is a judgment in place delivered on 5th May, 2020 in which the subject properties were clearly defined and awarded accordingly.

13. It is also not in dispute that the two properties the subject of this application were awarded to the respondent /applicant. Further, the petitioner/respondent does not deny that she is still in occupation of the share of property awarded to the respondent /applicant.

14. It is the applicant's case that since 5th May, 2020 when judgment was entered, he has not enjoyed use of his premises as the petitioner/respondent has refused to move out.

15. It is trite that, a litigant who is successful in any court proceedings is entitled to enjoy the fruits of his judgment. Nothing else should hinder the realization of such benefits. See the case of **Machira t/a Machira and Company Advocates Vs East African Standard (No.2) /2002) e KLR 63** where the court stated that;

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other; contrary to sound principle for the exercise of judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgment or of any decision of the court giving him success at any stage ...”

Similar position was held in Mohamed **Salim t/a Choice Burchery.V Nasser Puria Memon jamat (2013) e KLR.**

16. In the circumstances of this case, the respondent is arguing that, she has filed an application to appeal out of time which is yet to be heard. There is no stay of execution so far obtained to stop the execution process herein. The law is very clear under Order 42 rule 6 (1) of the Civil Procedure Act that no appeal shall operate as a stay of execution or proceedings.

17. In respect to this case, there is no appeal in place. Besides, there is no notice of appeal validly filed hence no appeal in place pursuant to Order 42 rule 6 (4) of the Civil Procedure Rules. What reason does this court have to stop the respondent /applicant from enjoying the fruits of his judgment?

18. It is trite that, court orders are not issued in vain. They must at all costs be obeyed and upheld. See **Hadkinson vs Hadkinson (1952) 2 All ER 562** where it was held that;

“...it was the unqualified obligation of every person against, or in respect of whom, an order has been made by a court of competent jurisdiction, to obey it unless and until that order is discharged.”

19. The court of appeal in the case of **Fred Matiang’i the cabinet secretary Ministry of Interior and Coordination of National Government Vs Miguna & 4 others (2018) e KLR** was categorical on the sanctity of the rule of law by parties obeying court orders. The court further stated that;

“when courts issue orders, they do so not as suggestions or pleas to persons at whom they are directed. Court orders issue Ex catheda, are compulsive, peremptory and expressly binding. It is not for any party, be it high or low, weak or mighty and quite regardless of his status or standing in society to decide whether or not to obey, to choose whether or not to obey; to choose who to obey or negotiate the manner of his compliance...”

20. The defendant has not to the satisfaction of this court explained why she cannot move out of the premises awarded to the respondent /applicant. To be allocated a salon as a business together with all the equipments does not automatically confer ownership rights over the property(land) in which it is being carried out. The petitioner can carry out her salon business elsewhere and surrender vacant possession of the respondent/applicant’s premises. She is occupying those premises without permission or authority of the court nor that of the owner in this case the applicant. In the absence of any stay from the appellate court, the respondent/applicant must be let to enjoy the fruits of his judgment.

21. It is now 6 years down the line since this case started. Litigation must come to an end. This court cannot be called upon to aid a party who has disregarded a court order by forcefully occupying and remaining in occupation of another person’s property. To exert court’s authority and dignity, the court order in place must be obeyed even if it means applying force by way of eviction.

22. Accordingly, I am satisfied that the application herein is merited and the same is allowed with orders that;

(1) Within 21 days from the date of delivery of this ruling, the petitioner/respondent is hereby directed to vacate from properties known as Plot No XXXXX Mainland North (subdivision section CR.No.XXXXX) and Plot No XXXX/1/MN and surrender vacant possession to the respondent/applicant.

(2) That in default of obedience to order(1) above, the petitioner/respondent shall forcefully be evicted from the said premises by the court bailiff by opening any lock or bolt, breaking into any door or do any other act necessary for putting the decree holder into full possession.

(3) For security purposes during the eviction exercise, the OCS Bamburi police station shall provide necessary security to ensure that peace prevails.

(4) I do award costs of the application to the respondent/applicant.

Order accordingly.

Dated signed, delivered virtually at Mombasa this 23rd day of April 2021.

J. N. ONYIEGO

JUDGE