



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**CIVIL SUIT NO. 21 OF 2018 (O.S)**

**MWG.....APPLICANT**

**VERSUS**

**DGW.....RESPONDENT**

**RULING**

1. Before this Court is the Notice of Motion dated **17<sup>th</sup> September 2020** by which the Applicant **MWG** seeks the following orders:-

**i. SPENT**

**ii. That pending the hearing and determination of the Originating Summons herein, this Court be pleased to issue an order directing that the Respondent who is current occupant of House, No. 38 L.R. No. xxxx/xx be compelled to service the loan repayments in respect thereof.**

**iii. That in the alternative, the Respondent be compelled to vacate House No. 38 L.R. No. xxxx/xx in order for the same be rented out and the rent be applied towards servicing of the loan pending the hearing and determination of the Originating Summons.**

**iv. That this court be pleased to make such further orders as the interests of justice may require.**

**v. That costs of the application be provided for.**

2. The Application was premised upon **Sections 1a, 1b, 3a and 63(e)** of the **Civil Procedure Act, Order 40 Rule 1(a), (3), (4) and (10)(1) (a)** of the **Civil Procedure Rules, Section 93** of the **Land Registration Act, Sections 2, 6, 7, 9 and 14** of the **Matrimonial Property Act** and all other enabling provisions of the law, and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **DGW** filed Grounds of Opposition dated **9<sup>th</sup> February 2021** to the Application and also filed a Replying Affidavit dated **9<sup>th</sup> February 2021**. The Application was canvassed by way of written submissions. The Applicant filed her written submissions dated **23<sup>rd</sup> February 2021**, whilst the Respondent relied on his written submissions dated **24<sup>th</sup> February 2021**.

**BACKGROUND**

4. The Applicant and the Respondent got married to each other on **7<sup>th</sup> December 1996** but have since divorced. The Applicant avers that during the subsistence of their union, the couple identified a house in **[Particulars Withheld] Estate, House No. 38 on L.R. No. xxx/xx/xx** for purchase. That the said property as being sold for **Kshs. 12,500,000/-** and the Applicant and Respondent agreed that each would contribute towards the purchase price. This property became the matrimonial home.

5. The Applicant alleges that she paid a sum of **Kshs. 1,250,000/-** as a deposit for the house and then obtained a loan for an amount of **Kshs. 11,250,000/-** from **Barclays Bank** being the balance of the purchase price. The Applicant states that the Respondent did not keep to his side of the bargain and that as a result she is now single handedly servicing the loan.

6. The Applicant states that when the marriage broke down she moved out of the matrimonial home on **2<sup>nd</sup> December 2017** together with the children of the marriage. That she continued to service the loan with **Barclays Bank** at the rate of **Kshs. 135,000/-** per month. The Applicant states that the loan repayments have become oppressive in view of her other responsibilities and in view of the fact that she suffered a pay-cut. That the loan is now in arrears to the tune of **Kshs. 675,000/-**.

7. The Applicant depones that she is apprehensive that the property which is registered in joint names will be auctioned by the Bank. She states that since the Respondent now occupies the said property with his new wife he should be directed by the Court to take over the loan repayment. In the alternative the Applicant prays that the Respondent be directed to vacate the property so that the same may be put up for rent which income can be used to service the loan.

8. As stated earlier the application is strenuously opposed by the Respondent. The Respondent confirms that during the subsistence of his marriage to the Applicant in the year **2012** they purchased the suit property. The Respondent avers that he contributed several cash payments towards the purchase of the property, legal fees and taxes. The Respondent further states that he expended money on the maintenance of the house and in construction of certain parts.

9. The Respondent submits that the present application is '**Res Judicata**' and ought to be dismissed on that basis. He further submits that the application is incompetent as the same has been filed by a stranger.

10. The Respondent challenges the Applicants claim that she is financially unable to meet the monthly loan repayments. He states that the Applicant currently receives an income of **Kshs. 80,000/-** as rental income from an Apartment which the couple had earlier purchased in the **year 2008**. The Respondent therefore opposes the prayers being sought by the Applicant in this application.

### **ANALYSIS AND DETERMINATION**

11. I have considered the Application dated **17th September 2020**, the Responses filed thereto, the Affidavits on record and annexures thereto as well as the written submissions filed by both parties. Based on my perusal of material presented before this Court the following are the issues which arise for determination:-

**i. Whether the present application is Res Judicata.**

**ii. Whether the prayers being sought by the Applicant are merited.**

#### **i. Res Judicata**

12. The Respondent in his Grounds of Opposition dated **9th February 2021** claimed that the present application was **Res Judicata** and thus ought to be struck out at the first instance. The Respondent submits that the Applicant filed a similar application being the Application dated **15th November 2019** seeking similar orders as the present one. That the earlier application dated **15th November 2019** has not been withdrawn.

13. The doctrine of **Res Judicata** is to be found in **Section 7 of the Civil Procedure Act Cap 21, Laws of Kenya** which provides as follows:-

**“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.” [own emphasis]**

14. In order to rely on the doctrine of '**Res Judicata**' the Applicant must establish the following:-

**a. That the issue in dispute in the former suit was directly and substantially in issue in the suit where the doctrine of Res Judicata is being pleaded.**

**b. That the former suit was between the same parties or those under whom they or any of them claim litigating under the same title.**

**c. That the former suit was heard and finally decided.**

**d. That the Court or Tribunal which determined the former suit must have been competent.**

15. A perusal of the record reveals that indeed the Applicant did file a Notice of Motion dated **15th November 2019** seeking similar orders as those being sought in the present application. Further it is also true that the application dated **15th November 2019** involved the same parties.

16. However it is of importance to note that the Notice of Motion dated **15th November 2019** was **NOT** heard and determined by any Court. For the principle of '**Res Judicata**' to apply it must be shown that the former suit or application **was heard and finally determined** by a Court or Tribunal with competent jurisdiction. This is **not** the case here. There is no evidence that the former application of **15th November 2019** was heard and finally determined by this or any Court. In the circumstances the present application dated **17th September 2020** cannot be said to be '**Res Judicata**.'

17. Moreover the Respondent has submitted that the Application dated **15th November 2019** remains on record as the same was never formally withdrawn. Once again the record does not bear him out. A perusal of the file reveals that a **Notice of Withdrawal of Application** dated **5th October 2020** was filed in the suit. This Notice was "**to wholly withdraw the Notice of Motion Application dated 15th**

**November 2019 against the Respondent herein with no orders as to costs.”**

18. An Affidavit of Service dated **8<sup>th</sup> October 2020** sworn by one **RISPER KAFU** a Court Process Server indicates that this Notice of Withdrawal was served upon Counsel on record for the Respondent on **7<sup>th</sup> October 2020** which service was duly acknowledged. In the premises I find that the former application was properly withdrawn and is no longer pending for determination.

19. Based on the foregoing I hold that this present application is not **Res Judicata** and I find that the same is properly before this court for determination.

20. The Respondent also opposed this application on grounds that the same has been filed by a stranger and is therefore incurably defective and a nullity in law. In this regard the Respondent submits that the Application under consideration was filed on **17<sup>th</sup> September 2020** by the firm of **Judy Thongori & Company Advocates**. That on the date the application was filed the said firm had not formally come on record for the Applicant. The Respondent contends that on this basis the present application was filed by a stranger and submits that the same amounts to an abuse of court process and ought to be dismissed.

21. Once again I have perused the record. A Notice of Change of Advocate was filed in this matter on **15<sup>th</sup> October 2020**. It is true that this Notice of Change was filed almost one (1) month **AFTER** the application had been filed. Therefore it is evident that the firm of **Judy Thongori & Co. Advocates**, filed this application **before** they formally came on record for the Applicant.

22. It must be remembered that the duty of any Court is to render substantive justice. **Article 159 (d)** of the **Constitution of Kenya 2010** exhorts Courts to administer justice **“without undue regard to procedural technicalities.”** The question of how and / or when counsel came on record is in my view a procedural issue. The Court ought not to dismiss or strike out a matter on account of mere procedural lapses. These lapses in my view ought not to hinder the Court from determining a matter on the merits. As such despite the said procedural lapse I will invoke **Article 159(d)** and proceed to determine this matter on its merits.

#### **ii. Merit of the Application**

23. It is common ground that the Applicant and the Respondent were once in a legal marital union which marriage later ended in divorce. Annexed to the Applicants Supporting Affidavit dated **17<sup>th</sup> September 2020** is a copy of the Divorce Decree. (Annexure **‘MWG-04’**).

24. The parties are also in agreement that during the subsistence of the marriage the parties purchased the suit property being **House No. 38 in Syokimau** on **L.R. No. xxxx/xx**. The purchase price for the said property was **Kshs. 12,500,000/-** and the same was registered in the joint names of both the Applicant and the Respondent. Annexed to the Applicants Supporting Affidavit dated **17<sup>th</sup> September 2020** is a copy of the Letter of Offer dated **17<sup>th</sup> December 2012** (Annexure **‘MWG-01’**) which Letter of Offer names the Respondent and the Applicant as the purchasers of the said property. The Letter of Offer was duly accepted by the Plaintiff and the Respondent who both on **19<sup>th</sup> December 2012** signed to accept the terms of that Letter of Offer.

25. The Applicant has pleaded that she is unable to continue servicing the monthly repayments for the loan due to financial constraints. She submits that given that the Respondent now occupies the suit property with his new wife he should be compelled to service the loan repayments in respect of the said house.

26. The fact that **Barclays Bank** (now **ABSA BANK**) advanced a facility for the purchase of the suit property is not denied by the Respondent. A copy of the charge dated **21<sup>st</sup> August 2013** in favour of the Bank is annexed to the Applicants Supporting Affidavit (Annexure **‘MWG-02’**). Likewise the fact that the Applicant has been servicing the loan is not denied by the Respondent. The Applicant has annexed to her application copies of her bank statements issued by **ABSA Bank** for the period **2013-2019** (Annexure **‘MWG-03’**). The statements indicate regular debits in respect of both the loan and interest thereon.

27. On his part the Respondent alleges that he made financial contribution towards the purchase of the house in question. The Respondent further submitted that he is currently expending an amount of **Kshs. 50,000/-** monthly in order to maintain the property. However the Respondent has not availed to the Court any documentary evidence by way of invoices and / or receipts to support this alleged monthly expenditure of **Kshs. 50,000/-**. Neither has he explained exactly what this **Kshs. 50,000/-** is being spent on ie nature of the maintenance.

28. The Respondent submitted that the Applicant was in a position to meet the monthly loan repayment. He alleges that the Applicant is currently pocketing a sum of **Kshs. 80,000/-** per month as rental income from an Apartment known as **[Particulars Withheld] Apartment A5** a property which the couple had purchased earlier in the year **2008**. He contends that the Applicant can utilize this income to pay off the loan. The Applicant concedes that she is receiving the rental income from the said Apartment but states that she receives **Kshs. 40,000/-** monthly and **not Kshs. 80,000/-** as alleged by the Respondent. The Applicant also averred that in **February 2020** her salary was cut by her employer. She has annexed a copy of her pay-slip for **July 2020** (Annexure **‘MWG-06’**) indicating her net pay of about **Kshs. 190,000/-**. A loan deduction of **Kshs. 135,000/-** per month leaves the Applicant with precious little to cater for the needs of herself and her children.

29. Whatever the case may be the fact of the matter is that the Applicant is currently repaying a loan on a property from which she no longer derives any real benefit. Instead it is the Respondent who is in occupation of the house and who derives benefit from the same. **Article 45(3)** of the **Constitution of Kenya, 2010** provides that:-

**“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”** [own emphasis]

30. In interpreting **Article 45(3)** the Court of Appeal in the case in **AGNES NANJALA –VS- JACOB PETRUS NICOLAS VANDER**

GOES [2011]eKLR, held as follows:-

**“This Article clearly gives both parties to a marriage equal rights before, during and after the marriage ends. It arguably extends to matrimonial property and is a Constitutional statement of the principle that matrimonial property is shared 50%, 50% in the event that the marriage ends.”**

31. The suit property had been utilized on the matrimonial home before the parties herein divorced. The Applicant has now left the home. It cannot be fair that she continue to shoulder the burden of meeting the entire loan repayment. The property is registered in the **joint names** of the Applicant and the Respondent. In the circumstances it is only fair and just that pending the final determination of this Originating Summons, the parties should equally bear the burden of meeting the loan repayments. Accordingly I allow this application and make the following orders:-

**i. The Applicant and the Respondent to be equally liable on a 50/50 basis for any outstanding arrears on the loan facility from ABSA Bank in respect of the property known as House No. 38 L.R. No. xxxxx/xx.**

**ii. Pending the hearing and determination of the Originating Summons herein the Respondent who is the current occupant of House No. 38 L.R. No. xxxxx/xx is directed to meet half (50%) of the loan repayments as demanded by ABSA Bank in respect of the said property.**

**iii. No orders on cost.**

Dated in Nairobi this 31<sup>st</sup> day of May, 2021.

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**MAUREEN A. ODERO**

**JUDGE**