



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

HCC NO. 26 OF 2010 (OS)

M W K.....APPLICANT

VERSUS

C W N.....RESPONDENT

RULING

INTRODUCTION

1. Application before me for determination is a Notice of Motion dated 22nd October 2014 but filed on 17th December 2014 by one M W K (hereinafter referred to as the applicant) seeking orders as follows:

(a) That this application be certified as urgent and be heard forthwith on account of its urgency.

(b) That the respondent be ordered to tender accounts or records relating to collection of rent for the property known as House No. [particulars withheld] Hazina Estate LR. No. Nairobi/Block [particulars withheld] from June 2010 to date.

(c) That the respondent be ordered to remit to the applicant half of the future rent for the said premises until execution of the judgment or the final determination of the issues between parties.

(d) That this honourable court do make such other or alternative directions/ orders as meets the interest of justice.

2. Application which is filed under the provisions of Article 159 of the Constitution, Sections 1A and 1B, 2 and 3A of the Civil Procedure Act and Orders 21 rule 13 and 51 rule 1 of the Civil Procedure Rules is premised on grounds on the face of it and affidavit in support deposed by the applicant in person on 22nd October 2014.

3. In response to the said application, the respondent on 16th April 2015 filed a replying affidavit deposed by the respondent on 13th April 2015 vehemently challenging the application.

4. Before I proceed to evaluate and make determination on this application, a brief background would be necessary. The suit herein commenced by way of Originating Summons dated 28th July 2010 pursuant to Section 17 of the Married Women's Property Act 1882 wherein the applicant (plaintiff) sought division of

matrimonial property in this case LR. No. Nairobi/Block [particulars withheld]– House No. [particulars withheld] Hazina Estate South B which was allegedly acquired during the subsistence of their marriage.

5. Upon hearing the matter fully, the trial court delivered its judgment on 6th June 2014 in which the property was shared between the two in equal share (50%:50%) with orders that the same was to be valued and proceeds shared out equally and in the alternative, the defendant was at liberty to buy out the beneficial interest of the plaintiff on monetary terms. Subsequently, the respondent/ defendant filed a notice of intention to appeal but no stay orders were obtained. That since judgment was delivered, the respondent has been collecting and using rent amounting to 40,000/= per month to the exclusion of the applicant.

6. Prior to the hearing, the applicant had on 2nd March 2011 filed an application similar to the instant application also seeking the respondent to render an account of the rental income from the suit premises. However, the application was abandoned in favour of the hearing and determination of the main suit.

Applicant's Case

7. It is the applicant's averment that, since the year 2010, the respondent has been collecting Kshs.40,000/= per month as rent from the said premises which rent he has refused to utilize in paying service charge and stamp duty in order to have the property transferred by NSSF into their joint names. She stated that, despite the respondent's advocate's letter dated 29th June 2010 (annexure MMK2) proposing that the rent be deposited in a joint account held by their advocates, the respondent has been adamant to execute that proposal even after the applicant and her advocate signed necessary bank documents to effect the proposal. The applicant therefore prayed for half of the rent collected since 2010 to date.

Respondent's Case

8. On the other hand, the respondent opposed the application arguing that the application herein is vexatious and amounts to an abuse of the court process as similar application seeking same orders had been filed on 2nd March 2011 and subsequently withdrawn hence the application herein amounts to resjudicata.

9. The respondent further avers that, to revive an application that had been withdrawn will amount to filing an appeal through the back door. He stated that the delay in executing the court judgment and more particularly order number two with regard to the defendant's interest in buying the beneficial interest of the plaintiff has been occasioned by the applicant due to her failure in approving the proposal as captured in the respondent's letter to the applicant's advocates dated 23rd July 2014. Lastly, the respondent claimed that he has been paying Kshs 30,000 to the applicant as maintenance hence nothing to claim from him.

Submissions

10. Mr. Mbigi Njuguna for the applicant filed his submissions on 22nd March 2017 arguing that the application does not amount to resjudicata as it was withdrawn and therefore not determined on merit. Mr. Mbigi further urged the court to find that the payment of Kshs 30,000/= maintenance being paid to the applicant as referred to by the respondent was in respect of a divorce and children maintenance cause which has nothing to do with matrimonial property.

11. Lastly, Mr. Mbigi opined that, although the respondent did file a notice of appeal, the same did not amount to stay orders. Counsel urged that the respondent was holding the money in his fiduciary capacity as trustee for the benefit of the plaintiff and cannot divert the same to his benefit. He referred the court to the case of **–In Re the estate of TNN (deceased) (2014) eklr.**

12. Mr. Muthoga Gaturu for the respondent filed their submissions on 11th March, 2017 challenging the

application. Counsel submitted that the application amounted to resjudicata thus offending Section 7 of the Civil Procedure Act. He further submitted that Order 21 rule 13 of the Civil Procedure rules is not relevant in so far as execution is concerned as it relates to a decree for recovery of mesne profit.

Analysis and Determination

13. I have considered the application herein, affidavits in support, replying affidavit and submissions by both counsels. Issues for determination are:

(a) Does the application herein amount to resjudicata;

(b) Is the applicant entitled to half share of the rent accruing from the property in question;

(c) Does preferment of an appeal against a court decree automatically amount to a stay order?

14. The principle regarding resjudicata is provided under Section 7 of the civil procedure Act which provides that:

“No court shall try any suit in which a matter 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”.

15. It is trite law that for a matter to be declared as resjudicata, the same must have been heard substantially and determined by a competent court on merit. **(See Henderson vs Henderson (1843) 67 ER 313 and Kamunye & Others vs Pioneer General Assurance Facility Ltd (1971) E.A 263)**. In this case, the application dated 2nd March 2011 was abandoned and or withdrawn as admitted by both parties hence not substantially heard and determined on merit. To that extent the doctrine of resjudicata cannot apply and Mr. Gaturu’s submission cannot stand.

16. As regards the pending appeal yet to be decided, Order 42 rule 4 of Civil Procedure Rules provides that no appeal shall operate as a stay of execution. In this particular case there is no stay of execution orders obtained from either the trial court or court of appeal. It therefore means that the orders of the court are alive for any interested party to execute.

17. The key issue for determination however is; is the applicant entitled to half share and a statement of account from the year 2010 out of the rental income being collected from the joint property now in question pending sale or formal transfer to the respondent who has expressed interest to buy out the applicant’s beneficial interest on the said property? As clearly stated by both parties, a similar application dated 2nd March 2011 was withdrawn before hearing of the main suit. The court was not invited to determine the issue of rental income hence no orders made to that effect. This court cannot therefore revisit the rental aspect prior to the delivery of judgment on 6th June 2014.

18. What about rent collected after judgment to date? As stated above, the trial court was not requested to address the issue of rent in its judgment. The court judgment does not include an order for recovery and accountability of rent. To allow a claim for recovery of rent from the respondent will amount to reopening the suit hence a fresh suit within the main suit which has already been determined. In any event, parties are to blame for the delay in execution process. The only remedy available in my opinion, is for the parties to expedite the process of execution by valuing and selling the property since there is no order for stay of execution. The claim by the defendant that he has been paying maintenance to the plaintiff to the tune of Kshs 30,000 is not relevant in this case as it relates to Divorce and child maintenance proceedings.

19. However, in the interest of justice and in exercise of its inherent jurisdiction to preserve the sanctity and credibility of court orders, this court cannot watch the rights of a litigant pronounced in a court judgment being trampled upon by a party who will stop at nothing but apply delaying tactics in frustrating execution process of a decree to defeat the ends of justice. The applicant must benefit and enjoy the fruits of her judgment.

20. For those reasons, this court will direct that, pending execution of the court decree herein, both parties are hereby directed to open an account held in their advocates' joint names within 30 days from the date of this ruling and the amount collected as rent from house no [particulars withheld] Hazina South B estate L.R.NO.Nairobi/block [particulars withheld] shall be deposited and shared equally on completion of the execution process less house maintenance and necessary expenses including such utilities as shall be necessary and agreed upon by both parties from time to time with the approval of the Deputy Registrar.

21. Accordingly, the application partially fails and succeeds with orders made for implementation as per paragraph 20 above. As regards costs, this is a family matter hence costs shall abide by the cause.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF JANUARY 2018.

J.N. ONYIEGO

(JUDGE)

In the presence of:

No appearance for the applicant

Mr. Mwangi holding brief for Mwihaki for the respondent

EdwinCourt Administrator