



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CAUSE NO. 54 OF 2013

JWW.....APPLICANT

VERSUS

EWH.....RESPONDENT

RULING

1. The applicant and the respondent got married on 4th December 1982 at PCEA Church of torch Thogoto/Kikuyu. The marriage was dissolved on 6th August 2013 by an order of the **Senior Principal Magistrates Court at Kikuyu in Divorce Cause no. 6 of 2012**.
2. The applicant filed originating summons dated 2nd September 2013 under **Article 45** of the **Constitution, section 17** of the **Married Women Properties Act 1882**, and **Order 37** and **Order 40 rule 1** of the **Civil Procedure Rules**. She sought the declaration that the immovable and moveable property acquired by the joint funds was owned jointly by the applicant and the respondent. The properties in question were Matrimonial home Dagoretti/[particulars withheld] sitting on approximately over 2 Hectares; Dagoretti/[particulars withheld]; Dagoretti/[particulars withheld]; NSE shares and bonds portfolio; and unit trust funds BAAM African Alliance. She also sought orders restraining the respondent from alienating, encumbering, interfering and or in any manner disposing of the said matrimonial property pending the hearing and determination of the application. The respondent filed his affidavit dated 18th October 2013 in response to the application. He stated that he did not oppose the application, but proposed distribution of the properties since the divorce proceedings had been concluded. He further listed 30 household items that the applicant had omitted to list as part of the matrimonial assets and 3 motor vehicles [particulars withheld] Nissan X-Trail, [particulars withheld] Mercedes Benz and [particulars withheld] Nissan Hard body.
3. Parties recorded consents on 26th March 2015 as follows: Nissan X-Trail valued at Kshs.1.2 million be kept by the applicant; motor vehicle registration number [particulars withheld] Nissan Hard body valued at Kshs.1.4 million be given to the respondent exclusively; motor vehicle registration number [particulars withheld] Mercedes Benz valued at Kshs.1 million be given to the applicant who was to give the respondent with Kshs.200,000/= being his share of the vehicle; all household items were to be distributed according to the applicant's submissions except that the 2 Grundig music systems were to go to the respondent; the applicant was to retain L.R. No. [particulars withheld] while the respondent was to retain L.R. [particulars withheld].
4. On 1st October 2015, the court delivered its ruling directing the applicant to retain Dagoretti/[particulars withheld] valued at Kshs. 48 million which comprised of homestead land Kshs. 18 million, improvements of Kshs. 8 million, middle portion of Kshs. 19 million and the lower portion of Kshs. 3 million be divided into three parts with the applicant getting the matrimonial home plus the improvements thereon, while the lower portion was to be sold and the proceeds utilized for the settlement of the outstanding mortgage which stood at Kshs. 2 million, while the remaining Kshs. 1 million was to be used to pay the valuer's charges of Kshs. 275,000 and any charges accruing from the subdivision of the said property . The middle portion valued at Kshs.19 million was to be sold with the applicant getting Kshs. 12.5 million and the respondent getting Kshs. 6.5 million. The respondent was to retain L.R. No. Dagoretti/[particulars withheld] valued at Kshs. 32 million. The applicant was to execute a transfer from the company to the respondent while the respondent was to meet the cost of stamp duty and processing the transfer in his name. The shares held by the parties were to be sold and the proceeds divided into two between the parties. The household items were to be divided equally as agreed by the parties with the Grundig music systems being sold and the proceeds shared equally, or the respondent was to pay the applicant half share of the same if he intended to keep the same. The shares in KQ, Standard Chartered Bank, National Bank and African Alliance Unit Trust were to be sold and the proceeds shared between the parties. The court directed that each party pays their own costs.
5. On 23rd October 2017 the applicant filed the present application under certificate of urgency seeking stay and review of the orders issued by this court on 1st October 2015 to define timeline for compliance. The application was based on the ground that the court did not set timelines for the implementation or the compliance with the decree; that the respondent through his advocates' letter dated 11th September 2017 categorically stated that he shall not proceed with the actualization of the subdivision of L.R. No. Dagoretti/[particulars withheld]; that

the respondent was exclusively in the process of developing L.R. No. Dagoretti/[particulars withheld] which was owned by family company [particulars withheld] Investment Ltd where both parties were directors without the applicant's knowledge and or consent; that Old Mutual had served the applicant with a demand letter threatening to sale the matrimonial home sitting on L.R. No. Dagoretti/[particulars withheld] to clear debts of a loan which is accumulating interest; that the respondent had made it impossible to implement the orders of this court and the applicant stood to suffer great prejudice; that the parties had tried to hold numerous meetings to come up with a way forward towards distribution but the meetings had not yielded fruits; that the applicant is unable to pay the valuer's fees of Kshs.275,000/=; and that the applicant shall suffer irreparable damage and loss if the matrimonial home is sold by Old Mutual as threatened. The application was supported by the applicant's affidavit dated 19th October 2017.

6. The application was opposed by the respondent through his affidavit dated 24th January 2018. He stated that it was the applicant who had defied the decree of the court and who continued to curtail the implementation; that the applicant had never paid him the Kshs.200,000/= as ordered yet she continues to enjoy the motor vehicle registration number [particulars withheld] Mercedes Benz; that the applicant claimed she was unable to pay the valuer's fees of Kshs.275,000/= yet she rejected the respondent's proposal for her to pay the said fees in full and deduct the respondent's portion from the Kshs.200,000/= that she owes him; that in total disregard of the decree and without the knowledge of the respondent the applicant went ahead and instructed the surveyor to subdivide L.R. No. Dagoretti/[particulars withheld] into four portions and allocated the respondent 0.363 Acres while allocating herself 1.496 Acres which was unacceptable; that the applicant has for the last 3 years refused, neglected and or refused to facilitate sale of Kenya Airways, Standard Chartered Bank, National Bank and Africa Alliance Unit Trust though she was the one in custody of the original documents; that she denied him access to the matrimonial home to collect his share of household furniture and licensed ammunition from the safe forcing the respondent to forfeit his share of the furniture; that he needed assistance from the court to gain access to L.R. No. Dagoretti/[particulars withheld] to secure live bullets from his safe for surrender to the Firearms Bureau; that L.R. No. Dagoretti/[particulars withheld] was awarded to him absolutely after which the same was transferred into his name after which he sold the property to a third party who is developing it; and that in order to secure titles to plot Nos. [particulars withheld] and [particulars withheld] as ordered at limb 6(b) of the decree, he filed ELC case Nos. 1055/2016 which matter is still pending determination. He made the following proposal regarding the distribution of the assets:

- a. that title No. Dagoretti/[particulars withheld] goes to the applicant wholly and solely;
- b. that the applicant repays the loan to Old Mutual and the valuation fees;
- c. that the OCS Kikuyu Police Station do assist the respondent to access the matrimonial home for purposes of securing the live bullets in the safe;
- d. that the Kenya Airways, standard Chartered Bank, National Bank and Africa Alliance Unit Trust be sold with the supervision of the advocates for the parties within 30 days and the proceeds be shared equally;
- e. that the applicant pays the respondent the sum of Kshs.200,000/= within 30 days failing which attachment to issue; and
- f. that the parcel No. [particulars withheld] and [particulars withheld] goes to the respondent in the event that ELC Case No. 1056/2016 is determined in his favour.

7. I have looked at the ruling of this court made on 1st October 2015. I note that both parties were to fulfill certain requirements in ensuring the execution of the ruling and the distribution of the property. The applicant was, for instance, required to reimburse the respondent Kshs.200,000/= being his share of motor vehicle registration number [particulars withheld] Mercedes Benz. There was no evidence that she had paid up the Kshs.200,000/=. The court also directed that all household items were to be distributed according to the applicant's submissions except that the 2 Grundig music systems were to go to the respondent. It was the respondent's case that that the applicant had denied him access to the matrimonial home to collect his share of household furniture and licensed ammunition from the safe forcing him to forfeit his share of furniture. The applicant did not controvert this allegation. Regarding the shares, the same were to be sold and equally divided between the parties. The respondent stated that the applicant had for the last 3 years refused, neglected and or refused to facilitate sale of Kenya Airways, Standard Chartered Bank, National Bank and Africa Alliance Unit Trust although she was the one in custody of the original documents. The applicant did not again controvert these allegations, nor offer any explanation regarding the status of the share. Then, there was the issue of Dagoretti/[particulars withheld] which instead of being divided into three portions in accordance with the ruling, the applicant had divided the same into four portions and allocated the respondent 0.363 Acres while allocating herself 1.496 Acres. The applicant did not explain why she had not acted in accordance with the consent.

8. The court applauds the effort by the parties to reach an amicable resolution of the dispute in regard to distribution of their matrimonial property. The effort resulted in the consent that is the subject of this application. The consent became a contract that bound the parties. It was to be implemented fully, and in good faith. When the applicant blames the respondent for non-compliance, she forgets that she, too, has not honoured her part of the bargain. She would not therefore be entitled to the prayers sought.

9. In the same spirit that the parties were able to agree, I give them another opportunity to agree on the full implementation of the terms of the consent and agreement. I refer this matter to court-annexed mediation, and therefore adjourn it for 60 days to allow for the reaching of a settlement. The Deputy Registrar is handed over the file to enable the conduct of the matter by a mediator. Mention shall be on 17th January 2019.

10. Costs shall be in the cause.

DATED and SIGNED at NAIROBI this 27TH day of NOVEMBER 2018.

A.O. MUCHELULE

JUDGE

DATED and DELIVERED at NAIROBI this 29TH day of NOVEMBER 2018.

ALI-ARONI

JUDGE