



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 20 OF 2011 (OS)

D E N.....PLAINTIFF

VERSUS

P N N.....DEFENDANT

RULING

1. I am called upon to determine a Motion dated 9th February 2017. It seeks two principal orders – a confirmation by the court that the plaintiff has complied with the order of the court in implementation of the Court of Appeal order by procuring alternative accommodation for the defendant and the minor children and a command to the defendant to give vacant possession of House Number 113 [particulars withheld] Estate Phase II on Nairobi Block [...] in conformity with the Court of Appeal judgment and directions of this court. It is brought at the instance of the plaintiff, D E N.

2. The plaintiff refers to the Court of Appeal decision of 9th March 2015 in CA No. 226 of 2012 and my decision of 8th September 2016, and avers that he has complied with the same by sourcing alternative accommodation for the defendant and the children. The property is said to be on Ngong/Ngong/[...]. He also states that he has also rented another house at Thika where he lives; being the premises on Gatundu Phase II Plot No. [...], and he would not mind living there with the children. He has attached to his affidavit photographs of the houses, as well as the relevant tenancy agreements. He would like to have the minors moved to the alternative accommodate to pave way for vacant possession to facilitate the final implementation of the court order to sell the house and share the sale proceeds equally between the parties.

3. He swore a second affidavit on 12th September 2017, wherein he deposes to his efforts to talk to his children to facilitate their leaving the house in dispute, that is to say Nairobi Block [...], and relocating either to the house on Ngong/Ngong/[...] or the other one on Gatundu Phase II Plot No. 1066. He avers that he faced resistance from the defendant, who swore that she will never move out of Nairobi Block [...].

4. The two affidavits by the plaintiff elicited a response from the defendant, who swore two affidavits. In one she states that the plaintiff did not consult her in procuring the alternative accommodation. She avers that issues relating to future rent, water, electricity and other incidentals ought to be addressed first before the children can be moved. She says that she has a review application pending at the Court of Appeal, and this court should refrain from making orders whose effect would be render the determination of the Court of Appeal on the review application nugatory. On the second affidavit, it is denied that the plaintiff sought to engage the children on the issues but was thwarted by the defendant. The rest of the affidavit dwells on whether or not the plaintiff wrote letters to the defendant, and on whether those letters were responded to.

5. The Motion was argued orally before me on 28th September 2017. Both sides gave vent to the rival affidavits on record. I have noted the arguments advanced.

6. To my mind the orders being sought in the instant application have their genesis in the decision of the Court of Appeal in CA No. 226 of 2012 of 9th March 2015, wherein it was ordered –

‘1. A declaration be and is hereby made that properties Title Number Nairobi Block [...], House No. [...] High View Estate Phase II Nairobi and Title No. Nyandarua/Oljoro Orok Salient/[...] were and still are the joint properties of the appellant D E N and the Defendant P N N in equally shares.

2. We direct that the above-mentioned equal sharing be and is hereby terminated in the following manner –

(a) the parties shall within thirty (30) days from the date of the delivery of this Judgment cause the matter to be mentioned before the presiding judge High Court Family Division for purposes of getting directions on the appointment of the valuer/valuers and the date for the filing of the valuation report(s). the costs of valuation shall be borne equally by the appellant and the defendant. In default of or lack of cooperation from one party the willing party can pay the whole valuation fees and then seek contribution from the other.

(b) the aggregate value of the two properties shall be apportioned equally between the appellant and the defendant.

3. we direct the Nyandarua property that is LR No. Nyandarua/ Oljoro Orok Salient/[...] shall be transferred into the sole name of the appellant D E N.

4. we direct that the Nairobi property that is LR No. Nairobi Block [...], House No. 113 shall be transferred to the defendant P N N on the following conditions.

(i) that she does within a period of one hundred and twenty (120) days from the date of the filing in Court of the current valuation reports on the properties pay to the defendant the amount forming the shortfall on the equal sharing of the aggregate value of both properties after factoring in the value of the Nyandarua property.

5. there will be liberty to apply in the High Court.

Each party shall bear own costs.’

7. Thereafter the plaintiff herein, who was the appellant in CA No. 226 of 2012, moved this court by an application dated 17th April 2015, seeking to have the Court of Appeal judgment implemented in obedience to order 2(a) of the said judgment. A ruling was delivered by Muigai J on 2nd October 2015 in the following terms –

‘1) The Court lacks jurisdiction to determine any issue regarding the dispute except enforcement and compliance of the Court of Appeal judgment and orders.

2) Interim stay of execution of the enforcement of the Court of Appeal judgment and orders for 120 days to allow the Defendant pursue a review of the appeal with regard to the matters raised in this Court in the Court of Appeal.

3) The appellant to collect from the matrimonial home through his advocate the uncontested items in the list attached as ‘DEN2.’

4) The Defendant and the children of the marriage to continue residing in the matrimonial home

until the final orders from the Court of Appeal.’

8. On 28th February 2016, the matter was placed before Muchelule J, after Muigai J had disqualified herself from further conduct of the matter. Muchelule J noted in the proceedings of that day that the Court of Appeal had on 9th March 2015 asked the High Court to implement its judgment and that on 2nd October 2015 Muigai J had given the defendant 120 days stay pending appeal for review by the Court of Appeal of its orders of 9th March 2015. It was noted that the defendant did not file any such review at the Court of Appeal within the time allowed, and, in the interests of justice, the court proceeded to direct the defendant to file an affidavit within fourteen days, in default of which the valuer proposed by the plaintiff was to be authorized to go ahead and value the properties. Instead of complying with the orders of 28th February 2016, the defendant applied to have the said orders vacated, which plea was rejected in a ruling by Muchelule J dated 9th June 2016, and delivered by me, on behalf of Muchelule J, on 17th June 2016.

9. The matter was subsequently placed before me for directions subsequent to the filing of the valuations. I gave the directions on 8th September 2016 after I had had time to peruse through the record. They were in the following terms –

‘In the end, the orders that I shall make in the circumstances are as follows:-

That the Land Registrar responsible for Nyandarua County shall cause the caution against the title in LR No. Nyandarua/Oljoro Orok Salient/[...] to be removed forthwith and to thereafter cause the said property to be registered in the name of the plaintiff, D E N;

That LR No. Nairobi Block [...] High View Estate Phase II House No. 113 shall be sold by private treaty, within the next 120 days of date herein, at a price of not less than Kshs. 14, 500, 000.00 and the proceeds of sale shall thereafter be deposited in court within seven (7) days of the sale for distribution as between the plaintiff and the defendant;

That the sale ordered in (b) above shall be conducted only after the parties hereto, either jointly or severally, have secured adequate alternative accommodation or residence for the children; and

That the matter shall be mentioned after sixty (60) days to confirm compliance with (c) above.’

10. Just like in the case of the orders made by Muigai J on 2nd October 2015 and Muchelule J on 28th February 2016, the defendant did not comply with the orders of 8th September 2016. She sought review of the said orders through an application dated 14th November 2016; I disallowed the application in a ruling delivered on 3rd February 2017.

11. The plaintiff thereafter sought to have the orders of 8th September 2016 enforced. He succeeded with respect to the order relating to Nyandarua/Oljoro Orok Salient/657, but I declined to allow sale of Nairobi Block [...] High View Estate Phase II House No. 113 before he or the defendant or both of them had secured adequate accommodation for the minors. That was informed by some of the factors that the Court of Appeal stated as being prime in the mind of that court as it made its final orders. The relevant portion of the Judgment of the Court of Appeal reads as follows –

‘There is nothing in section 17 of the Married Women Property Act (supra) which prohibits a court of law seized of a matter under that section from considering the welfare of the issues of the marriage where issues of disposal of the matrimonial home where these reside in is in issue like in the case under consideration so long as such consideration does not go to touch on the share entitlement of each disputing spouse. Herein, the fact of minor children of the marriage needing a place to live cannot therefore be ignored.’

12. There are decrees of the High Court and the Court of Appeal, which directed that the suit property be shared between the parties hereto. Those decrees await execution. The Court of Appeal has ordered the

High Court to implement its decision. This court is bound to do that unless the said decree is either set aside or varied by the Court of Appeal. The defendant claims to have sought review of the Court of Appeal decree from that court. However, no evidence of the alleged review application has been placed before me. In any event, even if there was such a pending application, the same would not bar this court from making further orders in the matter. There is no evidence that the appellate court granted stay of implementation of its earlier orders.

13. I note that the implementation of the decree of the Court of Appeal should be the responsibility of both the parties; however, it is only the plaintiff who is making efforts to comply. He has rented premises to accommodate both the children and the defendant. The defendant has taken no steps whatsoever in that direction. All she has done is to complain that she was not consulted and that certain other issues needed to be considered. For the time that I have handled this matter I have noted the frosty relations between the parties. I doubt that they would cooperate in these matters. Litigation must come to an end. There are very clear orders in this matter from the Court of Appeal. That decree must be complied with.

14. The orders that I am inclined to grant in the circumstances are as follows –

- a. **That I do allow the application dated 14th August 2017 in terms of prayers (2) and (3) thereof;**
- b. **That the defendant shall move out of the subject property to the premises standing on Ngong/Ngong/[...] within thirty (30) days of date hereof;**
- c. **That in the event the defendant neglects or refuses to comply with (b) above, the Deputy Registrar is hereby directed to cause the defendant to be forcible removed from Nairobi Block [...] and relocated to Ngong/Ngong/[...];**
- d. **That the children are at liberty to move in with the plaintiff into Gatundu Phase II Plot No. [...];**
- e. **That the plaintiff shall pay rent in respect of the premises on Ngong/Ngong/[...] for as long as the property in Nairobi Block [...] has not been sold and the proceeds of sale shared out between the parties; and**
- f. **That the defendant shall pay for the costs of these proceedings.**

DATED, SIGNED and DELIVERED at NAIROBI this 8TH DAY OF DECEMBER, 2017.

W. MUSYOKA

JUDGE