



**REPUBLIC OF KENYA**

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

**CIVIL CASE NUMBER 170 OF 2010(O.S.)**

**IN THE MATTER OF AN APPLICATION BY DYSSELEER MIREILLE LESOIPA UNDER SECTION 17 OF THE MARRIED WOMEN PROPERTY ACT 1882 AS AMMENDED**

**DML.....PLAINTIFF/APPLICANT**

**VERSUS**

**ML *alias* EL.....DEFENDANT/RESPONDENTS**

**RULING**

1. The Applicant herein **DML**, by her application dated 9<sup>th</sup> December 2015 and brought under the provisions of **Sections 1A, 3A, and 38(f) of the Civil Procedure Act and order 49 Rule 5 of the Civil Procedure Rules** sought four orders:

1. *That this court be pleased to order the Deputy Registrar of this court to execute transfer documents in favour of Nuclear Investment Ltd, the purchaser of **Parcel No. Particular /112**.*
2. *That this court be pleased to order that M/S Nuclear Investments Limited, the purchaser to release Kshs.2,050,000/= to the Plaintiff/Applicant's Advocates and the balance of Kshs.2,950,000/= be shared equally net of all costs, thereafter, the plaintiffs share be released to the firm of M/S Mugambi Nguthari & Company Advocates and the Defendants share be deposited in court for collection by the Defendant.*
3. *That this Honourable Court be pleased to order that M/s Nuclear Investments Limited, the Purchasers of **Parcel No. Particular Township/112** may take control and possession of all that development on the said land parcel.*
4. *That the costs of the application be provided for.*

2. The application is based on the grounds that judgment in the suit was delivered on the 9<sup>th</sup> February 2015 and a decree issued on 17<sup>th</sup> February 2015 drawn. Pursuant to the said judgment and decree the applicant has secured a purchaser for the property but the defendant who is holding the title for the property has failed and refused to co-operate in the sale of the property as ordered by the court.

It is sought that the Deputy Registrar of this court do execute the necessary documents for transfer in execution of the decree of the court.

3. In opposing the application the Defendant filed a preliminary objection on the 21<sup>st</sup> December 2015. The main objection is on **Jurisdiction**. It is contended that this court does not have jurisdiction to grant the orders sought as the matter is already in the Court of Appeal by dint of a Notice of Appeal filed against the judgment. It is contended that the plaintiff in execution of the decree in the intended sale of the suit property has breached the provisions of **Order 22 of the Civil Procedure Rules** and has not complied with **Order 49 Rule 5** thereof in that no Notice to Show Cause had been issued and served upon the defendant the Judgment having been more than one year old.

4. The defendant submits that the Deputy Registrars jurisdiction under **Order 49 Rule 5 and Section 98 of the Act** are in the first instance exercisable by the Deputy Registrar and any objection thereafter ought to go to a Judge. It is urged that the application is procedurally defective.

5. The defendant states that he has not failed to comply with the decree of the court as no notices were ever served upon him and that judicial notice ought to be taken that the defendant had been unwell for a long time.

6. It is further contended by the defendant that the orders sought cannot be urged in an application but upon substantive proceedings being taken, by filing a fresh suit.

The defendant further states that the Sale Agreement between the Intended Purchaser and the plaintiff is defective as the defendant was not a party and that the Intended purchaser has not been enjoined to these proceedings.

7. The applicant in response to the matter of Jurisdiction raised in the preliminary objection took the view that the preliminary objection was not merited as it did not raise pure points of law as stated in the **Mukhisa Biscuits case – (1969) E.A 696**.

He cited **Section 34 of the Civil Procedure Act** where it is stated that all questions arising from execution of a decree shall be determined by the court that issued the decree and not by a separate court.

Further, he cited the case of **Kepue Ole Ngweta and Another -vs- Sarah Njoki Munge (2015) e KLR** where the court held that **Section 34 of Civil Procedure Act** provides that issues of execution discharge or satisfaction of a decree be filed in the court that made the decree, and therefore bars a party from filing a separate suit. It was further submitted that a Notice of Appeal does not oust the court's jurisdiction on execution unless there is an order of stay of execution.

8. I have considered submissions by both counsel on the matter of jurisdiction.

It is trite that a court cannot confer jurisdiction on itself save that which is so conferred by the Constitution and Legislation.

Admittedly there is a Notice of Appeal filed, an intention to lodge an appeal to the Court of Appeal.

9. It is not in dispute that there is no stay of execution of the decree of the court pursuant to the judgment delivered on the 9<sup>th</sup> February 2015.

The decree as drawn and issued on the 17<sup>th</sup> February 2015 Paragraph 6 reads:

***“the suit property be sold and/or the parties buy each others entitlement in respect thereof.”***

As stated above, there is no stay of execution, a fact admitted by the defendant.

**Section 34(1) of Civil Procedure Act** states:

***“All questions arising between parties to the suit in which the decree was passed----- and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not by a separate suit.”***

From the above, it is evident that questions touching on execution of decrees are within this court's jurisdiction. The law prohibits filing of a separate suit for execution purposes – as held in the case **Eutyachus Mwangi Karanja & Other -vs- KTDA and Another (2014) e KLR** and also **Kepure Ole Ngweta Case (Supra)**.

10. That having been sorted, what is then the role of the Deputy Registrar in execution proceedings?

**Order 49** of the **Civil Procedure Rules** donates special powers to Registrars of the High Court. **Under Rule 79(1)(b)(x)** the Registrar is empowered to hear and give directions on execution proceedings save for orders on specific performance or for an injunction under **Order 22 Rule 28, and 75** upon applications to set aside sale on the ground of irregularity or fraud.

11. The issue at hand as stated in the application by the plaintiff is execution of the decree as directed by the court for the sale of the suit property. The defendant, it is stated, has failed to execute the sale and transfer document that is, the Sale Agreement and the transfer document.

**Rule 5 of Order 49** of **Civil Procedure Rules** empowers the Registrar to Orders execution in the following manner:

***“formal orders for attachment and sale of property and for the issue of notices to show cause on applications--- in execution of a decree of the High Court may be made by the Registrar --- but in the event of objection being taken to the proceeding thereunder, all further proceedings, shall be before a Judge.”***

I agree with the defendant/respondent that the plaintiff ***“put the cart before the horse.”*** by bringing the application before the Judge instead to the Registrar in the first instance as provided under the above order. This is however a procedural technicality that does not go into the merits of the application and that under **Article 159 (2)(d)** of the **Constitution** cannot bar the High Court from its mandate to dispense justice.

12. It is stated that the Defendant has failed to execute the Sale Agreement and transfer. The applicant has not demonstrated that he has transmitted the Sale Agreement, firstly to the defendant or his Advocates for approval and execution nor was the defendant engaged in the task of finding a suitable buyer for the suit property. In my understanding, the decree of the court did not say that the plaintiff was to unilaterally sale the property without involvement of the defendant or his advocates. The property having been declared a matrimonial property the couple (plaintiff and the defendant) is obligated to jointly agree on the mode and method of the sale of the property and agree on the basic conditions and terms of sale including the sale price. Having held that there is no demonstration by the defendant of having involved the defendant in any way in the sale transaction, it would be doing an injustice to the defendant to move to the next stage, completion of the sale of the property, by allowing and directing the Deputy Registrar to execute the transfer documents in enforcement of the decree of the court.

13. The judgment of the court is over one year old. **Order 22 Rule 18 of Civil Procedure Rules** mandates a Decree holder, before taking out execution proceedings to take out a Notice to show cause why execution should not issue. This was evidently not done. It can not be prudent for the decree to be executed without following due process as provided in the execution rules and procedure as provided under **Order 22** of the **Civil Procedure Rules**.

14. From the foregoing, the court finds that the preliminary objection is merited and is upheld.

The applicant must go back to the beginning, and together with the respondent/defendant agree on the modalities, starting from searching for a suitable buyer for the property to the agreement terms and

conditions and eventual execution for the Sale Agreement and transfer of the suit property. If the defendant fails to co-operate, only then, should the applicant approach the court for its assistance in the manner stated in the application and demonstratively show that the defendant has failed to co-operate in the process.

15. The court finds the application dated 9<sup>th</sup> December 2015 premature. It is dismissed with costs to the respondent/defendant.

**Dated, signed and delivered in open court this 26<sup>th</sup> day of May 2016.**

**JANET MULWA**

**JUDGE**