



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**FAMILY DIVISION**  
**SUCCESSION CAUSE NO. 20 OF 2011 (OS)**  
**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**

**D E N.....PETITIONER**

**VERSUS**

**P N N.....RESPONDENT**

**RULING**

1. The respondent has applied that the orders issued on 29<sup>th</sup> February 2016 by this court be set aside. The orders sought to implement the orders of the Court of Appeal that were issued on 9<sup>th</sup> March 2015. The substance of the Court of Appeal decision was the declaration that the two matrimonial properties (Title Number Nairobi Block [particulars withheld] House No. [particulars withheld] High View Estate in Nairobi and Title Number Nyandarua/Oljoro Orok Salient [particulars withheld] were joint properties of the applicant and the respondent in equal shares. The equal shares were to be terminated by having the two properties valued, the Nyandarua Property transferred to the appellant and the Nairobi property transferred to the respondent subject to the respondent paying to the appellant the amount forming the shortfall of the equal sharing of the aggregate value of both values after factoring in the value of the Nyandarua property. The parties had divorced on 21<sup>st</sup> February 2011.
2. This court was to supervise the implementation of the Court of Appeal decision. The matter was to be mentioned before this Court within 30 days for the purposes of giving directions on the application of the value/values and the date of filing of the valuation reports. The costs of the valuation were to be borne equally by the parties. In default of or lack of cooperation from one party, the willing party was to pay for the whole valuation fees and seek contribution from the other. After the valuation the respondent had 120 days to pay to the appellant the amount forming the shortfall of the equal sharing of the aggregate value of both properties after factoring in the value of the Nyandarua property.
3. On 17<sup>th</sup> April 2015 the appellant wrote to the Deputy Registrar of this court seeking the mention of the matter to have the Court of Appeal decision executed. The matter was mentioned on 7<sup>th</sup> May 2015 before Justice Muigai. The respondent sought time to engage a lawyer to represent her. The matter was adjourned to 4<sup>th</sup> June 2015 when the parties were asked to file and exchange pleadings/affidavits and come for *interparte* hearing on 25<sup>th</sup> June 2015. The parties were not

ready and were asked to come for hearing on 9<sup>th</sup> July 2015. Eventually the matter was argued before the Judge on 23<sup>rd</sup> July 2015 and ruling slated for 28<sup>th</sup> August 2015. It was eventually delivered on 2<sup>nd</sup> October 2015. In essence, the respondent was given 120 days stay to file an application in the Court of Appeal for the review of its decision. On 1<sup>st</sup> February 2016 the appellant came to court to report that the 120 days had expired on 2<sup>nd</sup> February 2016 and yet the application for review had not been filed in the Court of Appeal. There appears to have been some altercation that led to the judge disqualifying herself. The matter came before me on 25<sup>th</sup> February 2016, and that was when, in the presence of the parties, I asked that, now that the appellant had proposed a valuer (D C K) of Tuliflocks Limited), the respondent do file an affidavit within 14 days appointing a valuer failing which the valuer proposed by the applicant be deemed to be the valuer appointed by the Court and to value the two properties within 30 days, and to file a report. This is the order that the respondent seeks be set aside.

4. The application of the respondent that she was not present when the valuing of 2<sup>nd</sup> November 2015 that gave her 120 days was delivered; that she became aware of the ruling on 11<sup>th</sup> February 2016. In the motion she sought an extension of time by two weeks to enable her file the application for review in the Court of Appeal.
5. I have looked at the ruling of 2<sup>nd</sup> October 2015. There is no indication that the respondent was present on that day, or that she was served with the ruling date. I note that the ruling had been scheduled to be delivered on 28<sup>th</sup> August 2015. I find that the complaint is legitimate.
6. However, the big picture is that the Court of Appeal delivered its decision on 9<sup>th</sup> March 2015 and asked this court to make sure that it is implemented. There has been no implementation since. The respondent was at liberty to file for review in the Court of Appeal. This is because the decision of the Court of Appeal cannot be challenged or varied in this court. Even taking that the respondent did not see the ruling of Judge Muigai until 11<sup>th</sup> February 2016, good faith demonstrated that, knowing the ordered 120 days had passed, she did not even annex the intended application for review. When she appeared before me on 25<sup>th</sup> February 2016 this is what she said:

**“My prayer is that I be given time to go to Court of Appeal to challenge the order that it gave. I can’t agree on valuation.”**

The Court of Appeal decision was on 9<sup>th</sup> March 2015. Nothing stopped her from challenging it. She did not need the permission of this Court. I do not find that, in the circumstances of this case, there is merit in reviewing and/or setting aside the orders that were delivered by this court on 26<sup>th</sup> February 2016.

**DATED and SIGNED at NAIROBI this 9<sup>th</sup> day of JUNE 2016**

**A.O. MUCHELULE**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 13<sup>TH</sup> day of JUNE 2016**

**W. MUSYOKA**

**JUDGE**