



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 81 OF 2003 (O.S)

J B N.....APPLICANT

VERSUS

M O N.....RESPONDENT

RULING

1. The applicant filed originating summons dated 8th December 2003 seeking for a declaration that their matrimonial properties were jointly owned. She sought orders for the division of the properties between them. The dispute was heard by Justice K.H. Rawal (then of this court) who on 11/3/2011 made the following declarations/orders:

“1) L.R No. [particulars withheld] House No. [particulars withheld] Kyuna Crescent (Nairobi) is declared to be held in ratio of 60%40% in favour of the Applicant and Respondent respectively.

2) L.R No. [particulars withheld] House No.[particulars withheld] Woodlands Avenue (Nairobi) is declared to be held in the ratio of 55%: 45% in favour of the Applicant and Respondent respectively.

3) The Applicant is holding 50% share in L.R No. [particulars withheld] Apartment No. [particulars withheld] Waiyaki Way Nairobi.

4) The respondent is ordered to disclose forthwith the proprietorship of the above property being Apartment No. [particulars withheld] along Waiyaki Way.

5) The respondent is further ordered to render accounts of the Woodlands and Kyuna properties above specified as from December, 1996 to upto date and pay the Applicant her shares thereof as declared herein before.

6) The respondent to pay costs hereof.”

2. The applicant filed a motion dated 15th October 2013 seeking that the respondent pays her

Kshs.2,392,000/- being the remainder of balance due from the rents from the Woodlands and Kyuna properties; the respondent to execute forthwith an instrument of transfer in her favour on L.R No. **[particulars withheld]** as well as instrument of transfer of lease in her favour over L.R No. **[particulars withheld]**; and he be ordered to vacate and hand over forthwith possession of the property L.R No. **[particulars withheld]** to her. The application was based on the grounds that the respondent has failed to comply with the orders contained in the above judgment. More specifically, that the respondent has failed, refused and/or neglected to transfer the said properties to her and has refused to pay to her the balance of the rents due on the two properties; he has denied her possession of L.R No. **[particulars withheld]** to date; and that he continues to take rents there from and to occupy it without any regard to the court order. The applicant stated that she had the properties valued and computed her share of rents, and requested the respondent to effect transfer to her share of the Woodlands and Kyuna houses as ordered by the court but that was not done. She, lastly, stated that the respondent does not have any order of stay of execution.

3. The respondent filed a replying affidavit in response to the application. He swore that the delay in prosecuting the appeal was occasioned by his changing of advocates to represent him, as well as failure to obtain proceedings in good time to be able to prosecute the appeal he has filed against the judgment and orders now subject of this application. He stated that the applicant's valuation of the properties above was a subjective one, and did not therefore reflect the real value of the properties. He sought to be provided with the proceedings and also to be granted a stay of execution to await the resolution of the appeal. Of course, he cannot legally seek the stay of execution of the decree through a replying affidavit. If the respondent was aggrieved by the decision and has filed an appeal, it was open to him to file a formal application for stay of execution. As matters stand, therefore, there is no legal impediment to the execution of the decree following the judgment.
4. Secondly, Order 42 rule 6 of the Civil Procedure Rules provides that no appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order. It is a well known principle that a successful litigant should not be deprived of the fruits of his success to which, *prima facie*, he is entitled to pending appeal (**GEORGE ORARO.V. KENYA TELEVISION NETWORK, NBI HCCC NO. 151 OF 1992**). The only way a decree holder would be denied the fruits of his success is through an order of stay of execution pending appeal. There is no order of stay here.
5. It is obvious that the respondent has not taken any step to comply with the order that was issued on 11/3/2011. Nonetheless, he did not participate in the valuation of the properties. The valuation was at the instance of the applicant. If he was invited to participate in the valuation and was unwilling, the court ought to have been asked to appoint an independent valuer to carry out the valuation. The applicant's valuation was a subjective one. The respondent was entitled to have a say in the matter.
6. In view of the foregoing I make an order that, within 15 days from today, the parties should agree on a valuer to value the properties in question in terms of the judgment above so that the court can give effect to it. If the parties do not agree the court shall appoint such valuer, whose fees of valuation shall be paid by the respondent in any event. This matter shall be mentioned on 15th June 2015. To that extent, the application is allowed with costs to the applicant.

DATED at NAIROBI this 15th day of May 2015

A.O. MUCHELULE

JUDGE

DELIVERED at NAIROBI this 20th day of May, 2015

L. ACHODE

JUDGE