

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCCC NO.20 OF 2011

D E N.....PETITIONER

VERSUS

P N N.....RESPONDENT

R U L I N G

The dispute between the Petitioner and the Respondent was in respect of division of matrimonial property. In her considered judgment delivered on 19th July 2012, W. Karanja J (as she then was) made, inter alia, the following orders:

“In the broader interests of justice and fairness, and bearing in mind the best interest of the children herein, I make the following orders:-

- 1. That the matrimonial home i.e. House No.[particulars withheld] Highview Estate Phase II LR. No.Nairobi Block [particulars withheld] remains with the Respondent herein. The same should be transferred to her upon discharge after she completes paying the Kshs.1,000,000/- she has charged it for.***
- 2. In return, she will forfeit her rights in LR. No. [particulars withheld] which should be transferred to the Petitioner.***
- 3. The Respondent refunds the Petitioner Kshs.1,000,000/- to compensate him for losing any claim on the matrimonial property and also taking into account the disparity in value between the two properties. The Petitioner’s name not to be removed from the title documents until the said money is paid.”***

The Petitioner was aggrieved by this decision and indicated to the court that he would appeal to the Court of Appeal. In that respect, the Petitioner filed an application seeking to stay the execution of the judgment pending the hearing of the appeal. The application dated 1st August 2012 was dismissed by Musyoka J on 9th May 2013.

On 11th June 2013, the Respondent filed an application seeking the court’s assistance to enforce the judgment rendered in her favour. In particular, the Respondent prayed that the court orders the Petitioner to vacate from the suit property in conformity with the judgment of the court. She further asks the court to direct the Officer Commanding Kilimani Police Station to provide her with security so as to ensure that the judgment of this court is complied with. The application is supported by the annexed affidavit of the Respondent. The application is opposed. The Petitioner filed a replying affidavit on 23rd June 2013 in opposition to the application. In essence, the Petitioner stated that the Respondent was not entitled to possession until she paid him the sum of Kshs.1,000,000/- that was decreed in his favour by the court.

Prior to the hearing of the application, counsel for the parties herein agreed by consent to file written submission in support of their respective clients’ opposing positions. The said submission were duly filed. During the hearing of the application, this court heard oral submission made by Mr. Muia for the Respondent and by the Petitioner, who by then was acting in person. The issue for determination by this court is whether the orders sought by the Respondent in her application should be granted. There are certain facts that are not in dispute in this application. It is not disputed that there exists a valid judgment

of this court. That judgment has not been set aside by an appellate court. It is therefore a valid judgment that is capable of enforcement and should infact have been complied with. In response to the Respondent's application, it is the Petitioner's case that since the Respondent had obtained judgment by concealing from the court the fact that he was the one who had possession of the house, then the orders that she craves for cannot be granted. The Petitioner urged the court to take into consideration the fact that he was the one who was currently having custody of the children of the marriage and should therefore be allowed to continue residing in the suit property.

This court's view of the Petitioner's objection to the application is that the Petitioner appears to be rearguing the case that has already been decided. This court lacks jurisdiction to reopen the case. The Petitioner can ventilate the case before the Court of Appeal. His application for stay was dismissed. What remains is for the Petitioner to comply with the orders of this court. In the premises therefore, this court will allow the Respondent's application as a result of which the Petitioner is hereby ordered to give vacant possession of the suit premises i.e. House No. *[particulars withheld]* Highview Estate Phase II on LR. No. Nairobi Block *[particulars withheld]* to the Respondent within thirty (30) days of the date of this Ruling or in default thereof the Respondent shall be at liberty to evict the Petitioner therefrom. The Officer Commanding, Kilimani Police Station is directed to provide all necessary assistance to enable compliance with the orders of this court should the Petitioner fail to voluntarily give vacant possession. The Respondent shall have the costs of the application. It is so ordered.

DATED AT NAIROBI THIS 30TH DAY OF APRIL, 2014.

L. KIMARU

JUDGE