



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 174 OF 2005 (OS)

A M R.....PLAINTIFF

VERSUS

A N J.....DEFENDANT

RULING

This matter was initially brought before the High Court as an originating summons dated 26th August, 2005 in which the plaintiff sought certain declarations with regard to her shares in the matrimonial properties. The matter was litigated all the way to the Court of Appeal which rendered a decision on 16th March, 2012. In that decision the Court of Appeal held that the plaintiff was entitled to a 25% share of plot No. **[particulars withheld]** /XVII/Mombasa Island and that she (the plaintiff) was also entitled to a 25% value of plot No. Kilifi/Mtwapa **[particulars withheld]**. In addition the court awarded to the plaintiff the sum of Kshs. 100,000/= representing her contribution towards the development of plot No. Kilifi/Mtwapa **[particulars withheld]**. The plaintiff has now come to the High Court seeking directions on the realization of her shares in the matrimonial property. Both parties filed written submissions in respect of this matter. **MR. ONYANGO** Advocate acted for the plaintiff (wife) whilst **MR. MUTUBIA** acted for the defendant (husband). Counsel for the defendant submitted that the High Court is *functus officio* and therefore has no authority to issue directions in the matter.

It is common ground that the decision relating to the mode of distribution of the matrimonial property was rendered by the Court of Appeal. Does this render the High Court '*functus officio*'? In its judgment at page 20 line 15 the Court of Appeal held as follows:

“To ascertain the appellant’s exact entitlement, the property needs to be valued and then her contribution be calculated on the basis of the percentages we have assessed above. There is need for a valuer to be appointed by the High Court to do the valuation.....” [own emphasis]

By this ruling the Court of Appeal specifically referred the matter back to the High Court for appointment of a valuer. The purpose of valuation is to assess the value of the two properties. To simply have the property valued and leave it at that would be meaningless. I have no doubt that the intention of the valuation exercise was to provide a basis for the assessment of the 25% due to the plaintiff. As such it is right and only logical and proper that this exercise on realization of share be conducted by the High Court.

I have looked at the valuation report dated 9th August, 2012 prepared by the Government Valuer with

respect to plot No. **[particulars withheld]** /III/MN Mtwapa Kilifi. The value of this plot is given as Kshs. 32,000,000/=. Thus 25% of this would be Kshs. 8,000,000/=. Therefore the sum due to the plaintiff as her 25% share of this property is **Kshs. 8 million**. Similarly I have perused the report dated 9th August 2012 prepared by the Government Valuer with respect to plot Mombasa/Block XVII/**[particulars withheld]** Mombasa Island. The total value is given as Kshs. 30,000,000/=. 25% of this amounts to Kshs. 7,500,000/= thus the plaintiff's share of this property amounts to **Kshs. seven point five million**.

I have considered the submissions filed by both parties. In order to enable the plaintiff realize her court awarded share in the two properties, I do hereby direct as follows:

1. The defendant to pay the plaintiff within ninety (90) days of today's date, by way of buy out a sum of Kshs. 7,500,000/= constituting her 25% share in LR No. Mombasa/Block XVI/ **[particulars withheld]** Mombasa Island.
2. The defendant to pay to the plaintiff within ninety (90) days by way of buy out the sum of Kshs. 8,000,000/= representing her 25% share in LR No. **[particulars withheld]** /III/MN/Kilifi.
3. The defendant to pay to the plaintiff within ninety (90) days of today's date the sum of Kshs. 100,000/= awarded to her by the Court of Appeal.

The plaintiff by her submissions has also sought to be awarded proceeds of the rental income from the two properties from 1st April, 2012 until the date of completion of the buyout. I have carefully read the judgment of the Court of Appeal. At no time did the court make an award to the plaintiff of any portion of the rental income. The prayer for rental income is therefore misplaced as it does not form part of the realization of shares.

Dated and delivered in Mombasa this 25th day of April, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Onyango for Plaintiff

Mr. Mutubia for Defendant

Court Clerk Mutisya