



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE NO. 3087 OF 1981

MARGARET ROSE WAMBUI.....PLAINTIFF

VERSUS

SILVESTER JOHN NJOROGE.....DEFENDANT

RULING

This court has been informed by the applicant's counsel on record that the proceedings herein relate to husband and wife matrimonial property. The parties were heard on merit culminating in a judgment delivered by Mbitio J. as he then was on the 24th day of February, 2000. The salient features of the said judgment which is relevant to this ruling are as follows: -

(i) At page 1 of the said judgment there is observation that the plaintiff wife who is the applicant herein had moved to the seat of justice alleging that properties enumerated as: -

- (a) *Land Title number Ndeiya/Ndeiya/390,*
 - (b) *Plot Nos.36 and 4A Mirithu Market and Makutano Market respectively,*
 - (c) *Plots land reference No.209/66/15 Nairobi,*
 - (d) *Plot No.Kiambu/Karura/T.207*
 - (e) *Shares Nos 847 and 694 in Kangita Group,*
 - (f) *Shares No.992 Nguatairo Company,*
 - (g) *Plot on Kiamunyi Farm Nakuru of 7 acres,*
 - (h) *Two plots in Thigio Town*
 - (i) *Lorry Registration No.KQX 384, Tractor KMJ 685, Moms Pickup KAN 164, Peugeot No. KPS and GRRM, Jul 056.*
 - (j) *Knitting machine were in fact assets acquired during the subsistence of the marriage and that the same should be shared equally between them.*
- (ii) At page 2 it is observed that the defendant respondent filed a response.

(iii) Parties were heard on their merits.

(iv) At page 5 of the judgment line 4 from the top, the court noted that it had been called upon to determine which properties had been acquired during the subsistence of the marriage and, registered in the names of the “**plaintiff**”? I think it should read “**defendant**” and whether the plaintiff is entitled to a share of any of them. The court is right to say that the word should read “**defendant**” instead of plaintiff because from the introductory facts the plaintiff was seeking a share of the property acquired during the marriage which were registered in the names of the defendant.

(v) At page 8-9 the learned Judge assessed the applicable principles of law as confirmed by case law.

(vi) At page 9 line 10 from the bottom the learned Judge as he then was held thus: -

“In the present case, the parties hereto were income generating. While the one was busy hunting for family assets, the other was busy maintaining the family. In the circumstances, I hold that they were entitled to whatever family assets were acquired in the defendant’s (plaintiff’s) name during the marriage in equal shares. I therefore hold that the plaintiff is entitled to half of all the assets set out in paragraph 8(a) (b) and (c) of the supporting affidavit. I also hold that the plaintiff was entitled to 50% of plot nos.Ndeiya/Kiroe/T.365 and T.197. I accordingly (alter?) enter judgment for the plaintiff against the defendant for 50% of the sale price, if they have since been sold. I order costs of this suit plus interest to the plaintiff. Orders accordingly.”

In her pursuit of the realization of the fruits of the judgment in her favour, the plaintiff came back to court vide an application by way of notice of motion dated the 28th day of April, 2009 and filed on the 29th day of April, 2009. six reliefs were sought namely: -

(1) That the defendant/respondent, his employee and or his agent be compelled to deposit rental income accruing from the residential houses located in the suit property known and or described as Land Reference number 209/66/43 Mogotio Road, Parklands, Nairobi in court henceforth.

(2) That the defendant/respondent do produce full audited accounts of all the income earned from the joint properties from the date of filing this suit to date.

(3) That the defendant/respondent do produce and or furnish the court with all the title documents relating to the suit properties so as to enable the Deputy Registrar execute the transfer of half of the properties to the applicant per this honourable court’s orders dated 7th December, 2006.

(4) That the property known as Land Reference number 209/66/15 or the division and sub-division titles namely Land Reference Number 209/66/43 and land reference number 209/66/44 be valued and or sold and the defendant do pay the applicant the equivalent of half the value of the said properties.

(5) That the Deputy Registrar of this Honourable Court be authorized to sign all the necessary documents relating to the transfer, sale, valuation or other documents relating to the properties known as land reference number 209/66/15, land reference number 209/66/43, land reference number 209/66/44, Ndeiya/Ndeiya/390, plot number 36 and 4A Ndeiya/Kiroe/T.365 and Ndeiya/Kiroe/T.197.

(6) That the costs of this application be in the cause.

The court has been informed that parties were heard ex-parte on its merits and that hearing gave rise to orders made by the court on the 26th day of January, 2010, and extended by the Deputy Registrar on the 9th day of February, 2010. These read: -

(1) That the defendant/respondent do deposit all rental income accruing from the residential houses located on the suit property known and or described as Land Reference Number 209/66/43

Mogotio Road Parklands, Nairobi with the court within the next thirty (30) days.

(2) That the defendant respondent do produce full and audited accounts for all income earned from the suit property in Land Reference Number 209/66/43 Mogotio Road, Parklands,, Nairobi within thirty (3) days.

(3) That the defendant do within thirty (30) days deposit in court the title documents relating to Plots Nos. Ndeiya/Ndeiya/390, Plot 26 Mirithu Market, Plot No.209/66/43 (a subdivision of Plot No.209/66/15, the other sub-division of plot No.44 having been sold) and Ndeiya/Kiroe/T.365 and 197.

(4) That the plot No.209/66/43 be valued for division of proceeds on 50-50 basis between the litigants.

(5) That the Deputy Registrar of this Court to sign all the transfer papers giving the plaintiff her 50% share in all the stated properties, deposit of income and title documents to be in court.

(6) That the costs are hereby granted to the plaintiff/applicant.”

The plaintiff/applicant has once more come back to the seat of justice by way of an application dated 8th day of April and filed on the 22nd day of April, 2010 seeking two reliefs namely: -

(1) That this court be pleased to grant leave to the plaintiff/applicant to apply for orders of committal to prison for contempt and further or other consequent orders as may deem just to the court against the respondent for willfully disobeying and/or continuing to disobey the court’s order given on 26th January, 2010 issued on 9th February 2010 by Honourable Mr. Justice Mwera.

(2) That this honourable court be pleased to issue warrant of arrest and produce before this court Mr. Sylvester John Njoroge the defendant/respondent to show cause why he should not be punished by way of committal to jail or by way of such other sentence as the court may deem just to mete out for the respondent’s open contempt of this honourable court’s order given on 26th January 2010 and issued on 9th February, 2010 by Honourable Mr. Justice Mwera.

On the hearing date, the court was informed that prayer (1) is spent as the record shows that leave was granted on 3rd June, 2010. The grounds in support of prayer (2) are set out in the body of the application and the supporting affidavit. Those in the body of the application are to the effect that the orders issued on 26th day of January, 2010 were extracted and endorsed with a notice of penal consequences and were duly served on the 15th day of February, 2010, and to date the defendant/respondent has frequently disobeyed them hence the move to seek the court’s intervention to compel the defendant’s obedience to those orders. The grounds in the supporting affidavit also reiterates the grounds in the body of the application, that indeed orders were made by the court on 26th November, 2010, they were duly extracted and served but they have not been obeyed to date. The same were to be complied with within 30 days but the respondent has not done so. There is annexed extracted order MRWN-1, and the return of service evidencing service of the said order MRWN -2.

The respondent’s response is by way of a replying affidavit deposed by one Sylvester John Njoroge deposed on the 28th day of September, 2010, and filed on the 29th day of October, 2010. The following are the salient features of the same: -

- Vide paragraph 4 that he is unable to comply with the order with regard to plot number LR No.209/66/43 Mogotio Road Parklands because it is registered in the name of his late father, letters of administration have not been taken out, the income generated by the said plot collected by other survivors over which he has no control, and as such he cannot single handedly account for the same. That the period for accounting of accounts is not specified. That he cannot also comply with regard to parcel number Ndeiya/Ndeiya/390 because it is mortgaged to the Agricultural Finance Corporation since 1988 and the

title is held by the said Corporation.

- Vide paragraph 5 that the lack of succession to the father's estate has been a stumbling block to the release of title to the said plot because they do not know to whom the same should be granted.
- There is also recourse to the extract of titles to LR Number 209/66/15 annexure A. There is entry number 41 evidencing transfer to Njoroge Mwangi. At entry 45 the plaintiff placed a caveat on the same property which was removed. Vide entry no.48, there is mention of sub-division. Annexure B with respect to title number Ndeiya/Ndeiya/390 shows that indeed the said property was mortgaged to AFC on 12th February, 1988.

There is a further affidavit deposed by the plaintiff/applicant deposed on the 16th day of February, 2011, and filed on the same 16th day of February, 2011. The salient features of the same are as follows: -

- Reiterates the contents of the grounds in the body of the application and the supporting affidavit.
- Vide paragraph 6, that she paid Kshs.3,000.00 to Agricultural Finance Corporation to release the title and for this reason the title is available.
- Vide paragraph 7, that the judgment debtor is in charge of the rent collection or knows the person who is in charge of rent collection and it is therefore easy for him to account for the said income.
- Vide paragraph 8 that this court should compel the tenants to deposit the money into court.
- vide paragraph 9 that the judgment debtor is the one who has been transacting with regard to the Nairobi property as his signatures appear in the documents relating to the said property.
- Vide paragraph 12, that the judgment debtor is silent about the other properties affected by the breached order.
- Vide paragraph 13, 14, 15, 16 and 17 that since the judgment debtor has made a mockery of the court's dignity she should not be given allowance as he is a contemnor.

There is also reliance on the annexures namely the order of 9th December, 2010 annexure MXWA1A, return of service for the service of the said orders annexure B. A receipt to the tune of Kshs.3,000.00 paid to AFC on 18th January, 2011, paid by the plaintiff/applicant annexure MRUN2C authorizing the AFC to accept clearance money from the plaintiff in respect of payment to free the security held by then annexure, a letter from the applicant's Counsel dated 20th September, 2007 addressed to tenants on the Nairobi property asking them to deposit half of the rent with them the applicant's counsel's office for the benefit of the plaintiff/applicant, annexure 5 a valuation report on the Nairobi plot carried out at the request of the defendant/judgment debtor dated 29th day of October, 1997, an annexure 6, the order of 9th February, 2010, summons for attachment and sale of moveable goods dated 17th day of March, 2005, allocation letter of plot number 36A, Mirithu Market dated 31st March, 1976, application in Misc. Application No.275 of 1980 for the removal of a prohibitory order on land parcel number Ndeiya/Ndeiya/390, authority given by the defendant/respondent to Kiambu County Council on 28/11/85 authorizing one Joseph Thairu Kimani to develop plot No.4A, allocation for plot number Mirithu Market 36B dated 19th April, 1973.

Parties also filed written skeleton submissions. Those of the applicant are dated the 7th day of April, 2011, and filed the same date. The following have been stressed: -

- Leave to institute contempt proceedings was duly granted by Mwera J.
- The application for contempt was duly filed and served and the respondent has responded to the same

- That it is not true the title to LR Ndeiya/Ndeiya is still held by the Agricultural Finance Corporation, considering that the plaintiff/applicant paid off the outstanding debt and thereby causing the property to be discharged.
- Contends that the defendant/respondent is in charge of rent collection from LR NO.209/66/43 Mogotio Road Parklands.
- There is no mention about the other properties.
- The court is invited to note that the signatures on the affidavits is the same one which appears on the title and the valuation report of the Nairobi Plot which is proof that he exercises authority over the said property.
- The court is invited to take a stern action against the defendant/respondent who has made a mockery of all the court orders.

The respondent's submissions are dated 12th day of July 2011, and filed on the 13th day of July 2011. The salient features of the same are as follows:

- The defendant/respondent relies on the filed deponements.
- It is true his names are Silvester John Njoroge, the names used throughout the proceedings and for this reason he is not known by any other names.

He is incapable of complying with the orders issued on 26th January, 2010 by Mwera J. complained of because of the following:

- (a) He is not the registered owner of Land Parcel Number LR NO.209/66/43. He has no control over the rental income which is being collected by the other beneficiaries and as such he cannot be able to account for the said income.
- (b) Still maintains that Land Parcel Number LR Ndeiya/Ndeiya/390 is still held by Agricultural Finance Corporation.
- (c) Since the application does not contain the mandatory footnotes in warning non compliance with intention to respond, the same is incompetent and the same should be struck out.
- (d) The extracted order is also incompetent in that the penal notice is defective as the notice does not stipulate the duration liability of liability penalty in case of disobedience.

In their oral submissions, counsels for the applicant urged the court to grant them the relief sought because there is a decree in place, which has not been upset. On appeal, enforcement order in place, no denial of lack of knowledge of the said orders. Instead the dependant/respondent has put in a replying affidavit to justify disobedience.

As for the respondent oral highlights, are that it is conceded there is a judgment and decree in place. Concede that the enforcements orders were also served but they are unable to comply as they have explained.

There is reliance on a ruling by Rawal J. delivered by Rawal J. on the 1st day of December 2000 in the case of Rose Atieno versus City Council of Nairobi HCCC No.1848 of 2000 whereby the learned Judge faulted an application because it had not contained a footnote which is stipulated in the rules.

This court has given due consideration to the rival deponements, submissions, oral, highlights and the same considered in the light of the applicable principles of law and the court proceeds to make the

following findings on the same.

(1) On incompetence of the application this has arisen because the application has been drawn without inclusion of the footnote penal notice. In this court's opinion this is a defect curable under Order 51 Rule 10 CPR and Article 22(3)(d) and 159(2)(d) of the Constitution which enjoins courts of justice not to refrain from rendering of justice on account of technicalities. The objection raised is one of a technical nature which does not prejudice the respondent in any way and for this reason it will not be upheld at the expense of substantial justice. The court therefore, rules that the application is properly before this court, the defect is curable and the same will be considered on its merit.

(2) The court finds that since the orders of 26th January, 2010 sought to be enforced stem from the orders of 24th February, 2000, which have not been appealed against upset or varied in any way, this court can only fail to enforce them if special explanations has been demonstrated to exist. It is the business of a court of law to ensure that its orders are enforced not only to give effect to its orders, but also to ensure that the successful litigant accesses an effective remedy by realizing the fruits of the judgment..

(3) It is on record and it has been admitted by the defendant/respondent that he has notice of the said orders, that he is the addressee of these orders and by reason of principles of case law emanating from the court of appeal and as dutifully followed by the superior court and the subordinate courts, an addressee of court orders is required to respond to those orders in the following manner: -

(a) Observe the orders addressed to him in obedience and not in breach.

(b) The observance and obedience to the orders is demanded and lasts as long as the orders remain in force and have not either been varied and or discharged.

(c) The orders subject of this ruling have neither been upset on appeal or either varied or discharged otherwise. They therefore demand obedience.

(4) The orders affected are those made on 24th February, 2000 by Mbitio J. as he then was, (now rtd) and as issued for enforcement by Mwera J on the 26th January, 2010. These relate to certain properties. It is correctly submitted that out of the entire number the defendant/respondent has expressed inability to comply with regard to the two properties but is silent about the rest of the properties. This court's construction of that silence is that there is no valid explanation and no reason as to why the defendant has not given the plaintiff/applicant half share value in those unexplained properties.

(5) The two properties mentioned in number 4 above are LR Ndeiya/Ndeiya/390. The excuse was that the title is still held by Agricultural Finance Corporation on account of an accumulated mortgage loan secured against the said title. The plaintiff/applicant has countered this by exhibiting a letter written by her counsel on her behalf asking the AFC to accept payment from the plaintiff/applicant in order to release the title and she did so. There is no affidavit or statement of account from the AFC show that there is any mortgage which is still outstanding on the said property. The court is therefore satisfied that this property is free for the realization of the judgment. The search certificate relied upon is dated 25th October, 2010. The payment by the plaintiff was made after that date.

(6) The second property over inability to comply has been expressed is LR No.209/66/43 Mogotio Road Parklands. The reason alleged is that the same belongs to his deceased father and he has no control over it, nor the resultant income generated by the said plot. It is alleged the income is collected by other survivors and that no succession proceedings have been taken out in order to succeed the said property.

This court has given due consideration to the said explanation, and in this court's opinion the defendant/respondent's explanation does not hold because of the following reasons: -

(i) Indeed it has been argued that the defendant/respondent has all along been known by the names

of Sylvester John Njoroge but this has not been backed up by production of his identification documents.

(ii) He has alleged that the name belongs to his late father but he has not exhibited any identification document not even a death certificate to reveal the true names of his late father and to show that he is indeed deceased.

(iii) The alleged beneficiaries who were collecting the rent were not particularized. Neither have they put in a deponement that they are the ones collecting rent. In the absence of exhibiting of identification document by the defendant/respondent of his late father, and a supporting deponement from the survivors that indeed the property belongs to the late father's estate. There is no way the respondent can be excused from the compliance. Further there is no disclosure as to when the deceased father died. This could have been demonstrated by annexing a death certificate. There is also no explanation as to why letters of administration have not been taken out. In this court's opinion the foregoing factors go to show that these are lame excuses coined by the defendant/respondent and aimed at frustrating the enforcement of this court's orders and perpetually deny the successful litigant who is the plaintiff/applicant the enjoyment of the fruits of her judgment which has never been varied.

For the reasons given in the assessment, the plaintiff/applicant has demonstrated that there is no justification for non-compliance with the court orders. In essence the court is satisfied that the defendant/respondent as the addressee of the orders complained to have been breached, has not given any reasonable explanation for non-compliance and for this reason the plaintiff/applicant has earned the relief in prayer 2 of the application dated 8th April, 2010 and filed on the 22nd April, 2010 with variation that the defendant/respondent be arrested and committed to civil jail for the contempt of the said court order of 24th day of February 2000 and 26th January, 2010 and he be so detained for six months until he purges the contempt

2. The plaintiff/applicant will have costs of the application.

DATED, READ AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2011

**R.N NAMBUYE
JUDGE**