



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO. 2562 OF 1994 (O.S.)

EUNICE KYALO MUTHEMBWA.....PLAINTIFF
VERSUS
COSMAS K. MUTHEMBWA..... DEFENDANT

RULING

The Applicant in the Chamber Summons dated 12th July 2010 , has moved this court under **Sections 1A 1B, 3A and 34(1)** of the **Civil Procedure Act**, praying that from parcels of land registered in the name of her ex-husband (the Defendant/Respondent) be sold and the proceedings thereof be distributed between herself and the Respondent in terms of the judgment of the High Court dated 2nd July 1999, and the Court of Appeal judgment dated 19th April 2002. The affected properties are:-

1. L.R. No. 12767/29 (Original No. 12767/12/1) title No. 76380 Magadi Road
2. L.R. No. 12767/80 (Original No. 12767/12/2) Title No. 76379
3. L.R. No. 12661/58 Hardy Estate, Nairobi
4. Makueni/Kako.493

The Applicant prays also that an order be made for the parties to mutually nominate a reputable firm of estate agents to carry out the sale of the properties within 14 days of the court order, failing which the court itself appoints a suitable estate agent and further that the court be pleased to give directions for the enforcement of the judgments and decrees passed in this suit and in **Civil Appeal No. 74 of 2001**. The application is founded on the following grounds:-

1. That judgment in this matter was delivered on 2nd July 1999 and judgment in Civil Appeal No. 74 of 2001, was delivered on 19th April 2002 and the Applicant was awarded 50% share in all the three properties.
2. That despite various efforts to have the Applicant obtain her 50% share of the Properties, the Respondent has frustrated all such efforts.
3. The Respondent is in full control of all properties and has continued to encumber the properties even after the judgments of this court and the Court of Appeal. He is in receipt of all the income and benefits from all the properties.

It is supported by the Applicants affidavit of 12th July 2010, in which she has annexed copies of the two judgments and depones *inter alia*, that the Respondent has ignored the same and has subdivided and sold one of the suit properties, developed another one and continues to enjoy the proceeds thereof to her exclusion, despite the court having awarded her a 50% share of the same.

In response to the application, the Respondent filed a Replying Affidavit sworn on 11th January 2011 and a Supplementary Affidavit sworn on 17th March 2011. The Respondent's position is firstly, that, this court lacks jurisdiction to entertain the application since, in the Respondents view, the same appears to be seeking an interpretation of the Court of Appeal judgment, which, according to the Respondent, set aside the High Court judgment. Secondly, the Respondent holds the view that, going by the judgment of the Court of Appeal, an order for the sale of the property cannot issue, particularly when he has invested heavily in developing the property and has possession. He has deponed, however, that he has all along been willing to have the property valued and shared out in accordance with the Court of Appeal judgment, adding that it is the Applicant who has frustrated the process of distribution by insisting that the date of valuation be 1997 and not December 1992 as ordered by the Court of Appeal. He says that he is ready and willing to buy out the Applicant by paying her the value of her share.

After considering the facts of this case and the submissions made both orally and in writing and perusing both the judgment of the Court of Appeal and that of the High Court and the decree, I am not inclined to agree with the Respondent that this court lacks jurisdiction to hear the application. The High Court decision was not set aside but upheld by the Court of Appeal, albeit with variation. The Respondent has not provided any evidence to support his contention that it is the Applicant and not himself who has frustrated the due performance of the decree. He has also not demonstrated how the matter can be settled "*in terms of the Court of Appeal Ruling*" alone, without any consideration being given of the High Court decree which, in my view, specifies the legal interest to be shared.

The Court of Appeal only set aside **Order 3** of the decree of the High Court and varied **Order 1** to provide the effective date of valuation of the each parties' interest be the date when their cohabitation ceased, which is December 1992. According to **Order 4**, the parties were required to proceed before the Deputy Registrar of the High Court for the ascertainment of their respective interests/shares. This appears not to have happened and no mention of it has been made by either of the contestants in the affidavits or submissions filed.

I accept the Respondent's submission that a valuation of the properties is vital for the process of distribution and that a sale of the properties is not the only option to resolve the matter with finality. The Respondent can buy out the Applicant's 50% share, which cannot be ascertained otherwise than by valuations being undertaken by a valuer appointed jointly by the parties or if they cannot agree, a valuer appointed by the court. I have seen the valuation filed by the Applicant over **L.R. No. 12767/12**, which gives a market value of the property as at 21st February 1997 and the Respondent's 2 valuations dated 14th September 2010.

In my view, the said valuations do not render any assistance in resolving this long outstanding dispute. From the letter dated 12th November 2008, ("EMK 5") written to the Respondent by the Applicant's advocate, the option of having the Respondent buy the Applicant's share was offered. It would seem to be the best option in the circumstances but appropriate valuations must be undertaken. Directions in this regard ought to have been taken before the Deputy Registrar in accordance with **Order 4** of the High Court decree. For the sake of expediency, however, I order that the parties do proceed to agree on the appointment of a mutually acceptable valuer within the next 15 days, who will undertake to value the properties specified in this application and to file appropriate valuation reports into court within 45 days of this order. The valuer's terms of reference shall be drawn jointly by counsel, with special note being taken of **Order 2** of the decree, which is relevant because the Respondent has been utilizing the Applicant's share of the property since their cohabitation ended in December 1992. He owes her 50% of any income he has made to her exclusion while any liabilities remain his responsibility. The judgments are clear in this and need no interpretation.

Once the valuations are filed parties will mention the matter before the Deputy Registrar, Commercial Division for further orders. To give effect to the orders made herein, I make a further order that in the event the parties are unable to agree on a valuer, the Deputy Registrar shall proceed to appoint one, and to draw his terms of reference in accordance with the judgment of the High Court as varied by the Court of Appeal.

Costs of this application shall be in the cause.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH day of NOVEMBER, 2011

M. G. MUGO
JUDGE

In the presence of:

Mr. Kiura holding brief for Mr. Raiji For the Applicant

No Appearance For the Respondent