



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

Originating Summons 2 of 2009

S B.....APPLICANT

VERUS

AAL.....1ST RESPONDENT

C[....] MARKETING AND DEVELOPMENT LTD.....2ND RESPONDENT

RULING

The Applicant, SB on 23rd December 2009 filed this Originating Summons under the provisions of the Married Women Property Act 1882. The Respondents are one AA Langi and C[....]Marketing and Developments Limited. The First Respondent was at all material times, the Applicant's partner with whom they have lived as husband and wife and had 4 Children together. The second Respondent is a limited liability company jointly owned by the Applicant and the First Defendant.

In the Originating Summons the Applicant who claims title and/or ownership of what he claims to be matrimonial property wants the court to determine inter alia the following questions:-

- 1. Is the Applicant entitled to declaration that the property known as Kilifi/Mtwapa[....]registered in the name of the 2nd Respondent is solely owned by the Applicant and was acquired by funds and efforts provided by the applicant solely during marriage.
2. That this Honourable court be pleased to declare that 50% shareholding held by the 1st Respondent in the 2nd Respondent company is held in trust for the Applicant.
3. That the Honourable court be pleased to order the division of the said property and apportionment of the same between the applicant and the 1st Respondent in the percentages the court deems fit in the circumstances and based on contribution.
4.
5.
6.
7. That the costs of this suit be awarded to the Applicant.

The 1st Respondent opposed the summons and filed her replies. Directions were taken and the matter was ripe for hearing.

Before the hearing could commence the parties reached a substantial agreement virtually settling the dispute in this matter. On the 26th May 2010 the Parties through Counsel recorded the following consent:-

- 1. The suit property known as Mtwapa/Kilifi/[....] registered in the name of the 2nd Defendant/Respondent be sold at the price of Kshs.32,000,000/-.
2. The proceeds of the sale to be shared equally between the Applicants and the 1st Respondent including the deposits of 10% of the price.
3. The Applicant and the 1st Respondent share equally outstanding rates on the property, cost of consents of transfer, clearance certificate and any other costs and disbursements payable by the vendor arising from the transfer of the property of the purchaser.
4. The question of vacant possession and costs be deferred until 28.05.2010 when the matter

shall be mentioned.

5. **In the event that there is no agreement on vacant possession and costs, then this consent order shall stand vacated.**

On 28th May 2010, the parties recorded yet another consent edging the matter further to a mutual settlement. It was recorded as follows:-

“The parties have agreed on the question of vacant possession. By consent the 1st Respondent shall handover the suit property to the purchaser in vacant possession on the 90th day from the date of the Sale Agreement or on an earlier date as may be agreed between the parties to the Sale Agreement, the latter not being earlier than 45 days from the date of the Sale Agreement. This consent shall be incorporated and be part of the consent order recorded on 26.5.1020.”

It was further ordered that the Sale Agreement would proceed to conclusion. The only question now outstanding was threat of costs. The parties agreed that the court make a Ruling on whether the parties should make submissions on who is to pay costs or whether it should await the completion of the Sale Agreement.

This is the ruling to be made herein. I have considered all facts, matters and circumstances.

It is my sincere view that the parties have virtually resolved their differences and settled this dispute through the consent orders herein. The biggest hurdle is really over. With good faith, commitment and considering the best interest of the children of the parties, this settlement should be completed and consummated. It would be truly sad if it fails only due to question of who should pay the costs.

I would have recommended that just like they have agreed to share the proceeds of the sale equally and also bear the payment of all outgoing including rates, clearance certificate etc equally, then they ought to share the burden of the legal costs equally i.e each party to bear his/her costs. This makes sense to me. It is logical, fair and just.

It would facilitate the amicable conclusion and settlement of the entire case. It would save precious judicial time. If the property is sold and the proceeds shared equally, why should the court and the parties be put through a trial of the entire dispute only for purposes of determining who should pay costs? Would this not be wasteful and inconvenient? Would this not only go to escalate the costs? The retention of the said question for court's determination goes to undermine the intended sale and settlement.

Be that as it may, I think that a buyer having been identified and the main issues having been resolved, the lesser evil would be to proceed with the sale and parties litigate on the question of costs. The issues would be resolved substantially and question of costs, however, can still be determined by the court whatever it is worth or whatever purpose it will achieve.

I think that the question of costs can also easily be dealt with through submissions whether oral or in writing.

As a result, I do order and direct that the Sale Agreement proceeds as ordered and that the question of costs be deferred until the completion of the Sale Agreement. Once the sale is completed, then the parties shall make submissions on a date to be fixed regarding the question of costs. There is no point in making the submissions now as the future is unknown about the completion. The submissions being made will be subject to the successful completion of the Sale. If this fails, then of course all issues including that of costs will be litigated. It is hoped that this shall not be the case.

Dated and delivered at Mombasa this 11th day of June 2010.

M. K. IBRAHIM
J U D G E

Further Order

Mention on 10th September 2010 for directions.

Ibrahim, J

Coram:

Ibrahim, J

Court clerk – Kazungu

Miss Okata for the Applicants

Mr. Kabebe for the Respondents.

Ruling delivered in their presence.

Ibrahim, J