



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MOMBASA

Civil Case 160 of 2009

FARIDA ZULFIKAR NOORMOHAMED ADAMPLAINTIFF

VERSUS

ZULFAKIR NOORMOHAMED ADAMDEFENDANT

J U D G M E N T

The plaintiff and defendant are husband and wife having been married at Nairobi on the 19th July 1969.

In December 1992 the parties purchased in Nairobi Flat No. 75 built on L.R. No. 209/5558 – Nairobi in their joint names and in June 1995, the parties purchased in Nairobi Flat No. 38 built on L.R. No. 209/3458, Nairobi in their joint names.

The plaintiff in this suit claims that ever since the purchase of the above properties by the partners the defendant has been managing the same letting on them on lease or tenancy agreements to various tenants and occupiers and collecting all rents paid to himself but failing to account for any rents or pay any part thereof to the plaintiff in spite of demand made.

The plaintiff sought the following orders from this court:-

- (a) Delivery of all time and proper accounts of the rents collected by the defendant from and in respect of the said two properties.*
- (b) An order for payment of the said rents, collected in the past and now being collected that is the plaintiff's half share thereto to the plaintiff by the defendant.*
- (c) An order for appointment of a receiver to collect the rents instead of the Defendant.*
- (d) An injunction preventing the Defendant either by himself or by his servant or agents for collecting the said rent.*

- (e) *An order that the defendant give the names of all the tenants who have occupied the two properties their respective dates of occupation and the amount of rent received from the said tenants.*
- (f) *Any other order which may deem fit and proper for the Honourable court to make herein.*
- (g) *Costs of and incidental to this suit.*

The defendant was served with the summons and plaint on

22nd June 2009 but did not enter appearance. Upon application, interlocutory judgment was entered on 15.7.09.

At the trial the plaintiff testified on oath. She produced transfers of the two properties showing that they acquired the same jointly in their names.

After marriage on 19.07.1969, the parties lived in Voi for 5 years. The defendant then left and came to Mombasa while the plaintiff lives in Voi. The marriage still subsists according to the record.

Upon considering the plaint and evidence of the plaintiff, I

am satisfied that the properties are jointly owned properties. I am satisfied that the defendant has been letting the two properties and collecting the rents without giving any account to the plaintiff or paying any monies to her. The defendant chose not to defend the case or demonstrated he has any legitimate explanation for the failure to account. The plaintiff has not sought substantive orders for the dissolution of any partnership in respect of the properties.

I am not aware of any suit to divide or sell off the two properties. This is an action brought by way of actions i.e. plaint. However court does not seek final orders of a substantive nature. There is no finality to the issues and any decree issued will require continued court supervision. A judgment and decree is required to be enforced without re-opening the issues. Any aggrieved person has a right of appeal.

In this case any decree given will not be self-performing and in particular with regard to the question of appointment of receiver.

For how long is the Receivership? What happens if there is a dispute on collection of rents and accounts. What happens to the question of new leases and tenants. Who is to deal with new tenants/leases, the Receiver, the plaintiff or Defendant? How will accounts in the future be rendered.

I think that the plaintiff should have been bold enough to seek dissolution of the partnership here if the ownership is not pegged on marriage. For instance, it would be a solution if each party was given one of the properties absolutely and exclusively. That would end the matter once and for all.

Despite the foregoing this court must render judgment in this matter in one way or the other. This court has inherent jurisdiction and discretion under section 1(A) and 3A of the Civil Procedure Act apart from other laws.

I do find that it is not prudent to appoint a Receiver to collect rents indefinitely. This has the potential of creating new disputes in this otherwise family affair.

In the interest of fairness and justice and in terms of prayer (f) I do hereby grant the following prayers

in the stated variations:-

- prayer (a). Delivery of accounts shall be within 60 days of service of the Decree.
- Prayer (b).
- Prayer (d) but restricted to Flat No. 75 on L.R. No. 209/5558 in the Ngara Housing Scheme. The Plaintiff shall henceforth collect and receive the rents for the said flat. Tenant to be notified of the court order.
- Prayer (e). Liberty to apply is granted.

- Prayer (g). The Defendant shall pay costs of the suit to the plaintiff

Orders accordingly.

Dated and delivered at Mombasa this 6th day of November 2009.

M. K. IBRAHIM

J U D G E

6/11/09

Ibrahim, J

Court clerk – Kazungu

Mr. Kinyanjui h/b for Mr. Satchu for the plaintiff

Judgment read in their presence,

Ibrahim, J