



LMH v JMM (Matrimonial Cause 5 of 2020) [2024] KEHC 703 (KLR) (2 February 2024) (Ruling)

Neutral citation: [2024] KEHC 703 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE 5 OF 2020
G MUTAI, J
FEBRUARY 2, 2024**

BETWEEN

LMH APPLICANT

AND

JMM RESPONDENT

RULING

1. Vide a judgment delivered on 2nd December 2022 by Onyiego, J, the suit properties in this cause were declared to be matrimonial properties. The court ordered that the said matrimonial properties be distributed and or divided between the Applicant and the Respondent in a ratio of 50:50.
2. The applicant contends that since the delivery of the judgment, the respondent has been evasive and, hence, has impeded the division and distribution of the properties that are in his name.
3. Being so aggrieved, the applicant filed the Notice of Motion application dated 11th July 2023 seeking the following orders: -
 - a. That the honourable court be pleased to issue production orders to compel the respondent to produce complete and accurate accounts for the sale of the properties Plot No.XXX/VI/MN and Plot No.XXX/VI/MN;
 - b. That the honourable court be pleased to appoint a valuer for all the matrimonial properties listed in the judgment.
 - c. That the honourable court be pleased to order that the matrimonial properties be sold by way of private treaty and the proceeds distributed equally between the parties;
 - d. That the costs of this application be provided for.
4. The application is premised on the grounds stated in the said application and also on the supporting affidavit of the applicant sworn on 11th July 2023.



5. In her said Supporting Affidavit, the applicant deposed that since the delivery of the judgment, the respondent had been evasive and had impeded the division of the division and the distribution of the properties in accordance with the judgment.
6. She stated that during a meeting held on 30th March 2023 between the parties and their respective advocates, the respondent alleged that he had sold Plot No.1922/VI/MN to one Magdalene Mukunde Asmani for Kes.1,600,000/- via a sale agreement dated 22nd December 2017. In her view, the court had, in its judgement, directed that where property(ies) had changed hands without her consent, the respondent would be required to compensate her an amount equivalent to 50% of the value of the property(ies) on account of her share. In the absence of (a) sale agreement(s), the valuation would be done, and the proceeds would be shared in the said ratio.
7. She further contended that the respondent alleged that Plot No.XXXX/VI/MN was sold by a lender in the exercise of its statutory power of sale. However, he had conceded that the alleged lender had served no statutory notices. Despite all efforts to have the respondent disclose all documents on the alleged sale of the two (2) properties, she had been unsuccessful.
8. She averred that the respondent had wilfully failed to disclose the status of the matrimonial properties, stalling the distribution of the same. Thus, it was necessary to have a valuer appointed to ascertain the value of said properties for equal distribution to proceed. She, therefore, urged the court to allow the application.
9. In response, the respondent filed a replying affidavit sworn on 12th September 2023. He stated that some of the listed properties changed hands during the subsistence of their marriage. He stated that Plot No.XXXX/VI/MN Kwa Hola holds the family business ([particulars withheld] Hardware Services); Sub-division No.XXXX/VI/MN was used as collateral while obtaining a loan facility with the bank. The bank sold the said property upon default; the house without land on Plot No.XXXX/VI/MN was disposed of to cater for the applicant's college fees and family matters; unregistered parcel of land at Miritini houses family business (Miritini Hotel and Accommodation); unregistered parcel of land at [particulars withheld]-Magongo still intact, as is the Bamburi Plot with ten rooms. The only properties that have not changed hands are "e" and "i", which have not changed hands, and the same should be distributed equally or by the applicant choosing one which suits her. He urged the court to dismiss the application with costs.
10. The applicant filed a supplementary affidavit sworn on 13th October 2023. She denied the averments in the replying affidavit and stated that no appeal or review had been filed to challenge the judgement of the court, and thus, the respondent ought to comply with the same. She urged the court to allow the application herein.
11. The application was canvassed by way of written submissions. Subsequently, the applicant, through her advocates, Mwashushe & Company Advocates, filed written submissions dated 13th October 2022. Counsel submitted on four issues for determination, namely, whether or not the respondent should be compelled to produce complete and accurate accounts for the sale of Plot XXXX/VI/MN and Plot No.XXXX/VI/MN; whether or not a valuer should be appointed; whether or not the matrimonial property be sold by way of private treaty; and who should bear the costs of the application.
12. On the first issue, counsel submitted that the issues raised by the respondent were dealt with in the judgment. She urged that the court has power under clause 2 of the judgment and Rule 30(1)(a) of the *Matrimonial Rules*, 2022, to order the respondent to pay the applicant her share of the proceeds of the sale.



13. On the second issue, counsel submitted that parties have been unable to agree on the value of the matrimonial properties. Counsel urged the court to exercise its authority under Rule 30 (4) of the Matrimonial Property Rules, 2022, to appoint a valuer to carry out the valuation of the matrimonial properties so as to give effect to the judgment.
14. On the 3rd issue counsel submitted that it would be in the best interest of both parties for the sale to be by way of private treaty as the properties would thereby be sold at their respective market values.
15. On the fourth issue counsel urged the court to exercise its discretion and award costs to the applicant.
16. The respondent, on the other hand, through his advocates Ogoti & Company Advocates, filed his written submissions dated 28th November, 2023. Counsel reiterated issues raised during the trial and urged the court to consider the properties owned by both the parties and their contribution and have the properties registered in both their names and or each party to retain what is in their possession in the interest of justice.
17. I Have considered the application, the responses therein and the rival submissions by counsel, and it's now my duty to determine whether the Court should issue the orders sought.
18. Rule 30 of the *Matrimonial Property Rules, 2022* provides:-
 1. Upon hearing the summons or any application made in the proceeding, the court may make any one or more of the following —
 - a. an order for the sale of the matrimonial property or any part of the matrimonial property, and for the division, vesting, or settlement of the proceeds of sale;
 - b. in the case of property owned by the spouses jointly, an order vesting the property in them in common in such shares as the court considers just;
 - c. an order vesting the matrimonial property, or any part of the matrimonial property, in either spouse;
 - d. an order postponing the vesting of any share in the matrimonial property, or any part of such share, until a future date specified in the order or until the occurrence of a future event specified in the order;
 - e. an order for the partition or vesting of any matrimonial property;
 - f. in the case of matrimonial property owned by one spouse, an order vesting the property in the spouses jointly or in common in shares that the court considers just;
 - g. in the case of matrimonial property owned by the spouses jointly or in common, an order vesting the matrimonial property in one of them;
 - h. an order for the payment of a sum of money by one spouse to the other;
 - i. an order for the transfer of land, or of an interest in land, including a lease, licence or tenancy;
 - j. an occupation order granting to such spouse for such period or periods and on such terms and subject to such conditions as the court thinks fit, the right personally, and



to the exclusion of the other spouse, to occupy the matrimonial home or any other premises forming part of the matrimonial property:

Provided that, in making the order under this paragraph, the court may have regard to the interest of any minor or dependent children of the marriage;

k. an order vesting in either spouse the tenancy of any dwelling house:

Provided that the court shall not make an order under this paragraph unless

- i. the spouse against whom the order is made is or was the sole tenant of the dwelling house, or is or was a tenant holding jointly or in common with the applicant;
- ii. the other spouse is a tenant of the dwelling house; and
- iii. either spouse is residing in the dwelling house;

l. an order granting, to the person in whose favour an order is or has been made under paragraphs (j) or (k), the use of all or any of the furniture, household appliances and household effects in the matrimonial home or other premises to which the occupation order relates, or the dwelling house to which the tenancy order relates;

m. an order vesting the rights and obligations under a hire purchase agreement or conditional sale agreement, or under an agreement to hire or lease, in either spouse and any such order shall have effect notwithstanding anything in any agreement;

n. where a claim relates to a policy of assurance or insurance, an order—

- i. vesting the policy in either spouse subject to such conditions, including the payment of premiums by either spouse, as it thinks fit;
- ii. directing the payment of a proportion of the surrender or paid-up value from one spouse to the other; or
- iii. make such other order as it thinks just;

o. an order for the transfer of shares or stock, or of mortgages, charges, debentures, or other securities, or of the title or documents of title of any property;

p. an order for the transfer of rights or obligations under an instrument or contract, and an order of this kind has effect regardless of any provision or term of the instrument or contract;

q. an order varying the terms of any trust or settlement, other than a trust under a will or other testamentary disposition;

r. in the case of money or other property that is part of the separate property of one spouse, an order requiring that spouse to pay the money, or transfer the other property, to the other; or

s. such other orders or directions as the court deems just.

2. Where under any order made under these Rules one spouse is or may become liable to pay to the other a sum of money, a court may, upon hearing the parties, direct that it shall be



paid either in one sum or in instalments and either with or without security and otherwise in such manner and subject to such conditions, including a condition requiring the payment of interest, as the court deems fit.

3. Where a court makes an order for the sale of any matrimonial property and for the division, application, or settlement of the proceeds, the court may appoint a person to sell the property and divide, apply or settle the proceeds accordingly, and the execution of any instruments by the person so appointed shall have the same force and validity as if it had been executed by the person in whom the property is vested.
 4. In exercise of the powers under this rule, the court may make an order for valuation of the matrimonial property and give such other directions as it may deem appropriate.
 4. Where a court appoints a person, to sell any property and to divide, apply, and settle the proceeds or execute any necessary document or perform any other function the court may make provision in that order for the payment of remuneration to that person and for the reimbursement of their expenses.
19. This honourable court in its judgement in its delivered on 2nd December 2022, gave the following orders;
- a. That the properties herein below have been ascertained to have been acquired during the subsistence of marriage and therefore constitute matrimonial property for division in equal share at the ratio of 50% to 50%.
 - i. Plot number XXXX Section/VI/MN Kwa Hola
 - ii. Subdivision number XXXX of Section/VI/MN house without land on Plot Number XXXX/VI/MN.
 - iii. Unregistered parcel of land at Miritini.
 - iv. Unregistered parcel of land at [particulars withheld] Magongo area.
 - v. Bamburi plot with 10 rooms.
 - b. That in the event any of the above properties have changed hands without the consent of the applicant, the respondent to compensate the applicant the amount equivalent to the value of her 50% entitlement.
 - c. In the event that the property is not capable of physical division, the same be valued by a mutually agreed valuer and then sold, and the proceeds realized therefrom be distributed equally.
 - d. That this being a family related dispute, each party shall bear own costs.
20. The applicant's case is that the respondent acted in a manner that has impeded the execution of the judgement of the court and thus denied her the fruits of the judgment, being a 50% share of the matrimonial properties. On the other hand, the respondent, in his replying affidavit and submissions, has reiterated issues that were dealt with by the court in determining whether suit properties are matrimonial properties.
21. In paragraph 29 of its judgment, the court stated: -
- “In the instant case the applicant stated that the plots listed by her were indeed acquired during coverture. She attached sale agreements showing the dates they were acquired which



period falls within the dates of marriage which is, 21st December 1996, and dissolution of their marriage of their marriage on 10th June 2018. According to her, those properties are still in existence hence should be distributed. On the other hand, the respondent claimed that some of them were sold and only the unregistered plot at Miritini Bokole and a bar and restaurant are remaining. Unfortunately, the respondent did not attach any evidence to show that those properties listed by the applicant were acquired before the dissolution of the marriage or that they were disposed of with the knowledge of the applicant before the dissolution of the marriage. In fact, during his cross-examination, he admitted that he had no proof as to when those properties were obtained or disposed of. In the absence of such proof and considering the evidence adduced by the applicant that they were acquired during the subsistence of their marriage, I am satisfied that the properties listed in the originating summons were acquired during the coverture and, therefore, constitute matrimonial property.”

22. No appeal or review was preferred against the judgement of the court delivered on 2nd December 2022. Therefore the respondent cannot introduce new evidence or facts and or relitigate or seek variation of the court’s judgement in this application as this court is functus officio. I am guided by the case of *Raila Odinga v Independent Electoral & Boundaries Commission & 3 others* (Petition 5, 4 & 3 of 2013) [2013] KESC 8 (KLR) (Civ) (24 October 2013) (Ruling) where the court held:-

“We, therefore, have to consider the concept of “functus officio,” as understood in law. Daniel Malan Pretorius, in “*The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law*,” [2005] 122 SALJ 832, has thus explicated this concept: “The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker.”

23. It would appear to this Court, from the affidavit evidence, that the parties are unable to conclude the distribution of the matrimonial properties. The applicant is, therefore, unable to enjoy the fruits of a judgment in her favour. In essence, what she now has is a paper judgment. Should this Court sit back as its decision is rendered nugatory? I do not think so.
24. The submissions of the respondent are not helpful. This court is not sitting on appeal against the decision of Onyiego, J. I cannot, while considering this application rewrite his judgment, even if I disagreed with it. As I have indicated, this Court, save for applications for review or execution, is functus officio.
25. The respondent has submitted that he sold some properties. Paragraph 45(b) of the judgment contemplated this scenario. The court ordered that in such an event, he would be required to “compensate the applicant an amount equivalent to the value of her 50% entitlement”. He does not appear to have done so. In the circumstances, it is only fair and just that he accounts to the applicant by way of providing her with accurate accounts of the proceeds of the sales he claims to have made. Prayer 1 of the Notice of Motion, therefore, has merits and is allowed.
26. It will also be necessary to establish if any sales made by the respondent were bona fide and realised market prices. This, in my view, justifies the need for the appointment of a valuer to ascertain the



true values of the matrimonial properties identified by the Court. Similarly, prayer 2 of the motion is merited and is allowed.

27. From the conduct of the parties, it is evident that a division of the properties that would leave them as neighbours is a non-starter. This court cannot ignore the reality that their relationship is poisoned beyond repair. In light of this, it would be in their interest to have the properties sold and the proceeds divided between them.
28. Regarding costs, it is the opinion of this Court that it would not be fortuitous to award costs to the applicant as it would aggravate the situation.
29. It is, therefore, my finding that the application dated 11th July 2023 has merits. Consequently, I allow the same with no orders to costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 2ND DAY OF FEBRUARY 2024 VIA MICROSOFT TEAMS

GREGORY MUTAI

JUDGE

In the presence of:-

Ms. Mwashushe, for the Applicant;

Ms. Shamsa, for the Respondent; and

Arthur – Court Assistant

