



REPUBLIC OF KENYA



KENYA LAW
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**Matere v Akinyi (Civil Case 328 of 2013)
[2024] KEHC 663 (KLR) (Civ) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 663 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL CASE 328 OF 2013

JN MULWA, J

FEBRUARY 1, 2024

BETWEEN

JOSEPH NGAIRA MATERE PLAINTIFF

AND

**ELECTA AKINYI ATIENO OBURA ALIAS ELECTOR AKINYI
OJOO DEFENDANT**

RULING

1. In the Judgment of the court (Kamau J) dated 15th October 2019, the court made orders that: -
 1. The Partnership and joint ownership of the suit property (LR No. 140/287/057) be dissolved.
 2. The accounts with respect to the purchase of the suit property be taken and the plaintiff do reimburse the Defendant for the contribution that she had made towards the purchase of the property and/or payment of the monthly instalments to liquidate the loan.
 3. That in the alternative to the above (2), the suit property be disposed of and the proceeds be shared according to the contribution that each will have made and which contribution will be determined by taking accounts with respect of the suit property.
2. None of the reliefs granted to the parties were complied with leading to the Application before the court dated 24th April 2023 wherein the Defendant sought orders that: -
 1. Spent.
 2. This Honourable Court be pleased to set aside, review and/or vary the judgment delivered on 15th October 2019 and the consequential orders issued therein.



3. That the court be pleased to adopt the tabulations of the Defendant/applicant with or without any amendments.
 4. That in the alternative, the court be pleased to interpret the Judgment delivered on 15th October 2019 and the consequential orders therein.
 5. That costs be in the cause.
3. The Application is premised upon Section 1A, 1B and 3A of the [Civil Procedure Act](#) as well as order 45 Rule 1 and 2 of the [Civil Procedure Rules](#); and a supporting affidavit of the Defendant sworn on 25th April 2023.

The Respondent/Plaintiff though served has not filed any response to the application. The Defendant has filed submissions dated 9th October, 2023. I have considered the same as well as the cited authorities.

4. The Defendant's Case is that since the delivery of the Judgment in 2019, the Plaintiff has failed to comply with the directions and orders of the court despite him renting the subject property and collecting rent therefrom to the tune of Kshs 50,000/- monthly which rent he has been paying to NSSF in repayment of the loan from which the property was purchased jointly and registered to both parties.
5. It is a further acknowledgment and not in dispute that the initial deposit of the purchase price of Kshs 350,000/- was paid by both parties. It is also noted that the Plaintiff has made a request to NSSF to transfer the suit property to himself, to the exclusion of the Defendant which is contrary to the findings and orders of the court by its Judgment as aforesaid.
6. Further, it is deposed that the Plaintiff has failed and neglected to agree on the accounts particularly contributions by each of them as directed by the court, nor has he reimbursed the Defendant of her contributions towards the purchase price.
7. It is the Defendant's submission that the court's Judgment did not direct the Plaintiff to be registered as the sole owner of the property, and failure for him to agree to tabulation of accounts has caused prejudice to the Defendant as she has received nothing from the proceeds of the rent collected therefore, neither her share towards the purchase of the property.
8. I have considered the annexures to the Defendant's supporting affidavit. It is clear that the purchase of the property was made jointly by both the Plaintiff and the Defendant. Copies of receipts are annexed. They are in joint names.
9. It is by these averments that the Defendant seeks the orders stated in the application.

Analysis and Determination

10. The court notes that none of the parties lodged an appeal against the Judgment. It is also clear that the court orders have not been complied with. No accounts of the parties' contributions to the purchase price have been undertaken nor the rent from the said house save that the Plaintiff is alleged to be paying the NSSF Loan to clear so as to have it transferred in his name as stated above, to the exclusion of the Defendant.
11. The issues, therefore, that present themselves for determination are: -
 - i. Whether the Judgment dated 15th October, 2019 is executable and if so, which is the appropriate manner.
 - ii. Whether the said Judgment may be subjected to a review order to set aside or vary the same.



12. An order of review of a Judgment is conditional. Order 45 Rule 1 is couched in clear words as follows: -
- (1) Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
 13. In summary, there must be discovery of a new and important matter that was not in the applicant's knowledge or mistake or error apparent on the face of the record. Additionally, there could be other sufficient reasons.
 14. I have carefully considered the impugned Judgment. I find nothing that was not in the parties knowledge or reach when the case was being heard. I have also not found any mistake or error on the face of the Judgment.
 15. The applicant has not tendered any other reason that the court could consider as sufficient for the court's consideration that may lead to a review or setting aside of the Judgment –
See [Alpha Fine Foods Limited & Horeca Kenya Limited & 4 Others](#) [2021] eKLR, [Sanitam Services \(EA\) Limited v Rentikil \(K\) Limited & another](#) [2019] eKLR, [James Bosire Mchogu v John Kipkurui Chepkony](#) [2022] eKLR.
 16. I therefore decline to accord to the applicant an Order of Review to set aside the Judgment. In my view, the terms of the Judgment are clear, and there is an alternative if Order No. 2 cannot be achieved, as is the case herein.
 17. The parties have not been able to take accounts of what each contributed to the purchase of the property. The applicant admits that it is not possible because both paid or contributed to the purchase price equally and all payments receipts were issued in their joint names.
 18. To that extent, the only viable finding is that both the Plaintiff and the Defendant made contributions towards the purchase price. At the material times, the parties were husband and wife and both contributed to the purchase price and all payment receipts were issued in both their names.
 19. The Defendant deposes that she has sent to the Plaintiff her tabulation of her contributions but the Plaintiff has not responded hence the stalemate.
Considering the above, what would be the most appropriate orders in the circumstances?
 20. The alternative order in the judgment was disposing of the Property and sharing the proceeds equally. There is rent that has been collected and paid to NSSF to offset the loan to be considered. It is not clear who contributed what amount, and it was upon the parties to adduce sufficient evidence to show the contribution of each party separately. As that was not done, the court is left with no option than to



hold that the two antagonists made equal contributions to the purchase of the property, and therefore both are entitled to equal shares.

21. Further, if the property is sold, the proceeds shall be shared equally. In my view, that is the interpretation I can give to the impugned judgment as far as the ownership is concerned.
22. On the Kshs 350,000/- deposit, both parties contributed. There is no dispute on this – See paragraph 2 of the Judgment. It is also not in dispute that the rent collected from the property goes towards servicing the NSSF Loan. That again is each parties contribution; at 50:50 basis. The monthly rent is stated as Kshs 50,000/- from May 2008 to date, about 185 months. What the court has not been told is whether the rent stood at Kshs 50,000/- from May 2008 to date.
23. The Plaintiff's failure to participate in this application has robbed the court of crucial material facts that would have assisted in arriving at a fair and justifiable solution.
24. On the other hand, the Plaintiff has demanded that NSSF do transfer the suit property to himself, to the exclusion of the Defendant. This is not only illegal and wrong but also malicious. The court by its judgment at paragraph 17 and 18 stated that no husband should expect share from a property he owns with his wife if he cannot state the contribution he made towards the purchase of the property he jointly owns with the wife.
25. At paragraph 22, the court made a finding that there was no dispute that the property was registered in joint names of the Plaintiff and the Defendant (husband and wife). That is the position and ought to be so at NSSF books and records, unless it is varied by consent of both the parties.
26. On the deposit, upon analysis of the evidence, (See paragraph 27 onwards) the court made a finding that both the Plaintiff and the Defendant were allocated the said property, and cited a letter from NSSF dated 29th August, 2013 wherein NSSF wrote to the Defendant's Advocates informing them that they would endeavor to transfer the property in their joint names.
27. Interestingly, none of the two parties preferred an appeal if they were dissatisfied with the judgment in 2019. Six years after, the Defendant moved the court for review of the Court Orders.
28. One of the conditions to be met by an applicant to benefit for Review Orders under order 45 Civil Procedure Rules is that the application should be brought without undue delay. The delay of almost six years cannot be said to be reasonable. From the foregoing, it is but an afterthought in my view, as no reasons have been advanced for the unreasonable delay.
29. Consequently, I find and hold that the two parties, the Plaintiff and the Defendant have failed to agree on taking accounts as directed by the court in the impugned Judgment, therefore the only way out is the alternative relief at Paragraph 50(3) – to sell the property and share the profits equally, but upon proof that all the rent proceeds from the property has been paid to NSSF. That is only possible if statements from NSSF showing the Schedule of Mortgage (Loan) repayments from May 2008 to date is obtained. Since each of the parties claim to have paid the deposit, as rightly found by the trial court, (Kamau J), that amount will not be taken into account at the time of sharing the sale proceeds.
30. In terms of prayer number 4 of the Application, the court finds that the better option in respect of the court orders in the judgment dated 15/10/2019 is Order No. 3, which is the alternative to prayer no. 2 thereof.
I therefore decline to set aside review or vary the said judgment dated 15/10/2019.
31. Costs of the Application shall be in the cause for the same reasons stated in the judgment dated 15/10/2019.



Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE

