



**ASW v WN (Matrimonial Cause 8 of 2017)  
[2024] KEHC 2014 (KLR) (Family) (1 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2014 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CAUSE 8 OF 2017  
PM NYAUNDI, J  
MARCH 1, 2024**

**BETWEEN**

**ASW ..... APPLICANT**

**AND**

**WN ..... RESPONDENT**

**RULING**

1. By a Notice of Motion dated 25<sup>th</sup> November 2019, the Applicant seeks the following orders;
  12. The Land Registrar at Busia be ordered to remove the caveats placed on the properties known as Teso/Angoromo/6766 and Bukhayo/Mundika/10191. The Land Registrar at Nairobi be ordered to remove the restriction/caveat/caution in Maisonette No. 70 erected upon L.R 7149/142.
  1. The Respondent be deemed to be in contempt of the mediation agreement dated 15<sup>th</sup> August 2017 and adopted as an order of the court on 22<sup>nd</sup> January 2018 and be detained for the said contempt.
  3. Costs be in the cause.
2. The application is premised upon Article 159 of *the Constitution*, Sections 1A & 3A of the *Civil Procedure Act* and Order 51 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the Law and is supported by Applicant’s affidavit of even date and a further affidavit sworn on 17<sup>th</sup> May 2023.
3. The application is opposed by the Respondent who filed a Replying Affidavit sworn on 23<sup>rd</sup> January 2020.



4. The Application was canvassed by way of written submissions. The Applicant filed written submissions dated 17<sup>th</sup> May 2023 whilst the Respondent relied on submissions dated 25<sup>th</sup> September 2023.

## **Background**

5. The Respondent filed an Originating Summons dated 30<sup>th</sup> January 2017 against the Respondent seeking the following orders;
  1. The properties listed below be declared as having been matrimonial property:
    - i. Motor Vehicle Subaru Registration No. KBL 177Q registered on 24/05/2010.
    - ii. Title No. Teso/Angoromo/6766; by an absolute title registered on 03/10/2010;
    - iii. Maisonette No. 70 upon L.R 7149/142 (Original Number 7149/28) acquired by a lease registered on 30/11/2011;
    - iv. Title No. Bukhayo/Mundika/10191 by an absolute title registered on 23/03/2012;
    - v. Flat No. A8 Block A upon L.R 27253/37 acquired by a Lease registered on 30/07/2013.
  2. A declaration be made that the applicant is entitled to a half share of the said properties.
  3. The aforesaid properties be sold at its market value and the proceeds thereof be divided amongst the parties equally.
  4. Any other orders that may be deemed expedient in the circumstances. orders in respect of matrimonial property.
6. Through a Mediation Settlement Agreement filed in court on 15<sup>th</sup> August 2017, the parties agreed as follows;
  - i. That Augustine Saka Were transfer to Wilckister Nyaboke property known as Flat No. A8 Block A erected on L.R No. 27253/37 and Wilckister Nyaboke will settle the outstanding loan and interest on the bank facility.
  - ii. That Augustine Saka Were to collect the household goods at Wilckister's parents' home in Busia which will be facilitated by Wilckister Nyaboke.
  - iii. That Augustine Saka Were to have access to his daughter Trisha Saka from Wilckister Nyaboke's place of residence and spend time with her between 10 a.m. and 6 p.m. on alternate Sundays.
  - iv. That on school holidays, he will pick the child within three days of closing school and spend half of the holiday as the period may be with her.
  - v. Any other child visits will be arranged and agreed in advance with Wilckister Nyaboke.
  - vi. That Wilckister Nyaboke will lift all cautions on all parcels of land registered in Augustine Saka Were's name as soon as the transfer of house no. Flat No. A 8 Block A erected on L.R No. 27253/37 is completed.
7. Following disagreement on the mediation agreement the parties filed a consent dated 13<sup>th</sup> June 2019 in the following terms;



1. That the property known as Flat No. A8 Block A (hereinafter “the property”) erected on LR27253/37 be put on sale using an agent appointed by the Applicant.
  2. That the proceeds of the sale be utilized to off-set/settle/ clear the charge encumbering the property.
  3. That after the sale the Respondent be refunded all the money he had/has paid towards off-setting the mortgage from 1<sup>st</sup> October 2017. In the Event there is no sale, the Respondent shall be entitled to the said refund.
  4. That from the date of this consent, the Applicant is hereby allowed to procure a tenant for the property provided that she utilizes the rental income to refund the Respondent the monthly mortgage payments.
  5. That there be no orders as to costs.
8. The Consent was adopted as an order of the Court on 13<sup>th</sup> June 2019.

**- Applicant’s Case.**

9. The Applicant’s accuses the Respondent of failing to comply with the two consents. He states that the Respondent was to clear the loan and outstanding interest before he transfers the property to her. Also, that the Respondent has frustrated his efforts to look for a tenant or sell the house. He averred that he continues to service the loan. That the Respondent has only removed restrictions on Teso/ Angoromo/6766 and Bukhayo/Mundika/10191.
10. The Respondent has not given him the transfer forms and if he was to execute the same, it would be of no effect since the title is with the bank and there is a pending loan that should be paid. He stated that the Applicant has no interest on Maisonette No. 70 erected on L.R 7149/142 and the same should be removed. He intends to sell some of his properties to repay debts.

**Respondent’s Case**

11. The Respondent’s case is that the Applicant refused to transfer Flat No. 8 to her name. She averred that the Applicant has not availed to her transfer documents and has denied her access and possession of the said property. She stated that she will only lift the caution after the Applicant has transferred Flat No. 8 to her name.

**Analysis And Determination**

12. Upon considering the Notice of Motion, the Affidavits in support thereof and the Respondent’s Replying Affidavit thereto, I find that the only issue for determination is whether the Application dated 25<sup>th</sup> November 2019 has merit.
13. The matter revolves on the interpretation that is to be given to the 2 consents on record. This is because the latter consent does not refer to the earlier mediation facilitated agreement. The latter agreement of 15<sup>th</sup> June 2019 varied the earlier agreement, in relation to the handling of the House Flat No. A 8 Block A erected on L.R. No. 27253/37
14. The latter agreement makes no mention of the transfer of the property to the Respondent.
15. The consent of 13<sup>th</sup> June 2019 provides for the sale of the property and the Respondent was to facilitate that sale. It is not clear from the latter consent what the intention of the parties was with regard to



- the prior relation between the lifting of the caution and the transfer of the property as clause 4 of the consent envisages a situation where the Respondent elects not to sale but instead lease the property.
16. The consent of 13<sup>th</sup> June 2019 does not provide for transfer of the property to the Respondent neither does it provide for any conditions precedent to any action as did the earlier consent.
  17. In any event the Respondent has since removed cautions she had earlier placed against the properties in Busia.
  18. I am therefore unable therefore to find the Respondent in contempt of the mediation agreement dated 15<sup>th</sup> June 2017 and adopted as an order of the Court on 22<sup>nd</sup> January 2018 as it must be read alongside the Consent of 13<sup>th</sup> June 2019.
  19. The latter agreement as stated above does not require the Applicant to transfer the property to the Respondent.
  20. It is evident that the delay in finalising the transaction to either sell or lease the property by the Respondent has occasioned the Applicant hardship. There are counter accusations on the party responsible as the parties accuse each other of being responsible for the failure to complete the transaction.
  21. I observe that neither consents provided a timeline within which the Respondent was to comply, the open-endedness of the orders runs counter to the desired approach that all litigation must come to an end and timeously. In the circumstances, I allow the Application dated 25<sup>th</sup> November 2019 on the following terms;
    - a. The Respondent to comply with the terms of the consent dated 13<sup>th</sup> June 2019 within 60 days, that is with regard to the sale of the property and refund of the mortgage payments from 2017 to date to the Respondent. (less the rent that has been collected over this period by the Applicant)
    - b. In the event that the Respondent is unable to sell or elects not to sell the property she will identify a tenant for the said property within 14 days of the end of the 60-day period above and submit a proposal to the Applicant for refund of the mortgage payments made by him. (less the rent collected by the Applicant over this period)
    - c. The Applicant to execute all the documents to facilitate sale or leasing of the property within 7 days of presentation to him.
    - d. If the Applicant fails to comply with c) above the Deputy Registrar, Family Division to execute the documents
    - e. In the event that the Respondent fails to comply with (a) and (b) above the Applicant will be at liberty to dispose of the property within 30 days of that default and after settling the outstanding mortgage and refund of Mortgage repayments from 2017 (less rent collected) pay out the balance to the Respondent.
    - f. The Respondent to remove the caution/ restriction/ caveat in relation to Maisonette No. 70 erected upon L.R. 7149/142 within 7 days of the date hereof.
    - g. In the event the Respondent fails to comply with (e) above the Land Registrar, Nairobi to remove the restriction/ caveat/ caution placed by the Respondent with respect to Maisonette No. 70 erected upon L R 7149/142.
    - h. Each party will bear their own costs.



- i. The matter will be mentioned on 30<sup>th</sup> May 2024 to confirm compliance and take further directions.

**SIGNED, DATED AND DELIVERED VIRTUALLY IN NAIROBI ON 1<sup>st</sup> DAY OF MARCH, 2024.**

**P M NYAUNDI**

**HIGH COURT JUDGE**

In the presence of:

Sylvia Court Assistant

