



REPUBLIC OF KENYA



**Njenga v Ngigi & 2 others (Civil Case E034 of 2022)  
[2024] KEHC 5837 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5837 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
CIVIL CASE E034 OF 2022  
HI ONG'UDI, J  
MAY 24, 2024**

**BETWEEN**

**TERESIAH NYAMBURA NJENGA ..... PLAINTIFF**

**AND**

**ESTHER WANGECHI NGIGI ..... 1<sup>ST</sup> DEFENDANT**

**SAMUEL NJENGA KARIUKI ..... 2<sup>ND</sup> DEFENDANT**

**RAFIKI MICROFINANCE BANK LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Notice of motion application dated 2<sup>nd</sup> December 2022 by the applicant herein prays for the following orders;
  - i. The purported affidavit of spousal consent to the 3<sup>rd</sup> defendant's written submissions be expunged from the court record.
  - ii. The cost of this application be borne by the 3<sup>rd</sup> defendant.
2. The application is premised on the grounds on its face as well as the affidavit sworn on even date by Silvester Mwangi Muhia, counsel acting on behalf of the applicant. He deponed that the main issue in the application was that the plaintiff/applicant had not given spousal consent to the charge of Subukia/Subukia /West Block 1/813 which was her matrimonial home. He deponed further that on 27<sup>th</sup> July 2022, the defendant/respondent filed a replying affidavit sworn by one Jane Warau, where she denied that the property charged was matrimonial. He added that on 22<sup>nd</sup> September 2022 when the matter came up for hearing the court gave directions that the matter be disposed of by way of written submissions and the alleged spousal consent was not part of the court record.
3. In response to the application, counsel for the 3<sup>rd</sup> defendant/respondent filed grounds of opposition dated 6<sup>th</sup> December 2023. He stated that the application herein was improperly before the court as the



plaintiff/applicant had not disputed the authenticity of the annexed spousal consent but clandestinely sought for the same to be expunged on flimsy procedural technicalities contrary to the spirit of article 159(2)(c) of the Constitution of Kenya 2010.

4. Counsel stated further that the plaintiff/applicant had the opportunity of seeking leave to file supplementary submissions in response to the submissions by the 3<sup>rd</sup> defendant but instead chose to file the instant application. That the same was meant to delay the matter herein as she continued to enjoy interim orders in cahoots with the 1<sup>st</sup> and 2<sup>nd</sup> defendants to the detriment of the 3<sup>rd</sup> defendant.
5. The application was canvassed by way of written submissions.

#### **Plaintiff/Applicant's submissions**

6. These were filed by S.I.M.H. Muhia Advocates and are dated 5<sup>th</sup> January, 2024. Counsel submitted that the affidavit of spousal consent was introduced after the plaintiff/applicant had filed her closing submissions. Further, that the same came late in the day stating that it would be highly prejudicial to the plaintiff/applicant. He added that the same was filed without leave of court as was required in law before introducing new evidence. He urged the court to reject and expunge from the record the said affidavit of spousal consent.

#### **Defendant/respondent's submissions**

7. These were filed by S.I Mwaura Advocates and are dated 11<sup>th</sup> March, 2024. He identified one issue for determination which is whether the spousal consent affidavit was properly before the court. He submitted that it was undisputed that the said affidavit of spousal consent was signed by the plaintiff/applicant hence the same ought to be deemed as properly filed in court in support of the 3<sup>rd</sup> defendant/respondent's case.
8. Counsel submitted further that the application herein was based on a misapprehension of Order 7 rule 5 Civil Procedure Rules which was applicable at the hearing of the main suit. Further, that the plaintiff/applicant had not demonstrated with specificity the damages or prejudice she stood to suffer if the affidavit of spousal consent was admitted and considered by the court. He urged the court to dismiss the instant application with costs.

#### **Analysis and Determination**

9. I have considered the application, the supporting affidavit, grounds of opposition and the submissions by both parties. I opine that the main issue for determination is whether the application dated 2<sup>nd</sup> December 2022 is merited.
10. The plaintiff/applicant in her submissions argued that affidavit of spousal consent was introduced after she had filed her closing submissions and admitting it would be prejudicial to her. The 3<sup>rd</sup> defendant/respondent on its part argued that it was undisputed that the said affidavit of spousal consent was signed by the plaintiff/applicant hence the same ought to be deemed as properly filed in court in support of its case.
11. This court having perused its record notes that the plaintiff/applicant filed an application dated 5<sup>th</sup> July 2022 in ELC Civil suit number E40 of 2022. In response to the same the 3<sup>rd</sup> defendant/respondent filed a replying affidavit on 2<sup>nd</sup> August 2022. The said application was disposed of by way of written submissions and both parties complied. It is in the said submissions that the 3<sup>rd</sup> defendant/respondent annexed an affidavit of spousal consent which is what the plaintiff/applicant herein is challenging in her application dated 2<sup>nd</sup> December 2022.



12. It is not disputed that the 3<sup>rd</sup> defendant/respondent filed its submissions in respect to the application dated 5<sup>th</sup> July 2022 and the same was filed together with an affidavit of spousal consent signed by the plaintiff/applicant. The 3<sup>rd</sup> defendant/respondent argued that the said affidavit of spousal consent was signed by the plaintiff/applicant hence the same ought to be deemed as properly filed in court in support of its case.
13. The law is clear on how evidence is adduced in court in the event a party wants to rely on the same in support of their case. Further, the law requires that evidence be produced in support of the issues in contention whether at the hearing or by consent. In my opinion, written submissions are not a mode of receiving evidence as set out under Order 18 rule 2 of the *Civil Procedure Rules* which states as follows;
  2. Unless the court otherwise orders—
    - (1) On the day fixed for the hearing of the suit, or on any other day to which the hearing is adjourned, the party having the right to begin shall state his case and produce his evidence in support of the issues which he is bound to prove.
    - (2) The other party shall then state his case and produce his evidence, and may then address the court generally on the case.
    - (3) The party beginning may then reply.
14. Further, submissions do not amount to evidence unless expressly adopted as such. Consequently, in legal proceedings, evidence ought not to be introduced by way of submissions. As was held by Mwera, J (as he then was) in *Erastus Wade Opande v. Kenya Revenue Authority & Another* Kisumu HCCA No. 46 of 2007:

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”
15. As stated by the Court of Appeal in *Daniel Toroitich Arap Moi v. Mwangi Stephen Muriithi & Another* [2014] eKLR:

“Submissions cannot take the place of evidence. The 1<sup>st</sup> respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”
16. In view of the above, it is evident that documents filed with submissions do not amount to evidence since such documents are not introduced by consent or on oath. The application by the plaintiff/applicant seeks to have the affidavit of spousal consent expunged from the submissions.
17. The question one asks is why the affidavit of spousal consent was annexed to the submissions. It was for the court to see it and consider it. There is a clear way of introducing new evidence and what the 3<sup>rd</sup> defendant did is not acceptable. I therefore find merit in the application dated 02/12/2022 and allow it in terms of prayer No. (i). The affidavit of spousal consent annexed to the 3<sup>rd</sup> defendant’s written submissions is hereby expunged from the court record. Costs shall be in the cause.
18. Orders accordingly.



**DELIVERED, VIRTUALLY DATED AND SIGNED THIS 24<sup>TH</sup> DAY OF MAY, 2024 IN OPEN COURT AT NAKURU**

**H. I. ONG'UDI**

**JUDGE**

