



JMM v MWM (Civil Suit 46 of 2019) [2024] KEHC 8559 (KLR) (Family) (11 July 2024) (Ruling)

Neutral citation: [2024] KEHC 8559 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL SUIT 46 OF 2019
HK CHEMITEI, J
JULY 11, 2024

BETWEEN

JMM APPLICANT

AND

MWM RESPONDENT

RULING

1. This ruling relates to the application dated 27th February, 2023 filed by the Applicant, JMM seeking for orders that:
 - (a) Spent.
 - (b) This honourable court be pleased to review, vary and set aside the orders by His Lordship Muchelule, J issued on 27th February, 2020 directing that the rental income from Plot No. EK 23 Kahawa West from 1st April, 2020 be deposited into a joint bank account which the couple will open and operate until the cause is heard and determined.
 - (c) Upon reviewing, varying and setting aside its order of 27th February, 2020 as set out in paragraph 2 above, the honourable court be pleased to issue a mandatory order compelling the parties to appoint a property manager for Plot EK 23 Kahawa West.
 - (d) In the alternative to prayer 3 above, this honourable court be pleased to authorize the advocates on record to appoint a property manager for Plot EK 23 Kahawa West.
 - (e) Pending the hearing and determination of this application and the originating summons, this honourable court be pleased to issue a mandatory order compelling the Respondent to render an account of the proceeds of rental income beginning September, 2012 and ending January, 2023.



- (f) Pending the hearing and determination of this application and originating summons herein, this honourable court be pleased to issue a mandatory order compelling the Respondent to vacate from the residential property Plot No. EK 23 Kahawa West.
- (g) The officer Commanding Station (OCS) Kahawa West Police Station be required to enforce the orders of this honourable court.
- (h) The costs of this application be in the cause.
2. The application is supported by affidavit sworn by JMM on 27th February, 2023. He avers inter alia that through their advocates on record, they have complied with the orders of the court and opened a joint account at Family bank to which the cumulative rental income of Kshs.192,000/= is to be paid. The new bank account details to which the rent is to be paid was communicated to all the tenants.
 3. That the Respondent has however allocated herself the role of property manager and has been collecting the rent and depositing between Kshs.68,000/= - Kshs.80,000/= only into the joint account. She has further been withholding Kshs.112,000/= every month to his detriment because he cannot enjoy the benefits of his investment in the rental units during his productive years.
 4. He thus prayed for a neutral third party to be appointed to collect and account for the rental income and the Respondent to vacate the premises to ensure that the neutral party conduct his responsibilities smoothly.
 5. He deponed that the Respondent should account for the rental income that she has collected from September, 2012 when the construction was completed to January, 2023. She did not contribute any money towards acquisition and development of the property. She was a housewife while he worked in the United States of America. All she did was supervise the construction together with his cousin.
 6. The application is opposed vide replying affidavit sworn by MWM on 7th September, 2023. She avers inter alia that the application for review has been filed out of time and is a delaying tactic to the hearing and determination of the main suit. The parties authorized their advocates to open the joint account and the parties' advocates make monthly withdrawals therefrom as per their client's instructions.
 7. That the rent generated is Kshs.100,000/= and not Kshs. 192,000/= and she does not retain any of the rent collected. The Applicant has not laid a basis for the appointment of an agent to manage the property who will not be accountable to this court. The property is well managed by her including the payments of electricity, water, security, garbage collection, water, cleaning of the general areas, minor repairs and KRA tax on rent from her share of the rental income. The Applicant does not pay for anything.
 8. The instant application she deponed was res judicata as it raises the same issues and based on the same grounds as those in the application dated 6th October, 2020. She lives in one of the houses with their daughter and grand son and their son lives in another.
 9. That the houses and rent do not generate a flat rent of Kshs. 10,000/= and Kshs.5,000/= respectively as they are not always fully occupied. The occupancy is usually at 70%. She admitted that she lives on the matrimonial home situated on the suit property and the Applicant lives on another matrimonial property known as Muguga/muguga/628 where he does not pay rent.
 10. She said that the rent collected before 27th February, 2020 was not the subject of the court orders and most of it was collected when they were living together and before he became violent in the year 2019 making it necessary to file for divorce.



11. The Applicant filed written submissions dated 12th October, 2023 placing reliance on the following among others:-

a. Sarder Mohamed v Charan Singh Nand Sing and Another 91959) EA 793 where the court stated as follows:-

“Section 80 of the Civil Procedure Act conferred an unfettered discretion in the Court to make such order as it thinks fit on review and that the omission of any qualifying words in the Section was deliberate.”

b. Wangechi Kimita v Wakibiru Mutabi [1985] eKLR where the court stated as follows:

“I would add that I also agree with the reasoning of Nyarangi, JA that the third head under Order XLIV rule 1 (1), enabling a party to apply for review, namely “or for any other sufficient reason” is not necessarily confined to the kind of reason stated in the two proceedings heads in that sub – rule, which do not in themselves form a genus or class of things with which the third, general, head, could be said to be analogous.”

12. The Respondent as well filed submissions dated 22nd January, 2024 placing reliance on the following among others;

a. Pop-In (Kenya) Ltd & 3 Others v Habib Bank AG Zurich [1990] eKLR where the court stated as follows:-

“Where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

b. Christopher Musyoka Musau v N. P. G. Warren & 8 Others [2017] eKLR where the court stated as follows:

“A power of review is not to be confused with the appellate power which may enable an appellate court to correct all manner of errors committed by the courts below. The power of review cannot be stretched, as the learned Judge did to reverse and overturn his own judgment under the garb of review. Having misapprehended the evidence regarding the status of the roads and water works, by concluding that the question was not relevant in determining whether the Respondents were in breach of their professional undertaking, the learned judge had no jurisdiction to reconsider the question.”



Analysis and Determination

13. I have carefully considered the application, the responses thereto and the rival submissions filed by the parties.
14. Muchelule J (as he then was) said as follows on 27th February 2020;

“ I find that in the particular circumstances of this case the rent should be protected because it will ultimately be the subject of division. It is for these reasons that I grant a mandatory injunction whose terms shall be that the rental income from plot no EK 23 Kahawa West shall from 1st April 2020 be deposited into a joint bank account which the couple will open and operate until the cause is heard and determined.”
15. Based on the above decision and which none of the parties appealed against, it appears from the record that the parties proceeded to open the bank account jointly run by the parties. The interesting bit of this cause is that from the time of the said ruling none of the parties including the Applicant has taken any precipitate action of ensuring that the matter proceeds to full trial.
16. I think to allow the application however meritorious it is will further delay the hearing and conclusion of the matter. Nonetheless so as to dissuade the parties and specifically the Applicant from assuming that he was not gaining from the premises and to create transparency on the parties I think the only prayer worth considering is appointment of an agent who shall be a neutral manager of the property.
17. The said agent shall of course deposit the monthly collected rent in the joint account operated by both parties which is already in existence. The agent’s business is only managerial and nothing more. The decision on payments of any outgoings and liabilities shall be made by the parties herein until the matter is heard and determined.
18. The other prayers for accounts I think shall be taken up during the substantive hearing of the matter. It is expected that the parties including the Respondent have kept proper accounts even as she claims to pay utilities and other outgoings including repairs etc.
19. Consequently, the ruling dated 27th February 2020 is reviewed as hereunder.
 - (a) The parties herein and with the assistance of their counsels on record shall within 30 days from the date herein appoint a reputable and licensed estate agent to manage and run the premises situate at plot no EK 23 Kahawa West pending the hearing and determination of this cause.
 - (b) The parties shall fix this cause for hearing forthwith.
 - (c) Costs shall await the outcome of the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 11TH DAY OF JULY 2024.

H K CHEMITEI

JUDGE

