



NM v IMN (Civil Suit 5 of 2016) [2024] KEHC 10776 (KLR) (19 September 2024) (Ruling)

Neutral citation: [2024] KEHC 10776 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 5 OF 2016
HI ONG'UDI, J
SEPTEMBER 19, 2024
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF SECTION 17 OF THE MARRIED
WOMENS' PROPERTY ACT
THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013**

BETWEEN

NM APPLICANT

AND

IMN RESPONDENT

RULING

1. This ruling is in respect of the notice of motion application dated 10th July 2023 where the applicant seeks the following orders;
 - a. & (b) spent.
 - (c) That the court be pleased to have Kenmo Agencies or Njendu Commercial Enterprises to collect rent and distribute the same as per the court judgement instead of Muigai Commercial Agencies.
 - d. That there be an order for the respondent to be paying rent for [Particulars Withheld] Bookshop where she has been carrying out a business which rent be distributed in accordance with the court judgement.
 - e. That costs be provided for.



2. The application is premised on the grounds on its face as well as the applicant's affidavit sworn on even date. He deposed that judgment was delivered on 16th March 2022 and the parties by consent dated 4th November 2022 agreed that Muigai Commercial Agencies do collect rent from the rental premises namely Gilgil LR No. 1317/21X2/X site and service, Gilgil LR NO. 1317/2XX (plot 5X), Gilgil LR NO. 1317/2X6 (plot 4X), Gilgil Market Stall no XX.
3. He deposed further that the said agency had not been remitting the monthly statements despite demands by his advocate and it was not until 26th June 2023 that he was supplied with the same. According to him the said statements had visible discrepancies on the amounts collected for rent. Additionally, that the said estate agent did communicate to him that there was no rent collected in November 2022 as the rent collected was used to buy medicine for the respondent. Also, that the rent for December 2022 was not collected after the respondent falsely claimed that there were no tenants as they had vacated the premises.
4. He went on to depose that the agency had been including the payment of electricity bills yet the tenants have their individual meters. Further that the electricity bills could only be those incurred by the respondent but which had been included as an expense to further diminish the amount he gets at the end of the day. That the respondent operated a stationery shop in [Particulars Withheld] Building which should at the end of the day be accounted for when the final amount was due. He added that they needed an impartial commission agent who would collect rent, give honest expenses incurred and not just disbursing rent.
5. He deposed that the rent disbursement by the agent was haphazard since the funds ought to be dispatched to them by the 15th of every month. He went ahead to tabulate under paragraph 17 the various dates when rent was paid to him. He urged the court to order that Kenmo Agencies or Njendu Commercial Enterprises do collect rent from the premises.
6. In her replying affidavit filed on 18th December 2023, the respondent, averred that the appointment of Muigai Commercial Agencies was fronted and pushed decidedly by the applicant and there was nothing in the application that would justify disruption of the status quo. She further averred that the applicant would never be satisfied with whatever he got and would invariably want more than his share of everything. She added that his allegations against the said agency were unsubstantiated.
7. She confirmed that the agent had been collecting rent regularly and appropriating the same as ordered by court. She went on to aver that she ought to be the one lamenting that the said agent was not collecting anything or leasing out the parcel of land known as Nyandarua/Ol Aragwai/1xx2 which is held by the applicant but was held in the judgment to be part of the matrimonial property whose benefits should be shared like all the other property. She added that the applicant had not shown how the new or proposed agents would avoid any challenges.
8. According to her the applicant wanted an agent whom he could manipulate to remit to him more than his share of the rent to her disadvantage. That, this is not the first time he is proposing Njendu Commercial Enterprises as agents. That in the course of the hearing of the divorce proceedings and after judgment herein, he had proposed the same agent and she objected since they are best of friends. She added that the instant application has been brought in bad faith to facilitate fraud and mischief on the part of the applicant and it is in the interest of justice that the same be dismissed with costs.
9. The applicant filed a further affidavit dated 20th May 2024, challenging the contents of the replying affidavit.
10. Both applications were canvassed by way of written submissions.



Applicant's submissions

11. These were filed by Nancy W Njoroge & Company advocates and are dated 10th July, 2024. Counsel submitted that the estate agent was obligated to provide monthly statements of rents paid and not to have some months where no rent was paid. Further, that the agent's behavior was questionable for failure to diligently address the issues raised by the applicant and the agent's point man one Mr. Mwago had refused to answer questions on the disparities.
12. He cited the case of *Ngengi Muigai & Another v East African Building Society & Others* [2020] eKLR, where the court held as follows;

“I do not fathom any prejudice that may visit the Defendant if it is ordered to avail the accounts. For that reason, I find merit in the prayer, as said before, as a facilitative relief, for use by the court if the rental yield shall become of relevance for its final determination,

12. I do grant an order that within 30 days from the date of this ruling, the defendant shall file and serve upon the plaintiff true accounts of all the rents collected by its agents from the suit property beginning the 8/01/2004 till 31/01/2020”
13. Counsel submitted further that the applicant's application be allowed in the interest of justice as it's in good faith and for ensuring that justice is served. Further that the respondent who runs a bookshop on the premises be ordered to pay rent or the monthly rent be deducted from her 40% share. The applicant contends that Nyandarua/Ol Aragwai 1XX2 hardly gives any profits and the respondent can use half of it.

Respondent's submissions

14. The respondent's submissions were filed by Sheth & Wathigo advocates and are dated 12th July, 2024. Counsel identified two issues for determination.
15. The first issue is whether Mungai commercial agencies have breached the agreement to warrant the change of estate agents. He submitted in the negative and cited Section 2 (1) and 2(2) of the *Estate Agents Act* which provides as follows;
 - (1) “practice as an estate agent” means the doing, in connection with the selling, mortgaging, charging, letting or management of immovable property or of any house, shop or other building forming part thereof, of any of the following acts
 - (a) bringing together, or taking steps to bring together, a prospective vendor, lessor or lender and a prospective purchaser, lessee or borrower; or
 - (b) negotiating the terms of sale, mortgage, charge or letting as an intermediary between or on behalf of either of the principals;
 - (2) For the purposes of this *Act*, a person shall be treated as being a practicing estate agent if he or a partnership of which he is a member;
 - (a) receives payment for acts done by way of practice as an estate agent by him, or by a partner of his, or by an employee of his or of the partnership or by any person acting on his behalf; or
 - (b) holds himself or itself out as being prepared, in return for payment, to undertake the doing by any such person of acts by way of practice as an estate agent.”



16. The second issue is who should bear the costs of the application. Counsel cited section 27 of the Civil Procedure Act and the case of DGM V EWG [2021]eKLR where the court held as follows;

“...costs must follow event unless the court, for some good reasons, orders otherwise.”

17. In conclusion, counsel urged the court to dismiss the present application for being vexatious and a waste of the court’s precious time. He equally urged the court to order that the costs of the application be borne by the applicant.

Analysis and determination

18. I have considered the application, the affidavits and the submissions by both parties. I opine that the main issue for determination is whether the application dated 10th July 2023 is merited.

19. The applicant herein seeks for orders that the estate agents by the name Kenmo Agencies or Njendu Commercial Enterprises replace Muigai Commercial Agencies who are currently in charge of collecting rent for properties; Gilgil LR No. 1317/21X2/X34 site and service, 1317/2X5(plot 5X), 1317/2X6 (plot 4X), Nyandurua/Ol Aragwai 1XX2, Gilgil Milimani plot no. XX and Gilgil Market stall no. XX. His argument is that the said agent had failed to supply him with monthly statements for rent collected from the aforementioned properties and when the same were supplied to him they had discrepancies on the money collected as rent.

20. The respondent on her part opposed the application and argued that the current agent had not in any way breached its’ duties and/or the contract between them.

21. It is not in dispute that the current estate agent was appointed by the consent of both parties through their advocates. The respondent in her submissions confirmed that the said consent was entered into on 4th November 2022. This was in compliance with the orders issued vide the ruling delivered by Justice Chemitei on 6th October, 2022.

22. The applicant in his affidavit in support of the application annexed rent payment statements for the months of February, March, April, May and June 2023. The said statement indicates the rent collected from various tenants and the money paid to the parties herein. The applicant is not contesting the payments made to him or those made to the respondent as per the said statements. He only complained of there being discrepancies on the amount collected as rent.

23. Having looked at the statements relied on by the applicant, I note that he did not pin point the particular month or date in the statements which had rent payment discrepancies. He did not also, present any document indicating the rent due for collection and what was actually collected as per the statements. He therefore cannot expect this court to identify the said discrepancies for him on his behalf since the burden of proving his allegations lay solely on him. Section 109 of the Evidence Act provides that the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of such fact shall lie on any particular person.

24. For the said reasons this court does not find any reason to interfere with the manner in which the rent is being collected by the current agent that was appointed by the consent of the parties herein.

25. Regarding prayer No. (d) of the application seeking for orders that this court orders the respondent to be paying rent for [Particulars Withheld] bookshop where she has been carrying out business and that the said rent be distributed in accordance with the court’s judgment, this court finds the prayer



to be an afterthought. The applicant ought to have raised it during trial for the court to determine it together with the other substantive issues but he failed to do so.

26. The upshot is that the application dated 10th July, 2023 has no merit and the same is dismissed with no order as to costs.

27. Orders accordingly.

DELIVERED, DATED AND SIGNED THIS 19TH DAY OF SEPTEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

