



BM v TIM (Civil Suit 05 of 2019) [2023] KEHC 538 (KLR) (1 February 2023) (Ruling)

Neutral citation: [2023] KEHC 538 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
CIVIL SUIT 05 OF 2019
LM NJUGUNA, J
FEBRUARY 1, 2023**

BETWEEN

BM PLAINTIFF

AND

TIM DEFENDANT

RULING

1. The application for determination is the notice of motion dated August 4, 2022 and wherein the applicant seeks for orders that:
 1. The Honourable Court be pleased to issue an order and direct the land registrar to cancel the title deeds of land parcels LR Gaturi/Nembure/xxxx, xxxx, xxxx and xxxx and do revert the same to the original land parcel LR Gaturi/ Nembure/xxxx.
 2. The Hounourable Court be pleased to order and direct the district surveyor to effect the orders of this court and in particular the judgment issued on June 15, 2022.
 3. The Hounourable Court be pleased to order and direct that the parties herein do share the costs of the surveyor.
 4. The Honourable Court be pleased to order and direct that any or persons occupying the plaintiff/applicant's portion after the subdivision of Land Parcel No LR Gaturi/ Nembure/xxxx do give the plaintiff/applicant vacant possession of her land parcel.
 5. The OCS Embu Police Station be ordered and directed to provide security during the subdivision thereof.



6. Cost of this application.

2. The application is premised on the grounds on its face and further supported by the affidavit of the applicant.
3. The applicant's case is hinged on the fact that the respondent/ defendant and himself were wife and husband and that by a judgment delivered on June 15, 2022, this court ordered that the parties herein do share Land Parcel Gatari/Nembure/xxxx (which was subsequently sub divided into Gatari/Nembure/ xxxx, xxxx, xxxx and xxxx in the ratio of 50:50. That it is practically impossible to share the said portions equally noting that they are of different sizes and further, the respondent has since sold some of the resultant parcels to third parties who have occupied the portions. It was her case that this court be pleased to cancel the resultant portions and revert to the original parcel number Gatari/Nembure/xxxx. Additionally, this court was implored to order and direct the district surveyor to effect the orders issued on June 15, 2022 and further that the parties herein share the costs. That the OCS Embu Police Station be ordered and directed to provide security during the said sub divisions.
4. I have considered the application and the judgment delivered on June 15, 2022. The applicant avers that the respondent has already subdivided Land Parcel Gatari/Nembure/xxxx (which was subsequently sub divided into Gatari/Nembure/xxxx, xxxx, xxxx and xxxx). In its judgment, the court gave the following orders:

A declaration that the property known as Gatari/ Nembure/xxxx (which was subsequently sub divided into Gatari/Nembure/ xxxx,xxxx,xxxx and xxxx) with all the developments thereon acquired during the subsistence of the marriage between the applicant and the respondent, and registered in the name of the respondent is a matrimonial property; and that the same should be divided between the applicant herein and the respondent in the ratio of 50:50. In addition the court gave parties herein the liberty to purchase either's share of contribution of the properties aforesaid.
5. The applicant avers that it is practically impossible to share the portions equally as they are all of different sizes and since the respondent has sold some of the resultant parcel to third parties.
6. Section 12 of the *Matrimonial Property Act* provides that matrimonial property cannot be validly alienated without consent of both spouses in a monogamous marriage. Further, Section 36 of the *Land Registration Act* provides that the overriding interest of one spouse over matrimonial property registered in the name of the other spouse is not to be extinguished or varied unless the other spouse's consent was obtained before the disposition was carried out.
7. In my considered view, the non-consenting spouse can seek the intervention of the court to have any transaction entered into without his/her consent voided as it was entered into without spousal consent and if there is any transfer of ownership, cancelled. Having this in mind and the fact that this court issued orders declaring that Land Parcel Gatari/Nembure/xxxx (which was subsequently sub-divided into Gatari/ Nembure/xxxx,xxxx,xxxx and xxxx) is matrimonial property which was to be shared in the ration of 50:50, my humble view, therefore, is that the alleged sale and/or transfer is not tenable. The fact that Land Parcel Gatari/Nembure/xxxx(which was subsequently sub divided into Gatari/Nembure/ xxxx, xxxx,xxxx and xxxx) is a matrimonial property, leaves no doubt that the resultant subdivisions and titles issued as a result cannot stand for the reason that the land belongs to the applicant and the respondent. The applicant herein has beneficial interest on the said land and any dealings on the said land which may or took place without her consent are not valid in law.



8. On the second and third grounds that this court order the district surveyor to effect the orders of this court issued on June 15, 2022 and further, the parties herein share costs of the said process, in *Patel v EA Cargo Handling Services Ltd [1974] EA. 75* the court stated that:

' There are no limits or restrictions on the judge's discretion except that if he does vary the judgment he does so on such terms as may be just... The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.'

9. It is not lost to this court that it has inherent powers to give orders which are necessary to meet the ends of justice. Section 3A *Civil Procedure Act* provides:

' Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.'

10. This is further buttressed by Section 1A & 1B of the *Civil Procedure Act* which provides for overriding objectives of the Act which is to facilitate the just, expeditious resolution of disputes. Guided by the above, it is trite that in order for the court's judgment delivered on June 15, 2022 to be effected, then the services of a surveyor must be employed to help the parties herein get their respective shares of the said matrimonial property and in the same breadth, given the nature of the case herein, it is my considered view, therefore, that the OCS Embu Police Station ought to supervise the said process to provide security.

11. In the end, the application is hereby allowed in terms of prayers (1), (2), (3), (4) and (5).

12. Each party to bear its own costs of the application.

13. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 1ST DAY OF FEBRUARY, 2023.

L. NJUGUNA

JUDGE

.....Applicant

.....Respondents

.....Ex Parte Applicant

