



**Ndiga v Said (Miscellaneous Civil Application E032 of 2022)
[2023] KEHC 932 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 932 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
MISCELLANEOUS CIVIL APPLICATION E032 OF 2022
RE ABURILI, J
FEBRUARY 15, 2023**

BETWEEN

CHARLES OCHIENG NDIGA APPLICANT

AND

NEREAH MICHAEL SAID RESPONDENT

RULING

1. Vide a judgment of this court dated April 4, 2022 nearly one year ago in Siaya HC original Civil case OS No E009 of 2021, this court made certain declarations on whether certain properties listed in the Originating Summons are matrimonial properties and therefore whether the said properties are available for distribution between the Plaintiff and the Defendant herein and in what proportions. Regarding property Nos Uholo/Ugunja/1623 and Uholo/Ugunja/1726, the court ordered at (d) that the said properties shall be valued by a joint valuer to be agreed upon by the parties failing which a valuer shall be appointed by this Honourable court and the same be shared in the manner declared.
2. The court also ordered that there be liberty to apply in terms of Order No (d) above or on any settlement terms of the judgment.
3. It is now clear that the two parties to this suit had not agreed on the valuer to value the two properties. For the above reason, the Plaintiff by his application dated November 14, 2022 seeks from this court an order that ADD Property Consultants be appointed to undertake valuation of the said properties as ordered by this court in the judgment of April 4, 2022 and that costs of the said valuation be borne by the Plaintiff and the Defendant in equal shares.
4. The grounds upon which the application is predicated are that the Defendant and Plaintiff have failed to agree on a common valuer to undertake the valuation.



5. In the affidavit in support as deposed by the applicant and annexures, thereto, it is clear that the applicant has tried to engage the Defendant for the valuation of the said properties in vain. Efforts to get a common valuer have not borne fruit hence the application.
6. Opposing the application, the defendant's counsel filed grounds of opposition dated January 16, 2023 contending that the application is ex facie bad in law, misconceived, incompetent, oppressive, mischievous, contra - statute and abuse of the court process.
7. That the Respondent is not interested in the appointment of the proposed valuer as the said firm was unilaterally selected by the applicant with a clear focus of protecting his interests; that it is contrary to justice for the court to rubber stamp the applicant's desire of denying the Respondent the value in the suit properties by using the proposed valuer as a conduit and that the Respondent is keen on approaching her own valuers to assess the value of the property and only then can the court intervene. She urged the court to dismiss the application dated December 17, 2021.
8. The application was argued orally on January 21, 2023 by Mr Mungla and Mr Abidha counsel for the respective parties, reiterating the pleadings as above reproduced.
9. I have considered the application, the grounds, supporting affidavit and annexures and grounds of opposition as well as the respective parties' counsel's oral submissions.
10. The issue for determination is whether the application is merited.
11. First and foremost is that the application is made pursuant to Order No (d) & (e) of the judgment dated April 4, 2022 hence it is not correct for the Defendant to contend that it is ex facie bad in law, misconceived, incompetent, oppressive, mischievous contra statute and or an abuse of court process.
12. Secondly, it is clear from Order (d) that the court retained the power to appoint a valuer in the event that the parties failed to agree on who is to value the property.
13. Third, is that parties have indeed failed to agree on a valuer and whereas the Plaintiff has proposed a valuer and the quotation which is Kshs 38,000/= inclusive of VAT, the Respondent has refused to propose an alternative valuer and the estimated cost. She, instead, is suspicious that the valuer proposed by the applicant shall favour the applicant and disadvantage her by undervaluing the properties. That fear or suspicion in my view is unfounded since the applicant has not imposed on her the valuer but had gone ahead to identify just one of the eligible valuers to value the property and even the fee proposed in my view is reasonable.
14. However, as the Respondent has not given the alternative valuer to the one proposed by the applicant and she is not agreeable to the proposed valuer valuing the property out of suspicion and mistrust for the Plaintiff's intentions, I hereby make the following orders in order to implement the judgment of this court and for the ends of justice to be met:
 - a. That the valuation of the two properties Uholo/Ugunja/1023 and Uholo/Ugunja/1726 shall now be undertaken by an independent valuer namely, the Government Valuer from Siaya Lands Office and that the cost of such valuation shall be met by both the applicant and the Respondent in equal measure as shall be billed by the Government Valuer.
 - b. That the said valuation shall be undertaken within the next thirty (30) days of the date hereof.



- c. That the Valuation Report shall be filed into this court within the said thirty (30) days of today.

15. Each party to bear their won costs of the application; as there is an issue between them.

16. I so order.

17. File closed.

Dated, signed and Delivered at Siaya this 15th Day of February, 2023

R E ABURILI

JUDGE

