



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAJIADO**

**MATRIMONIAL CAUSE NO. 9 OF 2018**

**PKG.....PLAINTIFF/ APPLICANT**

**-VERSUS-**

**EWK.....DEFENDANT/RESPONDENT**

**RULING**

1. **Patrick Kariuki Gakungu**, the applicant and **Esther Wangari Kangethe**, the respondent, were initially involved in litigation over two properties, namely; **Kajiado/Ntashart/xxxx** and **Ngong/Ngong/ xxxxx** that were said to be matrimonial properties. After a full hearing, this court rendered a decision declaring **Ngong/Ngong/ xxxxx** a matrimonial property while the other was found not to be a matrimonial property. The court then declared that the matrimonial property was owned by the two in equal share. The property was to be valued for purposes of determining the share of each party and was thereafter to be sold and the proceeds shared equally. Either party was at liberty to buy the other's share.

2. Subsequently, on 22<sup>nd</sup> February 2021, Patrick Kariuki Gakungu, took out a motion on notice under sections 1A, 1B and 3A of the Civil Procedure Act, seeking a number of orders. First, was an order directing and/or requiring the Land Registrar, Ngong' to lift the encumbrances and/or cautions that the respondent had registered against the two properties. second, was an order directing and/or requiring the respondent, herself, her servants, agents or any other person acting through her to allow unlimited access to the applicant and/ or his representatives and or potential buyers to access the suit property for purposes of viewing or purchasing. Third, an order of eviction against the respondent in the event the property, **Ngong/Ngong/xxxxx** was sold and fourth, an order requiring the Officer Commanding Station, Ngong Police Station, to provide adequate security and ensure compliance with the above orders and implementation of the Judgment of this Court.

3. The motion is based on the grounds appearing on its face and the applicant's affidavit sworn on 22<sup>nd</sup> February, 2021. The grounds in support of the motion are that this court delivered a judgment on 22<sup>nd</sup> November, 2019 declaring Parcel No. **Kajiado/Ntashart/xxxx** the applicant's property and parcel No. **Ngong/Ngong /xxxxx** matrimonial property. It further ordered that the matrimonial property be valued and sold and the proceeds shared equally and that in the alternative, either party was at liberty to purchase the other's share.

4. The applicant stated that both suit properties have encumbrances placed by the respondent before the suit was filed. He also stated that the Registrar of Lands had refused to lift the encumbrances and the respondent refused to allow access to the matrimonial property making it difficult for potential purchasers to view the property. This he asserts, has denied the applicant effective enforcement of the lawful judgment. He maintains that he needs finances to meet urgent medical needs and it will be impossible for the respondent to vacate the property in the event that it is sold, which is also scaring away potential buyers.

5. In his supporting affidavit the applicant reiterates the facts and grounds on the face of the motion. He deposed that the respondent refused to participate in valuing the matrimonial property for the purposes of selling and sharing the proceeds which forced him to procure a valuation report that put the value of the property at Kshs. 8,000,000 which was also sent to the Respondent.

6. It is the applicant's case that the respondent refused to respond to his offer to buy her out of the property or allow potential buyers to view the property. She also declined to remove the encumbrances given that he could not buy her out. It is his further case that the respondent's actions forced him to seek potential buyers alone and that he had several challenges in that effort as the respondent was violent to those interested in viewing the property and denied them access. He stated that he had no problem if the property was sold to a buyer of the respondent's choice which offer was yet to be made.

7. According to the applicant, the Land Registrar, Ngong refused to lift the cautions and/or encumbrances placed on the two properties without a court order making it difficult to sell any of the properties. He is apprehensive that a potential buyer will not get vacant possession of property **Ngong/Ngong/xxxxx** and the Respondent's actions as well as the Registrar's refusal to remove the encumbrances have made it difficult to execute the judgment.

8. The respondent, though served, did not file a reply to the application.

9. The application came up for hearing on several occasions and the court directed that the applicant be served. And even after being served on the direction of the court, she neither filed a response nor attended the hearing. Her advocate did not also attend despite being served.

10. Counsel for the applicant moved the application and urged the court to grant the orders sought. He argued that the respondent had declined to allow potential buyers view the property; that she had declined to participate in the valuation of the property and that she had also not removed the cautions she place on the properties which was frustrating the applicant's effort to execute the judgment.

11. According to counsel, it is in the interest of justice that the orders be granted to enable the applicant execute the judgment given that the respondent has declined to co-operate with the applicant in every respect for purposes of enforcing the judgment. He argued that there was no basis for maintaining the caution on parcel No. **Kajiado/Ntashart/xxxx** when the property was decreed to belong to him.

12. I have considered the application, and the supporting affidavit. I have also considered the arguments by counsel for the applicant. The applicant has sought several orders through this application. The application was served on the respondent's counsel and affidavits of service filed. This was after this court directed that proper service be effected on the Advocates. Despite all this, the respondent or her advocates did not respond to the application. When the application came up for hearing, neither the respondent nor her advocate was in court. The application was therefore heard in the respondent's absence.

13. This court rendered a judgment on 22<sup>nd</sup> November 2019 declaring Parcel **No. Ngong/Ngong/xxxxx** a matrimonial property in equal shares. It also declared that **Parcel No. Kajiado/Ntashart/xxxx** was not matrimonial property. The court directed that the matrimonial property be valued, sold and the proceeds be shared equally. The court gave either party an option to buy out the other's in the property.

14. The applicant stated that he reached out to the respondent for purposes of settling the matter but she was unresponsive. The respondent's action is clearly uncharacteristic of someone interested in a matter she had also partially succeeded. She has refused to co-operate in valuing the property, she has refused to remove the encumbrance she placed against the property that has been decreed to belong to the applicant and she has also refused to take part in ensuring that the court's decree is executed. The respondent even refused to participate in this application despite service on both her and her advocate.

15. Having considered the application, the supporting affidavit and arguments by counsel for the applicant, I am satisfied that this application is for granting and is hereby allowed as follows:

***1) .The Land Registrar, Ngong Land Registry is hereby directed to remove cautions placed against Title Nos. Kajiado/Ntashart/xxx and Ngong/Ngong/xxxxxx by Esther Wangari Kangethe the respondent herein.***

***2) Esther Wangari Kangethe, the respondent, her agents and or servants are hereby ordered to allow Patrick Kariuki Gakungu, the applicant, his representatives or potential purchasers unlimited access to the property Ngong/Ngong/xxxxx for purposes of viewing the property.***

***3) The Officer Commanding Station, Ngong Police Station do provide security and ensure compliance with order No. 2 above.***

No order as to costs.

**DATED, SIGNED AND DELIVERED AT KAJIADO THIS 2ND JULY 2021.**

**E C MWITA**

**JUDGE**