



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KIAMBU**

**CIVIL SUIT NO. 22 OF 2016**

**BETWEEN**

**HNN.....PLAINTIFF**

**VS**

**JNK.....DEFENDANTS**

**RULING**

1. The plaintiff, **HNN** is the wife of **JNK**, the defendant. The plaintiff by this suit seeks judgment for the following orders:-

- a) *A declaration that the plaintiff and the defendant are legally married under the Kikuyu Customary Law.*
- b) *This honourable Court be pleased to grant a permanent injunction against the defendant to restrain him, his servants, workers and/or agents from harassing, threatening, evicting and/or interfering with the plaintiff's peaceful occupation and enjoyment of the matrimonial properties known as plot No. 26 Githiga Market, Githunguri/Githiga/xxxx, xxxx, xxxx, xxxx, xxxx and xxxx.*
- c) *This honourable Court be pleased to grant a permanent injunction to restrain the defendant from selling or transferring the properties known as Githunguri/Githiga/xxxx, xxxx, xxxx, xxxx, xxxx and xxxx.*
- d) *The OCS Githunguri Police Station to ensure compliance of those orders.*
- e) *The costs together with interests of this suit be paid by the Defendant.*
- f) *Any other relief that the Honourable court may deem fit to grant.*

2. On 1<sup>st</sup> August, 2018 the parties recorded the following consent.

**“IN COURT ON 1<sup>ST</sup> AUGUST, 2018 BEFORE HONOURABLE LADY JUSTICE C. MEOLI**

**ORDER**

**The matter coming up for mention for purpose of recording consent AND UPON HEARING Mr. Mitiambo for the plaintiff and Mr. Kaburu for the defendant AND BY CONSENT:-**

**IT IS HEREBY ORDERED:-**

- 1. THAT the defendant to surrender two acres of his land at Githiga Market Kiambu County registered in plaintiff's name as sole proprietor. The location of the portion be identified/agreed.**
- 2. THAT the defendant to pay Kshs.100,000/= to plaintiff to enable her start a business for her maintenance.**
- 3. THAT the plaintiff be at liberty to return to her matrimonial home at Githiga market.**
- 4. THAT the defendant to surrender one of the matrimonial homes to the plaintiff for her occupation and use.**

5. **THAT the matter be mentioned on 24/9/18 for further orders.**

**GIVEN under my hand and seal of this Court this 1<sup>st</sup> day of August, 2018.”**

3. The defendant by his application dated 20<sup>th</sup> September, 2018 sought to have the above consent set aside. By a Ruling delivered on 23<sup>rd</sup> October, 2020, this Court dismissed that application. The court by that Ruling held:-

**“The Court is however satisfied that in terms of the provisions of Order 25 Rule 5(1) of the Civil Procedure Rules, the consent recorded on 1<sup>st</sup> August, 2018 is lawful and effectively compromised the suit in part, and the plaintiff may, if she so desires, apply for judgment to be entered accordingly.”**

4. It is that holding that I presume prompted the plaintiff to move this Court as she has, by her Notice of Motion application dated 17<sup>th</sup> December, 2020. The plaintiff seeks the following prayers:-

**“THAT the ruling delivered electronically on 23<sup>rd</sup> day of October, 2020, be adopted as judgment.**

**THAT the defendant be compelled to specific performance (sic) if ruling is adopted.”**

5. The plaintiff by her affidavit in support of that application deponed that the defendant has refused to comply with the consent and he is at the verge of disposing matrimonial property as well as seeking to alienate the parcel of land the plaintiff is entitled to in line with that consent.

6. The defendant opposed the application by his affidavit sworn on 13<sup>th</sup> September, 2021. His opposition to that application however fails to respond to the issues raised by the plaintiff's application. The defendant deponed that neither he nor his advocate were aware of the delivery of the Ruling dated 23<sup>rd</sup> October, 2020. That he came to know of that Ruling on 14<sup>th</sup> April, 2021. That his advocate has written to the court seeking copies of the court's proceeding and ruling for purpose of filing an appeal. Further, that the consent refers to unidentified and unknown acres of land.

#### **ANALYSIS**

7. This Court by its ruling dated 23<sup>rd</sup> October, 2020 upheld the parties' consent recorded by the court on 1<sup>st</sup> August, 2018. That consent having been recorded by the court and as stated above having been upheld as representing the parties, lawful agreement is prime for adoption by this Court as provided under **Order 25 Rule 5(1)** of the Civil Procedure Rules. That Rule provides:-

**“Where it is proved to the satisfaction of the Court and the Court after hearing the parties directs that a suit has been adjusted wholly or in part by any lawful agreement or compromise, or where the Defendant satisfies the Plaintiff in respect of the whole or any subject matter of the suit, the Court shall on the application of any party order that such agreement, compromise or satisfaction be recorded and enter Judgment in accordance therewith.”**

8. My understanding of the first prayer of the plaintiff's application is that she seeks the adoption of the consent recorded on 1<sup>st</sup> August, 2018 as a judgment of this Court. The defendant was not correct in his disposition of his affidavit that the said consent “was no partial compromise.” That indeed is exactly what the consent was. On looking at the prayers in the plaint reproduced above, it becomes very clear that the consent did not encompass all the prayers of the plaintiff in this action. What will therefore come out of the consent is a preliminary decree representing that partial promise.

9. Decree is defined under **Section 2** of the Civil Procedure Act as follows:-

**“decree” means the formal expression of an adjudication which, so far as regards the court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final; it includes the striking out of a plaint and the determination of any question within [section 34](#) or [section 91](#),**  
...

**A decree is preliminary when further proceedings have to be taken before the suit can be completely disposed of. It is final when such adjudication completely disposes of the suit. It may be partly preliminary and partly final.** (underlining mine)

10. The Court of Appeal discussed the meaning of preliminary decree, although in the context of an appeal, in the case **MUTHIKE VS. KENYA FILM CORPORATION LTD (1989) eKLR** stated thus:-

**“The foundation is section 68 of the Civil Procedure Act, but the decision of this Court's predecessor in *Baker v Rush*, which analyses the meaning of a preliminary decree, is of importance, as having declared the law which has been followed for a long time. The argument is very well set out on pp 604 and 605 where the distinction was drawn between preliminary decrees and interlocutory orders. The former conclusively determine the rights of the parties on some issue or issues though further proceedings must be taken before the suit can be completely disposed of. That follows the definition of “decree” in the Civil Procedure Act. As against that there are ordinary interlocutory orders on such matters as misjoinder, jurisdiction, limitation and so forth. The latter are seen as having the effect of merely regulating procedure and do not decide the rights of the parties.”**  
(underlining mine)

12. In view of the fact that the consent partially compromised the plaintiff's claim, this court in accordance with provisions of **Order 25 Rule 5(1)** of the Civil Procedure Rules will adopt that consent and shall order a preliminary decree be issued in terms of that consent.

13. The plaintiff also sought by her application that, the defendant be compelled to carry out specific performance by transferring land in accordance with the consent.

14. What the granting of that prayer would mean is that the plaintiff would be executing the preliminary decree. Such execution before ascertaining the costs would be contrary to provisions of **Section 94** of the Civil Procedure Act. That Section provides:-

**“94. Where the High Court considers it necessary that a decree passed in the exercise of its original civil jurisdiction should be executed before the amount of the costs incurred in the suit can be ascertained by taxation, the court may order that the decree shall be executed forthwith, except as to so much thereof as relates to the costs; and as to so much thereof as relates to the costs that the decree may be executed as soon as the amount of the costs shall be ascertained by taxation”.**

15. The jurisprudence of **Section 94** is very clear from the many decisions of the courts. In the case **KARTA SINGH DHUPAR & CO. LTD VS. LIANARD HOLDINGS LIMITED (2017) eKLR** the court stated:-

**“16. This was also the finding in the case of; BAMBURI PORTLAND CEMENT CO. LTD V HUSSEIN (1995) LLR 1870 (CAK) where Shah JA stated as follows:-**

**‘Section 94 of the Civil Procedure Act requires that for execution of a decree before taxation, leave must be obtained from the High Court, such leave may be sought informally at the time judgment is delivered but if that is not done then it must be made by way of a notice of motion. The motion must be served on the other party and heard inter parties. Order 21 Rule 7(4) of the Civil Procedure Rules purports to confer on the registrar and deputy registrar the power specifically given to High Court under Section 94 of the Act. Rule 7(4) is clearly ultra vires Section 94 of the Act because the section reserves that power exclusively to the High Court.’”**

16. The plaintiff has moved this court for orders of specific performance of the consent. By that application it would seem that the plaintiff seeks to execute the preliminary decree before taxation. There was no specific opposition by the defendant of such execution. The prayer will therefore be granted.

#### **DISPOSITION**

17. In respect to the Notice of Motion dated 17<sup>th</sup> December, 2020, I grant the following orders:-

(a) The parties consent record by this Court on 1<sup>st</sup> August, 2018 is hereby adopted by this Court as an **Order of the Court**.

(b) A preliminary decree shall issue in terms of that consent as follows:-

**1. THAT the defendant to surrender two acres of his land at Githiga Market Kiambu County registered in plaintiff's name as sole proprietor. The location of the portion be identified/agreed.**

**2. THAT the defendant to pay Kshs.100,000/= to plaintiff to enable her start a business for her maintenance.**

**3. THAT the plaintiff is at liberty to return to her matrimonial home at Githiga market.**

**4. THAT the defendant to surrender one of the matrimonial homes to the plaintiff for her occupation and use.**

(c) Execution of that preliminary decree is hereby allowed to proceed before taxation of the costs.

(d) The defendant shall transfer the two acres of his land at **Githiga Market Kiambu County** within 21 days from this date hereof. In default leave is hereby granted to the Deputy Registrar of this Court to sign the transfer documents of the same to put into effect the orders of the preliminary decree

(e) The plaintiff is granted costs of the Notice of Motion dated 17<sup>th</sup> December, 2020.

**RULING DATED AND DELIVERED AT KIAMBU THIS 4TH DAY OF NOVEMBER, 2021.**

**MARY KASANGO**

**JUDGE**

Coram:

Court Assistant: Nancy

For the Plaintiff: Ms. Wanjiru H/B Mburu Muchua

For the Defendant: Mr. Mwangi Chege

**COURT**

Ruling delivered virtually.

**MARY KASANGO**

**JUDGE**