



**REPUBLIC OF KENYA**

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

**(Coram: G.V Odunga– J**

**CIVIL SUIT NO. 4 OF 2019**

***(Formerly Machakos ELC No.38 of 2015)***

**LMP.....PLAINTIFF**

**VERSUS**

**TMM.....1<sup>ST</sup> DEFENDANT**

**DENNIS MUNENE.....2<sup>ND</sup> DEFENDANT**

**DEMSA TRAVEL SOLUTIONS LTD.....INTERESTED PARTY**

**RULING**

1. This Court on 9<sup>th</sup> July, 2021 delivered a judgement in this matter in which it gave the following reliefs:

- a. A declaration that the property known as LR No.xxxxx/xxxx, Original Number xxxxx/xxxxx Title No.LRxxxxxx which is currently registered in the name of the 1<sup>st</sup> Defendant was a matrimonial property belonging to the Plaintiff and the 1<sup>st</sup> Defendant.*
- b. A declaration that the Plaintiff's contribution in the said property was 30% while the 1<sup>st</sup> Defendant's contribution towards the suit property was 70%.*
- c. A declaration that the Plaintiff did consent to the sale of the suit property by the 1<sup>st</sup> Defendant to the interested party.*
- d. A declaration that the Plaintiff is entitled to 30% of the proceeds of the sale of the said property by the 1<sup>st</sup> Defendant to the interested party.*
- e. A declaration that the interested party paid the agreed purchase price of Kshs 13.5 million to the 1<sup>st</sup> Defendant.*
- f. An order that the caution registered by the Plaintiff on the suit property be removed.*
- g. Each party will bear own costs of this suit.*

2. After the delivery of the said judgement, **Ms Mwai**, learned counsel for the Plaintiff orally sought for a stay of lifting of the caution and the Court granted the said stay but limited for 30 days.

3. By a Notice of Motion dated 6<sup>th</sup> August, 2021, the Plaintiff, though erroneously described in the Motion as the Defendants, seek the following orders:

- 1) THAT the Application be certified urgent and heard exparte on the first instance.**
- 2) THAT the Honourable court be pleased to hear this application during vacation time due to its nature of urgency as the courts earlier orders are expiring on the 9<sup>th</sup> August 2021.**

**3) THAT this Honourable court do enlarge time by extending the stay of the removal of the caution placed by the Plaintiff on matrimonial property known as LR NO. xxxxx/xxxx until the 1<sup>st</sup> Defendant complies with the court's judgment dated 9<sup>th</sup> July 2021.**

**4) THAT cost of this application be provided for.**

4. After setting out the terms of the said judgement, the Plaintiff/Applicant deposed that she now resides with the two children of the marriage in a rented house at Syokimau Nairobi while also taking care of the school fees and other needs of the children as the 1<sup>st</sup> Defendant no longer provides for them. She deposed that she had placed the caution as protection of her overriding interest over the property and if the same is removed before she is paid the 30%, she will be left destitute, without a home for the children and herself. It was her apprehension that once the caution is withdrawn, the interested party will transfer the property and she will have no other redress rendering the court order futile. According to her, no prejudice will be occasioned to the 3<sup>rd</sup> Respondent and interested party since they are already in occupation and in possession of the property.

5. The Plaintiff averred believed that the 1<sup>st</sup> Defendant/ Respondent is not committed to pay the 30% as directed as he has not made any effort to do so. She therefore sought for an order extending the stay of its orders for the withdrawal of the cautioned over the matrimonial suit property until the 30% contribution is paid to her.

6. In reply to the Application, the 1st Defendant vide his replying affidavit sworn on 20<sup>th</sup> August, 2021 averred that he utilised the proceeds of the sale of the suit property in taking care of their children, maintaining and educating them and meeting other family needs and that he has been out of employment since 2014 and without any income to date. As a result, he relocated upcountry where he is residing at the moment.

7. The 1<sup>st</sup> Defendant however disclosed that he is willing to comply with the judgement and proposed that he be allowed to pay of the said 30% of Kshs 13,500,000/- amounting to Kshs 4,050,000/- by surrendering his interest in a prime plot measuring 0.100 of an hectare located in Athi River within Mavoko Municipality being Mavoko Town Block x/xxxx whose current market value is over Kshs 4,000,000/-, a family business he set up for the Plaintiff in 2014 in Nairobi with an initial capital investment to Kshs 500,000/- and motor vehicle registration no. KBY xxxx, Toyota Probox with a current market value of Kshs 600,000/-.

8. He urged the Court to consider the fact that since 2014 up to 2021 he was living with his children and single handedly provided for their needs such as education, clothing, food, shelter, entertainment despite the fact that the Plaintiff who ought to have shouldered 50% thereof being their mother in gainful employment. He therefore urged the Court to give in credit for it out of the Plaintiff's determined share of 30% of the value of the suit property.

9. He urged the Court to dismiss the application with costs but urged the Court to consider his said proposal.

10. By a further affidavit, the Plaintiff denied that that the 1<sup>st</sup> Defendant utilized the proceed of the sale of subject property. She maintained that both parties have been maintaining the children and providing for their education without any issue prior to the sale of the said property and in any case the applicant has been contributing to the welfare of the children as well. According to the it is misleading for the 1<sup>st</sup> Defendant /Respondent to state that he wishes to comply with the court's judgment and pay the 30% by using title No. Mavoko Town Block x/xxxx which is actually a property registered in the Applicant's name and which was not bought with the proceeds of the sale of the matrimonial property. As regards the shop, it was his position that the shop was by both parties and in any case the business collapsed the same year. Regarding motor vehicle KBY xxxx, it was averred that the same was being used as a family car long before the 1st Defendant sold the matrimonial home.

11. The Plaintiff further denied the allegation that the 1st Defendant/ Respondent took all the responsibility of the children between 2014 and 2021 and averred that he failed to inform the court that the Applicant had taken the matter to the children's court and was also involved in the welfare of the children and further that for the year 2020 and 2021 the Applicant has been living with the children, taking full care including paying the school fees as one is still in college and another in high school. She further asserted that the 1st Defendant/Applicant failed to inform the court that he sold the other family properties including one-acre plot at Kamulu, 1/8 acre plot in Syokimau and 2 plots in Kitengela whereas whose purchase the Plaintiff had contributed for without sharing the proceeds therefor.

12. According to the Plaintiff, there is non-disclosure of the fact that the couple have other properties including 20 acre land in Namanga, 2 plots in Mombasa and land near Machakos town which properties are all in the 1st Defendant's name.

13. It was therefore averred that the 1st Defendant Applicant is a man of means and should pay the 30% of the sale price of the matrimonial house as ordered by the court. To the Plaintiff/Applicant, the 1<sup>st</sup> Defendant/Respondent wants the applicant and the children to be left destitute as he proceeds with his life with his new wife. It was her view that the 1<sup>st</sup> Defendant/Respondent has no intentions of paying what the court ordered him to pay and the reason why the Plaintiff/Applicant is apprehensive that once the caution is removed the 1<sup>st</sup> Defendant will not release the proceeds and the ends of justice will not have been met.

14. The Plaintiff insisted that it is in the interest of justice that the caution on the property remains in force until the 1st Defendants pay the 30% as ordered by this Court.

#### **Determination**

15. I have considered the application, the respective affidavits as well as the submissions filed. I have considered the issues raised herein.

16. There is no doubt whatsoever that this Court has residual power in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.

17. Accordingly, there is nothing wrong in the Court entertaining the proceedings whose effect is meant to ensure that its judgement is given effect to. To the contrary, a court of law must have the residual power to ensure that its decisions are given effect to and no provision of the rules should be so construed as to preclude a court from giving effect to its decision. See **Peter Mburu Echaria vs. Priscilla Njeri Echaria Civil Appeal No. 75 of 2001 [2007] 2 EA 139; Mawji vs. Arusha General Store Civil Appeal No. 19 of 1969 [1970] EA 137.**

18. One of the instances in which the court exercises this residual power is in the fulfilment of its obligation to ensure that the orders it issues are not issued in vain. This was recognised by the Court of Appeal in **Nicholas Mahihu vs. Ndima Tea Factory Ltd & Another Civil Application No. Nai. 101 of 2009** where it was held that the Court has the duty to ensure that its orders are at all times effective.

19. In this case, in order to give full effect to its decision, it is necessary that the Court compels the 1<sup>st</sup> Defendant to meet his obligation under the judgement by paying the Plaintiff her share of the contribution in the matrimonial property.

20. Whereas the union between the Plaintiff and the 1<sup>st</sup> Defendant was hit by the marital turbulence, the two parties must always remember that as a result of the said union there are innocent offspring for whom they will always be obligated. It is therefore important that they continue to carry out their affairs taking into account the best interest of the said issues of the marriage. They are expected, in whatever union they find themselves in, to exercise utmost good faith when it comes to the interests of the said children.

21. In this case, the 1<sup>st</sup> Defendant contends that he has fallen into hard times in the recent past. He has made certain proposals which are not acceptable to the Plaintiff who contends that the 1<sup>st</sup> Defendant is guilty of non-disclosure of the extent of his properties. The Plaintiff has gone ahead to disclose the assets which she believes the 1<sup>st</sup> Defendant is concealing. In my view in order to bring this matter to a close, it is necessary for the Plaintiff to place before this Court the specific particulars of the said properties as well as their proprietary status so that this Court can determine the matter with finality. In the premises, pending further orders of this Court I direct that the stay of the removal of the caution will remain in force. The Plaintiff is directed to move with speed to identify the 1<sup>st</sup> Defendants said properties failure to do which the Plaintiff's other option is to enforce the decree in her favour against the 1<sup>st</sup> Defendant in the usual manner including resort to committal to civil jail in the event that the 1<sup>st</sup> Defendant is found to deliberately avoiding the settlement of his obligations under the judgement.

22. There will be no order as to costs

23. It is so ordered.

**READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 8TH DAY OF DECEMBER, 2021.**

**G V ODUNGA**

**JUDGE**

**Delivered in the presence of:**

**MS CHELUNGAT FOR THE 1ST DEFENDANT**

**CA SUSAN**