



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

MATRIMONIAL CAUSE NO.1 OF 2017

MAA.....APPLICANT

VERSUS

ARR.....RESPONDENT

R U L I N G

The parties herein were married under the Islamic Law in 1981 and were blessed with three children. The marriage was dissolved on 16.6.2017 by the Marsabit Kadhi through Divorce Cause No.10 of 2017. The respondent filed this matrimonial cause by way of originating summons seeking a share of two properties which were alleged to have been acquired during the subsistence of the marriage. In a judgment delivered on 23rd July, 2018 the Court awarded the respondent 30% share of plot number XXX, Marsabit Town as the equivalent of her contribution to that property.

The applicant filed his application dated 26.10.2019 seeking several orders. The Court delivered its ruling on 26.11.2019 and dealt with most of the prayers except prayer five (5) which states as follows:

1. That upon the hearing and determination of this application there be an order and it is hereby ordered that the property known as plot number XXX be sold to a willing buyer and the proceeds of the sale be shared in the ratio of 30:70 as between the plaintiff/respondent and the defendant/applicant in line with the judgement of the court made on the 23rd July 2018.

In the ruling to 26th November, 2019 this court made inter alia the following orders:-

- 1. The parties to file a copy of the title deed or allotment letter for plot number XXX showing the size of the plot.**
- 2. Plot number XXX to be valued and a valuation report to be filed in court. The cost of the valuation to be paid from the rental income.**

Pursuant to those orders parties filed two separate valuations. The applicant filed a valuation report by [particulars withheld] Valuers Limited together with the allotment letter for plot number, XXX, Marsabit town. The valuers estimated the value of the property including the developments thereon at Ksh.16.5million. On her part, the respondent filed a valuation report by [particulars withheld] Valuers Ltd who returned an estimated value of the property at Ksh.16million. I have read the two valuation reports and apart from minor differences on the actual measurements of the plot as well as differences on measurements of the developments, the rest of the information is somewhat similar. The other difference is the amount of valuation which has a difference of Ksh.500,000.

This matter came up for mention on 27.1.2020 for further orders in relation to the applicant's prayer that plot number XXX, Marsabit town be sold. Mr. Kiogora appeared for the respondent. Counsel informed the Court that the respondent is seeking to buy out the 70% share of her former husband so that she can take up the property. Counsel stated that the respondent has invested over 3.5million on the property and lives there as well. The two parties are not business partners and the issue of majority and minority shareholders does not apply. The two developed the plot together. The respondent is even willing to take her 30% share and have the plot sub-divided as she lives on the plot. Counsel requested the Court to give the respondent two months to pay off the applicant.

Mr. Wakoko, learned Counsel, appeared for the applicant. Counsel opposed that request and informed the Court that the applicant is ready and willing to buy off the respondent's 30% share within one month. Thereafter the plaintiff/respondent will be at liberty to move and live elsewhere. The plaintiff was initially living on plot XXX and continued living there even after the divorce and completion of this matter. Mr. Wakoko urged the Court to allow the majority shareholder buy off the minority shareholder within thirty (30) days.

The respondent in her originating summons dated 4th August, 2017 sought at prayer three (3) orders of injunction restraining the applicant

from among other things selling plot number XXX, Marsabit town. In her reply to the applicant's application dated 26.10.2019, paragraph 17 of her affidavit states as follows.

17. That I vehemently oppose sale of plot No.XXX and sharing of the proceeds as proposed by the applicant. This honourable court should direct that the said plot be subdivided and I am given my 30%share. After the subdivision the applicant can proceed to sell his 70% if he so wishes.

It is quite clear from the applicant's application as well as affidavit in support that the applicant would like to have plot number XXX, Marsabit town be sold and the proceed shared out between the parties as per the apportionment by the Court. Paragraph's 4, 9, 10 and of the applicant's affidavit sworn on 26th October, 2019 states as follows:-

4.That it has become impossible for the applicant and the respondent to co-own the property and yet they do not share any relationship and are not willing to remain business partners to manage the property jointly.

9. That since the applicant and the Respondent do not have anything which connects them other than being co-owners of plot number XXX, it is imperative that the same be sold and each person be given his share and then they lead separate lives using their respective share.

10. That since the applicant and the respondent were formally divorced and the question of the matrimonial properties having been determined, it is only fair and just that they be allowed to lead their separate lives without being held together with a property which they are unable to manage jointly.

12. That the only thing left between the applicant and the respondent is the sharing out of plot number XXX which the applicant as the majority shareholder is ready and willing to dispose of and give the respondent her share of the proceeds.

During the hearing of the main application dated 26.10.2019, Mr. Wangira submitted that the applicant would like plot No.XXX sold and the respondent paid off her 30% share. Counsel further contended that the plot is within a municipality and the issue of sub-dividing it may not be possible as it will call for fresh PDPs. On her part, the respondent has been persistent that the plot should not be sold and if it were to be sold, then she be given her 30% share and the applicant be allowed to sell his share.

Given the application herein it is evident that the applicant's position all along has been that plot number XXX be sold and the proceeds shared between the two. On her part, the respondent is vehemently opposed to that idea and would like either to retain her 30% share or buy off the applicant. I do find the applicant's request to pay off the respondent's 30% share as an afterthought. This position only came out after the respondent's request to be allowed to pay off the applicant. The dispute involves a property acquired during the subsistence of the marriage. It is not a simple issue. Involving sharing out the property. The Court should be able to accommodate a party who wishes to retain a matrimonial property and allow him/her to do so. The applicant seems not to be willing to have the respondent take over the property but is ready to have it sold to a third party. The applicant is not out to keep the property for himself and would like each one to get his/her share and pass over ownership to a third party.

Since the respondent has all along indicated that she is against the idea of having the property sold and that she would rather retain her 30% share than have the property sold, I do find that the plaintiff/respondent is better placed to take over the property after paying the defendant/applicant's 70% share. The issue as to who holds the majority shares is not the determining factor as to who should take over the property. What is important is the circumstances of the dispute and the rival positions of the two parties. Why should the Court order the property sold to a third party if one of the shareholders is willing to buy it?

Since the two valuation reports only have a difference of Ksh.500,000 and in view of the fact that each party is entitled to the maximum value of the property, I do find that the value of plot number XXX, Marsabit town is Ksh.16.5million (Kenya shillings sixteen million five hundred thousand). I do further order that the plaintiff, **MAA** do pay off the defendant's 70% share totaling Ksh.11,550,000 within sixty (60) days hereof. The above sum to be paid either through the defendant's advocate or to be deposited in Court. Upon payment of the sum of Ksh.11,550,000 to the defendant, Plot number XXX, Marsabit town to be transferred to the plaintiff and be registered in her name. Parties shall meet their respective costs.

Dated, Signed and Delivered at Marsabit this 3rd day of February, 2020

S. CHITEMBWE

JUDGE