

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 8 OF 2018 (OS)

EMS.....PLAINTIFF

VERSUS

VMB.....DEFENDANT

RULING

1. On 5th March 2020, the court delivered a judgment in which it found that Butsotso/Shikoti/[.....] was matrimonial property, ordered that it be shared between the plaintiff and the defendant at the ratio of 30:70. The property was to be valued by a qualified valuer, and thereafter sold, and the sale proceeds shared between the two parties in the ratio of 30:70. The court gave the parties two alternatives to the sale of the property, and the sharing of the sale proceeds. The first was that the defendant could buy out the plaintiff, by paying to her an equivalent of 30% of the value of the property, after a valuation has been done. The second alternative was that 30% of the land, in terms of acreage, be excised, and conveyed to the plaintiff, but excluding the portion where the house stands.

2. I am called upon to determine a Motion dated 15th September 2020. It seeks in the main, extension of time to enforce the judgment of 5th March 2020, so that the period of execution is twelve months instead of six months, upon valuation of the property. It also seeks that the defendant be allowed to pay the plaintiff the 30% value in installments until payments in full, and that the plaintiff be ordered to acknowledge the payments through an advocate.

3. The grounds on the face of the application are that the parties have been unable to meet, with a view to engage the valuer as they are not on good terms. The lands registry had also been closed due to the Covid-19 pandemic. The defendant lost income due to the onset of Covid-19 pandemic and the period within which the defendant was supposed to start paying the 30% of value expired, also due to the difficulties presented by the Covid-19 pandemic and the defendant was ready to start making the payments once valuation was completed.

4. The affidavit that the defendant swore, in support of the application, on 15th September 2020, largely mirrors the grounds in support, set out on the face of the application. The only thing I may recite from the affidavit, is the averment that the defendant was ready to make a monthly payment of Kshs. 6, 000.00 towards the value of the 30%, starting with an initial payment of Kshs. 20, 000.00.

5. In response to the application, the plaintiff filed grounds of opposition, on 5th October 2020, of even date. She argues that the prayers sought in the application seek a review of the judgment, and that the court was well aware that the defendant would not be in a position to pay the value of 30%, hence the second option of 30% of the portion being excised and transferred to her name.

6. The application was urged orally on 6th October 2020. The defendant submitted that he wanted time extended to enable him comply with the order to pay the plaintiff 30% of the value of the property. He explained that he had not intentionally failed to comply, rather the valuation ought to precede the payment. He said that his homestead stood on the property, and that his other family resided there. He argued he would be prejudiced if the property was sold before valuation. He said that his means were meagre, being a salary of Kshs. 12, 000.00 per month. He stated that he had paid his share of the valuation fees, and was waiting for the plaintiff to pay her share. He proposed to pay the value of 30% in instalments, in one year.

7. In response, the plaintiff stated that since the defendant had said that he had no money to pay for the 30% value, then she should be given 30% of the land. She said that she was not interested in being paid Kshs. 6, 000.00 per month, adding that she could not accumulate the total amount required for purchase land if paid by instalments

8. In rejoinder, the defendant stated that he had not denied the plaintiff her 30% of the land, but he preferred giving her the monetary value for the land.

9. The judgment of 5th March 2020 is clear, that the property in question is to be shared equally between the parties at the ratio of 30:70. The property was to be valued, and thereafter sold, and the proceeds shared at the ratio determined by the court. The alternatives to selling the property are that the defendant buys out the plaintiff's share and the 30% share of the land due to the plaintiff being excised and transferred to her. The defendant is not keen on the land being sold, because he says he has a home on the land, occupied by his other family. He would prefer to buy out the plaintiff. The plaintiff, on her part, takes the position that since the defendant does not have the money to pay her for her 30% shares, then she should simply be given 30% of the land, as the installments proposed may, in the long run, not be useful to her.

10. As the defendant has a home on the land, where he says a family is in residence, it may be imprudent to have the land sold for the proceeds to be shared. In disputes of this nature, disposal of the land by sale is usually the best option. However, where there are houses or homes, occupied by some of the parties, it may be more reasonable to consider other options.

11. The two options on the table, in view of the occupancy of the land by the family of the defendant, are that the defendant buys out the plaintiff or that the 30% be conveyed to the plaintiff. The defendant has opted for the former, while the plaintiff has pitched tent on the latter

option. I am told that the defendant has paid his share of the charges for valuation of the land, and suggests that the plaintiff was holding up the process by not paying her share. He says that once valuation is completed he should be in a position to settle the 30% to the plaintiff within a year. Firstly, the defendant has not exhibited any evidence that he has paid his share towards the valuer's charges. Secondly, the land has not been valued, and, therefore, the monetary value of 30% is unknown. It is not possible to assess whether that value can be settled by the defendant within one year, given the level of his monthly income.

12. Taking the above into account, I am persuaded that the second option is the more reasonable, that the 30% of the land is excised and transferred to the plaintiff. It is the easier of the options to carry out. I have seen on record a copy of the sale agreement of 10th March 2009, the two parties were the purchasers of the land, it's only that registration of the land excluded the plaintiff.

13. The final order that I should make, in the circumstances, is that 30% of Butso/Shikoti/[.....] shall be excised and registered in the name of the plaintiff, excluding the portion which has the house. The Motion, dated 15th September 2020, is disposed of in those terms. Each party shall bear their own costs.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 4TH DAY OF DECEMBER 2020

W MUSYOKA

JUDGE