

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 20 OF 2011

DENAPPLICANT

VERSUS

PNNRESPONDENT

RULING

1. The applicant DEN filed this application on 23rd May 2018 under **sections 1A, 1B, and 3A** of the **Civil Procedure Act** and **Order 51 rule 1** of the **Civil Procedure Rules** seeking that the respondent PNN do remove her items from the home situated at Ongata Rongai on LR No. Ngong/Ngong/[...] to where she presently resides; that, upon granting the above prayer, the applicant does cease to pay rent for the above house with immediate effect; and that the court reviews its order on the selling price of not less than Kshs.14,500,000/= to selling price of not less than Kshs.10,000,000/=. The respondent opposed the application by filing grounds of position.

2. The background of this case was that the parties were a couple who got married on 29th December 1990. They divorced on 20th December 2010. The applicant filed a suit to share matrimonial property. They had acquired two properties in the course of the marriage. These were house No. [...] Highview Estate Phase II LR No. Nairobi [...] and land parcel Nyandarua/Oljoro Orok Salient/[...]. A decision was made by this court. There was an appeal in the Court of Appeal. The appeal was allowed. The Court of Appeal decided that the two properties were jointly owned in equal shares. The equal sharing was to be determined. The two properties were to be valued and the aggregate values were to be shared equally. The applicant was to get Nyandarua/Oljoro Orok Salient/[...], and the Nairobi house was to be given to the respondent subject to her paying the applicant the amount forming the shortfall of the equal sharing after factoring in the value of the Nyandarua property.

3. Because the respondent was not cooperative, the applicant got a valuer who valued the two properties. The Nairobi property was valued at Kshs.14,500,000/= and the Nyandarua property was valued at Kshs.1,750,000/=. This court found that what the respondent was to pay the respondent as shortfall after considering the value of the Nyandarua property and subtracting the value from his entitlement over the Nairobi property was Kshs.6,375,000/=. It was ordered that the Nairobi property be sold by private treaty within 120 days at a price of not less than Kshs.14,500,000/= and the proceeds of the sale be deposited in court within 7 days of the sale for the distribution. It was further ordered that before the sale the parties were to get an alternative accommodation for their minor children.

4. At one point the applicant complained that he had found buyers for the Nairobi property but the respondent had refused to vacate it. Fast forward, the applicant found a house at Ongata Rongai on LR No. Ngong/Ngong/[...]. He rented it for the children and has since been paying rent, etc. So far he has incurred over Kshs.300,000/=. However, the respondent has refused to stay there and has moved to her own accommodation after, at the instance of the applicant, she was forcefully removed from the Nairobi property. The respondent left her property in the Ongata Rongai property. According to the applicant, this property is being vandalized and /or stolen and he is having to incur a lot of money to provide security. Hence his application that she be compelled to take whatever property that is left there to wherever she stays. Secondly, he is not able to get a buyer for “not less than Kshs.14,500,000/=” and seeks the order reviewed so that he gets a buyer for not less than Kshs.10,000,000/=. This is in respect of the Nairobi property.

5. It is material that this application did not attract a replying affidavit. The factual position in the application was therefore not opposed. The grounds of opposition were that the application was an abuse of the process of the court; the orders sought were the subject of the contempt of court application dated 25th January 2018; and the application was incurably defective as it offended the provisions of **Order 40 rule 7** of the **Civil Procedure Rules**.

6. An application for review of order, decree or judgment of the court can only be made under **section 80** of the **Civil Procedure Act** and/or **Order 45** of the **Civil Procedure Rules**, and there are grounds upon which such review can be allowed. The jurisdiction of the court was not invoked to enable it deal with the prayer for review. It is now trite that where there is a clear remedy under the **Act** and **Rules** the court cannot be asked to proceed under **sections 1A, 1B** and **3A**.

7. The second application under consideration is by the 2nd respondent who seeks that the applicant be committed to civil jail for a period not exceeding six months for contempt of court; she be granted occupation of the Nairobi property; and the applicant be restrained from trespassing, transferring, selling, leasing or in any other way dealing with the property. The application was based on the grounds that the court issued an order on 16th January 2018 maintaining the *status quo* as regards the property; the said order was given in the presence of the parties; the applicant had flagrantly ignored the said order and was interfering with the respondent’s occupation with the property. The applicants response was that the orders issued on 16th January 2018 were made after the respondent had been forcefully evicted from the premises; the respondent had, in any case, secured an alternative accommodation; and that the eviction followed the respondent’s refusal to obey a lawful court order.

8. I note from the record that on 16th November 2018 the respondent caused Judge Musyoka to recuse himself from the matter. The judge asked that the *status quo* be maintained before the matter was placed before another judge. The record further shows that, following application, Judge Musyoka had on 8th December 2017 given the respondent 30 days to move out of the Nairobi property, failing which she be forcefully removed. She was to move to the Ongata Rongai property. When she did not vacate as ordered, on 10th January 2018 the Deputy Registrar directed the OCS Capital Hill police Station to evict her. The applicant swore that the respondent was evicted on 15th January 2018. The averment was in the applicant's replying affidavit sworn on 30th May 2018. There was no response to it.

9. It follows that by the time of the order for *status quo* issued on 16th January 2018, the respondent had been evicted on 15th January 2018. Therefore, the claim that the eviction was in flagrant disobedience of court order, order of 16th January 2018, was without any factual or legal basis. By 16th January 2018 the respondent was out of the Nairobi house by virtue of a court order, after she had failed to voluntarily move out within 30 days.

10. The result is that the respondents application dated 25th January 2018 is dismissed with costs.

11. Regarding the applicant's application dated 22nd May 2018 (and filed on 23rd May 2018), I direct that the (the applicant) ceases to pay any further rent for the Ongata Rongai LR No. Ngong/Ngong/[...] property. With notice to the advocate of the respondent, he will remove whatever property she has in the property and take it to her house where she presently lives. To that extent, his (applicant's) application is allowed with costs.

DATED and SIGNED at NAIROBI this 10TH day of DECEMBER 2018

A.O. MUCHELULE

JUDGE