REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 62 OF 2006 (OS)

S R W……..……...…..APPLICANT

VERSUS

S W……..……..…RESPONDENT

RULING

On 26th September 2014, this court rendered its judgment in respect of a dispute between the Applicant and the Respondent relating to distribution of matrimonial property. At page 8 of its judgment, this court stated thus:

> ***"As regard the other two mansionettes, the same belong to the Respondent. Since the three (3) mansionettes are contained in one title (the suit property), the parties have two options: they can partition the property so that the two properties are delineated and two separate titles issue for the same, or alternatively the mansionette occupied by the Applicant be valued and the Respondent pays for the value of the mansionette. If the first option is to be exercised, the court will require a report to be made by a Planner and a Surveyor to determine if it is possible to partition the property as directed by the court. If not, the second option shall be invoked. This matter shall be mentioned forty-five (45) days from the date of this judgment for the parties to inform the court what option they have chosen to exercise."***

Pursuant to the direction issued by the court in the judgment, the Applicant notified the court that she intended to exercise the first option by having the mansionette that she is occupying hived off from the main title so that she can be registered thereof as the owner.

On his part, the Respondent was of a contrary view. The Respondent's position is that the mansionette currently occupied by the Applicant cannot be excised from the main title because the size of the land on which the property stands is below the minimum area that a title can be issued. In that regard, the Applicant attached a copy of a report prepared by Lloyd Masika Limited, a registered valuation firm which indicated that the setup of the developments on the parcel of land rendered the same not sub-divisible. The report is contained in a letter dated 15th January 2015. The finding made in the report is supported by another report prepared by G. Njoroge, a registered physical planner working with Eco Plan Kenya Limited. In the report dated 20th July 2015, he noted that the parcel of land falls under Zone 4B2 of Nairobi County. In this zone, the minimum allowance of a parcel of land upon which a single dwelling house may be built is 0.05 of a hectare. He stated that:

> ***"the sub-division of this plot as shown in the attached plan (Plot B) will have an area of 0.0350 hectares which is less than the minimum plot requirements as per the above Nairobi zoning requirements. This is, therefore, will not be approved by the County Government of Nairobi since it falls below the acceptable standards in the area."***

The planner recommended that if the domestic quarters behind the main house are included, then the 0.05 hectares threshold will be achieved. The alternative would be to have the house registered as a sub-lease as per the available land registration laws.

This court visited the property on 7th March 2017. The court made the following observations:

"Court visit the locus in quo – i.e the site where the property that is the subject of the dispute is situate. The court observed that the three houses are adjoining each other. There is a smaller one storey house at the extreme end of the property. Court sees the property occupied by the Petitioner/Plaintiff. It is the first house as one enters the compound. There is a guest house behind the main house. It is two bed-rooms. The building is at the rear from the right hand boundary to the left hand boundary of the main house."

Other than advocates for the parties, a Mr. Iqbal Janowalla, Architect and Mr. Peter Musui, a Valuer were present. Both professionals agreed that if the guest wing behind the main house that is occupied by the Applicant is excluded, then permission will not be granted by the Nairobi County Government for the sub-division and excision of the parcel of land on which the house is situate. Mr. Owang', learned counsel for the Applicant and Mr. Muturi, learned counsel for the Respondent made oral submissions urging their respective clients' cases. Mr. Owang' submitted that for the conundrum relating to the sub-division of the suit parcel of land to be resolved, the court should allocate the guest house behind the main house (Mansionette No.1) to the Applicant. On his part, Mr. Muturi was of the view that since the land cannot be subdivided, the court should compel the Applicant to accept the second option i.e. the valuation of the suit property and thereafter the Respondent be allowed to compensate her with the assessed value.

This court has carefully considered the facts of this application. It was clear to the court when it visited the property that the guest house behind the main house occupied by the Applicant is an extension of that main house. The guest house cannot be separated from the main house since the architectural design of the guest house meant that its roof is attached to the main house. To resolve the problem that may arise if the guest house is not included as part of the main house in the sub-division, this court allocates the guest house to the Applicant. The property shall therefore be sub-divided so that mansionette No.l shall be excised from the main title along the boundary between mansionette No.1 and mansionette No.2 from the front of the property to the back of the property. The road of access to the property shall be the common access of the three mansionettes. It shall be excluded from the portion that shall be sub-divided and excised in favour of the Applicant. The cost of the sub-division and extension of lease shall be borne *pro-rata*, between the Applicant and the Respondent i.e the Applicant shall bear ? of the cost while the Respondent shall bear ? of the cost. It is so ordered.

DATED AT NAIROBI THIS 14TH DAY OF MARCH 2017

L. KIMARU

JUDGE