REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 25 OF 2011

JANE NJOKI KUBAI alias JANE NJOKI MAYER.....1ST PLAINTIFF

MERCY NJERI.....2ND PLAINTIFF

-VERSUS-

JAMES KUBAI MATHU.....1ST DEFENDANT

HOUSING FINANCE COMPANY OF (K) LTD.....2ND DEFENDANT

RULING

1. This ruling is in respect of the Notice of Motion dated 6th February, 2019 by the 1st defendant seeking the following orders:

> **1. That the court do order that the property known as sub-division number 3007 of Sections VI Mainland North and all the developments erected thereon be valued by a court appointed valuer and thereafter;**
>
> > **a. The same be sold by private treaty through the advocates of the parties and,**
> >
> > **b. The proceeds therefrom be distributed as per the consent order recorded in court on 18/9/2017.**
>
> **2. That the costs of the application be provided for.**

2. The application is supported by the affidavit of James Kubai, the applicant sworn on 6th February, 2019. He deposed that the suit property has the original three bedroomed house with a kitchen, sitting room, a washroom, bathroom and a store, four additional self-contained bedsitters and three detached shops. That the 1st plaintiff occupies two bedrooms, the kitchen and sitting room and rents out the four self-contained bedsitters and the shops and keeps all the rental income therefrom. The applicant avers that he occupies one bedroom and receives nothing from the rental income collected by the 1st plaintiff. The applicant states that he is a retiree and has no source of income. He states that his relationship with the plaintiffs has totally gone from bad to worse as the family fibre which kept them together is not recognized by them. The applicant avers that he lives under extreme fear from possible harm by the agents of the 2nd plaintiff and that he has been taken to Changamwe Police Station on false accusations by the 2nd Plaintiff. That on 7th June, 2018 he was badly injured by thugs and has annexed a discharge summary. The applicant has deposed that he is old and week and wants to go upcountry and reside there. It is for this reason that he wants 50% share of the suit property. The applicant states that he offered the plaintiffs to buy him out but they have not responded positively. He has annexed a copy of a letter to the plaintiffs' advocates which he states has not elicited a positive response. The applicant avers that it is in the interest of justice that the property should be valued and sold competitively and the proceeds therefrom distributed as per the consent order of 19/9/2017, adding that the plaintiffs have a right to purchase the applicant's share if they so wish.

3. The plaintiffs have opposed the application through grounds of opposition dated 8/5/2019 and the replying affidavits by Mercy Njeri and Jane Njoki Kubai alias Jane Njoki Mayer both sworn on 7th May 2019. It is the plaintiffs contention inter alia that the applicant maintains exclusive possession, occupation and use of one (1) bedroom in the main house and enjoys unfettered access to the rest of the facilities in the said house and gratuitous residence in the said house, with no obligations whatsoever as regards utility and all other bills/expenses as he blatantly declined to pay for the same. The plaintiffs have deposed that they occupy one bedroom while another bedroom is occupied by Agnes Njeri and Joseph Mungai, the applicant's granddaughter and grandson respectively.

4. The plaintiffs' case is that the main house is the family home currently owned by both the plaintiffs and the applicant while the rest of the developments on the property belong to the 1st plaintiff and the funds received therefrom service the properties' bills. The plaintiffs contend that the applicant has all along been selling other properties without involving other family members. The plaintiffs further contend that the

consent recorded in court on 19/9/2017 was purely in the spirit of cohesiveness, with no provision for division of the suit property whether on the title document or on the ground and that the property remains undivided to-date. The plaintiffs aver that the applicant has sold all other properties that his family would have dwelt in and that the entire family has nowhere else to proceed to should the family home now be sold.

5. The application was canvassed by way of written submissions. The 1st defendant/applicant filed his submissions on 9th July 2019 which were duly highlighted by Mrs. Umara, learned counsel for the applicant. The Plaintiffs filed their submissions on 17th October 2019 and the same were highlighted by Mr. Ngonze, learned counsel for the plaintiffs.

6. The 1st defendant is husband to the 2nd plaintiff and father to the 1st plaintiff.in his submissions, the 1st defendant gave the origin of the case herein and stated that he took a mortgage with the 2nd defendant to purchase the suit property, and after a few years of payment, the 1st defendant was unable to continue paying the monthly installments. That out of goodwill and on humanitarian basis, the 1st plaintiff, keen to have her parents not dispossessed from their matrimonial home, stood in for the 1st defendant and paid the rest of the installments. Later, the 1st plaintiff laid a claim on the property because of the payments she made. The matter came to court and before the court could make a final determination, the parties recorded a consent on 18th September, 2017 which consent was adopted by the court in the following terms; inter alia;

> **"That by consent the 1*st* plaintiff be included as a 50 % co-owner of the property known as PLOT NO. LR. SUB-DIVISION 3007 SECTION VI MAINLAND NORTH, and that the title be rectified to reflect that**."

7. The 1st defendant pointed out that the plaintiffs made an attempt to disown the said consent but the court dismissed the application and upheld the consent vide the ruling made on 14th March 2018. The 1st defendant submitted that he filed the current application in order to set in motion the substance of the consent recorded in court. It is the 1st defendant's submission that the grounds of opposition and affidavits in reply by the 1st and 2nd plaintiff address issues which literally were overtaken by events by virtue of the consent recorded in court. It is therefore the 1st defendant's submissions that the same issues cannot be raised again. The 1st defendant cited the provisions on Section 7 of the Civil Procedure Act which touches on res judicata and relied on the case of **John Florence Maritime Services Limited & another – v- Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR**. The 1st defendant further submitted that some dispositions in the said replying affidavits are made in bad faith and intended to misguide the court into forming a dark opinion over the applicant. Counsel for the 1st defendant submitted that a consent adopted by court is a final determination and the consent order is a binding agreement between the parties and that it is trite law that consent is a contract in which parties make reciprocal concessions in order to resolve their differences and therefore avoid litigation or where litigation has commenced, bring it to an end. Counsel further submitted that consent once given judicial approval as was the case herein vide the ruling of this court on 14/3/18, it becomes a determination of the controversy and has the force and effect of a judgment. The 1st defendant's counsel relied on the case of **Flora Wasike –v- Destimo Wamboko (1988) I KAR 625 and Kassmir Wesonga Ongoma et al versus Ismael Otoicho Wanga, (1987) eKLR** which was cited with approval in the case of **Mohamed Bare & 48 others –v- Kenya Rural Roads Authority (2016) eKLR** and submitted that the plaintiffs cannot purport to re-open issues between the parties which were settled to the satisfaction of both parties.

8. On whether it is in the interest of justice that the property be sold and the proceeds distributed as per the consent order recorded on 18/9/2017, the 1st defendant's counsel referred to the contents of the affidavits on record and in particular that the relationship between the applicant and the 2nd plaintiff has totally failed and that the family fibre which kept them together is no longer recognized by the plaintiffs. That the applicant desires to go upcountry to settle and live a quiet life, hence is asking this court to enable him recover his share of the suit property. The 1st defendant's counsel relied on the case of **F. S. – v- E. Z (2016) eKLR** where two spouses who had lived together for ten years had their matrimonial property sold and proceeds shared between them when the marriage hit the rocks. The 1st defendant further submitted that the respondents herein cannot purport to give the property in question any sentimental value as a basis for opposing the sale. That the suit property has previously been charged to the 2nd defendant with full knowledge and consent of the plaintiffs. Relying on the case of **Julius Mainye Anyega –v- Ecobank Kenya Limited (2014) eKLR** the applicant's counsel submitted that from the onset, the parties herein have comfortably lived with the risk of parting with the property and urged the court to allow the application.

9. Counsel for the plaintiffs reiterated the contents of the replying affidavits and cited the provisions of Articles 40, 47, 48, 50 and 159 of the Constitution of Kenya, Section 2 of the Matrimonial Property Act, 2013, Section 91 and 93 of the Land Registration Act, 2012, Section 107 of the Evidence Act. Counsel further made reference to the definition of a matrimonial home under Section 2 of the Matrimonial Property Act, as well as Section 6(3), 7, 12 (5) and 14 thereof. The plaintiffs' counsel relied on the case of **Njeri Mwangi –v- Equity Bank Ltd & Another (2017) eKLR** and **PWK –v- JKG (2015)eKLR, Peter Mburu Echaria –v- Priscilla Njeri Echaria (2007) eKLR, Francis Njoroge –v- Virginia Wanjiru Njoroge, Nairobi Civil Appeal No. 179 of 2009, and TMW –v- FMC (2018) eKLR,** and submitted that the applicant has totally failed to make out a sufficient case on the merits to warrant grant of the orders sought in the application and urged the court to dismiss the same with costs to the plaintiffs.

10. I have considered the application; the affidavits in support and against and the rival submissions made as well as the authorities relied on. The main issue for determination is whether the property known as SUBDIVISION NUMBER 3007 SECTION VI MAINLAND NORTH and all the developments erected thereon should be valued and sold and the proceeds therefrom distributed as per the consent order recorded in court on 18th September, 2017.

11. The plaintiffs are a daughter and wife of the 1st defendant respectively. The plaintiffs filed this suit seeking two main prayers, namely, a declaration that he 1st plaintiff is the owner of the suit property and for the 1st plaintiff to be registered as the sole proprietor of the same, as well as a permanent injunction restraining the 2nd defendant a financial institution from discharging the suit property to the 1st defendant. The 1st defendant filed a statement of defence which generally traversed the plaintiffs'' claim. The matter was set down for hearing on numerous occasions but never proceeded for one reason or another. On 18ht September, 2017 the parties recorded a consent which consent was adopted by the court in the following terms:

> **"1. That by consent that 1st plaintiff be included as a 50% co-owner of the property known as plot No. LR. Sub-division 3007 Section VI Mainland North, and the title be rectified to reflect that.**

2. That costs of the suit be paid to the 2nd defendant by the plaintiffs and the 1st defendant, to be agreed upon and in default of agreement, the same to be taxed by the Deputy Registrar.

3. The matter to be fixed for mention on 1st November, 2017 to confirm compliance"

12. Subsequently, the plaintiffs filed the Notice of Motion dated 26th September, 2017 seeking to set aside the said consent order. The court however found that the application had no merit and dismissed it on 14th March 2018. It is therefore clear from the foregoing that the issue of ownership of the suit property was settled through the consent that was recorded in court by the parties on 18th September, 2017. Prior to the said consent, the 1st defendant was the sole registered owner of the suit property. However, pursuant to the consent recorded by the parties, the 1st plaintiff became a co-owner of half (50%) of the property while the 1st defendant retained half (50%) of the property. It is my considered view that the relationship that resulted from the consent between the parties is that the 1st plaintiff and the 1st defendant is a co-tenancy as defined under Section 91 (1) of the Land Registration Act, 2012, with each of them having half (50%) interest in the suit property. In that regard, I do agree entirely with the applicant's submission that the plaintiffs in their responses to the application herein have gone back to issues that, in my view, had long been agreed and settled.

13. In this application, the 1st defendant has informed the court that the relationship between the 2nd plaintiff and the applicant has totally failed and that the fibre which kept them together is no longer recognized by the plaintiffs. The applicant deposed that he lives under extreme fear from possible harm by agents of the 2nd plaintiff and that on 7th June, 2018, he was badly injured by thugs and exhibited the medical documents. The applicant added that he was taken to Changamwe Police Station on false accusations by the 2nd Plaintiff. The applicant states that he is an old and weak retiree and wishes to go and reside upcountry. The applicant averred that he offered the plaintiffs the opportunity to buy him out, but the plaintiffs have not responded positively hence this application.

14. Section 91 of the Land Registration Acct provides as follows:

91. (1) In this Act, co-tenancy means the ownership of land by two or more persons in undivided shares and includes joint tenancy or tenancy in common.

2. Except as otherwise provided in this Act, if two or more persons, not forming an association of persons under this Act or any other way which specifies the nature and content of the Rights of the Persons forming that association, own land together under a right specified by this section, they may be either joint tenants or tenants in common.

3. An instrument made in favour of the two or more persons and the registration giving effect to it shall show-

a. whether those persons are joint tenants or tenants in common; and

b. the share of each tenant, if they are tenants in common.

4. If land is occupied jointly, no tenant is entitled to any separate share in the land, consequently –

a. dispositions may be made only by all the joint tenants;

b. on the death of a joint tenant, that tenant's interest shall vest in the surviving tenant or tenants jointly; or

c. each joint tenant may transfer their interest inter vivos to all the other tenants but to no other person, and any attempt to so transfer an interest to any other person shall be void.

5. If any land, lease or charge is owned in common, each tenant shall be entitled to an individual share in the whole and on the death of a tenant, the deceased's share shall be treated as part of their estate.

6. No tenant in common shall deal with their undivided share in favour of any person other than another tenant in common, except with the consent in writing, of the remaining tenants, but such consent shall not be unreasonably withheld.

7. Joint tenants, not being trustees, may execute an instrument in the prescribed form signifying that they agree to sever the joining ownership and the severance shall be complete by registration in the prescribed register of the joint tenants and tenants in common.

8. On and after the effective date, except with leave of a court, the only joint tenancy that shall be capable of being created shall be between spouses, and any joint tenancy other than that between spouses that is purported to be created without the leave of a court shall take effect as a tenancy in common."

15. Section 94 of the Land Registration Act provides for the partition of land occupied in common while Section 96 provides for the sale of co-owned land. It provides as follows:

"96 (1) If for any reason the land sought to be partitioned is incapable of being partitioned, or the partition would adversely affect the proper use of the land, and the applicant for partition or one or more of the other tenants in common require the land to be sold, and the tenants in common cannot agree on the terms and conditions of the sale or the application of the proceeds of the sale, the tenants in common may make an application to the court for an order for sale and the court may –

a. Cause a valuation of the land and of the shares of the tenants in common to be undertaken; and

b. Order the sale of the land or the separation and sale of the shares of the tenants in common by public auction or any other means which appears suitable to the court; or

c. Make any other order to dispose of the application which the court considers fair and reasonable.

2. The court shall, in exercising its powers under paragraphs (b) and (c), have regard to any of the matters set out in Section 94(3) (a) to (f) that may be relevant in the circumstances.

3. A tenant in common shall be entitled to purchase the land or any share of it that is offered for sale, either at an auction or at any time by private sale."

16. The court has considered Section 96 (1) of the said Act and it indeed gives the court discretion to make such orders for the valuation and sale of land held in common either by public auction or any other means. Sub- section (3) of Section 96 above is clear that a tenant in common is entitled to purchase the land or any share of it that is offered for sale, either at an auction or by private sale. It is apparent that the relationship of the parties herein is no longer cordial. It is also not disputed that the 1st defendant offered to sell to the plaintiff's his share of the suit property. The applicant stated that the plaintiffs chose to ignore the said offer and/or failed to respond positively. On the other hand, the plaintiffs aver that allowing the application shall only serve to polarize the party's family members further.

17. In my view, it would be unconscionable to let the applicant continue to reside in the suit property with the plaintiffs and other family members against his wish and with the looming risk of harm against him. That would not only be exposing the applicant's life to risk, but would also amount to violating his fundamental rights and freedom which would be unconstitutional, illegal and unlawful. In my view, the applicant has the constitutional and legal right to decide where he wants to reside in, and especially where he will feel his safety is secure. There is no compelling reason why the applicant should be denied these rights. Moreover, the plaintiffs have not shown how they will be prejudiced if the application is allowed. The plaintiffs will not be rendered homeless because they still retain 50% of the property through the 1st plaintiff. They also have the option of buying out the applicant in order for them to retain the entire suit property.

18. Taking into account the law as set out in the preceding paragraphs, and considering the material before me, I find that the 1st defendant's application is merited and the same is hereby allowed.

19. Consequently, I make the following orders:

a. The joint ownership in respect of the property known as SUBDIVISION NUMBER 3007 OF SECTION VI MAINLAND NORTH between the applicant and the 1st plaintiff is severed.

b. A reputable valuer to be agreed upon by the parties within 30 days from the date hereof to carry out valuation of the property known as SUBDIVISION NO. 3007 OF SECTION VI MAINLAND NORTH together with all the developments erected thereon for purposes of ascertaining its current market value and a reserve price in the event of a forced sale.

c. Should any party fail to participate in the appointment of the valuer, the party who is ready will be at liberty to appoint one and the other party shall be bound by the valuation.

d. The valuation costs shall be shared between the applicant and the 1st plaintiff in the ratio 50%:50%

e. Following such valuation, the 1st plaintiff shall pay to the applicant 50% of the assessed market value of the property within three (3) months from the date of the valuation, failing which the property known as SUBDIVISION NO. 3007 SECTION VI MAINLAND NORTH and all the developments erected thereon shall be sold subject to the reserve price fixed by the valuer aforesaid and the proceeds therefrom shall be shared between the applicant and the 1st plaintiff in the ratio of 50%:50%.

f. In the event that any of the parties fails to co-operate in the sale of the suit property should such sale become necessary, the Deputy Registrar of this court shall be at liberty to execute any document that may be necessary to facilitate the sale of the suit property and the distribution of the proceeds thereof in accordance with the orders made herein.

g. Each party shall bear its own costs of this application.

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 9TH day of July 2020.

C.K YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant