



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

CIVIL SUIT NO.180 OF 2002

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT, 1882

ROBINA MORAA MAUYAPLAINTIFF/APPLICANT

VERSUS

TOM STEPHEN MAUYADEFENDANT/RESPONDENT

RULING

1. By a Notice of Motion under **Sections 3A, 34, 38(d), (f), and 40 of Civil Procedure Act, Order 22 Civil Procedure Rules, Section 17 of Matrimonial Property Act** the applicant sought the following orders **THAT:-**
 - a. *The Applicant be at liberty to collect her share of rental income from 30% of rental houses comprised of LR NO. CENTRAL KITUTU/DARAJA MBILI/1702 pending inter parties hearing of this application.*
 - b. *The applicant be at liberty to collect her share of rental income from 30% of the rental houses comprised of LR NO. CENTRAL KITUTU/DARAJA MBILI/1702 pending the hearing and determination of this application.*
 - c. *The respondent be committed to civil jail for non-remission of the applicant's outstanding share of rental income in accordance with the decree issued by the court on 6th December 2012.*
 - d. *The joint estate agent be appointed for purposes of collecting rent and disbursing the same to the parties, in the alternative the applicant be allocated 30% of the rental houses strictly to collect rent.*
 - e. *Cost of the application be in the cause.*

1. The application was supported by the annexed affidavit of the applicant ROBINA MORAA MAUYA in which she deponed that on 8th November 2012 this honourable court entered judgment in her favour and a decree issued thereon in which the court directed that she should be paid every month 30% of the rental income collected from LR NO. CENTRAL KITUTU/DARAJA MBILI/1702 for life time while the defendant (respondent) remains the legal owner thereof.
2. It was deponed that since the said judgment the respondent had not been faithful in making payment of the decretal sum with the last payment being on 29th May 2014 and that the respondent was not keen on making payment in respect thereof unless ordered by this court.
3. In response to the said application the respondent filed statement of grounds of opposition in which it was stated that the application was premature, misconceived and bad in law. It was further stated that the court did not have jurisdiction to adjudicate upon the matter being functus officio with the court being invited to sit on appeal or the decision of a court of co-ordinated

- jurisdiction.
4. It was therefore submitted by Mr. Oguttu that this court does not have jurisdiction on the matters herein unless by way of review application. It was further submitted that any order granted by this court will be at variance with the judgment on record. The trial court having confirmed the ownership of the property and management thereof to the respondent and that it was therefore the responsibility of the respondent to collect rent and remit 30% thereof to the applicant.
 5. It was submitted that the proposal to appoint a mutual agent would be contrary to the judgment though legal sound. He however submitted that if the orders were to be made then the applicant should meet the commission in respect thereof. He submitted that if the applicant is allowed to enter upon the property to collect 30% taking into account the nature of the dispute, the same will result into disturbance and would derogate from the order of the court which confirmed ownership of the property as per **Sections 23, 24 and 26 of Land Registration Act 2012**. It was therefore submitted that the application is not tenable as it is inviting the court to sit on an appeal of a judgment of a court of similar jurisdiction.
 6. In a rejoinder Mr. Momanyi submitted that it is only a judge who can give post judgment direction and that it is only fair that the commission be shared.

HISTORY

7. A brief history of this matter would be necessary in determining the application herein. The applicant herein ROBINA MORAA MAUYA on 26th July 2002 took out an originating summons under **Section 17 of the Married Women's Property Act 1882** in respect of several properties including the suit property and sought an order that the said property be shared equally between him and the respondent. On 18th March 2003 I.C.C. Wambilyangah, J as he then was dismissed the motion with cost.
8. On 22nd July 2003 the applicant under certificate of urgency filed a chamber summons under **Order XXXIX Rules 1 and 2 of Civil Procedure Rules and Sections 3A of Civil Procedure Act** for an order of injunction restraining the respondent from selling, transferring or disposing the suit properties. It is not clear from the court record whether the order of 18th March 2003 was set aside but on 31st July 2003 Wambilyangah J issued an order of injunction and prohibition pending further orders of the court.
9. On 11th April 2011 directions were given that the O.S proceed by way of oral evidence and upon the said hearing on 8th November 2012 R.N. Sitati, J. delivered a judgment in the following terms in respect of the suit property.

“23.4 Central Kitutu/Daraja Mbili/1702 shall remain the property of the defendant subject to payment of 30% of the monthly income therefrom to the plaintiff from the date of this judgment through out her life.”

24. Considering the nature of the dispute, I order that each party shall bear its own cost of this suit.

10. Before me is therefore an application under **Section 3A, 34, 38(d), (f) 40 of Civil Procedure Act and Order 22 Civil Procedure Rules**.

Section 34 (1) provides as follows:-

“(1)All questions arising between the parties to the suit in which the decree was passed or their representative and relating to the execution, discharge or satisfaction of the decree shall be determined by the court executing the decree and not a separate suit.”

11. The question which this court has to answer is whether it is the court executing decree for which this provision is applicable? Execution proceedings are provided for under **Order 22 of Civil Procedure Rules** and therefore if the application is for execution of decree then the applicant ought to comply with the provision of **Order 22**. If this then be the correct position then the court

- executing decree as regards this matter would be the Deputy Registrar of this court who has the duties of executing decrees from the High Court.
12. The judgment of Justice R.N. Sitati is that the respondent do pay to the applicant 30% of monthly rental income in the suit property. If the judge wanted the applicant to collect her share or to appoint a joint estate agent for the purposes of collection of rent she would have said so. Since the applicant has not sought review of the said judgment as regards the mode of payment of the 30% I would agree with the submissions by Mr. Oguttu that any order granted herein by this court will amount to review of the said judgment through the back door.
13. Post judgment orders are generally restricted to few matters touching on the judgment, review, release of exhibits. Provision of typed proceedings (whether typed or not among other) post judgment orders do not touch on substantive matters. Once a judgment is pronounced the court becomes functus officio as far as the issue raised in the pleadings.... a judgment is final. It signals the completion of proceedings save for execution proceedings....” See **JKK -vs- JKG High Court of Kenya at Milimani Civil Suit No.53 of 2003 (O.S)**.
14. I further agree with Mr. Oguttu's submissions that prayers No.1 and 2 if granted will amount to derogation of the judgment on record and would interfere with the respondent's proprietary interest as confirmed by the court in its judgment herein.
15. The above notwithstanding, this court being a court of justice and mercy and upon perusal of the court records where it is clear that it has not been easy for the applicant to secure the remittance of 30% monthly rental income and taking into account the fact that Mr. Oguttu conceded that his client will not have objection to appointment of a joint estate agent for purposes of collection of rent on condition that the commission thereof be met by the applicant and taking into account the inherent powers of this court as was stated in **Republic -vs- The Public Procurement Complaints Review and Appeals Board & another Ex-parte Jaconossi Impresse Spa Mombasa HCCA No.365 of 2006** where the court had this to say:-

“That the court has power under its inherent jurisdiction to make order that may be necessary for the end of justice and to enable the court maintain its character as a court of justice and that this repository power is necessary to be there in appreciation of the fact that the law cannot make express provisions against all inconveniences.”

16. I would therefore in exercising that power in addition to the provision of **Article 159(2)(d)** of the **Constitution of Kenya 2010** which require that justice be administered without due regard to procedural technicalities make the following orders:-
- a. *A joint Estate Agent be appointed for the purposes of collecting rent and disbursing the same to the parties herein in the ratio of 30%:70% monthly income as per the judgment of Justice Sitati.*
 - b. *The commission for the said Estate Agent unless mutually agreed otherwise between the parties to be paid by the Applicant.*
 - c. *This being a family dispute each party to meet their own cost of the application.*

Delivered, dated and signed at Kisii this 11th day of March, 2015

J. WAKIAGA

JUDGE

In the presence of:-

Mr. Kaburi for Applicant

N/A for Respondent