



REPUBLIC OF KENYA
HIGH OF KENYA AT NAIROBI
FAMILY DIVISION
HIGH COURT CIVIL APPEAL NO. 20 OF 2011
(HIGH COURT CIVIL APPEAL - 226 OF 2012)
D E N.....APPELLANT

VERSUS

P N N.....RESPONDENT

RULING

INTRODUCTION

By an application filed in this Court by the appellant on 17th April 2015, the Appellant sought a mention date for execution of the orders. These orders are from the judgment and orders of Honorable Judges of the Court of Appeal Nambuye J., S. Gatembu Kairu J., & J.Mohammed J.

The Court of Appeal on hearing an appeal from the High Court judgment and decree dated 19th July 2012 ordered as follows;

- 1. The appeal be and is hereby allowed.***
- 2. The order of the High Court dated the 19th day of July, 2012, be and is hereby set aside and substituted with an order that properties Title [particulars withheld] Nairobi and Title No. [particulars withheld] were and still are the joint properties of Appellant D E N and the Respondent P N N in equal shares.***
- 3. The above mentioned equal sharing be and is hereby terminated in the following manner;***
- 4. The Parties shall within 30 days from the date of the delivery of judgment cause the matter to be mentioned before the Presiding Judge High Court Family Division for purposes of getting directions on appointment of valuer (s) and the date of filing valuation reports(s). The Costs of valuation shall be borne equally by the appellant and the Respondent. In default of or lack of cooperation from one party, the willing party can pay the whole valuation fees and then seek contribution from the other [party]***
- 5. The aggregate value of the 2 properties shall be apportioned equally between the Appellant***

and Respondent.

6. The Nyandarua property that is [particulars withheld] shall be transferred into the sole name of the Applicant D E N.

7. The Nairobi property that is L.R. No [particulars withheld] shall be transferred to the Respondent P N N on the following conditions;

8. That she (the Respondent) does within a period of 120 days from the date of filing in Court of the current valuation reports to pay the Appellant the amount forming the shortfall on the equal sharing of the aggregate value of both properties after factoring in the value of the Nyandarua property.

9. There will be liberty to apply in the High Court

10. Each party to bear its own costs

ORAL SUBMISSIONS

On 7th May, 2015 Counsel for the Appellant informed the Court that the matter was to proceed in terms of implementing the Court of Appeal judgment and orders of 17th April, 2015 and 9th March, 2015 respectively. The Appellant was ready for appointment of a valuer and to pay fees which would be refunded by the Respondent.

The Respondent informed Court that she was not represented and could not proceed with the matter. The Appellant through Counsel reiterated that the Respondent intended to delay the process as she made the same application in the Court of Appeal twice and was allowed to obtain legal representation and she did not and thus the hearing proceeded *ex parte* culminating with the orders in Court. The Appellant stated the matter was urgent as he wished to carry his belongings away especially his medical supplies from the house. He also wanted to buy another house from his 50% share payment from the house. Therefore the matter was urgent.

The Respondent informed the Court that she was not ready to proceed, she had financial difficulties and numerous responsibilities.

The matter was adjourned to 4th June, 2015 and 25th June, 2015 so that both parties would file affidavits outlining the various issues relating to execution of the Court of Appeal orders with specific reference to the arrangements for the children as the orders take effect.

This Court informed the parties that before the orders of valuation, sale and division of matrimonial property was undertaken, the parties are to take cognisance that the matrimonial home [particulars withheld] is the home of the children of the dissolved marriage. The condition precedent was for the parties to agree and inform the Court of the arrangements for the children's home before these orders were effected.

Whereas the Appellant was insistent that the Court of Appeal orders be implemented immediately the Respondent objected and informed the Court that following the High Court order of 19th July, 2012 she was to reside in the matrimonial home with the children. The Respondent further informed the Court that the matrimonial home was the home she bought through a mortgage from her former employer the bank at subsidized interest rates. She paid for the home for ten (10) years. The Appellant vacated the home in 2014 through High Court order of 30th April, 2014. She has been taking care of the four (4) children single handedly and paid for their education.

The Appellant sold the other property **Title No.** [particulars withheld].

PLEADINGS

The Appellant filed Petitioner's Affidavit to directions in effecting the orders of the Court of Appeal on 15th June, 2015 and annexed the Judgment and Court orders. He proposed the valuer as per the attached profile "DEN2". He applied for limited access to the matrimonial home to collect his goods as per the list he filed in Court as "DEN3".

The Appellant deponed that he is the father to four (4) children, and he has and continues to educate them by paying their school fees as shown in "DEN5". He told the Court that he had custody of the children of the marriage vide a Court order of 22nd July, 2010 annexed to the application as "DEN11". He was living with the children until the Respondent effected an eviction order and the Respondent was left in the house with the children.

He intends to buy a house to live with the children once the matrimonial home is valued, sold and proceeds shared. He will also use the 50% share to cater for and maintain the children.

He deponed that the land [particulars withheld] was sold to offset a loan the Respondent guaranteed for the Appellant's Company [particulars withheld]. He also deponed the land in Kibwezi was sold and the proceeds deposited in her Account No. [particulars withheld] Barclays Bank, Moi Avenue.

The Respondent, filed a supplementary affidavit of 24th June, 2015 and 9th July, 2015 and she deponed that they were married with the Appellant in 1990 and divorced in 2012. She obtained decree nisi and got custody of the children as per the annexed order "PNN1". The matrimonial home Nairobi [particulars withheld] she bought from a loan she obtained through her employer [particulars withheld] as evidenced by a bundle of payslips attached to her affidavit as "PNN2" but put the name of the Appellant as a co-owner of the home.

As a [particulars withheld] employee she was entitled to various loans, car, house, personal and purchase loans. She obtained another loan of Ksh. 150,000/= from her employer and paid Ksh. 300,000/= for the purchase of [particulars withheld]. The Respondent sold the land and he did not inform her. He received the sale proceeds and he did not maintain the children of the marriage.

In May, 2010 to 6th October, 2014 she lived with her children in rented house. She paid rent, children upkeep, medical and school fees single handedly. The Appellant bundled her belongings out of the house and left them outside and were destroyed by rain.

Following the judgment of 19th July, 2012 and application dated 11th June, 2013, the High Court ordered the Respondent to vacate the matrimonial home and she and the children live in the home to date.

The Respondent contested the list of items the Appellant sought from the house as she bought some of the listed items. She conceded that items 3, 13 and 14 be handed over to the Respondent. The other items are used by the children and some he had picked earlier on.

The Respondent depicted the Appellant as a violent man to his children especially E W N, at home and in school.

The Respondent seeks that the sale of the house be stayed as it is the only house, the four (4) children have known and continue to reside in. The children do not want to live with the Appellant and they cannot be forced to live with him.

The two (2) properties were purchased through her efforts having worked in the [particulars withheld] for 22 years. The Appellant is a man of means. The house should not be disposed of due to the Appellant's proposal without taking into account the plight of the four (4) children of the marriage.

The Respondent also seeks that before the execution of the Court Appeal orders, the Appellant accounts

for proceeds from the sale of **Title Number** *[particulars withheld]*.

ISSUE:

With the advent of new facts deponed by the Appellant and Respondent in affidavits and through oral submissions can/should this Court proceed to execute the Court of Appeal orders?

OBSERVATIONS

From the oral and written submissions of both the Appellant and Respondent the Court observed;

1. The Respondent worked as *[particulars withheld]* for 11 years before she was married to the Appellant in 1990. She continued working until she retired in 2000.
2. The Respondent owned motor vehicle Reg. *[particulars withheld]* Peugeot 205, after the Appellant lost his job in 1991 she sold it and the proceeds she gave the Appellant to start a business travelling to Dubai to buy goods for sale.
3. The Respondent purchased a van and it was used as a business to transport children to and from school. The Appellant transferred the van to his name and sold it.
4. In 1991 the Respondent took a loan to purchase House No. *[particulars withheld]* and put the name of the Appellant as co-owner.
5. In 2008 the Respondent took a loan of Ksh. 1million for the maintenance of the children.
6. The Respondent contributed Ksh. 300,000/= to the purchase of **L.R. No.** *[particulars withheld]*.
7. The Respondent purchased motor vehicle *[particulars withheld]* Nissan Saloon that the Respondent had an accident with and was transferred to his company.
8. The Respondent financially supported the Appellant in an election bid that he lost.

The Appellant also carried out the following;

1. The Appellant has paid school fees, medical expenses for the children up to 2010.
2. He runs a Company *[particulars withheld]*.
3. The Appellant bought motor vehicle Reg. No. *[particulars withheld]* Nissan Saloon.
4. He sold land in Kibwezi
5. He sold land in Nyandarua
6. He sold Thika Municipality Block *[particulars withheld]* and Thika Municipality Block *[particulars withheld]*.

ORDERS

This Court is cognisant of the following facts,

- a. The Court of Appeal judgment and orders by Honourable Justices R. Nambuye J, S. Gatembu Kairu J & J. Mohammed J of 9th March, 2015 and 17th April, 2015 respectively are binding on this Court.

b. This Court facilitates the process of appointment of valuer(s), valuation of the two (2) suit properties and equal division of the proceeds of sale by the Appellant and Respondent. Alternatively the Respondent may buy out the Appellant's share to the property that comprises the matrimonial home.

c. Despite the Respondent being accorded by the Court of Appeal opportunity to obtain legal Counsel on 24th October, 2013 and 18th September 2014 respectively, the Respondent did not attend Court and present her case on appeal.

The Respondent was duly served for the hearing of the appeal and she did not appear. The appeal was heard *ex parte*.

d. This Court lacks jurisdiction to determine any other issues raised pertaining to the Cause except in relation to execution of orders.

e. Had these issues raised in this Court been ventilated by the Respondent in the Appellate Court, this Court would not be tasked to hear and determine the same.

However; this Court is constrained by the Respondent's and Appellant's submissions that directly impact on the execution of the Court of Appeal judgment and orders.

In a nutshell the Respondent's case is that she has worked all her life to fend for her family maintaining the children and financing acquisition of family properties. She is retired with limited financial resources and numerous financial obligations. To sell the only house for herself and four (4) children is to render them destitute. The Respondent has no financial income or resources to pay the 50% balance of the income as matrimonial property. To have her pay off the Appellant's interest in the house is unfair as he has sold family property and did not account for the same, he owns properties individually apart from the two (2) matrimonial properties that are the subject of the Court.

The Appellant will be compensated his interest in the matrimonial house for himself, yet the house will not be available for sale for the Respondent as it will be home for the children and the Respondent.

Due to all these issues raised and taking into account that this Court's role is specific to execution of the orders of Court of Appeal judgment, the Court cannot in good conscience proceed with execution in light of the matters raised especially when the same were not presented before the Court of Appeal.

Therefore the Court orders;

- 1. The Court lacks jurisdiction to determine any issue regarding the dispute except enforcement and compliance of the Court of Appeal judgment and orders.**
- 2. Interim stay of execution of the enforcement of the Court of Appeal judgment and orders for 120 days to allow the Respondent pursue a review of the appeal with regard to the matters raised in this Court in the Court of Appeal.**
- 3. The Appellant to collect from the matrimonial home through his advocate the uncontested items in the list attached as "DEN2".**
- 4. The Respondent and children of the marriage to continue residing in the matrimonial home until final orders from the Court of Appeal.**

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 2ND DAY OF OCTOBER, 2015

M. W. MUIGAI

JUDGE

In the presence of:

MR. WILSON: I have one application to make.

I am applying for certified copies of proceedings and ruling.

I am applying for Leave to appeal the decision of the Court.

COURT: The Application for certified proceedings and ruling is allowed.

The right of appeal to the Appellant and the right of review to the Respondent are both allowed.

M. W. MUIGAI

JUDGE