



LA v MSF (Divorce Cause 34 of 2018) [2022] KEKC 146 (KLR) (21 July 2022) (Ruling)

Neutral citation: [2022] KEKC 146 (KLR)

REPUBLIC OF KENYA
IN THE KADHI'S COURT AT UPPER HILL (NAIROBI MILIMANI LAW COURTS)
DIVORCE CAUSE 34 OF 2018
AH ATHMAN, SPK
JULY 21, 2022

BETWEEN

LA PLAINTIFF

AND

MSF RESPONDENT

RULING

1. This is a ruling on two applications, the first by the respondent dated 20th August, 2021 and the second one the plaintiff dated 1st November, 2021. The respondent's application prays for declaratory orders that the amount of KES 300,000.00 has been fully settled, the Land registrar Kajiado to be directed to transfer the property known as Kajiado / Kitengela / xxxxx (hereinafter referred to as 'suit property') to the respondent and issuance of a copy of divorce certificate.
2. The plaintiff's application prays for orders that the Court do vary and partially set aside the consent dated 11th December, 2018 to the extent of the amount payable to the plaintiff in respect to the matrimonial property title No. Kajiado / Kitengela / xxxxx and the amount payable be the half of current valuation of market price of the suit property.
3. The respondent's application is not properly on record. Although it bears the receipt stamp of the registry (received on 23rd August, 2021) it is not receipted or served upon the plaintiff. I have also checked the CTS, there is nothing uploaded or filed by the respondent. The respondent appointed the firm of Billy Amendi & Company advocates who entered his notice of appointment on 31st May, 2022. On 15th March, the respondent had appeared in person to argue his application. He was directed to serve the plaintiff. On 6th June, 2022 when the matter came up for mention to confirm filing of written submissions, the respondent had not filed theirs. The court granted Mr. Amendi for the respondent (14) days to file the submissions on behalf of the respondent. They failed again to file their submissions when the matter was scheduled for mention for the purpose and up to the 6th of July, 2022 when the court retired to write its ruling despite him being reminded by our court assistant at the registry.



4. The respondent's application dated 20th August, 2021 remains unserved and un-argued. It is considered abandoned. When an application is scheduled for hearing and the applicant fails to argue it, the application may, which we hereby do, be dismissed.
5. The parties entered consent adopted by court on 5th October, 2018. Under the terms of the agreement the parties were to share the matrimonial property on a 50-50 basis. Upon payment of the plaintiff's share the property registered in both parties' names would belong entirely to the respondent. They had agreed, without valuation, that the property was worth KES 600,000.00. The share of the plaintiff would be KES 300,000.00. It is this value the plaintiff moved court to have reviewed.
6. The plaintiff deposed that the respondent grossly misrepresented of the value of the suit property. However, upon valuation of the market rates the property she found that it is valued at KES 1,800,000.00 and not KES 300,000.00 as suggested by the respondent and should therefore be set aside or reviewed accordingly.
7. The respondent failed to file reply and written submissions with respect to the plaintiff's application dated 1st November, 2021 seeking review of the consent agreement.
8. Mr. Ali for the plaintiff submitted that consent orders were made without sufficient and / or misrepresentation of material facts. He stated that at the time of entering the consent order the presumed value of KES 600,000.00 was not predicated on any valuation of the suit property.
9. Valuation reported dated 5th October, 2021 by Zenith (management) valuers Ltd put the value of the suit property at KES 1,800,000.00
10. It is trite law a consent order can only be set aside or varied on grounds which would justify setting aside a contract. Factors that can vitiate a contract include if it was obtained through fraud, collusion, or is contrary to the policy of the court, or was entered in ignorance, misapprehension, misrepresentation or insufficient material facts. In *National Bank of Kenya Ltd vs Pipeplastic Samkolit (K) Limited* the Court of Appeal held:

‘A court of law cannot rewrite a contract between the parties. The parties are bound by the terms of their contract unless coercion, fraud or undue influence are pleaded and proved.’
11. In *Kenya Commercial Bank Ltd vs specialized Engineering CO. Ltd* [1982] KLR 485 Harris, J held:

‘A consent order entered into by counsel is binding on all parties to the proceedings and cannot be set aside or varied unless it is proved that it was obtained by fraud or collusion or by an agreement contrary to the policy of the court or where the consent was given without sufficient material facts or in misapprehension or ignorance of such facts, in general for a reason that would enable the court to set aside an agreement.’
12. Islamic law, encourages reconciliation and amicable settlement of disputes. Terms of such agreement are recognised as binding under Islamic law save where they are repugnant to law. In a hadith reported by Al Zarqany (Mukhtasar al Maqasid) 942, Al Tirmidhi 1352, Ibn Maja 2353 on the authority of Amr Ibn Auf and Al Albany in Sahih Al Jami' 671 and Al Tabarani 4404 on the authority of Rafi' ibn Khudaij, the prophet (may Allah's peace and blessings be upon him) said:

“Muslims are bound by the terms of their agreements and reconciliation is acceptable between Muslims in what is permissible, except a condition that legitimizes the prohibited and prohibits the legitimate.”



13. Islam also prohibits deceit and cheating (gharar and ghash) in all transactions. Lack of full disclosure of material facts in transactions amounts to deceit and cheating prohibited both in Islamic and common law.
14. In the instant case, the only disputed issue on the consent agreement is the valuation of the suit property. Parties had entered agreement adopted by court without benefit of valuation. It is a material fact of the consent that parties had to be fully and correctly aware of. The valuation report clearly shows the value of the property had been misrepresented. It is a ground for varying a contract and therefore qualifies as a ground to vary the consent agreement, especially considering the application had not been formally opposed.
15. The consent agreement was entered in October, 2018. The valuation report was done in October, 2021, three years after the agreement. The proper and correct valuation of the matrimonial property is that at the time of entering the consent agreement. Considering the effect of passage of time and inflation rates on value of properties, I find the agreed value was on the lower side but that in the valuation report is on the higher side. In the circumstances I have two choices, either another valuation report that will give the correct value of the property as at October 2018 is done or I adopt a value of the mean of the two valuations. I accordingly adopt KES 1,200,000.00, the mean of the two valuations as the value of the property. The share of the plaintiff will thus be and is hereby reviewed to KES 600,000.00. The respondent to pay her the same, less any monies already paid with respect to her share of the matrimonial property.

Each party to bear its own costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY ON 21ST JULY, 2022

HON. ABDULHALIM H. ATHMAN

SENIOR PRINCIPAL KADHI

In the presence of:

Ms. Judith Ndori, Court assistant

Mr. Ali for the Applicant

Mr. Billy Amendi for the respondent

