



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Ramadhan v Juma (Civil Appeal (Application) 28 of 2018)
[2023] KECA 76 (KLR) (3 February 2023) (Ruling)**

Neutral citation: [2023] KECA 76 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL (APPLICATION) 28 OF 2018
DK MUSINGA, W KARANJA & MSA MAKHANDIA, JJA
FEBRUARY 3, 2023**

BETWEEN

AFWA MOHAMMED RAMADHAN APPLICANT

AND

ATHUMAN NASURA JUMA RESPONDENT

(Being an application for review under Article 20 & 259 of the Constitution, Sections 3, 3A, 3B of the Appellate Jurisdiction Act, against the decree and judgment of the Court of Appeal at Mombasa (Visram, Karanja & Koome, JJ.A. date 6th June 2018 in Mombasa Civil Appeal No. 28 of 2018)

RULING

1. The parties herein were husband and wife between 1995 and 2004 but their relationship appears to have soured and so they parted company. Afwa Mohamed Ramadhan (the applicant) moved the High Court vide Originating Summons dated 26th August, 2005 in which she sought certain declarations with regard to her shares in the matrimonial properties. The High Court rendered itself on the matter, but the decision was appealed against and this Court in its decision dated 16th March, 2012 held that the applicant was entitled to a 25% share of Plot No. 151/xvii/Mombasa Island; 25% value of Plot No. Kilifi/Mtwapa 3820 and a sum of Ksh. 100,000 representing her contribution towards the development of Plot No. Kilifi/Mtwapa 584. The Court also remitted the matter to the High Court for appointment of a valuer, whose report was to provide a basis for the 25% contribution due to the applicant.
2. The valuation was conducted and a report dated 9th August, 2012 was prepared by the Government valuer with respect to Plot No. 3820/III/MN Mtwapa Kilifi. The value of the plot was given as Ksh. 32,000,000 and 25% would be Ksh. 8,000,000. A report with respect to plot No. Mombasa/Block



XVII/151 Mombasa Island dated 9th August 2012 was also prepared and its total value was Ksh. 30,000,000, 25% of this would amount to Ksh. 7,500,000.

3. In this regard, the High Court in its ruling dated April 25, 2014 directed as follows: -
 - a. The defendant (respondent now) to pay the plaintiff within ninety (90) days of today's date by way of buy out a sum of Ksh. 7,500,00 constituting her 25% share in LR NO. Mombasa/Block XVI/151 Mombasa Island;
 - b. The defendant to pay to the plaintiff within ninety (90) days by way of buy out the sum of Ksh. 8,000,000. representing her 25% share in LR No. 3820/III/MN/Kilifi;
 - c. The defendant to pay to the plaintiff within ninety (90) days of today's date the sum of Ksh. 100,000 awarded to her by the Court of Appeal.
4. The applicant was aggrieved by this decision and filed an application for review, vary and or setting aside the orders dated April 25, 2014 for the reason that it did not comply with the decision of the Court of Appeal. This application for review was dismissed vide a ruling dated April 28, 2015.
5. The respondent appealed to this court and when the matter came up for hearing the parties recorded a consent which was adopted as a consent judgment. The appeal was compromised in the following terms:-
 1. That the judgment of this Honourable Court delivered on March 16, 2012 in Civil Appeal No. 162 of 2009 Afwa Mohamed Ramadhan v. Athuman Nusura Juma be and is hereby clarified as follows:-
 - i. That the shares of the parties in the matrimonial properties be and is hereby retained and reaffirmed at 75% in favour of the appellant and 25% in favour of the respondent
 - ii. That the matrimonial properties constitute all that piece and or parcel of land known as Mombasa Block XVII/151 and all that piece and or parcel of land known as Kilifi

Mtwapa/3820 both currently registered in the names of the appellant

 - iii. That the aforesaid matrimonial properties be offered for sale by the parties and or their respective agents at a purchase price to be agreed between the parties or such prices as may be as near as possible to the valuation report prepared and submitted to the High Court by the Government Valuer dated 9th August, 2012.
 - iv. That the proceeds of such sale be shared between the parties in accordance with their respective shares herein
 - v. That any liability arising and or attached to the sale shall be shared by the parties in accordance with their respective shares in the matrimonial properties.
 - vi. That in the event the appellant declines, refuses and or neglects to execute the instruments of sale and transfer then the deputy registrar of the High Court



of Kenya at Mombasa shall be at liberty to execute the same on behalf of the appellant.

- vii. That in addition to the respondent's 25% share in the matrimonial properties, the respondent's costs as awarded in the judgment in Civil appeal No. 162 of 2009 Afwa Mohamed Ramadhan v. Athuman Nusura Juma shall also be paid out of the proceeds of any such sale.
 1. That each party shall bear their respective costs of this appeal.
 2. That this matter be and is hereby referred back to the High court for purposes of ensuring compliance with the above orders and execution, if need be.
6. The respondent is now before this Court under a notice of motion application dated March 17, 2021 seeking orders that: the orders made or entered by consent of the parties on June 18, 2018 at the instance of this Court be reviewed as the court may deem fit and that this court does substitute them with orders appropriate and practical for the realization of the shares of the matrimonial property.
7. The grounds on the face of the application and the averments in the affidavit sworn by Afwa Mohammed Ramadhan, are basically as we have summarised above.
8. In addition, it is averred that it has been more than two years and the properties have not been sold since the respondent has frustrated the sale, and meanwhile he continues to collect rent from the tenant on plot number Mombasa/Block XVII/151 including the 25% share the respondent holds in the same. In regard to Kilifi/Mtwapa/3820, the respondent continues to occupy the three-storey block of apartments hence the consent cannot be practically realized since the appellant (respondent in the application) who is in control, in possession and who benefits from the present status quo has no desire to sell, dispose off or part with any portion of the same.
9. At paragraph 17 of the applicant's supporting affidavit she asks this court to make the following orders:-
 - a. The original title deeds/certificates of title be deposited with the Deputy Registrar of the High Court of Kenya - Family Division within the next seven (7) days to hold and only to release with the written consent of both parties or order of the court;
 - b. The appellant to provide accounts for all moneys received from the properties from June 2018 and remit 25% share to the applicant;
 - c. The respondent refunds the applicant the sum of Ksh. 92,500 being his half share of the valuation fees and pay the Ksh. 66,995 being the Party & Party costs taxed and awarded in HCCC No. 174 of 2005 (O.S) within the next fourteen (14) days.
 - d. An order for the appointment of an Architect/Physical planner to be engaged in the next thirty (30) days to partition the properties and register the same under the sectional property Act with all the costs being borne by the appellant.
 - e. Upon conclusion of the partition and registration, the appellant to transfer a mutually agreed 25% of the sub-titles to the respondent within thirty (30) days or in default the Deputy registrar of the High Court - Mombasa do execute the instruments of transfer in favour of the respondent.



- f. An order issued for the incorporation of a management company to hold the revisionary interest in the matrimonial properties with 25% shareholding held by the respondent and 75% shareholding held by the appellant.
10. The applicant further avers that if the orders sought are not granted, she continues to be kept off the fruits of a lawful legal process and her right to property has been infringed.
 11. The application is opposed through the replying affidavit of Athman Nusura Juma July 28, 2021. He strongly denies the applicant's averments and deposes that the consent was made after much consideration and its practical implementation, thus it would be prejudicial to him if the same is vacated or set aside or substituted. Further, that the applicant has not made any effort to avail potential buyers for the property, whose sale price has been too high for potential buyers. He avers that depositing the title deeds in court would scare potential buyers to verify on the same from court and it is the duty of the applicant to sell off the property.
 12. In addition, he avers that the applicant has not given valid reasons for the consent to be set aside and that the application offends the doctrine of res judicata and the prayers sought have already been adjudicated upon and are not available, thus the matter cannot be re-opened in the manner the applicant wishes.
 13. At the virtual hearing of the motion on April 26, 2022, learned Counsel Mr. Onyango appeared for the applicant, while Mr. Mutubia, learned counsel appeared for the respondent. In his submissions, Mr. Onyango urged that the Court has the power to grant the orders sought and on being asked whether the consent could be varied when proof of duress or fraud or collusion in entering into it had not been established, counsel submitted that this Court can exercise its discretion and interfere with the consent.
 14. In regard to the prayers at paragraph 17 of the affidavit, he urged that it was a proposal, and that the respondent could buy out the applicant's shares. Further, that there was a judgment in place and the respondent was frustrating the applicant from realizing her share by imposing on potential buyers, onerous rules to be followed before viewing the property and that the respondent was not keen on having the properties sold.
 15. On his part, Mr. Mutubia, submitted that the applicant had not met the threshold for varying a consent order which was recorded after lengthy discussions between the advocates and not the parties directly who had realised it was not possible to offer the properties for sale.
 16. On the prayers being sought in the affidavit, counsel maintained that the same ought to have been embodied in the main motion and stressed that it was not the respondent's fault that they could not get buyers for the properties, which in his opinion were overvalued at Ksh. 20,000,000. Therefore, the respondent could not be penalised for not actualising the judgment since the sale depended on the demand in the market. He urged us to dismiss the motion for being without merit.
 17. We have considered the application, the response and the submissions by the parties. The crux of the application is whether the threshold required for setting aside the consent dated 18th June, 2018 has been met.
 18. The law is very clear in regard to setting aside of a consent. In *Brooke Bond Liebig v. Mallya* [1975] EA 266, Mustafa, Ag. VP stated thus;

“The compromise agreement was made an order of the court and was thus a consent judgment. It is well settled that a consent judgment can be set aside only in circumstances, e.g on grounds of fraud or collusion, that there was no consensus between the parties, public policy of for such reasons as would enable a court to set aside or rescind a contract. In



this case the parties and their advocates consented to the compromise in very clear terms; they were certainly aware of all material facts and there could not have been any mistake or misunderstandings. None of the factors which could give to the setting aside of a consent agreement existed.”

19. Addressing the same issue in the case of *Flora N. Wasike v. Destino Wamboko* [1988] eKLR, this Court reiterated the above position as follows:-

“Any order made in the presence and with the consent of counsel is binding on all parties to the proceedings or action, and on those claiming under them... and cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable the court to set aside an agreement.”

20. From the above cited decisions, it is clear that a consent can only be set aside if it can be shown that it was procured through fraud, misrepresentation non-disclosure of material facts or mistake or for a reason which would enable a court set aside a contract. Have any of these ingredients been demonstrated?
21. We have relooked at the contents of the consent and on the whole, we are not persuaded that the consent was obtained through mistake, collusion, fraud, misrepresentation or any of the other grounds that require to be demonstrated in order for the Court to set aside such a consent. We hold the view that the consent was well intended, and even as it stands now, it still impresses us as the most equitable way of distributing the matrimonial property, of course with the co-operation of both parties and bona fides on the part of both of them. Had the respondent agreed to cooperate and acted in good faith, this matter would have been resolved by now. We have no legal basis for setting aside the consent. Besides, we note that no alternative prayers have been sought in the application and the averments in the affidavit cannot be deemed to be alternative prayers. We are therefore not in a position to grant them.
22. We note however, that the respondent lives on one of the properties and collects rent from the other to the total exclusion of the applicant. He therefore has no incentive to look for buyers or even assist those the applicant gets to view the property. The respondent is clearly frustrating the sale of the properties. The consent was made in 2018 and as at April 26, 2022 when this application came up for hearing, the property had not been sold.
23. It is clear to us that unless we intervene, the respondent will continue to frustrate the execution of the consent and the injustice being visited on the applicant will be perpetuated. This is a Court of justice endowed with the sacrosanct duty to do justice to all those who appear before it seeking justice. Furthermore, this Court has a duty to ensure that its orders are complied with or enforced, and where it becomes clear to the Court that one of the parties to a consent judgment, which becomes a judgment of the court once adopted as such, is deliberately circumventing or impeding the judgment by its conduct and designs, then the Court cannot abdicate its duty to do justice.
24. For this reason, while not setting aside or reviewing the consent judgment, but in order to ensure that the same is complied with, and to obviate further inequity which is being visited on the applicant, we order that pending sale of the properties in terms of the consent, all the rent hitherto collected by the respondent be deposited in a joint account to be opened in the joint names of their advocates. 25% of such rent be paid to the applicant monthly until the properties are sold and proceeds shared as ordered in the judgment.

Each party to bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2022.



D. K. MUSINGA, (P)

.....

JUDGE OF APPEAL

W. KARANJA

.....

JUDGE OF APPEAL

ASIKE-MAKHANDIA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

