



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KISUMU**

**CIVIL SUIT NO. 1 OF 2011 (OS)**

**IAO.....PLAINTIFF**

**VERSUS**

**SON.....DEFENDANT**

**RULING**

The application dated 1<sup>st</sup> March 2021 was filed by the Plaintiff, **IAO**. It is an application for orders to compel the Defendant, **SON** to pay to the Plaintiff the sum of Kshs 7,000,000/=.

1. The amount of money being sought by the Plaintiff is 50% of the proceeds from the sale of their matrimonial property.
2. It is common ground that on 16<sup>th</sup> August 2020 the Defendant sold the matrimonial property for Kshs 14,000,000/=.
3. However, the Defendant has explained that he had spent Kshs 5,278,539/= to improve the house, so as to make it habitable.
4. He also said that he spent a further sum of Kshs 995,000/= to facilitate the sale of the house.
5. However, the Plaintiff submitted that the Defendant was not entitled to a reimbursement of the said amounts, from the proceeds of sale.
6. If the Defendant were to be reimbursed the total sums which he had allegedly expended in either improving the house or in facilitating the sale of the said house, that would imply that the sum of Kshs 6,273,539/= would be deducted from the proceeds of sale, leaving the balance of Kshs 7,726,461/=.
7. According to the Defendant, it is only the said sum of Kshs 7,726,461/= that ought to be shared equally between him and the Plaintiff.
8. It is noted that the Defendant did not seek the concurrence of the Plaintiff before deciding to spend the huge amounts of money to allegedly improve the house.
9. However, the Defendant explains that the improvements were done in good faith, for the sole purpose of rendering the house habitant.
10. The Defendant submitted that the ownership of matrimonial property vests in accordance with the contribution of the spouse towards the acquisition or development of the said property, whether it was before, during or after the spouses got married.
11. In my considered opinion, it is not open to the Defendant to canvass that issue at this stage. I so hold because the question

concerning the entitlement of each of the parties was determined by Majanja J. in the judgment dated 13<sup>th</sup> March 2017.

12. This is what the learned Judge said;

**“21. In conclusion, I make the following Orders;**

**(a) I declare South C House No. [Particulars Withheld] situate on LR NO. xxx/xxxx/xxx is matrimonial property and that the plaintiff is entitled to a 50% share thereof.**

**(b) That the property shall be valued within ninety (90) days and sold thereafter and the proceeds shared equally between the plaintiff and the defendant. The costs of valuation shall be shared equally.**

**(c) In the alternative, either the plaintiff or defendant shall be at liberty to buy out the share entitlement of the other should they deem fit.**

**(d) Each party shall bear its costs.**

**(e) Each party shall be at liberty to apply for further and other orders.”**

13. Following that determination, the issue about the ratio for the sharing of the matrimonial property is *res judicata*. Therefore, the Court has no jurisdiction to re-open the said matter.

14. I further note that the Defendant filed an application dated 17<sup>th</sup> November 2018, through which he sought a review of the Judgment.

15. Some of the reasons why the Defendant sought review include the acquisition of loans to enable him to;

**“..... further facilitate the furnishing and adding improvements to the house.”**

16. Based on those contentions, the Defendant had deponed thus in his affidavit dated 17<sup>th</sup> November 2018;

**“47. THAT Selling the (house) at [Particulars Withheld] Court No. xxx, in South C off; to have the proceeds shared equally between myself and the Respondent will be totally unfair. I’ll have been denied justice and efforts I put in to build the house .....**”

17. In effect, the Defendant did revisit, in that application, the question about the equal sharing of the proceeds from the sale of the matrimonial house.

18. On 23<sup>rd</sup> May 2019, T.W. Cherere J. dismissed the Defendant’s application.

19. By rejecting the Defendant’s application for review, the learned Judge reaffirmed the Judgment of Majanja J. That is yet another reason why it was not now open to the Defendant to raise issues which would have the effect of varying the terms of the judgment.

20. It is notable that Majanja J. had expressly given to each of the parties, liberty to apply for further orders. Therefore, if the Defendant was desirous of incurring expenses in furnishing or improving the house; and if he wished to have the expenses shared with the Plaintiff, it had been open to him to apply for appropriate orders from the Court.

21. It was wrong to seek to impose upon the Plaintiff, a share of the expenses incurred in the furnishing or the improvement of the house, when the Defendant had neither sought her concurrence nor appropriate orders from the Court.

22. The sum of Kshs 5,278,539/= is substantial. It would only have been fair to the Plaintiff if her concurrence was sought before such an amount was spent on the house, if the Defendant expected her to pay one-half of the said expenses.

23. I also note that whilst the house had been valued at Kshs 12.0 Million, according to the Defendant, the expenditure of Kshs 5.2 Million only served to increase the value of the said house to Kshs 14.0 Million. It is thus arguable that the expenditure did not add much value to the house: Or, to put the matter differently, the expenditure appears not to have been necessary!

24. Prior to the expenditure, the Plaintiff would have been entitled to Kshs 6.0 Million, therefore, I find no justification in expecting the Plaintiff to accept Kshs 3,863,230/=, as now suggested by the Defendant.

25. However, I find that the transaction of sale was undertaken at some expense. The said expenses are as follows:

1. *Valuation Fees..... Kshs 150,000*

2. *Legal Fees.....Kshs 325,000*

3. *Commission to Sales Agent.....Kshs 420,000*

4. *Transfer Fee/Stamp Duty..... Kshs 100,000*

***TOTAL*** ***Kshs 995,000***

26. The said expenses should be shouldered equally between the Defendant and the Plaintiff.

27. I therefore find that the Plaintiff is entitled to Kshs 6,502,500/=, after deduction of Kshs 497,500/= from Kshs 7,000,000/=.

28. In order to bring this matter to a close, the Defendant should pay that amount to the Plaintiff.

29. Each party will meet his or her own costs of the application, even though the Plaintiff was successful. I have so ordered, consciously, in order to avoid a further round of acrimony, when there would be a fight in determining the quantum of costs.

30. I am alive to the fact that the money was allegedly held in a fixed deposit account after the sale. It would therefore have earned some interest.

31. However, in the same spirit of bringing the issue to a close, without leaving room for further acrimony, I order that the Defendant shall retain the interest earned on the deposit.

**DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER 2021**

**FRED A. OCHIENG**

**JUDGE**



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