Cherop v Bowen (Civil Case E009 of 2022) [2024] KEHC 10425 (KLR) (21 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10425 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE E009 OF 2022

RN NYAKUNDI, J

AUGUST 21, 2024

BETWEEN

SHARON JEMUTAI CHEROP .... APPLICANT

AND

MATHEW BOWEN .... RESPONDENT

RULING

1. I have before me a Notice of Motion for determination dated 10th July, 2024. The application is expressed to be brought under the provisions of Section 1A, 1B, 31, 80 & 99 of the *Civil Procedure Act*, Order 45 Rules 1 & 2 of the *Civil Procedure Rules*, Article 47(1), 50(1)(2) of the *Constitution* Kenya and the applicant seeks orders as follows:

    a. Spent

    b. That this Honourable Court be and is hereby pleased to review its ruling rendered on the 14th June, 2024 precisely; - that a mutual real estate agent be appointed to collect rent and manage all the rental income emanating from LR. No. Uasin Gishu/Kisumu Settlement Scheme/4994, the said funds once collected be deposited in an interest earning account in the joint names of counsels on record pending the hearing of the main suit, and that the minors school fees related needs be paid from the aforesaid account pending the hearing and determination of the cause.

    c. That upon review, this Honourable Court sets aside the ruling thereto and substitute it with an appropriate ruling that conforms with the said review.

    d. That the Honourable court be pleased to issue any other orders as it may deem fit and necessary in the interest of justice and fairness.

    e. That the costs of the application be provided for.

2. The application is grounded on 16 grounds and a supporting affidavit sworn by Sharon Jemutai Jerop. The applicant contends that this honorable court made a ruling on the 13th June 2024 on

the defendant's application dated 4th February, 2024, which impugned ruling made erroneous orders with regards to maintenance of the Plaintiff's and Respondent's children a matter patently outside its jurisdiction as the same has been determined at the Eldoret Chief Magistrate's Court children case No. E161 of 2021.

3. That the Children's case No. E161 of 2021 made orders vide ruling issued on 18th March, 2022 on fees payment of the minors by the defendant which he had failed to comply and is in blatant contempt a fact that he materially failed to disclose before this Honorable Court but instead tried to circumvent the orders by bringing the application dated 5th February, 2024.

4. The applicant further averred that a notice to show cause was issued on 31st January, 2024 against the Defendant for non-payment of minors fees and other educational needs. That the Defendant did not appeal to the lower court's ruling on fee payment. She stated that this court's ruling on fees payment is outside its jurisdiction since no appeal was preferred and therefore the total fees including transport to school for the minors is Kshs. 508,180/= per year which amount the proceeds from the rental units cannot sustain considering.

5. That in making a ruling regarding the proceeds of the suit property known as LR. No. Uasin Gishu/Kisumu Settlement Scheme/4994, the court acted prematurely in concluding that the suit property is jointly owned by the parties herein without considering the contribution of the parties, an issue that is the subject to the hearing of the main suit.

6. According to the applicant, she contributed solely financially to the purchase and development of LR. No. Uasin Gishu/Kisumu Settlement Scheme/4994 but caused the same to be registered jointly based on the previous relationship with the defendant being her husband.

7. The applicant argued that the court erroneously relied on falsified information and material non-disclosure by the defendant and failed to take into consideration material evidence adduced by the Plaintiff. That the fact that the court erroneous reliance on the Defendant's brazen lies and non-disclosure is obvious from a cursory reading of the ruling and it is thus bound to remedy the error as a matter of justice.

8. That the error qualified to be corrected under this court's power to review its own decision on the basis of clear error on the face of record and existence of sufficient reason to review.

9. In response to the application, the defendant filed grounds of opposition dated 17th July, 2024 vehemently opposing the application for reasons that there is no such error apparent on the face of the record to warrant a review. That such an error is one that needs not an elaborate argument to be established.

10. The Defendant argued that the present application entails a reappraisal of evidence and reanalyzing this court's decision which is beyond the scope of review jurisdiction. That the application does not meet the pre-requisites of Order 45 Rule 1 of the *Civil Procedure Rules*.

11. The parties equally filed submissions in agitating their positions.

Plaintiff/Applicant's submissions.

12. The Plaintiff/Applicant filed submissions dated 29th July, 2024 in which she submitted only on one question, which is whether the application meets the legal threshold for review. Learned Counsel Ms. Mengich submitted that there is an error on the face of the record which tilts the scales in so far as the impugned ruling appertains. On this she cited the provisions of Section 80 of the *Civil Procedure Act*

and Order 45 Rule 1 of the *Civil Procedure Rules*. She further cited the decision in Paul Mwaniki v National Hospital Insurance Fund Board of Management (2020) Eklr.

13. Learned Counsel submitted that the Respondent mischievously hijacked these proceedings by bringing in children's matters in a matrimonial cause between the parties herein in an attempt to confuse the court and circumvent its clear intellect on justice in this matter. She submitted that the impugned ruling makes orders as regards to school fees of the issues of the parties herein a matter that is alive and well before the children's court as per Section 74 of the *Children's Act*.

14. In counsel' view, this Honorable Court acted prematurely and inconsistently with the Matrimonial Property Act, in concluding that the suit property known as LR. No. Uasin Gishu/Kisumu Settlement Scheme/4994 is jointly owned by the parties herein without considering the contribution of the parties and whether the property falls within the ambits of "matrimonial property" which intelligibly ought to be determined at the close of the matrimonial cause which is still pending for hearing. Counsel therefore submitted that the application is proper and ought to be allowed as it is in consonant with the provisions of Art. 47,48 & 50.

The Defendant/Respondent's submissions

15. On behalf of the Defendant learned counsel Mr. Mukabane submitted that there is no error on the face of the record as a mistake apparent or apparent error on the face of the record is one that is self-evidence and does not require elaborate arguments to be established.

16. According to counsel, the instant application entails a reappraisal of evidence and reanalyzing this court's decision which is beyond the scope of review jurisdiction. On this he cited the law on review under Order 45 Rule 1 of the *Civil Procedure Rules*. He concluded that there is no sufficient and/or any reason advanced to warrant the court to review its decision. Therefore, the application is incurably defective as there is no discovery of new and important matter or evidence. That there is no clerical or arithmetic mistake or error apparent on the face of the ruling and/or order sought to be reviewed.

Decision

17. Under section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure Rules*, the court may review its decision, inter alia: - on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

18. Having read through the application and the grounds of opposition together with the rival submissions, the only issue that presents itself for determination is whether there is a mistake or error on the face of the record or any sufficient reason to justify review of the judgment herein.

19. The Supreme Court of India in the case of *Aribam Tuleshwar Sharma v Ariban Pishak Sharma* (1979) 45CC 389, 1979(11) UJ 300 SC, held that:

> "The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made, it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercise on any analogous ground. But it may not be exercised on the ground that the decision was erroneous on merits. That would be the province of a Court of Appeal. A power of review is not to be confused with appellate power which may enable an Appellate Court to correct all manner of errors committed by the Subordinate Court."

20. Additionally, the same court in *Ajit Kumar Rath v State of Orisa & Others*, 9 Supreme Court Cases 596 at Page 608 stated as follows:

> "The power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason" ..... means a reason sufficiently analogous to those specified in the rule"

21. In discussing the guiding principles on the issue of review, the court in the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR pronounced itself as follows:

> "I am clear in my mind that the reasons offered by the applicant do not qualify to be 'sufficient reason' within the meaning of the rules cited above nor are they analogous or ejusdem generis to the other reasons stipulated in Order 45 Rule 1. For this holding I rely on Evan Bwire vs Andrew Nginda where the court held that 'an application for review will only be allowed on very strong grounds particularly if its effect will amount to re-opening the application or case a fresh. The principles which can be culled out from the above noted authorities are: -
>
> i. A court can review its decision on either of the grounds enumerated in Order 45 Rule 1 and not otherwise.
>
> ii. The expression "any other sufficient reason" appearing in Order 45 Rule 1 has to be interpreted in the light of other specified grounds.
>
> iii. An error which is not self-evident and which can be discovered by a long process of reasoning cannot be treated as an error apparent on the face of record justifying exercise of power under Section 80.
>
> iv. An erroneous order/decision cannot be corrected in the guise of exercise of power of review.
>
> v. A decision/order cannot be reviewed under Section 80 on the basis of subsequent decision/judgment of a coordinate or larger Bench of the tribunal or of a superior court.
>
> vi. While considering an application for review, the court must confine its adjudication with reference to material, which was available at the time of initial decision. The happening of some subsequent event or development cannot be taken note of for declaring the initial order/decision as vitiated by an error apparent.
>
> vii. Mere discovery of new or important matter or evidence is not sufficient ground for review. The party seeking review has also to show that such matter or evidence was not within its knowledge and even after the exercise of due diligence, the same could not be produced before the court/tribunal earlier.

viii. A mistake or an error apparent on the face of the record means a mistake or an error, which is prima-facie visible and does not require any detail examination. In the present case the petitioner has not been able to point out any error apparent on the face of the record.

ix. Section 80 of the *Civil Procedure Code* provides for a substantive power of review by a civil court and consequently by the appellate courts. The words occurring in Section 80 mean subject to such conditions and limitations as may be prescribed thereof and for the said purpose, the procedural conditions contained in Order 45 Rule 1 must be taken into consideration. Section 80 of the *Civil Procedure Code* does not prescribe any limitation on the power of the court, but such limitations have been provided for in Order 45 Rule 1.

x. The power of a civil court to review its judgment/decision is traceable in Section 80 *CPC*. The grounds on which review can be sought are enumerated in Order 45 Rule 1."

22. For clarity, it is useful for the parties to separate the subject matters to avoid some overlapping of jurisdiction. The proceedings before the subordinate court should be allowed to be litigated into full circle so as not to violate the rules of natural justice under Art. 50 of the Constitution. The application before court on the face of it was premature for even the issues of appointment of a management agent of the impugned property being contested by the Plaintiff and the Defendant in so far as the interim orders are concerned on maintenance of the children, could have been as well be canvassed before that children's court. However, I take judicial notice needless to say some interlocutory orders were issued, which the applicant seems to make reference to as having pierced the rights to the matrimonial property. It is my considered view that the orders were purely procedural without handing down any definitive rights under the *Matrimonial Property Act*. It is within this background that the court gives an advisory opinion that any substantial assertions on which either parties' case was founded before the trial court should not be invoked in a superior court so as not to occasion a mistrial or prejudice.

23. In response to the issue of review jurisdiction, I say that the threshold has not been met to set any interlocutory orders aside save for preservation of rem dependent upon the hearing and determination at a future date of Eldoret High Court Civil Case No. E009 of 2022 (O.S). Consequently, notwithstanding the approach taken by the parties to invoke remedies under the Children's Act correspondingly with the Originating Summons on distribution of the marital estate, the best cause is to dispose of the pending suits in the court below in a manner which has just been indicated to pave way for any appeal in any event. It is in that context assertions No. 8 and 9 raised by Sharon Jemutai in the supporting affidavit dated 10th July, 2024 be determined on the merit at an appropriate forum. In the same vein, this court did not in any way review the orders of the Children's Court as earlier on issued for that was not a justiciable matter for this court's jurisdiction. However, there is no prejudice for parties to have a draw down from the escrow account on the terms of maintenance as decreed by the trial court. This mode guards and enforces the doctrine of the best interests of the children under Art. 53(2) of the *Constitution*.

24. In the end, the Notice of Motion dated July 10, 2024 does not meet the threshold for an order of review; thus, devoid of merit and it is hereby dismissed.

25. Each party shall bear its own costs.

26. Orders accordingly.

SIGNED DATED AND DELIVERED VIA EMAIL AT ELDORET, THIS 21ST DAY OF AUGUST 2024

..

R. NYAKUNDI

JUDGE