



**MJEDB v JBN (Matrimonial Cause E072 of 2021)
[2024] KEHC 15424 (KLR) (Family) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15424 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E072 OF 2021
PM NYAUNDI, J
NOVEMBER 29, 2024**

BETWEEN

MJEDB APPLICANT

AND

JBN RESPONDENT

RULING

1. The Application for determination is dated 22nd July 2024 filed by MJEDB (the Applicant). It seeks the following orders;
 1. Spent.
 2. That this Honourable Court be pleased to review or vary its judgment delivered on 14th June 2024.
 3. That costs of the application be in the cause.
2. The Application is brought pursuant to Section 80 of the *Civil Procedure Act* Cap 21 of the Laws of Kenya, Order 45 and Order 51 Rule 1 of the *Civil Procedure Rules* and all other enabling provisions of the law and was supported by a sworn affidavit by the Applicant of even date.
3. The application is not opposed. The Respondent was served with the application but did not file a response or written submissions.
4. The Applicant herein, MJEDB took out Originating Summons dated 19th October 2021 January against the Respondent seeking declaration of the following;
 1. Whether the applicant and the Respondent officiated their union on 24th July 2019 and prior to that had been living together as husband and wife from the year 2015?



2. Whether there is one issue of marriage between the applicant and the respondent?
3. Whether the applicant has been solely providing and taking care of the issue whilst the Respondent has neglected his parental duties?
4. Whether the marriage was dissolved on 15th March 2021?
5. Whether the applicant was working as a (voluntary) clinical nutritional consultant in Kenya for the period 15th September 2015 to 16th December 2015 and 6th April until 8th August 2016 and is currently working as a clinical nutritional consultant in the Netherlands while the respondent is a practicing nurse licensed in Kenya and was previously working in Somalia and is currently practicing in the Netherlands as a nurse and an order picker?
6. Whether the applicant and the respondent during the subsistence of their marriage used and applied their income unsparingly towards acquisition and development of the acquired matrimonial properties?
7. Whether the parties during subsistence of their marriage acquired the following properties namely: -
 - a. Plot 32 on Mavoko Town Block 2/xxxx Road Ville Syokimau.
 - b. Tsavo Skywalk Executive Apartment No. C1202 on LR No. Dagoretti/Riruta/xxxx.
 - c. Plot No. 7 on South Konza Block 5/xxxx-Malili II.
8. Whether the applicant contributed to the acquisition of the above mentioned properties and if so, to what extent?
9. Whether the applicant is entitled to equal share of all the matrimonial properties acquired jointly despite the respondent having and/or is in the process of having himself registered as the sole owner?
10. Whether the court should order that all matrimonial properties acquired during the subsistence of the marriage be distributed equally now that the marriage is dissolved?
11. Who should pay costs?
5. On 14th June 2024, this court delivered its judgment in the following terms;
 - a. That a declaration is hereby issued that 50% proportion of the properties listed below and held jointly by the Applicant and the Respondent.
 - i. Road Ville Syokimau
 - ii. Tsavo Skywalk Executive Apartment No. C1202 on LR No. Dagoretti/Riruta/xxxx
 - b. The Respondent shall have the 1st Option to buy out the Applicant by paying to her 50% of the purchase price of the assets within 90 days from the date hereof.
 - c. In the event that the Respondent elects not or is unable to pay the Applicant as stipulated under (b) above the Properties shall be sold by an Estate Agent commissioned by the Applicant and Respondent and the parties to share the proceeds, less expenses, estate agent fee and other costs related to the transaction within 30 days of communication from the Respondent that he will not be exercising his option under (b) above.
 - d. In the event the parties are unable to agree on an estate agent, the Applicant will solely identify and commission an estate and upon sale of the assets, the Applicant and Respondent shall share



the proceeds, less expenses, estate agent fee and other costs related to the transaction within 30 days of the appointment of the agent.

- e. This being a family matter, each party will bear their own costs.
 - f. Mention on 18th September 2024 to confirm compliance
6. The Applicant's application is based on the following grounds;
1. That this Honorable Court delivered its judgment on the 14th day of June 2024 issuing a declaration apportioning 50% of the properties Roadville Syokimau and Tsavo Skywalk Executive Apartment No. C1202 on LR No. Dagoretti/Riruta/xxxx to the Applicant however failing to indicate the Land Reference number of the Roadville Syokimau property which should be Plot No. 32 Mavoko Town Block 2/xxxx, Roadville Syokimau.
 2. That this Honourable court having acknowledged in its judgment that the Applicant adduced sufficient evidence confirming that the Roadville Syokimau plot was bought on 5th November 2019 however seem to have mistakenly failed to note that the Roadville Syokimau Plot Land reference number was Plot 32 on Mavoko Town Bock 2/xxxx and as such Roadville Syokimau Plot and Plot No. 32 on Mavoko Town Block 2/xxxx are one and the same property.
 3. That this Honourable court apportioned two out of the three properties subject matter of this suit failing to consider the evidence adduced by the Applicant in regards to the third property; Plot No. 7 on South Konza Block 5/xxxx Malili II which evidence includes an email from the Respondent to the Applicant where the Respondent advises the Applicant that they continue paying for the said property and later the Applicant could sell it.
 4. That the Applicant further adduced evidence where the Respondent; in an email, acknowledged that there were two plots in Kenya which the Applicant contributed in the purchase thereof and as such he had no problem forfeiting the same to the Applicant.
 5. That in apportioning the Roadville Syokimau plot without indication of its Land Reference Number would make it impossible for the Applicant to execute the court's orders in regards to the said property.
 6. That in the court further failing to take into consideration the evidence adduced in regards to the property Plot No. 7 on South Konza Block 5/xxxx Malili II would be prejudicial to the Applicant in addition to causing her substantial loss given her contribution towards purchase of the same.
 7. That this application is made in good faith and without unreasonable delay.

Analysis and Determination.

7. The applicant states that this court did not indicate the Land Reference for land known as Plot 32 on Mavoko Town Block 2/xxxx Road Ville Syokimau. That the judgment only indicated Road Ville Syokimau.
8. The other argument is that this court did not make a declaration on property known as Plot No. 7 on South Konza Block5/xxxx-Malili II.



9. I will start by addressing the second issue. I have gone through the judgment of this court delivered on 14th June 2024. At paragraph 14 of the said judgment, when determining whether the properties listed are matrimonial properties, I stated as follows;

Basically, for property to qualify as matrimonial property, it must meet the definition in Section 6 quoted above. From the evidence available in court, it is clear to me that the Applicant and the Respondent solemnized their union in Nederland in Rotterdam on 24th July 2019. The Applicant argued that she started cohabiting with the Respondent in 2015 and did their traditional wedding in 2017. Road Ville Syokimau was purchased on 5th November 2019 while Tsavo Skywalk Executive Apartment No. C1202 on LR No. Dagoretti/Riruta/xxxx was purchased on 22nd January 2021. The parties divorced on 15th March 2021. There is no doubt that the two properties were acquired during the subsistence of the marriage between the parties herein. The court is unable to discern when Plot No. 7 on South Konza Block 5/xxxx-Malili II and Plot 32 on Mavoko Town Block 2/xxxx were purchased. No documents have been furnished as proof of ownership.

10. The court established that proof ownership of Plot No. 7 on South Konza Block 5/2/xxxx-Malili II was not furnished to this court. In the absence of a copy of a title deed, it was difficult for the court to ascertain when the property was purchased and if it indeed belonged to the Respondent or was matrimonial property. The court held that only two properties; Roadville Syokimau and Tsavo Skywalk Executive Apartment No. C1202 on LR No. Dagoretti/Riruta/xxxx qualified as matrimonial property based on the evidence presented before this court. The allegation that this property was not distributed in the judgment therefore does not stand.

11. The substantive requirements of Order 45 of the *Civil Procedure Rules*, which deals with review are firstly, the discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant and could not be produced at the time when the decree was passed. Secondly, an applicant must demonstrate that there has been some mistake or error apparent on the face of the record. Thirdly, review can be possible for any other sufficient reason.

12. The power to set aside orders must be exercised within the framework of Section 80 of the *Civil Procedure Act* and Order 45 Rule 1. Section 80 of the *Civil Procedure Act* provides as follows:

80. Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

13. Order 45 Rule 1 of the *Civil Procedure Rules, 2010* provides as follows;

45. Rule 1 (1) Any person considering himself aggrieved-

- a. By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
- b. By a decree or order from which no appeal is hereby allowed, and who from 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 decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.

14. A clear reading of the above provisions shows that Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. They lay down the jurisdiction and scope of review. They limit review to the following grounds- (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
15. What is apparent in the Judgment of 14th June 2024 on paragraph 24 order (a) is an error on the face of the record.
16. Courts of similar and superior jurisdiction have discussed the several grounds for allowing review. In *Muyodi v Industrial and Commercial Development Corporation & another* [2006] 1 EA 243, the Court of Appeal described an error apparent on the face of the record as follows:

...In *Nyamogo & Nyamogo v Kogo* (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by long drawn process of reasoning or on points where there may conceivably be two opinions, can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.
17. The supreme court of Uganda in *Edison Kanyabwera v Pastori Tumwebaze* (2005) UGSC 1, provided for what constitutes an error apparent on the face of the record, it stated as follows:

It is stated that in order that an error maybe a ground for review, it must be one apparent on the face of the record, ie an evident error which does not require any extraneous matter to show its incorrectness. It must be an error so manifest and clear that no court would permit such an error to remain on the record. The error maybe one of fact, but it is not limited to matters of fact, and includes also error of law.
18. The court of appeal in *National Bank of Kenya Limited v Ndungu Njau* (1997) eKLR stated as follows;

A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established.
19. From the above quoted decisions, it is clear that the courts agree that the error or omission must be self-evident without there being a need for additional arguments.



20. In the Judgement delivered by this court, at paragraph 24 (a) states order one states that;
- (a) ...That a declaration is hereby issued that 50% proportion of the properties listed below and held jointly by the Applicant and the Respondent.
 - (i) Road Ville Syokimau
 - (ii) Tsavo Skywalk Executive Apartment No. C1202 on LR No. Dagoretti/Riruta/xxxx
21. Not indicating the full Land Reference Number is an error that can be corrected by this court.
22. Order 24 (a) of the Judgment is amended to indicate that the property is known as Plot 32 on Mavoko Town Block 2/xxxx Road Ville Syokimau.

Final Orders

23. The Final orders as revised will therefore read as follows-
- a. That a declaration is hereby issued that 50% proportion of the properties listed below and held jointly by the Applicant and the Respondent.
 - i. Plot 32 on Mavoko Town Block 2/xxxx Road Ville Syokimau
 - ii. Tsavo Skywalk Executive Apartment No. C1202 on LR No. Dagoretti/Riruta/xxxx
 - b. The Respondent shall have the 1st Option to buy out the Applicant by paying to her 50% of the purchase price of the assets within 90 days from the date hereof.
 - c. In the event that the Respondent elects not or is unable to pay the Applicant as stipulated under (b) above the Properties shall be sold by an Estate Agent commissioned by the Applicant and Respondent and the parties to share the proceeds, less expenses, estate agent fee and other costs related to the transaction within 30 days of communication from the Respondent that he will not be exercising his option under (b) above.
 - d. In the event the parties are unable to agree on an estate agent, the Applicant will solely identify and commission an estate and upon sale of the assets, the Applicant and Respondent shall share the proceeds, less expenses, estate agent fee and other costs related to the transaction within 30 days of the appointment of the agent.
 - e. Mention on 14TH May 2025 to confirm compliance
 - f. This being a family matter, each party will bear their own costs.

DATED, SIGNED AND DELIVERED ON THE VIRTUAL PLATFORM, AT NAIROBI THIS 29th DAY OF NOVEMBER, 2024.

PATRICIA NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant

