



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 3 OF 2014 (O.S)

FM.....APPLICANT

VERSUS

CN.....RESPONDENT

RULING

1. The applicant F.M. and the respondent C.N. got married on 10th December 2005 at Brakenhurst Baptist Church in Kiambu under the **African Christian Marriage and Divorce Act** (now repealed). In November 2009 a property known as House No. xx at South Park Estate along Mombasa Road in Nairobi was bought on mortgage and registered in their joint names. When on 4th February 2014 the applicant filed originating summons (which she later amended to a petition), she was claiming that this was a matrimonial property that they had jointly acquired and/or developed, and that her contribution, both direct and indirect, was equal to that of the respondent. She wanted the house sold and the proceed shared equally.

2. The respondent opposed the claim. His case was that he solely acquired the property on mortgage, which mortgage he was servicing alone. This was a 20-year mortgage. He had registered the property in their joint names, but the applicant had not made any contribution to the acquisition or to the payment of the mortgage. He stated that the applicant had lived in the house for only 6 months before she left to go and file a divorce cause to dissolve the marriage. He asked that the suit be dismissed with costs.

3. It was common ground that by the time this cause was filed, the applicant had filed **Divorce Cause No. xxx of 2010** seeking to have the marriage dissolved. It was also common ground that the respondent was the one living in the house, following their separation.

4. The dispute was heard orally by Justice W. Musyoka. A judgment was delivered on 9th June 2020. The Judge found that:-

- a. the house constituted matrimonial property having been acquired and developed during the subsistence of the marriage between the applicant and the respondent;
- b. the property was under mortgage, a substantial part of which was yet to be settled;
- c. the applicant had indirectly, non-monetarily, contributed towards the acquisition, development and maintenance of the suit property; and
- d. there was uncertainty as to what each of the parties actually contributed directly or non-monetarily to the acquisition and development of the property.

5. Lastly, the court found that under **section 7** of the **Matrimonial Property Act (No. 49 of 2013)** and because it had not been proved that the marriage between the applicant and the respondent had been dissolved, it could not alienate the property. This is what the court observed.

“33. In the instant case, the applicant was obliged to demonstrate that the marriage with the respondent had since been dissolved, at least as at the date she was giving evidence. She did not deal at all with that aspect of the case when she testified orally. The respondent alluded to dissolution of the marriage but provided no proof. As it is, there is no evidence that the

said marriage has been dissolved by a valid decree of a court of competent jurisdiction. Consequently, I would have no jurisdiction to alienate the subject property as between the parties hereto.

34. Since I lack jurisdiction to determine the matter the best I can do, in the circumstances, is to strike out the suit, which I hereby do. Each party shall bear own costs.”

6. This is the decision that led the applicant to file the present Notice of Motion dated 2nd December 2020 in which she sought that the judgment be reviewed, set aside and/or varied on the ground that she had discovered new and important evidence that was not within her knowledge and which she would not produce during the case. The new and important evidence was that, the marriage had been dissolved on 15th May 2015 when a *decree nisi* was obtained and which was followed by a decree absolute on 4th March 2016. In the supporting affidavit, she stated that she had, at the time of the hearing of this cause, given her then advocate this information and provided the documentation, but that the advocate had not guided her to testify regarding the same or to produce the dissolution documents. She blamed her then advocate for the predicament she has found herself in. She stated that if the judgment is not reviewed and/or set aside so that she could show that the marriage had been dissolved she will be irreparably prejudiced because she will not benefit through the division of the matrimonial property which is jointly registered between the two. She stated that –

“14. THAT I urge this Honourable Court to consider my predicament and admit the above documents, in support of my application for review, to enable this court determine division (of) matrimonial property.”

She did not want the mistake of her then counsel to be visited on her. The application was brought under **Order 45** of the **Civil Procedure Rules** and **sections 1A** and **3A** of the **Civil Procedure Act**.

7. The respondent filed grounds of opposition dated 16th November 2021. He relied on the following grounds:-

- “1. that the application is vexatious, frivolous and an abuse of the court process and ought to be dismissed with costs;**
- 2. that there has been an inordinate delay of over one (1) year on bringing the said application which is merely an afterthought;**
- 3. that there is no evidence to warrant the Honourable Court to review the Judgement of this Honourable Court to review the Judgement of this Honourable court dated 22nd May 2019;**
- 4. that the court is *functus officio* as far as the instant suit is concerned;**
- 5. that the instant application does not meet the criteria for review and or setting aside judgment and ought to be dismissed with costs;**
- 6. that the trial court rightly decreed that it lacked jurisdiction to alienate the subject property and the Respondent ought to be allowed to enjoy the fruits of his judgement;**
- 7. that the applicant intends to re-open a matter that has already been heard and concluded by a competent court;**
- 8. that the applicant’s and or her advocate’s laxity and or negligence ought not to be visited upon the Respondent;**
- 9. that the issues and or documents alleged to form the basis of the applicant’s application for review were at all times within the applicant’s knowledge and or possession and therefore cannot be described as “new and important” evidence;**
- 10. that the application ought to be dismissed with costs.”**

8. Counsel for the applicant and counsel for the respondent each filed written submissions on the application. They referred the court to decided cases. I have had the advantage to read and consider these.

9. On the face of things, this is a very easy application to determine. The application was brought under **Order 45** of the **Civil Rules**, and the specified ground was that there was new and important evidence which the applicant had discovered, which was not within the knowledge or could not be produced by the exercise of due diligence. The evidence was that her marriage to the respondent had been dissolved by the time she testified on 9th February 2017 and on 27th July 2017.

10. The applicant is the one who had filed **Divorce Cause No. 174 of 2010** against the respondent. The cause was heard and determined. The marriage was dissolved on 15th May 2015 and *decree nisi* issued. It was made absolute on 4th March 2016. It is therefore evident that the applicant had this evidence at the time that she testified in this cause. If she says that she had handed over the evidence to her advocate, the same advocate was leading her through her testimony. She does not say that her advocate stopped her from testifying about the divorce. She stated that she relied on the advocate on when, if at all, that evidence could be used. In short, the respondent is right to say that the evidence regarding the dissolution of the marriage was with the applicant and that she had the opportunity to tender it. Which she did not. The remedy of review is consequently not available to her. His counsel made reference to the decision in **Republic –v- Advocates Disciplinary Tribunal Exparte Apollo Mboya [2019]eKLR**, but the decision was substantially dealing with the review based on the ground of mistake or error apparent on the face of the record. This is not the ground on which the applicant based her application. In the instant case, the applicant cannot say that she has since come by new and important matter or evidence which, after the exercise of due diligence,

was not within her knowledge or could not be produced by her at the time when she testified. She had the evidence with her, and with her advocate. It is trite that an application for review has to be specific on the ground on which it is brought (**Otieno, Ragot & Company Advocates –v- National Bank of Kenya Ltd [2020]eKLR**). This application was specifically grounded on new and important matter or evidence which, after the exercise of due diligence, was not within the applicant’s knowledge or could not be produced by her at the time. The ground must fail.

11. Secondly, an application for review has to be made without unreasonable delay. The judgment was delivered on 9th June 2020. The present application was filed on 2nd December 2020, about six (6) months later. There was no attempt in the supporting affidavit to explain the delay. I find that the delay was inordinate in the circumstances.

12. The result is that the application by the applicant is dismissed. However, given that the parties had divorced at the time the judgment was delivered, I ask each party to bear their own costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JANUARY, 2022

A.O. MUCHELULE

JUDGE