REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 37 OF 2014

NJY.....PLAINTIFF/APPLICANT

-VS-

PKB.....DEFENDANT/RESPONDENT

Coram: Hon. Justice R. Nyakundi

M/S Isiaho Sawe & CO. Advocates for the plaintiff

M/S Tororei & CO. Advocates for the defendant

R U L I N G

What is before the court is an application dated 30th march 2021 expressed to be brought under Section 80 of the Civil Procedure Code, Order 45 Rules 1, 2 and 5 of the Civil Procedure Rules. The applicant seeks orders that the court reviews its judgment delivered on 25th June 2019 and that the court order a retrial.

The application is based on the grounds that the applicant had moved the court seeking distribution of matrimonial property but the court found that it could not distribute the property as the parties were still in a legal marriage. Inadvertently forgot to inform the trial court during the hearing that there was a divorce cause pending between the parties in Eldoret Divorce Cause No. 72 of 2016. The failure to inform the court was not intentional and there is a likelihood that had the trial court been informed it may have reached a different finding. The marriage between the parties has since been dissolved.

The Respondent filed a replying affidavit to the application and contends that the matter was determined on merit by the court. The applicant has failed to demonstrate the criteria to warrant the review of the decree.

DETERMINATION

Upon consideration of the pleadings and the submissions of all the parties herein, the issue for determination is whether the court should review its judgment of 25th June 2019.

THE LAW

Order 45 Rule 1 of the Civil Procedure Rules provides the following conditions for a court to review its own orders;

> **a) Discovery of a 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.**
>
> **b) A mistake or error apparent on the face of the record.**
>
> **c) The application must be made without unreasonable delay.**
>
> **d) Any other sufficient reason.**

The principles governing review jurisdiction are now well settled as adverted to in various decisions. In **Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243,** the Court of Appeal held as follows ***"In Nyamogo & Nyamogo -vs- 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."

I find it peculiar that during a claim for distribution of matrimonial property it would inadvertently slip one's mind that they are divorcing the opposing party. The same information was within her knowledge and could have been produced during the pendency of the suit. The applicant has not proven that there is a mistake or error apparent on the face of the record. The decision the applicant seeks to review was delivered on 25th June 2019. The application was filed on 20th April 2021. The divorce proceedings were concluded on 20th December 2019. The applicant has not explained the delay in filing the application.

The applicant is better placed to file an appeal as the application does not meet the threshold for review. The court cannot sit as an appellate court on its own decisions which fall short of the expressed provisions of section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. The orders sought are to overturn and change the character of the decision that was made on merit. The matter was decided on a point of law and can only be overturned on appeal.

In the premises I find that the application has no merit and is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 17th DAY OF FEBRUARY, 2022.

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R. NYAKUNDI

JUDGE