



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

MATRIMONIAL CAUSE NO. 4 OF 2019 (OS)

IN THE MATTER OF THE MATRIMONIAL PROPERTIES ACT, 2013

BETWEEN

PK.....PLAINTIFF/RESPONDENT

VERSUS

PK.....DEFENDANT/APPLICANT

RULING

1. On 19th September 2019, this Court (A. Mabeya J) delivered Judgment in the matter and issued a permanent injunction restraining the Applicant from interfering with the Respondent's title, user, occupation and/or enjoyment of [particulars withheld]. The Court also ordered that the Applicant be allowed to remove all his personal belongings from the property. The Court granted this injunction upon being satisfied that the Respondent, the estranged wife to the Applicant had solely acquired and developed the suit property, and further, that it was necessary to protect the Respondent from potential harm and violence against her by the Applicant.

The Application

2. Being aggrieved by the Judgment, the Applicant filed an application dated 15th January 2020 by way of chamber summons seeking the following orders: -

i) THAT the Honourable Court be pleased to review out of time its Judgment dated 19th September 2019 and set aside the order removing and/or evicting the Applicant from his matrimonial home.

ii) THAT the Honourable Court be pleased to hear the Applicants claim over land parcel number [particulars withheld].

iii) THAT the Honourable Court be pleased to allow the Applicant access to the matrimonial home erected on L.R No. [particulars withheld].

iv) THAT the implementation of the Court's Judgment dated 19th September 2019 be stayed.

3. The Application is premised on the grounds on the face of the application and the supporting affidavit sworn on 15th January 2020. It is averred that the Applicant and the Respondent have been married as husband and wife since 22nd August 1998 and have been blessed with three issues namely RK (28 years), DR (21 years), AB (17 years); that they then established their matrimonial home at [particulars withheld]; that they have been living peacefully on their said matrimonial home until the year 2019 when the Respondent rushed and filed Divorce Cause No. 7 of 2019; that the said divorce cause was filed in bad faith as the same was hurriedly determined in favour of the Respondent and consequently, she filed the instant suit; that the divorce cause was filed purposefully to deprive him of this constitutional rights under Article 45 (3) of the Constitution of Kenya 2010; that the court's orders barring him from accessing his matrimonial home has reduced him to a destitute, homeless and hopeless person; that he was not aware of the contents of the said application before the Honourable Court as he was not properly advised by his Advocates on record then, hence he prays to be given a chance to give evidence over his claim over the matrimonial property.

The Respondent's Response

4. The Application is opposed vide the Respondent's replying affidavit sworn on 10th November 2020 and the grounds of opposition dated

16th November 2020. In her replying affidavit, she avers that the case was heard and concluded vide Judgment dated 19th September 2019 whereby the Court held that L.R No. [particulars withheld] belongs to her absolutely and a permanent injunction was issued restraining the Applicant from interfering with her title, use, occupation and enjoyment of the said property; that to the best of her knowledge, no appeal has been lodged against the judgment and therefore the Applicant's application is misplaced, and it is an attempt by the Applicant to review the Judgment of the Court; that the application has been brought very late in the day and should be dismissed since it is an abuse of Court process considering that the Applicant has brought on board five other parcels of land which were not the subject of this case; that there is no suit pending in view of the Judgment in this matter and that what the Applicant raises in his application is a new cause of action which should be filed in a new and separate suit; that the status quo which should be maintained is as per the Judgment of the Court which was in her favour meaning that the suit property wholly belongs to her and the Applicant should not interfere with her enjoyment and user; that the Court cannot be asked to issue orders of restriction in respect of the suit property in view of the Judgment of this Court; that no evidence has been given to show that she is in the process of selling and transferring the parcels of land; that the Court is *functus officio* and that the only recourse that the Applicant had was to file an Appeal against the Judgment if he was dissatisfied with it.

5. The grounds of opposition raises 3 points being that there has been excessive inordinate delay in bringing the application; that judgment already having been delivered, the only recourse is to file an appeal; that there has been no new evidence that has been tendered to prove ownership over the suit property.

Applicant's Submissions

6. The Applicant filed submissions dated 28th January 2021. Therein, he reiterated the averments in his supporting affidavit and submits that himself and the Respondent have 3 children who equally need their father at home, in the matrimonial home. He further submits that denying the Applicant access to his matrimonial home is denying his fundamental rights and that the Applicant and Respondent have been living in the matrimonial home for several years and the Respondent is only being unfair and unjust in denying the Applicant access to his home as the head of the family.

7. He submits that removing him from his matrimonial home, where he has lived for over 28 years, amounts to a violation of his fundamental rights. He submits that himself and the Respondent are husband and wife and they have been blessed with 3 children namely RK (29 years), DR (22 years), AB (18 years). He submits that together with the Respondent, they established their matrimonial home at [particulars withheld] Subcounty, Meru County on the suit property and that they have been living peacefully on the said property until the year 2019 when the Respondent maliciously filed a divorce cause which was hurriedly determined in her favour and she consequently filed High Court Matrimonial Cause No. 4 of 2019. He submits that the said divorce cause was purposefully filed to deprive him of his constitutional rights under article 45 (3) of the Constitution of Kenya which provides that parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage. He submits that he has been reduced to a destitute, homeless and hopeless person. He prays to be given a chance to give evidence over his claim over the matrimonial property.

8. Relying on Sections 17 (1) and (2) of the Matrimonial Property Act 2013, he submits that Courts are not limited in respect of declaration of rights of a spouse's interest in matrimonial property. He further cites Section 14 of the Matrimonial Property Act which provides as follows: -

Where matrimonial property is acquired during marriage,

a) In the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse and

b) In the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.

9. He relies on the cases of *Njoroge v Ngari (1985) KLR 480* and *NWM v KNM (2014) KLR*.

Respondent's Submissions

10. The Respondent filed submissions dated 22nd February 2021. She avers that the Court having already rendered its decision, is *functus officio*; that the Applicant does not have any claim against the parcel already declared by Court to be hers; and that the Applicant's application is unwarranted and substantively defective and ought to be dismissed with costs. She identifies to issues for determination as follows: -

i) Whether leave ought to be granted.

ii) Whether the Application is defective.

11. She submits that in determining whether or not to grant leave to the Applicant, in addition to the essential elements as established by law, the Court ought to look at the substratum of the suit in totality. Citing the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi, (Civil Application No. Nairobi 255 of 1997 (unreported))* she outlines the essential elements as the length and reason for the delay, the chances of the appeal/review succeeding if the application is allowed and the degree of prejudice to the parties if the application is or is not allowed. She submits that the Applicant has not advanced any good reasons or explanation for the inordinate delay, let alone as to why he is yet to apply for the Judgment and further, that equity aids the vigilant and not the indolent. She submits that the chances of the review application are minimal since the Court already dealt with the issue of ownership of the suit property. She further submits that should the application be granted she stands to be greatly prejudiced because she is in use of her registered property and that ownership is not disputed.

12. On whether the application is defective, she submits that it is defective as it has not been brought under the proper provisions of the law

i.e Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules, 2010 and she has outlined the conditions for grant of review citing the case of **Francis Njoroge v Stephen Maina Kamore (2018) eKLR**. She submits that none of the conditions have been met by the Applicant since there is no discovery of new evidence as the land remains the Respondent's property, the parties already divorced as such there's no place they jointly call home and moreover, the Application ought to be brought vide a Notice of motion and not a chamber summons application. She further submits that with respect to the application for stay of execution, the same ought to be done by a notice of motion application and it ought to be brought under the provisions of Order 51 of the Civil Procedure Rules 2010.

13. On the issue of breach of fundamental rights, the Respondent submits that the Applicant ought to file a Petition as per the Mutunga Rules. She submits that the Applicant is a non-starter, is defective and is misplaced and ought to be dismissed with costs.

Issues for Determination

14. The issues arising herein for determination can be summarized as follows: -

i) Whether the Court should review out of time the Judgment dated 19th September 2019.

ii) Whether the Court should grant the Applicant access to the matrimonial home erected [particulars withheld].

Determination

15. The Applicant urges that he wants to be allowed to argue his claim over the suit property. In essence, he claims ownership to the property. In the Judgment of the trial Court, the Court established that the suit property was acquired and developed solely by the Respondent. The Court found that the Applicant had not contributed towards the acquisition or improvement of the property. It was on this basis, coupled with the evidence of threats and harassment meted to the Respondent by the Applicant that the Court issued a permanent injunction against the Applicant from accessing the suit property. In fact, the Court found it necessary to request the OCS to oversee the removal of the Applicant's property from the suit property.

16. Once the Court rendered itself as aforesaid, it became *functus officio* in the matter. The only way the Court's jurisdiction could be invoked is by way of review or if the Applicant wanted an application for stay or injunction pending appeal. The Applicant has brought his application under Order 45 Rule 1 (i) (a) and (b) of the Civil Procedure Rules, Section 4 (a), 7, 14 (a) and (b), 17 & 18 of the Matrimonial Property Act and Article 19, 20, 22 & 45 (3) of the Constitution of Kenya. Other than Order 45 which is on review, the other provisions would appear to impute the Court's jurisdiction over new and fresh merit based matters, thereby inviting the Court to conduct a re-trial, which is not permissible. As already stated, the Court is already *functus officio*, and the essence of this doctrine which is to give finality to adjudication of matters.

17. See the Court of Appeal decision of **Telkom Kenya Limited Vs John Ochanda (suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited) 2014 eKLR** and the Supreme Court decision of **Raila Odinga & 2 Others Vs Independent Electoral and Boundaries Commission & 3 Others 2013 eKLR**.

18. This Court will therefore limit its analysis of this matter to the review sought. The law in Section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules allows for an Applicant to file an application for review where no appeal has been preferred against an impugned decision. See **Otieno, Ragot & Company Advocates Vs National Bank of Kenya Limited Civil Appeal No. 60 & 62 of 2017 (2020) eKLR**. The Applicant is therefore allowed to bring his application for review.

19. The conditions to be met in an application for review as per the provision of Order 45 of the Civil Procedure Rules are as follows: -

i) Where there is a 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 was made.

ii) On account of some mistake or error apparent on the face of the record.

iii) For any other sufficient reason.

20. The Applicant has not demonstrated what nature of evidence he intends to bring and this Court is therefore not able to analyze whether any such evidence, if any fits into that type of evidence contemplated in Order 45. Indeed, the Applicant argued for his claim during the hearing of the matter and the Court indeed analyzed evidence from both parties. Any such evidence that the Applicants intend to bring must be evidence which he could be able to obtain at the time of hearing, despite the exercise of all due diligence. The Applicant does not claim this to be the case. There is also no claim of there being a mistake or error on the face of the record. In the premises, the conditions for grant of review have not been met.

21. The Applicant instead, has raised matters concerning his constitutional rights to property and the rights of parties to a marriage. These are all matters which ought to have been raised during the hearing of the main suit. The Applicant claims that he was not aware of the contents of his previous application before the Court as he was not properly advised by his Advocates on record. This Court is baffled at this averment because what is in issue is evidence over ownership of the suit property and it is the litigant who ordinarily gives his Advocate the evidence in his possession to support his case. This Court is not convinced that this is a proper reason, much as it does not find footing in any of the 3 grounds allowed for review under order 45.

22. Had the Appellant been dissatisfied with the outcome of the Judgment more so on a point of law as it appears or even on a point of fact, he ought to have appealed against the same instead of reviewing. This Court has held time and again that a good ground for appeal is not a

good ground for review and vice versa. See the case of *Abasi Balinda v Frederick Kangwamu & Another Miscellaneous Cause No. 3 of 1962, 1963 EALR 557, 558*, See also *John Githinji Gichira v Benard Munge Gichira, Civil Appeal No. 10 of 2012 [2017] eKLR*. See also *National Bank of Kenya v Ndungu Njau, (1996) KLR 469*.

23. In conclusion, this Court does not find any merit in the application before it. The Applicant has not demonstrated that he has met the threshold for grant of review orders but he instead appears to be raising contestations on points of law which cannot be entertained in such an application for review.

ORDERS

24. Accordingly, for the reasons set out above, the Court makes the following orders: -

i) The Applicant's application dated 15th January 2020 is hereby dismissed.

ii) The Respondent shall have the costs of the application.

Order accordingly.

DATED AND DELIVERED ON THIS 24TH DAY OF JUNE, 2021.

EDWARD M. MURIITHI

JUDGE

Appearances

M/S Kaberia Arimba & Co. Advocates for the Appellant

M/S Joan W G Ndorongo & Co. Advocates for the Respondent.