



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

(CORAM: CHERERE-J)

MATRIMONIAL CAUSES CIVIL CASE NO. 1 OF 2011

BETWEEN

I.A.O.....PLAINTIFF/RESPONDENT

AND

S.O.N.....DEFENDANT/APPLICANT

RULING

1. By a notice of motion dated 17th November, 2018 brought under Section 3A and B of the Civil Procedure Act, Order 40 Rules 1(a)(b) and 4 (1) and (2), Order 45 Rule 1(a) and (b), Order 51 Rules 1, 4, 5, 7, and 10 (2) of the Civil Procedure Rules, Section 28 of the Matrimonial Causes Act Cap 152 Laws of Kenya, Marriage Act No. 4 of 2014 Part X Rule 78 (c), Chief's Act on Customary Divorce and all enabling provisions of the Law, the Applicant seeks orders **THAT**:

- 1) **That the Honourable Court be pleased to review the judgment that was issued on 13th March, 2017**
- 2) **That the Honourable Court admits new evidence and take further evidence and witnesses that was not part of the record in the pleadings and proceedings**
- 3) **Costs be provided for**

2. The application is based on grounds among others **THAT**:

- i. The Applicant has new and compelling evidence that will influence the outcome of the judgment
- ii. The Applicant solely contributed towards development of property situated at **LR. NO. XXX/XXXXX/XXX**
- iii. The Respondent disposed off **BLOCK/X/XXX/XXX** and **BLOCK/X/XXX/XXX** belonging to the family and should not be allowed to benefit twice
- iv. That Applicant has retired and **LR. NO. XXX/XXXXX/XXX** is family property

3. The Application is supported by an affidavit sworn by the Applicant on 17th November, 2018 in which he reiterates the grounds on the face of the application. The Applicant has attached several annexures marked **SON 1 to 14**.

4. The application is opposed on the basis of a replying affidavit sworn by the respondent on 19th March, 2019. She avers that all the matters raised by the Applicant were considered at the hearing and are not new. She avers that she bought property at Komorock but the same has never been allocated to her.

Analysis and Determination

5. I have considered the application in the light of the supporting affidavit and the replying affidavit and annexures thereto.

6. The issue in question is whether the applicant has satisfied the threshold for grant of an order of review. Order 45 of the Civil Procedure Rules which as follows:

1. (1) Any person considering himself aggrieved-

(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 a review of judgment to the court which passed the decree or made the order without unreasonable delay.

7. In the case of *National Bank of Kenya Limited v Ndungu Njau [1997] eKLR*, the Court of Appeal stated with regard to review: -

“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 require no elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect exposition of the law and reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

8. It is not disputed that the issues raised in this application were determined by way of a Judgement dated 13th March, 2017 where the court declared that **LR. NO. XXX/XXXXX/XXX** is matrimonial property and that the Respondent is entitled to 50% share.

9. The Applicant has attached an undated list marked **SON 14** which contains names and plot numbers. Among them is the Respondent's name which appears against plot numbers **BLOCK/X/XXX/XXX** and **BLOCK/X/XXX/XXX**. The respondent's averment that the plots were neither allocated to her nor disposed off has not been controverted since the share certificate that the Applicant has annexed is not in the Respondent's name.

10. The Applicant has a right of appeal against the court's judgment but he has chosen not taken that path. Applicant has not demonstrated 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 impugned judgment was passed, or some self-evident error or omission on the face of the record, or any other sufficient reason that would entitle her to an order of review.

Disposition

11. From the foregoing analysis, I have come to the conclusion that the notice of motion dated 17th November, 2018 is devoid of merit and it is dismissed with costs to the Respondent.

DELIVERED AND SIGNED IN KISUMU THIS 23rd DAY OF May 2019

T. W. CHERERE

JUDGE

In the presence of:

Court Assistant - Felix

For Defendant /Applicant - Ms. Machage h/b for Mr. Nyanga

For Plaintiff /Respondent - Mr. Mweisigwa h/b for Mr. Ojuro