REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

CIVIL CASE NO.6 OF 2017

FLORENCE WANGUI MACHARIA .....PLAINTIFF

VERSUS

JULIUS GICHOBI NGURE .....DEFENDANT

RULING

1. The application pending before court is dated 27.4.2018 seeking orders that court reviews and sets aside order 2 made on 7.2.2018 and issued on 12.2.2018. The said orders was for taking of proper accounts with all necessary enquiries and directions for business known as Baricho chemist in Baricho, Kutus, Kimbimbi, Kiburu, Kibirigwi and Karii.

APPLICANT'S CASE

That Baricho chemist is a professional business owned by him alone and there is an error on the face of the record in that the

Respondent had not demonstrated any contribution in the business. That such an order may only be made after the case has been heard and court determined that the Respondent made contribution. That he was not served with the originating summons and the application.

2. In response, she claimed that she is the ex-wife of the Respondent and Baricho chemist were run by both the applicant and the Respondent for the benefit of the family. That the order is for taking accounts and not to share profits which can only be ordered after determining the cause. That the applicant was served with the originating summons on 27.7.2017 and he signed on the return copy. In addition, he was served with the application dated 22.9.2017 but he refused to sign. An affidavit of service is filed in both instances;

Review is provided under ***Section 80 of Civil Procedure Act.*** It provides;

> ***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 judgment to the court which passed* the decree or made the order, and the court may make such order thereon as it thinks fit.**

Further **O*rder 45 rule 1 (1) (a)*& (b)**provides;

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

GROUNDS FOR APPLYING FOR REVIEW

Review can only be allowed under certain circumstance. It is not in all cases that one is allowed to apply for review. The grounds are;

i) Discovery of new and important matter of evidence which, after 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.

ii) Mistake or error apparent on the face of the record

iii) Any other sufficient reason which may make the court to review its order.

In ***Pancras T. Swai V. Kenya Breweries Limited (2014) eKLR***.

The Court of Appeal in dismissing the application held;

> ***"It seems clear to us that the appellant, in basing his review application on the failure by the Court to apply the law correctly faulted the decision on a point of law. That was a good ground for appeal but not a ground for an application for review. If parties were allowed to seek review of decisions on grounds that the decisions are erroneous in law, either because a judge has failed to apply the law correctly or at all, a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review when such courts are factus officio and have no appellate jurisdiction".***

In addition it held that;

> ***"The discovery of new and important matter or evidence or mistake or error apparent on the face of the record or for any other sufficient reason in rule 1 of Order 44 (now Order 45 in 2010 Civil Procedure Rules) relates to issues of facts which may emerge from evidence. The discovery does not relate or refer to issues of law. The exercise of due diligence referred to in rule 1 refers to discovery of facts but dos not relate to ascertainment of existing law which the court is deemed to be alive to"***.

3. The appellant is alleging that there is an error based on facts. This is not a ground which entitles him to a review. There is no discovery of new matter of evidence or any sufficient reason which entitle him to a review.

ISSUES ARISING

1. WHETHER OR NOT THE APPLICANT WAS SERVED

As per the affidavit of service filed on 7.2.2018, the applicant was served with the application on 19.10.2017 but he declined to sign to acknowledge the receipt.

2. WHETHER THERE WAS AN ERROR

The applicant has indicated that there was an error on the face of the record in that the Respondent had not demonstrated any contribution in the business. That such an order may only be made after the case has been heard and court determined that the respondent made contribution.

In Anthony ***Gachara Ayub V. Francis Mahinda Thinwa [2014] eKLR*** the Court of Appeal dealt with the issue of error on the face of the record and stated:

In the case of ***Draft and DevelopEngineers Limited V. National Water Conservation and Pipeline Corporation, Civil Case No.11 of 2011***, the High Court correctly stated 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 a real distinction between a mere erroneous decision and an error apparent on the face of the 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 a 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal"***

3. In this case, there is an affidavit of service on record proving that the appellant was duly served with the application but he never filed any response. Therefore, the Court has no reason to doubt that the process server served all the documents. In any event, the applicant did not seek to cross examine the process serve on the said evidence. The court was satisfied that the Respondent was duly served and ignored the court process.

In my view, the court had an opportunity to peruse the applicant's application and submissions and in delivering it's judgement reconsidered and evaluated the evidence. There is no error which has been proved by the applicant.

The applicant has submitted that he has annexed some documents relating to Baricho chemist annexture JGN 6, 7 & 8 which show the bank account transactions and loan application forms. The question is how can he then allege that he will be prejudiced.

I find that the application lacks merits. I dismiss it with costs.

Dated at KERUGOYA this 20th day of December, 2019.

L. W. GITARI

JUDGE

COURT

The ruling has been read out in open court.

L. W. GITARI

JUDGE