



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC NO. 1 OF 2007 (OS)

IN THE MATTER OF SECTION 17 OF MARRIED WOMEN'S PROPERTY ACT 1882

L W LAPPLICANT

VERSUS

S A N L RESPONDENT

RULING

INTRODUCTION

1. By originating summons dated 9th January 2007 and filed the same day, the applicant herein sought declaratory orders and division of various matrimonial properties pursuant to Section 17 of the Married Women's Property Act 1882. After a prolonged hearing process, parties agreed to record a consent dated 21st January 2015 detailing on how they wished to share the property in question thus adopting the same as a final judgment on 22nd January 2015 before J. Achode.

2. In the said order, it was agreed by consent to share the property as hereunder:

1. Property to be transferred to the applicant herein LWL alias LWJ:

- i. L.R Nairobi/Block [particulars withheld]
- ii. L.R Nairobi/Block [particulars withheld]
- iii. L.R No. Kajiado/Kitengela/[particulars withheld]
- iv. L.R No. Kajiado/Kitengela/[particulars withheld]
- v. Motor Vehicle Reg. No. [articulars withheld]

2. Properties to be transferred to the respondent herein SANL

- i. L.R No. Lari/Bathi/[particulars withheld]
- ii. L.R No. Lari/Bathi/ [particulars withheld]
- iii. L.R No. 7785/[particulars withheld]
- iv. L.R No. 7785/ [particulars withheld]
- v. L.R No. Kajiado/Kitengela/ [particulars withheld]
- vi. L.R No. Nairobi/Block [particulars withheld]Motor Vehicle Reg. No. [particulars withheld]
- vii. Motor Vehicle Reg. No.[particular withheld]

3. That the respondent to ensure that all land rents and rates are fully paid up to 31st December 2014.

4. That each party to bear its own costs.

Applicant's Case

3. On 21st December 2017, the applicant moved to this court vide a notice of motion of even date pursuant to Sections 1A and 80 of the Civil Procedure Act Cap 21 Laws of Kenya and order 9 rule 9 of the Civil Procedure rules seeking the following orders:

1. Spent.

2. That this honourable court to set aside the consent orders granted on 22nd January 2015.

3. That this honourable court be pleased to review the consent orders granted on 22nd January 2015.

4. That the matter on division of matrimonial properties be heard and determined in the manner that is fair, just and equitable to both parties, and as shall be directed by this court; including but not limited to having the properties valued to determine the just distribution to the parties.

5. That the respondent be ordered to produce ownership documents relating to the matrimonial property situated in Kitui and have it included in the list of properties to be divided between the parties.

4. Application is premised on grounds on the face of it and affidavit in support sworn on 20th December 2017 and a supplementary affidavit to that effect sworn on the 23rd May 2017 in which it was deposed; that the consent Judgment was obtained through threats and intimidation, coercion and undue influence, misrepresentation and concealment of material facts on the part of the respondent; that the words used by the respondent and his action were intimidating, threatening and severe such that she feared for her life and that the respondent concealed a plot situated within Kitui Municipality by lying that it had been grabbed a fact she later discovered in June 2017 that it was not true.

5. At Paragraph 7 of the supporting affidavit, the applicant listed and reproduced particulars of cruelty as was listed in her divorce petition citing frequent beatings by the respondent leading to police reports. That due to irreconcilable differences and cruelty meted against her, her parents advised her to let go some properties and do away with this case hence the cause of her signing the consent albeit unwillingly.

6. Regarding concealment and misrepresentation of material facts, she averred that the respondent concealed the fact that he was married to another woman with 3 children before signing of the consent Judgment. She therefore asserted that non disclosure of that information amounted to fraudulent means of taking what belonged to her and her children and giving to another woman and her children which act was insulting, demeaning and cheating on her. She alleged that the respondent should not have taken another woman to her matrimonial home (property) instead of building a home for her. She further claimed that the respondent has already charged Plot No. Kajiado/Kitengela/[particulars withheld] to K-rep Bank instead of transferring it to her and that plot No. Lari/Bathi/ and Runda L.R [particulars withheld] both matrimonial properties were given to the respondent contrary to the law.

Respondent's case

7. In reply to the application, the respondent filed a replying affidavit denying the allegations leveled against him terming them baseless in law and without merit. He contended that the respondent had not produced any new facts to warrant review orders or setting aside the consent judgment. Further, the respondent averred that the orders were voluntarily entered with the full knowledge of the applicant and her advocate who actually pushed for entry of consent judgment hence the issue of intimidation, coercion or threat does not arise as negotiations took over 9 years to arrive at the said consent.

8. Regarding the property in Kitui, the respondent claimed that he had bought the property alone but a dispute arose over ownership with a 3rd party claiming it hence he has not been issued with ownership documents of the same and therefore cannot claim to be the owner of the property. Concerning the loan taken in relation to LR Kajiado/ Kitengela[particulars withheld], he asserted that he had taken a loan to pay school fees for the children in the 2005 but later on sub-divided the land to give the applicant her 10 acres while he retained his ten acres which serves as security for the loan. He claimed that the delay of 3 years to review a judgment is in bad faith and not justified. He opined that whereas he has signed all necessary documents to facilitate the transfer of the applicant's properties into her name, the applicant has not done the same in his favour and to the contrary, she has even gone as far as placing restrictions against any transfer. As to his marriage to a second wife, the respondent stated that he married the year 2010 three years after their divorce.

9. When the matter came up for hearing, both parties agreed to dispose the matter by way of written submissions. Subsequently, the applicant filed her submissions in person on 25th May 2018 and the firm of Wanjiku Mwaura representing the respondent filed theirs on 9th May 2018.

Applicant's Submissions

10. In her submissions, the applicant reiterated the averments contained in her affidavit in support and supplementary affidavit aforementioned. She submitted that there was discovery of new evidence and material facts she came to learn after entry of consent judgment that the respondent had another wife with three children. She cited Section 7 of Matrimonial Property Act 2013 which provides that matrimonial property rests in the spouses according to their contribution. She further prayed for Kitui property to be subjected to distribution because it was acquired during the subsistence of the marriage.

11. With regard to Plot No. Kajiado/Kitengela/[particulars withheld] which was allegedly charged to K-rep bank by the respondent and Plot No. Nairobi [particulars withheld] whose transfer process had not been completed, she claimed that she spent so much in separating the title for Kitengela/Kajiado/[particulars withheld] to have it transferred to her name and also incurred further expenses to complete the transfer process for the Nairobi [particulars withheld]. Concerning the inordinate delay in filing the application as alleged by the respondent, she responded that there was no delay as she discovered of the issues in controversy in May 2017.

12. To bolster her case that she has satisfied the required grounds for setting aside a consent judgment, she made reference to the case of **Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Ltd (CA Civil application No. Nai 1 of 2015)** in which the court held that circumstances under which a consent judgment can be set aside are similar to those that vitiate a contract, inter alia fraud, collusion, illegality, mistake, an agreement contrary to the policy of court, absence of sufficient material facts and ignorance of material facts. The court of appeal holding was in agreement with similar positions held in **J.M. Mwakio vs Kenya Commercial Bank Ltd. Civil Appeal application 28/1982, Brooke Bond Liebig v Mallya 1975 EA 266, Hirrani v Kassam (1952) 19EACA 131, and Kenya Commercial Bank Ltd vs Specialized Engineering Co. Ltd (1982) KLR P 485.**

Respondent's Submissions

13. Mrs. Mwaura for the respondent also adopted averments contained in the replying affidavit terming the application an abuse of the court process, an afterthought, mischievous and lacking in factual and legal basis, overtaken by events as the applicant has already transferred what is due to her and that the same is inordinately late in filing. Mrs. Mwaura asserted that the applicant has not come to court with clean hands as she is already enjoying the fruits of the same judgment she wants to set aside as she has assumed ownership of her share already.

14. Learned counsel opined that the applicant who is a lawyer by profession is lying that she was coerced to enter into consent judgment as similar grounds of cruelty were raised during her divorce which was concluded the year 2007 and therefore the respondent's marriage to a second wife the year 2010 is not an issue.

Analysis and Determination

15. I have considered the application herein, supporting affidavit and supplementary affidavit thereof, replying affidavit and rival submissions by both counsels. Issues that fall for determination are as follows:

i. Whether the consent judgment entered on 22nd January 2015 was obtained through fraud, coercion, intimidation, malice, undue influence, misrepresentation and or concealment of material facts.

ii. Whether there is discovery of new material facts and evidence to warrant grant of the orders sought.

iii. Whether there was inordinate delay in filing the application.

16. The crux of the application herein is that the impugned consent judgment was obtained through fraud, coercion, threat, intimidation, non-disclosure of material facts and misrepresentation of material facts on one hand and that there is discovery of new material facts and evidence to warrant review of the consent judgment on the other hand.

17. The law governing grant of review orders is anchored under Order 45 (1) which provides:

Sub-Section 1– 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 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, 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.

18. As stated, there are two limbs of this application. I would like to start with the first one as whether the consent judgement was entered through intimidation, threat, coercion, fraud, misrepresentation or concealment of material facts. It is now settled law that for a court to set aside consent judgment, the aggrieved party must prove that the impugned consent judgment is tainted with fraud, coercion, illegality, mistake, an agreement contrary to the policy of the court or absence and ignorance of material facts among other factors (See **Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Ltd (supra)**). Similar position was held in the case of **Flora Wasike vs Destimo (1988) I KAR 625**). In the case of **POP – In (Kenya) Ltd and 3 others vs Habib Bank A.G.Zurich,(1990) e KLR**, the court of appeal held that:

“Parties are not permitted to begin fresh litigation because of the new views they may entertain of the law of the case, or new versions which they may present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end except when legal inequity is exhausted.”

19. In this case, the applicant has stated that the respondent was cruel to her in that he used to beat her thus compelling her parents to let him go with even the property. The grounds of cruelty listed in her divorce petition are the same ones listed and replicated in this case. There is

no dispute that the couple divorced sometime December 2007. The consent judgment was entered 22nd January 2015 long after they had divorced. Judgment was entered by an advocate representing the applicant who is also a lawyer. The consent judgment was a culmination of a prolonged persuasion and negotiation between parties from the year 2007. If adjournments granted for purposes of recording consent are anything to go by, cruelty that was meted out 9 years preceding entry of this judgment has no nexus at all.

20. There is no allegation or proof that she and her advocate were intimidated, coerced, influenced or even threatened prior to entry of consent judgment. We cannot use cruelty a ground of divorce to set aside or review the consent Judgment. After the two divorced, they went their way and they were at liberty to decide on what was good for them. In fact, the applicant has transferred most of the property allocated to her using the same judgment. The ground of threats, intimidation or coercion is without basis.

21. Was there misrepresentation or concealment of material facts? The applicant claimed that the respondent failed to disclose to him that he had married another wife by the time they were sharing the matrimonial property. The respondent does not deny that after divorce in the year 2007, he proceeded to marry in the year 2010. Was there any condition attached to the consent judgment that the respondent was not supposed to marry or have another wife after divorce? Was the respondent bound to communicate to the applicant that he had married after their divorce? The answer is in the negative. What was in issue at the time the consent judgment was entered was division of matrimonial property and not who had married who after divorce.

22. The respondent was not under obligation to remain single after divorcing the applicant. It is therefore immaterial whether the respondent was married or not at the time of entering consent judgment. That ground also lacks basis. A consent judgment is insulated against abuse by a litigant who may feel that he or she did not get what he deserved simply because he or she did not negotiate properly. To allow such new versions or change of circumstances and afterthoughts to vitiate a judgment voluntarily entered by consent by adults of sound mind and worse still advocates will in my considered view amount to an abuse of the court process. Why would it take 3 years for the applicant to discover that she was intimidated, coerced or threatened to enter into a consent judgment and even continue transferring property into her name using the power of the same Judgment.

23. Was there misrepresentation of material facts or discovery of new and important matter or evidence with regard to Kitui property which was not included in the consent judgment based on grounds that the respondent had lied that the property had been repossessed by a third party? Both parties are in agreement that that property is in existence but the same is a subject of a dispute between the respondent and a 3rd party hence ownership is not yet determined.

24. This position was known to both parties even at the time of entering the consent judgment and that is why it was not part of the consent Judgment. The position is still obtaining. The applicant has not proved that it has changed ownership to the respondent. There is however nothing new save to say that, the applicant should lodge a caveat on that property until ownership is determined so that if it passes to the respondent the same shall then be the subject for consideration and division.

25. As to the Kitengela/Kajiado/[particulars withheld] property on loan to K-rep and Nairobi Block [particulars withheld] not having complete transfer documents, the applicant admitted that she has since gotten her 10 acres out of the Kitengela/Kajiado/[particulars withheld] and Nairobi property transferred to her although she is complaining of having incurred exorbitant costs in changing ownership into her name. When judgment was entered, each party was deemed to have fully carried out search and was convinced that he or she was ready to take the property in the condition it was. In any event the titles have been separated and she is not the one repaying the loan hence no prejudice. Any costs incurred in transferring the property to her name was inevitable and incidental thereto hence cannot be reversed. I do not find anything new because she knew or ought to have known that Nairobi property was not transferred to her husband's name by the time of entering the consent. She accepted the property as it was. She cannot plead ignorance on her part.

26. The upshot of it all is that I do not find any discovery of any new material evidence or material facts that was not within her knowledge upon exercising due diligence or was there any apparent error on the face of the record. As stated in the case of **National Bank of Kenya Ltd vs Ndungu Njau Civil Appeal No. 611 of 1996**, a review of a court order may be granted if:

“ ... 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 the law. Misconstruing a statute or other provision of the law cannot be a ground for review.”

27. Was the application filed within reasonable time? This is mixed grill. On one part, it was not filed within reasonable time in so far as the allegation of coercion, intimidation and threats before entry of judgment. If this were true, it could not have taken her three years to file the application. This has already been dealt with herein above. However, on the second limb, there was discovery by the applicant that the dispute over the Kitui property had been finalized in favour of the respondent hence creating room for division of that property the same having been acquired during the subsistence of the marriage. This was occasioned by the respondent's lawyer one Itonga requesting the applicant to sign transfer documents in favour of the defendant sometime May 2017. Based on that discovery, the application cannot be said to have been filed late. Since there was no proof of that transaction, the applicant has a right to seek inclusion of the property for division at the appropriate time upon confirming that the dispute is over and the property is in the plaintiff's name or due to be transferred into his name.

28. However, the applicant is directed to file necessary ownership documents before the court within 45 days to confirm the status of ownership of Kitui property which then will separately be considered for division before reviewing the judgment for inclusion of that particular property.

29. Based on the above finding, the application to set aside and or review consent Judgment herein is hereby dismissed as it lacks merit. This being a family dispute, each party shall bear his or her own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF JULY, 2018.

J.N. ONYIEGO (JUDGE)

In the presence of :

Applicant/plaintiff.....In person

Mrs. Mwaura.....Counsel for the respondent/defendant

Edwin..... Court Assistant