REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO.18 OF 2014

FAUZIA ISSA.....APPLICANT/APPELLANT

VERSUS

ABDUSAMAD NOOR HASSAN.....DEFENDANT/RESPONDENT

R U L I N G

The notice of motion by the applicant dated 25.2.2016 prays for the following reliefs:

1. **This Honourable Court do grant leave to the firm of Arnold Otundo & Associates advocates to come on record for the applicant/appellant,**
2. **The Honourable court be pleased to grant a stay of or extend the stay of execution granted on the 5th day of February, 2014 and confirmation of grant which was confirmed on 29th October 2014 pending the hearing and determination of the application inter parties.**
3. **The Honourable court be pleased to review its orders made on 25th July 2014 and the confirmation of grant resulting. The applicant equally prayed for the costs of the application.**

The same is supported by the applicant's sworn affidavit dated 25th February, 2016. According to the applicant, the said judgment of the court delivered one and half years ago contains the following errors, which can be summarised as:

a. **the applicant a widow has been ordered to vacate the matrimonial home;**
b. **a minor Abdullhalim Noor Hassan has been dis-inherited;**
c. **the Kadhi's court lacked jurisdiction to entertain land matters;**
d. **the debt of Kshs.250,000/= did not form part of the estate;**
e. **no statement was availed from Barclays Bank Account No.082200519 to the court and despite the court dealing with it.**
f. **the KDF Act 2012 Pensions Regulation was breached;**

On his part the respondent did file a replying affidavit sworn on 2nd March, 2016 in which he depones that this court's work is functus officio and that the estate has since been distributed and nothing is left for redistribution and review. That the proper recourse for the applicant was to file an appeal.

This court has perused the entire proceedings together with its judgment of 25th July 2016 as well as the applicant's submission. Essentially all that the applicant is praying for is a review of the afore stated judgment.

Section 80(a) and (b) of the Civil Procedure Act as well as Order 45 rule (1) and (2) thereof permits a party to apply for review of a decision Order 45 rule (1)(a) and (b) provides as follows:

"1(1). Any person considering himself aggrieved -

a. **by a decree or order from which 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 of 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 an 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 order without unreasonable delay."**

It is not disputed that this matter arose from an appeal from the decision of the Kadhis court. The court consequently used the proceedings and judgment emanating from the said court in particular the evidence as adduced by the parties in arriving at its decision. In light of the above, could it be said that the issues raised by the applicant were not within her knowledge?

Is it possible that the matrimonial home, the age of the minor , the question of whether or not the Kadhis court lacked jurisdiction to entertain the land issues and the debt as well the account with Barclays Bank were issues which she had no idea at the time of prosecuting the proceedings before the Kadhi? Even further during the appeal exercise were there issues not within her knowledge?

I do not think so. There were very substantive issues and one could not have failed to raise them at any of the two occasions. To ask this court to review the same is tantamount to rehearing the appeal afresh. As clearly deponed by the respondent the proper recourse for the applicant was to file an appeal to the Court of Appeal. The issues she has raised are weighty and fundamental and cannot be reviewed.

More importantly the provisions of Order 45(1) (b) presupposes that the application ought to be brought without unreasonable delays. This application has been brought after 1 ½ years. Can that be termed a reasonable delay? I do not think so. The reasons adduced by the applicant for the delay in my view are too pedestrian.

I think I have said much to show that this application ought to fail. The same is dismissed with no order as to costs.

Dated, signed and delivered this 27th day of April 2016.

H. K. CHEMITEI

J U D G E