**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**FAMILY DIVISION**

**JUDICIAL SEPARATION CAUSE NO 45 OF 2014**

**A N M………………………….………PETITIONER**

***VERSUS***

**J T M……………….....…..…………RESPONDENT**

**RULING**

**PLEADINGS**

By a Notice of Motion application filed on 29th April 2015 by the Applicant, the Respondent sought review of this Court's Ruling of 24th March 2015. The Application is based on **Section 80 and 3A of the Civil Procedure Act Cap 21, Order 45 Rules 1, 2, & 3 of the Civil Procedure Rules, 2010** and all other enabling provisions of the law.

The orders sought on review are;

a. This Court reviews Order 1 of the Ruling delivered on 24th March 2015 on the basis that there is a mistake or error apparent on the face of the record and further there are sufficient reasons and in lieu therefore that the property namely L.R.No**.** ***[particulars withheld]*** (Grevillea Park ***[particulars withheld]*** Massionette No**.** ***[particulars withheld]*** Grevillea Grove Westlands) shall remain in the exclusive ownership of the Applicant and that the Respondent should not interfere with the same.
b. The applicant be allowed to lease the property namely L.R.No ***[particulars withheld]*** (I.R. No ***[particulars withheld]*** Grevillia Park ***[particulars withheld]*** Massionatte No**.** ***[particulars withheld],*** Grevillia Grove Westlands) for purposes of providing for the children pending the hearing and determination of this suit.

c. The Court to grant any other orders it deems fit and just.The Application is supported by the deponent's Ms Elizabeth Mungai' s affidavit on behalf of the Respondent that detailed excerpts from the Court Ruling of 24th March 2015 specifically;

***"That the transfer negates the matrimonial aspect of the properties as the Petitioner voluntarily gave up his spousal interest to the Respondent and the children. The operative law that allows the Respondent to exercise her ownership rights and enjoy the bundle of rights is now within the land laws."***

***"The registration of a person as the proprietor of land shall vest in that person the absolute ownership***

***of that land together with all rights and privileges belonging or appurtenant thereto."***

***"The facts before this court make it clear that the Respondent is the registered owner of the suit properties."***

***"That the Petitioner conclusively transferred ownership of the properties to the Respondent and he confirmed the same in an affidavit sworn by him."***

***"The evidence before this court demonstrates that the Petitioner intended that the properties be transferred exclusively to the Respondent. This makes clear that although the properties are matrimonial property, the Respondent is the sole registered owner of the same. On this basis the presumption in Section 93(1) of the Land Registration Act that the suit properties are held or jointly owned by the parties is rebutted."***

***"Now that it has been claimed that the suit properties came to be registered in the Respondent's name by way of fraud or misrepresentation"***

***"In the above regard this Court finds that the properties should remain in the Respondent's ownership unless any compelling evidence can be produced to justify otherwise."***

***"The Petitioner swore an affidavit in which he gave his free consent and disclaimed any interest in the suit properties. His deposition is in the Court's record. He cannot now be heard to claim that the suit properties should be returned to him. To deprive the Respondent ownership of properties which were willingly and procedurally transferred to her for the purpose of holding them in trust for the children is not justified especially when she currently has custody of the children of the marriage."***

***"Being a Court of law and equity the ends of justice will be best served by restraining the Petitioner's agents from interfering with the Respondent's enjoyment of her exclusive ownership of the properties and the car. All other transfers or division of matrimonial property shall be determined upon presentation of the matrimonial property settlement to court. If the division of thee matrimonial property shall ensue the transferred properties shall be taken into account amongst other relevant circumstances of the parties."***

***"The suit properties namely L.R. No. [particulars withheld], Mavoko Town Block [particulars withheld] and Mavoko Town Block [particulars withheld] shall remain in the exclusive ownership of the Respondent and that the Motor Vehicle Registration No. [particulars withheld] be released to the Respondent for her use, but their ownership shall not be transferred to any other person."***

According to Counsel for the Applicant, the fore stated excerpts are the basis of the Applicant's application.

The Applicant through the deponent stated that from the above excerpts of the Court Ruling, the same orders would follow for the Westlands property.

The Petitioner, by the Replying Affidavit filed on 11th June 2015 and he deposed as follows;

a. That property LR NO. ***[particulars withheld]*** (IR NO.***[particulars withheld]*** Grevillea Park ***[particulars withheld]*** Massionatte ***[particulars ]*** Grevillea Grove Westlands) is their matrimonial home.

b. The Petitioner objects to leasing or letting the matrimonial home and states that with regard to the children of the marriage, he offered, filed and recorded consents in the Family Court in Australia Parramatta and is already providing for upkeep of the children in terms of school fees, accommodation, clothing, food and upkeep costs, medical insurance, transport and holiday expenses.

c. The children issues are being handled in Australia Parramatta Family Court, which is seized of the issues of custody, visitation and provision for the children of the marriage.
d. The Applicant did not satisfy the provisions of **Order 45 Rule 3(2) CPR 2010.**

The Applicant through the deponent filed a further affidavit on 1st July, 2015 and reiterated that the suit property L.R ***.[particulars withheld]*** is no longer matrimonial property as the Petitioner transferred it to the Applicant as settlement of matrimonial property and the Court has taken note of the same in the Ruling delivered on 24th March 2015.

As part of property settlement the parties agreed the Petitioner would retain 600 acres of land in Kitui as per the attached copies of title marked **Exhibit 1a, b & c.**

The Petitioner and Respondent filed a consent on 1st June 2015 in Family Court in Australia Parramatta and it only referred to custody and visitation rights to the children of the marriage. The deponent asserted that the Petitioner is not providing for the children and if so he did not attach or provide proof of the same.

**SUBMISSIONS**

The parties opted to proceed by way of filing written submissions on the matter. The Applicant and Respondent filed their submissions on 9th July 2015 and reiterated in detail the contents of their respective affidavits.

In a nutshell, the Applicant stated that the application is properly before Court and have complied with **Section 80 of CPA and Order 45 (1) of CPR 2010.**

The applicant brought to the attention of the Court the following factors;

The parties acquired various properties during the marriage.

In 2013, the petitioner left the matrimonial home and transferred to the Respondent the home and other properties and there is no dispute on this.

The Respondent lived the matrimonial home with the children of the marriage until they relocated to Australia.

In reliance of **Section 24 (a) of the Land Registration Act, 2012** upon registration, then one exercises rights of absolute ownership.

On his part, the Respondent's submission in essence was that the order of court in question was proper given that the court does not have jurisdiction to entertain an application for distribution of matrimonial property prior to dissolution of the marriage.

The Respondent submitted that the transfer of the property by the Respondent to the Applicant was by no means a settlement for the parties' separation. The Respondent therefore urged the court to dismiss the Applicant's application.

**ISSUE**

1. Should the Application filed for review of the Ruling delivered on 24th March 2015 be allowed and upheld**?**

**LAW**

The Court has considered the submissions of both Counsel on the matter. The main ground for this

application is that that there is a mistake or error apparent on the face of the record. The scope of review is found under **Section 80 of the Civil Procedure Act**, which 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 the judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit."***

**Order 45 Rule 1 (1)** of the **Civil Procedure Rules** which derives from **Section 80** of the **Civil procedure Act** provides that:-

***"(I) 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 allowed and who from discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge and 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 review of the decree or order, may apply for a review of the judgment to the court which passed the decree or made the order without unreasonable delay."***

Therefore, there are three (3) grounds, which an application for review may be made. The first ground is from discovery of new and important matter of evidence. The second ground is on account of some mistake or error apparent on the face of the record and the third ground is for any sufficient reason. In the Applicant's application of 29th April 2015, the Applicant alleges that there is a mistake or error apparent on the face of the record and further that there are sufficient reasons to warrant the review of the orders of this court of 24th March 2015.

With respect to "a mistake or error on the face of the record", this principle was outlined in the cases of ***MICHAEL MUNGAI V FORD KENYA ELECTIONS & NOMINATIONS BOARD & ORS. (2006) EKLR*** in which the Court had borrowed from the principles as detailed in ***NYAMOGO & NYAMOGO ADVOCATES V KAGO (2001) 2 EA 173*** *as well as* ***MUYODI V INDUSTRIAL & COMMERCIAL DEVELOPMENT CORPORATION & ANOR (2006) 1 EA 243***. The principles outlined in the case of ***NYAMOGO & NYAMOGO ADVOCATES*** **the court observed as follows: -**

***"We have carefully considered the submissions made to us by the advocates of the parties to this appeal. 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".***

Similarly, the finding of the Court of Appeal in the **MUYODI case** held*:*

***"For an application for review under Order XLV, Rule 1 to succeed, the applicant was obliged to show***

***that there had been discovery of new and important matter or evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the fact of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay.***

***An error on the fact of the record could not be defined precisely or exhaustively, as there was an element of indefiniteness inherent in its very nature to be determined judicially on the facts of each case. There was a real distinction between a mere erroneous decision and an error apparent on the face of the record. An error that had to be established by a long drawn out process of reasoning or on points where there may conceivably be two opinions could hardly be said to be an error apparent on the face of the record. However, where an error on a substantial point of law stared one in the face, and there could reasonable be no two opinions, a clear case of error apparent on the face of the record would be made out; Nyamogo and Nyamogo v Kago applied".***

Having given due consideration to the application for review and the pleadings and arguments of both the Applicant and the Respondent, the Court addresses the matter as follows;

**EVALUATION**

The genesis of this matter is the Petitioner's pending petition for judicial separation filed on 27th February 2014. Before it could be heard and determined, the Petitioner filed an application under certificate of urgency seeking restraining orders against the Respondents' relatives from access and occupation of the matrimonial home; the suit property, in the present application and orders to repatriate the children of the marriage back from Australia.

This application took centre stage; first with a Preliminary Objection on the jurisdiction of the Court and the Court gave the Ruling on 1st December 2014.

The Respondent filed another application on 10th December 2014 and the Petitioner filed an application on 12th January 2015, which were both heard, and the Court delivered Ruling on 24th March 2015. This is the Ruling the subject of a review on the basis that there is an error on the face of the record.

The applicant quotes from the Ruling the reasoning that led to the transfer of suit properties; Mavoko Town Block ***[particulars withheld]*** & Mavoko ***[particulars withheld]*** and motor vehicle Registration ***[particulars withheld]*** to the Respondent as all of them were in the name of the Respondent and there was no evidence of fraud or misrepresentation. More so the Court took into account the fact that since the properties were transferred for the benefit of children of the marriage and the Respondent had physical custody of the children, it is in the best interests of the children the properties are at their disposal.

With regard to suit property L.R.***[particulars withheld]*** (Grevillea Park ***[particulars withheld]*** Massionate No ***[particulars withheld]*** Grevillea Grove Westlands) the Applicant stated that since the property was transferred by the Petitioner to the Respondent as evidenced by **Exhibit 2d** of the application filed on 10th March 2015; by the same analogy that applied to the other properties the matrimonial home ought to be transferred to the Applicant. This is the error apparent on the Court record.

The Court Ruling of 24th March 2014 is divided into 2 parts; pages 3-6 specifically dealt with the suit property; the matrimonial home of both the Petitioner and Respondent. The Court delved into the matter and relied on **Sections 12(1-5) of the Matrimonial Property Act 2013** as follows;

**Section 12 (2)** provides;

***''A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of the Court''***

**Section 12 (4) provides;**

***‘’Subject to subsection (3) a spouse shall not be evicted from the matrimonial home by any person except;***

a. ***On the sale of any estate or interest in the matrimonial home in execution of a decree***
b. ***By a trustee in bankruptcy; or***
c. ***By a mortgagee or charge in exercise of a power of sale or other remedy given under any law’’***

**Section 12(5) provides;**

> ***‘’The matrimonial home shall not be mortgaged or leased without written and informed consent of both parties.’’***

There are specific provisions with regard to the matrimonial home and therefore unlike the other properties that the Court declared belong to the Applicant; this Court did not find sufficient evidence on record to confirm the transfer of the home by one spouse to the other spouse.

This Court observed from the pleadings and submissions on record;

a. There is a valid marriage between the Applicant and Respondent and there are children of the marriage.
b. The issues before this Court are of judicial separation, injunctive orders with regard to the suit properties and transfer of the agreed suit properties.
c. The issues regarding custody, visitation and provision for the children of the marriage are before another forum. This Court cannot delve into this aspect of the matter.
d. The issue regarding divorce is also before another forum and not the subject to this Court and division of property would only follow after the divorce.
e. Both the applicant and Respondent vacated the matrimonial home but the same remains their home until dissolution of the marriage, division of matrimonial property, distribution with the consents of the spouses.
f. Whereas the Applicant through learned Counsel alleged that there was a Matrimonial Settlement Agreement, this Court has not been privy to the same, the Agreement was not produced in Court or evidence tendered to confirm this fact.
g. The pleadings and submissions are at variance and in conflict with regard to the issues raised; on the one hand the Respondent claimed the transfers made were to be reversed to his name and injunctive orders given that the Applicants relatives may not access the matrimonial home. On the other hand there is a transfer of the home to the Applicant but the Respondent claims his right to the matrimonial home. The law; **Section 12 of the Matrimonial Property Act, 2013;** irrespective of registration of the home, it protects each spouse’s right to the matrimonial home until dissolution of the marriage, division of matrimonial property, consents of spouses and/or order of the Court.

It is for the above reasons that this Court decided the matrimonial home remains property of both the Applicant and Respondent until hearing and determination of the matter in Court. This matter is still at the interlocutory stage; direct evidence has not been adduced to shed light on credibility of the rival pleadings deposed by the parties.

The only error that the Court’s attention is drawn to, is with regard to Order 2 of the Ruling of 24th March, 2015, where on transfer of the properties, it was included, the Land Reference L.R.[***particulars withheld]*** of the matrimonial home. This is a typographical error as Order 1 of the Ruling had dispensed with the matrimonial property. Secondly, the body of the Ruling consists of Pages 3-6 that dealt with the issue of the matrimonial home separately. The issue regarding the other properties;

Mavoko Town Block ***[particulars withheld]*** & Mavoko ***[particulars withheld]*** is addressed extensively at Pages 6-12 and with regard to motor vehicles at Pages 13.The reasoning follows that Order 2 ought not to include L.R. ***[particulars withheld]*** the matrimonial home.

**Section 99 & 100 of the Civil Procedure Act** envisage errors in judgments, decrees or orders of the Court. **Section 99 provides**;

***Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the Court either of its own motion or on application of any of the parties*.**

Pursuant to this provision Order 2 of the Ruling is amended to remove and delete the land reference of the matrimonial home as Order 1 of the Ruling addresses the issue. Finally the Court finds that the matter before Court though properly before the Court for review, the error apparent on the face of the record is in this Court's view with respect to Order 2 of the Ruling. Parties may exercise the right of appeal to address the issues.

**FINAL ORDERS**

1. **For the above reasons the Court finds the application for review of 27th April 2015 is upheld only to the extent of the typographical error of Order 2 of the Ruling of 24th March 2015.**
2. **The parties may pursue the ownership and transfer of the matrimonial home after divorce proceedings and division of matrimonial property proceedings**
3. **In the instant Court matter, the parties may adduce evidence on the transfer and ownership of the matrimonial home to conclusively determine the same one way or the other.**
4. **Issues regarding the Children are in the domain of the Australian High Court and this Court cannot canvass the same.**

**DATED, SIGNED AND DELIVERED IN OPEN COURT THIS DAY OF 21ST OCTOBER 2015**

**M.W. MUIGAI**

**JUDGE**

***In the presence of;***

*Ms. Judy Thongori for applicant*

*Mr. Mugambi Laichena for respondent*