REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MILIMANI

CIVIL SUIT NO: 53 OF 2003 (OS)

J K K.....PETITIONER

VERSUS

J K G.....RESPONDENT

RULING

The application I am called upon to decide is the Motion dated 6th December 2011. The applicant seeks the setting aside or review or vacation or discharge or revocation of the orders made by consent on 21st July 2005. The application is premised on Cap 160 of the Laws of Kenya Section 3A and 80 of the Civil Procedure Act and order 51 of the Civil Procedure Rules.

The consent in question stated as follows:-

"By consent -

1. ***The petitioner herein J K K has today abandoned her claim in all the matrimonial property listed in her Originating Summons dated 31st January 2003, except for the claim to the property listed as(witheld) situated in Kibera Ayany Estate. This is the property the applicant wife claims to have made substantial contribution to, and for which she receives monthly rent from the tenant, who is her son with the respondent".***

The Originating Summons was thereafter heard orally. Both parties testified on 25th May 2006. Judgment on the matter was pronounced on 2nd November 2006 by Dulu J.

The orders made on 21st July 2005 were interlocutory. Interlocutory orders are made within the suit and they are of two types. There are those made before judgment and those made after judgment. The post-judgement orders are restricted to a few matters touching on the judgement: review, release of exhibits, provision of typed proceedings (whether certified or not among others), among others. Post-judgment orders do not touch on substantive matters. Orders made prior to the pronouncement of the judgment can only be challenged by way of review following a proper application in that respect. Once judgment is pronounced the court becomes *functus officio* so far the issues raised in the pleadings and the orders made

in the matter prior to judgment are concerned.

A party who is aggrieved by an order by consent made prior to the pronouncement of a judgment should challenge the decision through an interlocutory application before judgment is pronounced. Once a judgment is pronounced the proceedings effectively come to an end. A judgment is final, it signals the completion of the proceedings, save for execution proceedings. It provides closure to the process. The court trying the matter ceases to have jurisdiction so far as the substance of the suit is concerned. The orders and decisions made by the court before it delivered judgment cannot thereafter be revisited by the same court. Such orders and decisions can only be re-examined by the trial court on review. Review on such orders and decisions can only be with respect to the judgment. The pre-judgement orders and decisions cannot be re-examined by the trial court separately and independently of the judgment. The trial court can only revisit them if issues are raised relating to them in an application seeking a review of the judgment. Otherwise once a court becomes *functus officio*, the remedy available to a party aggrieved by some order or decision or judgment of the court is to appeal to the higher court, if the law governing the matter does provide for a right of appeal.

The consent order of 21st July 2005 was a pre-judgement interlocutory order. The applicant, as a person aggrieved by that order, ought to have applied for its review or setting aside or vacation or revocation before judgment was pronounced by Dulu J on 2nd November 2006. The pronouncement of the judgment terminated the proceedings on 2nd November 2006. Thereafter this court become *functus officio* so far as the substance of the proceedings was concerned. There is no jurisdiction to revisit the order of 21st July 2005 after pronouncement of judgment. It could only be revisited it if it had been raised as one of the issues in a review application brought under Order 42 of the Civil Procedure Rules of the judgment pronounced on 2nd November 2006. A review of the order of 21st July 2005 independently of the judgment delivered on 2nd November 2006 is not feasible. The application before me has not been brought under Order 42 and review cannot be granted on the basis of the provisions cited in the application.

The application of 6th December 2011 appears to me to be an afterthought. It appears to be a reaction to the respondents' application dated 12th September 2011. The judgment of 6th November 2006 declared that (witheld), the subject of the consent order of 21st July 2005, was jointly owned by the applicant and the respondent in equal shares. The respondent by his application dated 12th September 2011 sought to have the judgment of 6th November 2006 implemented by asking leave of court to sell (witheld) so that the proceeds could be shared equally between the parties. It was after the applicant was served with this application of 12th September 2011 that she filed hers dated 6th December 2011 alleging that the consent of 21st July 2005 was recorded without her instructions. On the same date, 6th December 2011, she swore an affidavit in reply to the application dated 12th September 2011 asserting a similar position – that the consent orders of 21st July 2005 were recorded without her consent. I find it hard to believe that the applicant was unaware of the purport of the order of 21st July 2005 until she was served with the application dated 12th September 2011. Her challenge of the consent orders is coming seven (7) years after judgment. I note that her evidence on 25th May 2006 related only to the acquisition of the (witheld). She ought to have noted as far back as 25th May 2006 that something was amiss, if indeed she had not given instructions on the consent as she now alleges.

I find no merit whatsoever in the application dated 6th December 2011 and I hereby dismiss it with costs.

DATED, SIGNED and DELIVERED at NAIROBI this

12th DAY OF July, 2013.

W. M. MUSYOKA

JUDGE