REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Case 215 of 2000

GUNTER JOSEF RITSCHEL……..……....….PLAINTIFF

VERSUS

1. GISELA GEB JUNGEN BORK

2. LUGO KASGARA (As legal Representative of the Estate of Jaji Lugo)……..…….…….. DEFENDANTS

RULING

By a motion taken out pursuant to order XLIV rules 1,2 and 3 of the Civil Procedure Rules, Gunter Josef Ritschel, the plaintiff herein, prayed for the decree issued on 29/3/2007 to be varied by an order of review so that there is an order directing the parties to buy the share of the other in the house, the subject matter of the suit. The plaintiff swore an affidavit and a further affidavit in support of the motion. The defendants herein, Gisela Geb Jurgen Bork and Lugo Kasgara (As legal representative of the Estate of Jaji Lugo) strenuously opposed the motion.

On the 29th day of March 2007, Lady Justice Khaminwa delivered a judgment in favour of the plaintiff. The copy of the decree of the same date annexed to the affidavit of Gunter Josef Ritschell provides in part as follows:

"***1. That the ownership record of plot no. 1620 Shanzu squatter settlement scheme be amended to read***

(a) Gunter Josef Ritschel

(b) Kasgara Lugo as personal representative of Jaji Lugo

2. That the co-ownership be partitioned so that the title shall be issued in the names of the co-owners separately

3. That the 1st defendant do pay the plaintiff's and the 2nd defendant's costs of the suit to be taxed and assessed by the taxing officer of this court."

The plaintiff now wants to have the above decree varied by an order of review so that an order is issued to the effect that either party shall be at liberty to buy the share of the other in the house, the subject matter of this case. It is the submission of the plaintiff that the judgment is silent on the issue of the house standing on the parcel of land which the 2nd defendant has staked a claim on the house insisting that its owned jointly. It is averred that the 2nd defendant has on several occasions threatened to move into the house with his family to reside therein. The plaintiff avers that he has offered to buy the 2nd defendant's share of the plot but the 2nd defendant has refused insisting on the house. It is claimed that during the trial, the 2nd defendant only brought out evidence on the ownership of the plot. The plaintiff claims that the house therein was built by the 1st defendant and the deceased, Jaji Lugo whom the 2nd defendant represents, did not make any contribution. The plaintiff states that she is a retired Swiss National suffering from parkinson's disease hence it is impossible to share the house with the 2nd defendant and his family who come from a different ethnic background. The plaintiff stated that he is willing to have the property valued and any person willing to purchase the same to buy it so long as he is reimbursed the expenses he incurred in reconstructing the roof. The plaintiff has further stated that the house is not big enough to be shared by two families.

Mr. Omollo, learned advocate for defendant submitted in opposition. It is his argument that there is nothing new raised in the motion which can move this court to review the decree as proposed. It is also said that the application was filed after an unreasonable delay.

I have considered the competing submissions made by learned counsels on both sides. I have also perusal the material placed before me. The law is very clear when it comes to the principles to be considered before granting an order for review. The court of appeal restated those principles in the case of **Joshua Otieno Buyu =vs= Petro Ochieng Wasambwa C.A No. 347 of 2000 (unreported)** in which the court of appeal expressed itself as follows:

"***In an application for review, an applicant has to show that there has been discovery of new and important matter of evidence which, after the exercise of due diligence, was not within his knowledge and could not be produced at the time the decree was passed or on account of some mistake or error apparent on the face of the record or any other sufficient reason."***

The plaintiff says that the issue of the sharing of the house was not dealt with during the trial. In essence, according to the plaintiff, the issue was not envisaged. Though the issue touching on the house was not addressed to during the trial, it is obvious that the plaintiff knew that the issue will arise at the end of the trial. In fact the issue touching on the house is raised in the plaintiff's learned advocate's submissions dated 13/7/2006. Which read in part as follows:

"***There is also no counter claim by the 2nd defendant for the property. At best the 2nd defendant could be entitled to half the value of the plot on which the house stands."***

It is clear that the plaintiff did not act with due diligence in having the above issue raised. In the circumstances I do not think the decree should be reviewed. There was evidence all along that a house stood on the land.

A careful perusal of the order sought for shows that the plaintiff seeks for an order to direct either party to buy the share of the other in the house standing on the suit land. I do not think such a prayer can be granted by a court of law. Courts are not there to draw agreements for the parties but are there to arbitrate over disputes. I refrain from entering the arena to direct parties on how to share out what is due to them. Such a prayer should have been included in the pleadings or raised during the hearing of the suit.

For the above reasons I dismiss the motion with costs to the defendants.

Dated and delivered this 18th day of February 2008.

J. K. SERGON

JUDGE

In open court in the presence of Mr. Khatib for the plaintiff/Applicant and Mr. Buti h/b Kamoti for the Defendant.