REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NYERI
Civil Case 350 of 1999

S W W……...……RESPONDENT/PLAINTIFF

Versus

F W K……..…APPLICANT/DEFENDANT

RULING

The Respondent to the present application brought this action under Originating Summons brought under *Section 17* of the Married Womens Act. The suit was heard by this court and the judgment was delivered on 29th November 2006. The Applicant has now moved the court by way of Notice of Motion brought under *Order KLIV Rule 1 (1)* of the Civil Procedure Rules and *Section 3A* and *Section 80* of the Civil Procedure Act. The Applicant seeks review of the judgment delivered by the Honourable Lady Justice Okwengu on 29th November 2006. That application is based on the following grounds:-

"***(a) That whereas the Applicant produced in evidence certified true copies of the register of membership of Ragati Farmers Cooperative Society which production was not objected to by court nor by the Plaintiff the court never the less either deliberately or inadvertently omitted it or ignored the said evidence thereby failed to find that Land parcel Number NARUMORU BLOCK [particulars withheld] was bought before the marriage.***

(b) that failure the (sic) court to consider evaluate and rule one way or the other on the aforesaid very important issues that formed the very basis and backbone of the applicant's defence and then proceeding to dismiss the said evidence as it did in total disregard of the said evidence and as if that issue had never been raised was tantamount to and was as bad as dismissing the Applicant's defence without giving the applicant a fair hearing as envisaged by the provisions of Section 77(9) of the Constitution of Kenya.

(c) That the Applicant has come to the discovery of new and important matter and evidence which after the exercise of due diligence was not within his knowledge and could not be produced by him at the time when judgment was entered and which discovery shows that…(sic)"

The Applicant's argument in support of that application is that he owns property **NARUMORU BLOCK *[particulars withheld]*** which he completed paying the purchase price in 1971 before his marriage to the Respondent/Plaintiff. That the Applicant during trial produced in evidence certified true copy of the register of the land buying company which proved date of purchase. That through an unnamed brother the applicant had discovered a share certificate of that property which proved he was a shareholder of Ragati Farmers Cooperative Society in 1972. The Applicant then made un-substantiated allegations that the Respondent destroyed the original shareholder certificate. The Applicant further stated that 1972 was before his marriage to the Respondent. The Applicant further deponed in his affidavit in support as follows:

"***That the court's award concerning Land parcel MAGUTU/RAGATI/ [particulars withheld] amounts to mistake and error on the face of the record as the said Land is inherited and the Plaintiff was only entitled to the value of any improvement done by her which she did not prove.***

That the holding No. 3 of the Honourable court also amounts to mistake and error on the face of the record as they shifted the burden of proving the existence of the said Land to the Defendant instead of the Plaintiff who had made the allegation.

That the properties subject to Section 17 of the Married Women Property Act is only restricted to those properties in existence or registered in the name of one spouse at the time the proceedings under the said Section are heard.

That the judgment of the Honourable court is therefore erroneous in as far as it purports to include properties like motor vehicle registration Number [particulars withheld]B which was neither in the custody nor in the ownership of the defendant herein who is myself."

The Respondent in opposing the application denied the submissions of the applicant's ownership of **NARUMORU/BLOCK *[particulars withheld]***, before they were married. That the Respondent made contribution towards the completion of the purchase of that property and that in any case that she began to co-habit with the Applicant in 1970. The Respondent denied destroying the shareholder certificate and also denied being charged in a criminal court for such alleged act. The Respondent concluded by stating that there are no mistakes or errors on the face of the record as the court clearly deliberated and determined the issues before it.

I confirm that I have considered the judgment delivered on 29th November 2006 the subject of the present review application. Although I am of the view that the applicant's application, even if the allegation thereof were correct, is misconceived, I find that the ground upon which it is brought is not grounded on the judgment being attacked. The Learned judge who conducted the trial had the following to say in her judgment:

"***On his part the husband testified that he bought NARUMORU BLOCK [particulars withheld] on 13th October 1970 from Ragati Farmers Co-operative Society. He produced a copy of the membership register showing that he was registered as a member of the Society on 13th March 1970. He constructed a house on the Land even before he got married…….NAROMORU BLOCK [particulars withheld] is where the couple had set up a matrimonial home. It is not disputed that this property is registered in the name of the husband. The issue is when was the property acquired? The certificate of official search (D. Exh. 11) shows that he was registered as the proprietor in 1988…… Photocopies of what purports to be a register of membership of Ragati Farmers Co-operative Society was produced. No evidence was adduced as to who was maintaining the Register and why it could not be produced."***

That excerpt of the judgment is enough to persuade the applicant that his ground for seeking review is misconceived. Indeed considering the Applicant's application in totality, I am of the firm view that what the Applicant seeks is to be allowed to regurgitate the evidence presented at trial and to be allowed to present fresh evidence for the court to reconsider its judgment. That in my view is not the intention of *Order XLIV* of the Civil Procedure Rules. I found the Learned judge who conducted the trial considered the issues presented before the court and even if she had not, the correct venue for the applicant to question that is the Court of Appeal. In that regard I rely on the case **NATIONAL BANK OF KENYA -V- NDUNGU NJAU (1996) LLR 469** where the Court of Appeal stated:-

"***It will not be 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 and erroneous conclusion of Law. Misconstruing a statute or other provision of the Law cannot be a ground for review."***

In the AIR commentaries on the Code of Civil Procedure by Chitaley and Rao (4th ed) Vol. 3 at 3227 it is

stated:

"***A point which may be a good ground of appeal may not be a ground for an application for review. Thus, an erroneous view of the evidence or of Law is no ground for a review though it may be a good ground for an appeal."***

I believe I have said enough in this ruling to show that the Applicant's application is incompetent and misconceived but for completeness of that finding I borrow the words of Justice Ringera (as he then was) in the case of **EASTERN AND SOUTHERN AFRICA DEVELOPMENT BANK V AFRICAN GREEN FIELDS LTD AND OTHERS [2002] E.A. 377**, where he stated:

"***I am tempted to say that although the Plaintiff's application has the face of a review application, it has the heart of an appeal."***

The end result is that the application dated 30th January 2007 is hereby dismissed with costs thereof being awarded to the Plaintiff.

Dated and delivered at Nyeri this 29th day of June 2007.

MARY KASANGO

JUDGE