REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KAKAMEGA

Divorce Case 3 of 1997

M.M .....PETITIONER/RESPONDENT

V E R S U S

C.A.S .....RESPONDENT/APPLICANT

RULING

On 29.12.03, the applicant, C.A.S applied by way of Notice of Motion dated 23-12-03 for review of the judgement given on 16-12-98 and sought leave to file Answer to the divorce Petition. Among the grounds stated in the body of the application included the statement that "***the claim for matrimonial property in the Petition for divorce was bad in law, and that the decree granting distribution of the matrimonial property at the same time as the divorce was also bad in law."*** The grounds also included an allegation that the Applicant had instructed Messrs Anziya & Company Advocates to take steps in the cause but they failed to do so.

In his affidavit in support of the application, the applicant averred that he became aware of the Petition in 1999 after judgement had been given and when an application was made for an order of transfer of part of the matrimonial property. An error on the face of the record was alleged without amplification and the judgement and decree were attacked as being bad in law for the aforementioned reasons.

Mr. Kraido, learned counsel for the Applicant, submitted that the Applicant was not served with the Petition and that the hearing proceeded ex-parte and decree was being executed. The ex-parte judgement is dated 16-12-98 and the application to set aside was made four years later on 29.12.2003. In paragraph 2 of his supporting affidavit, the Applicant averred that he learnt of the Petition in 1999. He averred that M/S Anziya & Co. Advocates whom he instructed then did not take any steps inspite of their "***constant assurances that they would do the needful."***

The affidavit of the Applicant did not state when the Applicant instructed Messrs Anziya & Company nor when he became disillusioned with them. It does not also show when he instructed the advocates now on record. Relying on the applicant's supporting affidavit, Mr. Kraido contended that there was an error on the face of the record because of inclusion of matrimonial property in the cause, which was contrary to law.

Mr. Kamau, learned counsel for the Respondent, opposed the application and in doing so relied on the replying affidavit by his client. He contended that if the court was in error, the right course was to appeal and not, he said, to ask the court to sit on appeal on its own orders. He relied on the case of National Bank of Kenya Ltd. versus Ndungu Njau C.A. Civil Appeal No. 211 of 1996. He found fault with the application because it was premised on Order 44 which he said did not deal with setting aside. Because the application sought both review and setting aside it was his view that it should have been

brought under Order IXA Rule 10. But "***the setting aside"*** is a consequential order of review under order 44 and I find no fault in the application being premised on order XLIV Rule 1(1)(a) of the Civil Procedure Rules. Mr. Kamau further submitted that there was laches of 4 years. He relied on the case of ***Orero v. Seko (1984) KLR 238 at page 239.*** Mr. Kamau further drew the attention of the court to paragraph 13 of the replying affidavit and stated that the Applicant had on 3/11/99 appeared before the Judge and agreed to surrender a property, a fact that was not disclosed in the application. A careful perusal of the record shows that the Applicant appeared in court on 8/11/99 when he told the court he did not wish to give the Applicant 15 acres and was recorded as telling the court that he intended to appeal against the dissolution of the marriage. The record also shows that on 12-1-2001 the Applicant again appeared in court.

I have carefully perused the application and the replying affidavit. I have also given due consideration to the submissions of both counsel. The grounds on which the court may order review of a judgement are set out in Order 44 Rule 1(1) of the Civil Procedure Rules.

The court will exercise its discretionary power under Rule 1(1) of Order 44 to review judgement if it is satisfied that:

(i) there is discovery of new and important matter or evidence which after 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 was made; or

(ii) there was a mistake or error apparent on the face of the record; or

(iii) there is sufficient reason,

In ***National Bank of Kenya Limited v. Ndungu Njau – Civil Appeal No. 211 of 1996 (unreported),*** the court of Appeal had this to say on the question of review:

"***A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self evident and should require no elaborate argument to be established. It will not be a 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 reaching an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review."***

It is now accepted that the words "***for any other sufficient reason"*** in Rule 1(1) (supra) need not be analogous to the grounds specified in the rule because section 80 of the Civil Procedure Act Cap 21 confers an unfettered right to apply for a review. It has also been held that a point that may be a good ground of appeal may not necessarily be a good ground for review and an erroneous view of evidence or of law is not a ground for review though it may be a good ground for an appeal. ***(see Belinda v. Kangwamu (1963) E.A. 557).***

The application shows that the applicant's grounds for review were "***discovery of new and important matter and an error on the case of the record."*** The applicant has not satisfied the court that there was either an error on the face of the record or discovery of new and important matter. The reasons advanced may be a good ground for appeal but not constitute a ground for review. For that reason I am not inclined to allow the application.

The applicant was not entirely truthful and even if the application was brought under Order IXA rule 10 I would have been disinclined to allow it because the record shows that he knew of the Petition before 1999 yet in paragraph 2 of his affidavit he stated that he came to learn of the Petition in 1999. He failed also to explain satisfactorily the extreme dilatoriness of four years by disclosing the reasons that militated against his ability to come to court within a reasonable time. There was no evidence on the basis of which the court could determine that the delay was excusable.

I do not find merit in the application and accordingly I dismiss it with costs to the Respondent.

Dated, signed and delivered at Kakamega this 18th day of May, 2006.

G. B. M. KARIUKI

J U D G E