



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII**

Civil Appeal 44 of 1993

TERESA MORAA ANURI APPELLANT

VERSUS

PATRICK ANURI MARASI RESPONDENT

RULING

The respondent had appealed against the findings and judgment of District Magistrate Nyamira in a Divorce Cause. On 31st July 1995 both counsels for the appellant and the Respondent appeared before Justice Mbaluto (as then was). The counsel for the appellant addressed the court and then the following order was recorded:

“Order:-

By consent appeal allowed and the decision of the learned

District Magistrate set aside. Each Party to bear his/her own

Costs here and in the court below.”

It is the above order that the applicant who is the respondent in the appeal seeks to be reviewed and set aside. The ground supporting the application is that there was an error of law in the face of the record in that it purports to have been made by consent of the parties without the applicants consent.

Mr. Bosire who argued the application said the court did not record anything Mr. Nyasimi who was for the respondent said. He said that the applicant had not given any instructions to his counsel to consent. He said parties should have signed the consent order.

Application was opposed. It was submitted that there was no supporting affidavit filed as required by order 50 Rules.

I have carefully considered the application . As submitted there is no affidavit supporting the application. Order 50 rules 3 CPR do not expressly states that every motion shall be supported by an affidavit unless where there is a ground of evidence otherwise on grounds supporting the motion would suffice. In this case there is only one ground to support the motion. Applicant states that the consent order contains an error of law on record. However the court was not told which law is referred to. The only thing stated is that the applicant did not consent to the order. That is not an issue of law but of fact. The applicant who is the one alleging that he did not give instruction to his counsel ought to have sworn an affidavit on oath and say that he did not give such instructions. In absence of such an affidavit we only have submission

from the bar about such instructions.

There is not even an affidavit from Mr. Nyasimi who was the advocate for the applicant to state that he had no instruction. The court had directed that he do so way back in 1996. If he had had refused to do so the applicant should have sworn and filed an affidavit to that effect.

Thus though the record does not show what counsel for the applicant said on 31/7/95 there is also nothing to show that he did not consent to the order recorded. He was present representing the applicant. Indeed it is desirable for the court to record what all the parties states but that omission above is not fatal.

I therefore find application has no merit. It is dismissed with costs.

Dated this 12th day of April 2005

KABURU BAUNI

JUDGE

c.c. Mobisa

Respondent present

N/A for Appellant