



**BJL v JKL (Matrimonial Cause E069 of 2021)
[2023] KEHC 24427 (KLR) (Family) (9 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MATRIMONIAL CAUSE E069 OF 2021
EKO OGOLA, J
OCTOBER 9, 2023**

BETWEEN

BJL PETITIONER

AND

JKL RESPONDENT

RULING

1. The Application before this Court is dated 5th October 2022. The Respondent/Applicant prayed for the following Orders:-
 - a. Spent;
 - b. The decision of the Honorable Court dated and delivered on 28th March 2022 and 29th September 2022 be reviewed and the orders be set aside;
 - c. The costs of this Application be provided for.
2. The Application is based on the grounds set out therein and the Supporting Affidavit sworn by the Applicant. The Applicant avers that as per this court's ruling dated 28th March 2022, the Applicant surrendered motor vehicle [Particulars withheld] to the Petitioner. However, he was unable to surrender Kitengela House No. 63 because it belonged to a third party. Therefore, the court could not make any orders regarding that house until the third party was heard. He argued that the Kitengela house had never been their matrimonial house.
3. The Applicant argued that the Court granted the said order based on misdirection and misapprehension of the facts in finding the Applicant was guilty of disobedience of court orders. He reiterated that the Kitengela home was unknown to him and therefore he could not have transferred it to a third party. For these reasons, the Applicant prays for review of the said Orders so as to expressly



state that the property is unknown to him and as such he cannot comply with the court order dated 28th March 2022.

4. To put matters into context, the parties were married on 24th June 1997. The marriage has since been dissolved. Before the Divorce Petition was heard and determined, the Petitioner filed this instant suit vide Originating Summons dated 13th October 2021. The Petitioner listed properties that she claimed were jointly acquired, hence, they should be considered matrimonial property. The Petitioner prayed for the properties to be divided equally amongst them.
5. The Petitioner further prayed that pending the dissolution of their marriage, she should be allowed to live in their matrimonial house; Kitengela House No. XX and that she be allowed to use vehicle [Particulars withheld] Prado and [Particulars withheld] Pick up. In response to the Summons, the Respondent/Applicant deposed that Kitengela House No. xx was unknown to him. He further added that he did not own the two aforementioned vehicles.
6. The Court delivered its Ruling on 22nd March 2022. It was held as follows:-

“Regarding the matrimonial home at Kitengela House No. 63, it does appear clear that because the respondent found a man there, which the applicant denies, he declared that the applicant vacates the premises...On the basis of this provision, I direct that, because the parties are still married, the applicant shall immediately be allowed by the respondent to occupy the matrimonial home on Kitengela House No. xx. This is until this case is heard and determined.

...I have already stated in the foregoing that there is a rebuttable presumption that he holds this vehicle in trust for her. This being the case, I direct that the respondent surrenders [Particulars withheld] immediately for the use of the applicant...”

7. On 11th April 2022, the Petitioner filed an Application stating that the Respondent/Applicant had disobeyed the court order to hand over the Kitengela House No.63 to her. In response, the Respondent argued that the house did not belong to him but it belonged to a third party. Therefore, he is incapable of giving the house to the applicant. He insisted that the Petitioner moved out of the said house on her own volition and that she was never evicted.
8. On 29th September 2022, the Court delivered its Ruling stating as follows:-

“The obedience of a court is at the heart of the administration of justice. It is an obligation that binds any person against whom the order has been made. If the person thinks that the order is illegal or void he has to move with speed to have it reviewed and/or set aside.

If the respondent has since transferred the house, that would be an act in disobedience.

That being the case, I find that the respondent is guilty of disobedience of the order that was issued by this court on 28th March 2022.”

9. In response to this Application, the Petitioner filed a Replying Affidavit dated 28th February 2023. She deposed that the Applicant’s ignorance of the Kitengela house is feigning. She deposed that the house is indeed awaiting transfer as soon as the parties are able to raise the stamp duty. The Petitioner annexed to her affidavit, pictures of the house, pictures of the vehicle [Particulars withheld] parked outside the Kitengela house, pictures of the parties in the said house, and a certificate of official search stating that the Applicant is the registered owner of the Kitengela house. The annexures have not been disputed by the Applicant.



10. The Petitioner further deposed that the Applicant engaged in the illegality of transferring the Kitengela house. Therefore, the Applicant is a dishonest person and not one acting in good faith. According to the Petitioner, the Applicant disobeyed court orders as he was acting in bad faith by frustrating the process

Determination

11. I have considered the Application, the rival affidavits of parties, and the entire record of the Court. It is common ground that the High Court has the power to review its orders. But such power must be exercised within the framework of Section 80 *Civil Procedure Act* and Order *45 Rule 1*. Section 80 provides as follows:-

“ 80. Any person who considers himself aggrieved-

- (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- (b) by a decree or order from which no appeal is allowed by this Act,

May apply for a review of judgement to the court, which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

12. Order *45 Rule 1* provides as follows:-

“ 45 Rule 1

- (1) Any person considering himself aggrieved-
- (a) By a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) By a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the 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 made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for review of judgement to the court which passed the decree or made the order without unreasonable delay.”

13. The Applicant’s main contention is that the Court on two occasions made determinations based on misdirection and misapprehension of the facts. The applicant from the onset argued that the Kitengela house was unknown to him. The Court in its Ruling addressed his alleged ignorance. Therefore, this cannot be termed as discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made.



14. The other condition under Order 45 is ‘on account of some mistake or error apparent on the face of the record’. In *Nyamogo & Nyamogo v Kogo* {2001} EA 170 discussing what constitutes an error on the face of the record, the court rendered itself as follows:-

“An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a substantial point of law stares one in the face and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long-drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal.”

15. The Indian Supreme Court in the case of *Aribam Tuleshwar Sharma v. Aribam Pishak Sharmal*, speaking through Chinnappa Reddy, J., (SCC p. 390, para 3) 1 (1979) 4 SCC 389; AIR 1979 SC 1047 made a pertinent observation that it has to be kept in view that an error apparent on the face of the record must be such an error, which must strike one on merely looking at the record and would not require any long-drawn process of reasoning on points where there may conceivably be two opinions.

16. In *Attorney General & O’rs v Boniface Byanyima* HCMA No. 1789 of 2000 the court citing *Levi Outa v Uganda Transport Company* {1995} HCB 340 held that;

“...the expression mistake or error apparent on the face of record refers to an evident error which does not require extraneous matter to show its incorrectness. It is an error so manifest and clear that no court would permit such an error to remain on the record. It may be an error of law, but the law must be definite and capable of ascertainment.”

17. There is a distinction between a mere erroneous decision and a decision which could be characterized as vitiated by ‘error apparent’. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected. A review lies only for patent error where without any elaborate argument one could point to the error and say here is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it. Thus, a clear case of error apparent on the face of the record would be made out.

18. In the case of *Republic v Advocates Disciplinary Tribunal Ex parte Apollo Mboya* [2019] eKLR Mativo J. (as he then was) held as follows:-

“The term “mistake or error apparent” by its very connotation signifies an error which is evident per se from the record of the case and does not require detailed examination, scrutiny and elucidation either of the facts or the legal position. If an error is not self-evident and detection thereof requires long debate and process of reasoning, it cannot be treated as an error apparent on the face of the record for the purpose of Order 45 Rule 1 of the Civil Procedure Rules and Section 80 of the Act. To put it differently an order, decision, or judgment cannot be corrected merely because it is erroneous in law or on the ground that a different view could have been taken by the court/tribunal on a point of fact or law. In any



case, while exercising the power of review, the court/tribunal concerned cannot sit in appeal over its judgment/decision.”

19. What the applicant is raising requires examination and argument. He argues that the Kitengela house belongs to a third party and no orders should be made without the third party being heard. The Petitioner disagrees with this position and further attaches a certificate of official search stating that the Respondent is the registered owner of the Kitengela house. The Petitioner deposed in her sworn affidavits that she was chased away from the matrimonial home and she prayed to be allowed to live in it till the marriage is dissolved. The wisdom flowing from the cited jurisprudence is that no error can be said to be apparent on the face of the record if it is not manifest or self-evident and requires an examination or argument to establish it. In the instant case, therefore, I am not satisfied that there is an error apparent on the face of the record.
20. Review proceedings are not an appeal. The review must be confined to errors apparent on the face of the record; re-appraisal of the entire evidence; or how the judge applied or interpreted the law would amount to an exercise of appellate jurisdiction, which is not permissible. A point which may be a good ground for appeal may not be a good ground for review and an erroneous view of evidence or law is not a ground for review though it may be a good ground for appeal.
21. In view of my above conclusions, I find that the grounds cited do not qualify to be grounds for review to bring the application within the ambit of the grounds specified in Order 45 Rule 1. It is my finding that this is not a proper case for the Court to grant the review sought or even to exercise its discretion in favour of the Applicant. Accordingly, the applicant’s application dated 5th October 2022 is dismissed with no orders as costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 9TH DAY OF OCTOBER 2023

E.K. OGOLA

JUDGE

