



THE REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO. 25 OF 2018(O.S)

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT 1882

ENW.....APPLICANT

VERSUS

GSW.....RESPONDENT

RULING

Under consideration is the Notice of Motion dated 13th January, 2021 filed by ENW, the Applicant. She is seeking the following orders:

1. That this application be certified as urgent, in the first instance and the same be allowed to be heard on priority basis.
2. That this Honourable court be pleased to reinstate the Applicant's Application for Review dated 27th November, 2019 withdrawn on 3rd August, 2020.
3. That this honourable court be pleased to further review of this court's judgment delivered in Nairobi on 27th November, 2019 on account that there is an error or mistake on the face of the record as the presiding court failed and or neglected to order the respondent to declare and give accounts for all past and present dealings with the matrimonial properties through charging, leasing, selling, transferring or in any other manner alienating the properties and pays the applicant 100% of the full consideration and or income received in the event that any of the properties has been unilaterally disposed of by the Respondent.
4. That, costs of the Application be provided for.

In support of the Application, the Applicant has advanced the grounds found on the face of the Application and on the Affidavit sworn by the Applicant on the 13th January 2021. In summary form, the Applicant claims that despite providing evidence in respect of this matter, the trial court made an error on the face of the record in failing to order the Respondent to account for the following properties that form matrimonial property:

- (i) *L.R. NO. [...] Embakasi Nairobi;*
- (ii) *Sale of Shares in Printers Workers Housing Cooperative Society at Syokimau;*
- (iii) *Uasin Gishu/Chepsaita/[...] and*
- (iv) *Household effects and Family Plot at Matete Market.*

She claims that this is against the provisions of Article 45 (3) of the Constitution.

The Applicant has deposed that she filed the Notice of Motion dated 27th November 2019 seeking to have the Judgment of this court (Onyiego, J.) reviewed but she withdrew the application on 3rd August 2020. She now seeks to have the withdrawn Notice of Motion reinstated so that she can seek review of the impugned judgment. She further deposed that she provided the evidence at the trial that the above properties are matrimonial property and pleaded for declaration of accounts of the properties listed above but the court failed to grant the orders she sought and failed to share equally the property between her and the Respondent.

The Application is opposed on the grounds that both parties agreed to withdraw their applications for review and the notice of appeal filed by the Respondent. The Respondent deposed in his Replying Affidavit dated 18th February 2021 that valuation on LR NO. [...] Embakasi Nairobi was to be done in accordance with the terms of judgment but this did not happen as the Applicant wanted to be present during the valuation. That the Applicant makes reference to children yet they were all adults at the time judgment was delivered and that there was no proof of payment of school fees or maintenance that would be relevant to the matrimonial property proceedings. That the grounds upon which the application is based are that of an appeal and not for review. That the application seeks an order for reinstatement of the application for review dated 27th November, 2019 and at the same time seeks at prayer 3 an order for review on a ground which previously had not been raised in the former application.

In response to the Respondent's Replying Affidavit, the Applicant deposed in her Further Affidavit that she contributed towards the acquisition of LR No. [...] Embakasi Nairobi and that the Court made an error in failing to confirm that she spent Kshs. 1.6 million as deposit to purchase the property and continued to make further payments towards repaying the loan. She further states that contrary to court's finding that she did not prove the shares held in Printers Workers Co-operative Society, that it was on record that on 20th March, 1998 she was allocated plot No. [...] by Printers Workers Co-operative Society Ltd as shown by her attached letter of allocation. That it was an error to award 100% of the shares in Printers Workers Co-operative Society to the Respondent.

Directions were given to dispose of this application by way of written submissions. The Applicant's submissions are dated 5th May, 2021. Those by the Respondent are dated 18th May 2021. I have read the rival submissions. Both sets of submissions are part of the record of the court and I need not repeat them word for word in this ruling.

Central to the Applicant's submissions is the claim that the trial court made an error on the face of the record in granting the Respondent 100% of the shares in Printers Workers Housing Cooperative Society at Syokimau; that the court made an error on the face of the record in failing to make reference to the evidence on record to award property known as L.R No. [...] Embakasi Nairobi by sharing this property out in the ratio of 40% in favour of the Applicant and 60% in favour of the Respondent despite the Respondent having taken all the remaining properties at 100%. The Applicant identified the applicable law as Section 7 of the Matrimonial Property Act; Section 14 of the same Act and Article 45(3) of the Constitution.

She argues that the error apparent on the face of the record is 100% of the shares in Printers Workers Housing Co-Operative Society at Syokimau awarded to the Respondent when the record shows that these shares were allocated absolutely to the Applicant on 20th March, 1998 and the Respondent consented for her to benefit from the sale of the plot absolutely on 7th April, 2014. She continues to state that under Article 45(1) of the Constitution parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage.

The Respondent submitted that the Application ought to be declined for reasons that it contains procedural and substantive inadequacies. He submitted that the present application seeks different orders from the Application sought to be reinstated. The Respondent raised the issue as to whether there is any error/mistake on the face of the record. The Respondent relied on the case of **Republic -vs- Advocates Disciplinary Tribunal ex parte Appolo Mboya (2019) eKLR** in which court cited **Nyamogo -vs- Nyamogo** on what constitutes an error of fact on the record.

I have considered this matter. The Notice of Motion dated 27th November 2021 seeks three orders:

(i) Certification of the Notice of Motion as urgent, in the first instance and allowing it to be heard ex parte.

(ii) Review of the judgment dated 25th September 2019 to allow sharing of L.R No. [...] Embakasi Nairobi in the ratio of 60% to the Applicant and 40% to the Respondent.

(iii) Costs of the Application.

That Application was withdrawn. The court record shows that on the date when this Application was withdrawn, 17th September 2020, the court was told that there was on record a Notice of Withdrawal of the Application dated 3rd August 2020. Counsel for the Respondent did not have an objection to the Notice to withdraw the Application. The order of the court of that date reads as follows:

"Pursuant to the Notice of Withdrawal dated 3rd August 2020 seeking to withdraw Application dated 27/11/2019, the same is allowed and Application dated 27/11/2019 marked as withdrawn. File taken back to the Registry."

This is what has necessitated the current application seeking to reinstate that of 27/11/2019 which record of the court shows was withdrawn pursuant to a Notice of Withdrawal by the Applicant dated 3rd August 2020. The current application seeks an additional prayer, which is prayer No. 3 seeking orders that:

That this honourable court be pleased to further review of this court's judgment delivered in Nairobi on 27th November, 2019 on account that there is an error or mistake on the face of the record as the presiding court failed and or neglected to order the respondent to declare and give accounts for all past and present dealings with the matrimonial properties through charging, leasing, selling, transferring or in any other manner alienating the properties and pays the applicant 100% of the full consideration and or income received in the event that any of the properties has been unilaterally disposed of by the Respondent.

This is a new prayer that is not contained in the Application dated 27/11/2019 sought to be reinstated. This is what the Respondent claims to be a confusion in both applications and a review order different in scope from the previous application. It seems to me that the Applicant is seeking to amend her application dated 27/11/2019 without following procedure.

What concerns me is that the Applicant has not addressed the differences in her two applications in her affidavit or submissions. If this court were to allow the Application dated 13th January 2021 to succeed, what is being sought in the earlier application would be settled by that order and this would amount to determination of the application sought to be reinstated before hearing the parties.

On the issue of what constitutes an error/mistake on the face of the record, I have considered the provisions for review set out in section 80 of the Civil Procedure Act which provides as follows:

Section 80. Review

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 judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Further, **Order 45 of the Civil Procedure Rules** provides as follows:

Order 45 of the Rules:

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 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 a review of the judgment to the court which passed the decree or made the order without unreasonable delay. (emphasis added).

2. A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

These provisions (Section 80) clothe the court with the power to make orders for review and (Order 45) the jurisdiction and scope of review. *See Republic v. Advocates Disciplinary Tribunal Ex parte Apollo Mboya [2019] eKLR.*

In its decision in *National Bank of Kenya Ltd v. Ndungu Njau Civil Appeal No. 211 of 1996* the Court of Appeal stated as follows with respect to the jurisdiction of the court to review orders or judgments:

“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 reached an erroneous conclusion of law. Misconstruing a statute or other provision of law cannot be a ground for review.”

What constitutes an error or mistake on the face of the record is further considered in *Muyodi vs. Industrial and Commercial Development Corporation & Another [2006] 1 EA 243*, where the court held as follows:

“In Nyamogo & Nyamogo -vs- Kogo (2001) EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of 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 long drawn process of reasoning or 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 or wrong view is certainly no ground for a review although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us.”

In the matter before me, the Applicant admitted the circumstances under which her application dated 27/11/2019 was withdrawn but argued that she discovered further errors of fact and law in the judgment of the court she is seeking to review. This issue was picked by counsel for the Respondent to argue that errors of fact and law are not redressed by review but by an appeal.

In the matter under consideration, the Applicant identifies the error or mistake on the face of the record as the court’s action in granting the Respondent 100% of the shares in Printers Workers Housing Cooperative Society at Syokimau without reference to the evidence; failing to refer to the evidence on record to award property known as L.R No. [...] Embakasi Nairobi by sharing this property out in the ratio of 40% in favour of the Applicant and 60% in favour of the Respondent despite the Respondent having taken all the remaining properties at 100% and failing to order the Respondent to declare and give accounts for all past and present dealings with the matrimonial properties through

charging, leasing, selling, transferring or in any other manner alienating the properties and pay the Applicant 100% of the full consideration and or income received in the event that any of the properties has been unilaterally disposed of by the Respondent.

I have read the judgment sought to be reviewed. I noticed that the court considered the issue with regards to LR No. [...] Embakasi Nairobi when the court rendered itself that though the Applicant claimed that she bought the property and the same was held in trust for her benefit 100% there was no proof showing this. The only proof to this was the attached proof of her contributions towards the acquisition of the house. The court further appreciated the Applicant's direct and indirect contribution towards this property and proceeded to order the same to be shared in the ratio of 40% in favour of the Applicant and 60% in favour of the Respondent. Likewise in respect to Printers Workers Co-operative Society at Syokimau the court found that this property was acquired by the Respondent 100% and awarded it to the Respondent.

It is argued by the Respondent through his counsel that the Applicant has failed to pinpoint the alleged error or mistake on the face of the record and that what is clear is that the Applicant is dissatisfied with the judgment she is seeking to have reviewed basing her claim on Article 45(3) of the Constitution and therefore this matter does not fall within the ambit of review but appeal.

I agree with the Respondent on this argument. What the Applicant identifies as an error or mistake on the face of the record in my considered view is not self-evident but requires elaborate argument to be established. It amounts to revisiting the issues already addressed by my brother Justice Onyiego in the impugned judgment. What she identified as an error or mistake apparent on the face of the record does not stare one in the face. It is obvious to me that what she raises could reasonably lead to two or more opinions and to my mind and going by the authorities, this is not a clear case of an error apparent on the face of the record. In my view this is a matter which has to be established by long drawn process of reasoning or on points where there may conceivably be more than one opinion and therefore it can hardly be termed as an error apparent on the face of the record.

I need to make it clear that I am not sitting on appeal of my brother's judgment. The Applicant's Notice of Motion must be decided within the confines of what she has pleaded. She has a duty to disclose an error apparent on the face of the record within the ambit of Section 80 of the Civil Procedure Act and Order 45 of the Civil Procedure Rules. She has failed to do so. She sought and the court granted her orders to withdraw her Application she now seeks to have reinstated. By coming back to seek reinstatement of the same application she chose to withdraw and by changing the scope of the review she is seeking, the Applicant is abusing process of this court. What she ought to have done is to go on appeal.

Consequently, the Applicant's Notice of Motion dated 13th January 2021 is hereby declined. It stands dismissed. I however order that each party to bear own costs as earlier ordered by Justice Onyiego in the Judgment dated 25th September 2019. Orders shall issue accordingly.

Dated, signed and delivered this 8th July 2021.

S. N. MUTUKU

JUDGE