REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL SUIT NO. 8 OF 2017 (O.S.)

PB.....APPLICANT

VERSUS

AWB.....RESPONDENT

Coram: Hon. Justice R. Nyakundi

Gicharu Kimani Advocate for the Applicant

Respondent in person

R U L I N G

The applicant sought a review of this Court's Judgment involving the distribution of properties with the respondent. By dint of this application dated 30.4.2021, the applicant seeks orders of this Court to rewrite the entire Judgment afresh. The motion has filed is supported by his own affidavit asserting the same contextual facts on the marriage, dissolution and distribution of the marital estate.

As for the initial trial, it was not clear whether the respondent had been served with the Court process server. In this second challenge based on review, the appellant indicates that the respondent last known email has been procured making effective service possible. Notwithstanding that service upon the respondent no credible evidence was forthcoming in so far as the allegations of these marital assets are concerned.

Analysis

In this new application after delivery of Judgment, two twin issues arise:

> ***(1). What was the level of clarity as to the matters sought in the Originating Summons in the context of the burden of proof based on the pleadings?***
>
> ***(2). Coming up before the Court again whether, the applicant has satisfied the threshold pursuant to Section 80 of the Civil Procedure Act and Order 45 Rule (1) of the Civil Procedure Rules.***

Issue No. 1

The statutory provisions governing, the composition and jurisdictional procedures on the burden of proof for present purposes falls within Section 107, 108, and 109 of the Evidence Act. The burden of proof is the onus of proof vested upon a party who alleges existence or non-existence of a fact which he or she asserts for any Court to give Judgment. The concept of marshalling such evidence by the Court involves grouping together critical statements of the claimant and his or her witnesses for and against a particular point. It is from that position of a Judge takes a clear view of the various disputed points regarding the dispute.

The principle underlying this framework is the concept of appreciation by the Court meaning assessing the worth, value and quality of a particular piece of evidence. I bear in mind that the applicant's case was adduced pursuant to Section 43 of the Evidence Act whose basic rule of evidence is that no particular number of witnesses shall in any case be necessary for the proof of a fact. It is only the Judge who ought to weigh such evidence as its quality necessary to qualify the probability test.

In Civil cases the claimant bears the burden of proof to show that a cause of action exist arising from a set of circumstances whether contract, commercial, family, marriage etc. The balance of probability standard means that a Court is satisfied a fact or event occurred if the Court

considers that, on the evidence, the occurrence of the fact or event was more likely than not. The established criteria on this legal principle is to be found in **RE B {2008} UKHL 35 where Lord Hoffman** using a mathematical analogy stated:

> ***"If a legal rule requires a fact to be proved (a fact in issue), a judge or jury must decide whether or not it happened. There is no room for a finding that it might have happened. The Law operates a binary system in which the only values are 0 and 1. The fact either happened or it did not. If the tribunal is left in doubt, the doubt is resolved by a rule that one party or the other carries the burden of proof. If the party who bears the burden of proof fails to discharge it, a value of 0 is returned and the fact is treated as not having happened. If he does discharge it, a value of 1 is returned and the fact is treated as having happened."***

In another case of same jurisprudential question, the Court in **Re H (Minors) {1996} AC 563** stated as follows:

> ***"The balance of probability standard means that a Court is satisfied an event occurred, if the Court considers that, on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the Court will have in mind as a factor, to whatever extent is appropriate."***

In the particular case, that the more serious the allegation the less likely it is that the event occurred, and hence the stronger should be the evidence before the Court, concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accident physical injury etc. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although, the result is much the same, this does not mean that where a serious allegation is in issue, the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred the more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established. Whether the applicant likes it or not the legal burden of proof is consciously or unconsciously the acid test applied when the Court made a decision in that particular Originating Summons. As a trial Court, there was a struggle to distill on the facts proved and disapproved in so far as ownership of the marital estate was concerned between the parties.

The salient features on the proposed distribution was based on the affidavit by the applicant dated 6th March 2017 and his statement on oath during the hearing of his claim. It is crystal clear from the affidavit that the applicant asserted existence of the following immovable properties:

(1). Title Number Kiambaa/Kihara/xxxx.

(2). Plots Mtwapa Section III to wit – Plot xxxx (original xxxx/x)

(3). Plot Number xxxx (Original Number xxxx/xx)

(4). Plot No. xxxx (original Numbere xxxx/xx)

He further alleged that the original files are in the custody of the respondent. The applicant similarly attached a search certificate for **Kiambaa/Kihara/xxxx**. The affidavit evidence and applicant's own testimony left open-ended scenario to the Court on the acquisition of the properties listed as **Mtwapa Section (III)** with citation of corresponding numbers.

The applicant claimed contributory purchase but failed to show that by any documentary evidence the second form of evidence applicable was that trusteeship as a companion of the respondent. However, the facts asserted on the same vein are diametrically rebutted for lack of specifics of entries in the respective land registries or County Government repository on proof of payment of rates to ensure that they met the conditions set out in the letter of allotment of such documentary of ownership. The Court also discerns from the evidence on ownership of that those properties seemed to have changed hands to one **AA alias FA**. Hence the obligation was on the applicant to demonstrate that any such transfer to the aforesaid person mentioned in the title was done so fraudulently and not as a bonafide purchaser, for value. The evidence annexed on **Kiambaa/Kihara/xxxx** indicates that the property is an absolute right of the respondent as the sole proprietor. By virtue of said ownership in the land registry, the burden is imposed on the applicant to prove that fact on contribution.

Further the fact relevant here is one to be given that not only was the property acquired jointly but by its registration in the name of one spouse an automatic right of a share ensues on dissolution of the marriage. While one can appreciate the fact of marriage, between the applicant and respondent, the dilemma I find myself with greatest respect to the case is the missing threads of evidence contained in the affidavit and on oath before the Court. Thus for the applicant to prove and win his case, on distribution of the matrimonial property he simply had to establish the pleaded claim, by discharging his legal burden of proof.

Also it must be noted that **Mtwapa Section (III)** apparently changed ownership to a third party as illustrated in the annexed copies of titles. What happened in this transaction is a question of the legality of the sale. The applicant did not succeed in proving non-existence of a contract between the seller and purchaser and the breach of the covenant by the respondent. The Court had no evidence on misrepresentation or fraud or mistake for him to succeed so that the sale can be set aside. Presumptions, as a matter of Law or as a matter of fact allows this Court to assume the existence of a bonafide sale of **Mtwapa Section (III)** to the purchaser for value. Unless certain facts are presented to the contrary.

In the purview of this case are what the Court has been presented with is the fact of marriage and its dissolution. Contextually, the applicant had the burden to proof that he placed trust and confidence in the respondent in relation to the management of Mtwapa property, coupled with a transaction which was entered with **A**, can only be interfered with if he could show there was undue influence in the acquisition.

In such a case, the applicant would have to prove not only the fiduciary relationship but also satisfy the criteria of absence of good faith. It is

settled Law that the presumption of resulting trust is a rebuttable presumption of Law. In the present case, the burden of proving that the transfer was not intended to be passed to a third party – was the applicant to disapprove the resulting trust to that other purchaser. In a typical case of matrimonial cause on distribution of property, the applicant has to show that the respondent broke some rule.

The Court in receiving the applicant evidence and evaluating it at its highest and lowest in order to determine whether the matrimonial rule has been broken, those components to arrive at such a finding were missing. The Court could not completely ascertain about what happened in the past in relation to **Mtwapa Section (III)** properties. All we were told a sale occurred but important elements to a degree of probability remained in the realm of unknown.

I take the position that this was a case presented with scanty evidence with a ray of hope because the respondent never filed any suit papers, it would be a walk over for the applicant. Unfortunately, the standard of proof means that the Court must be satisfied that the event in question is more likely to have occurred.

Issue No. 2

The applicant also is asking this Court to review the Judgment on the entire model of distribution. The background to this application still remains to be the primary affidavit with a minor inclusion of attempted service upon the respondent. The pertinent provisions thereof on this remedy is provided for under Order 45 Rule of the Civil Procedure Rules. For easier reference it states as follows.

The scope of this Court's review jurisdiction was considered in the case of Independent **Medico Legal Unit v Attorney General of the Republic of Kenya, EACJ Application No. 2 of 2012** in which the court affirmed the current state of the Law as follows:

> ***"…… As the expression 'error apparent on the record' has not been definitively defined by statute, etc, it must be determined by the Court's sparingly and with great caution. The 'error apparent' must be self-evident; not one that has to be detected by a process of reasoning. No error can be said to be an error apparent where one has to 'travel beyond the record' to see the correctness of the Judgment – see paragraph 2 of the Document on 'Review of Jurisdiction of the Supreme Court of India' (supra). It must be an error which strikes one on mere looking at the record, and would not require any long drawn process of reasoning on points where there may conceivably be two opinions – see Smti Meera Bhanja v Smti Nirmala Kumari (Choudry) 1995 SC 455. A clear case of 'error apparent on the face of the record' is made out where, without 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 – see Thugabhadra Industries Ltd v The Government of Andra Pradesh 1964 AIR 1372; 1164 SCR (5) 174; also quoted in Haridas Das v Smt. Usha Rani Banik & Ors, Appeal (civil) 7948 of 2004. In summary, it must be a patent, manifest and self-evident error which does not require elaborate discussion of evidence or argument to establish – (See: Sarala Mudgal vs Union of India M. P. Jain, page 382, Vol. 1) Review of a Judgment will not be considered except where a glaring omission or a patent mistake or like grave error has crept into that Judgment through judicial fallibility – see Document: 'Review Jurisdiction of Supreme Court of India" (supra). The review jurisdiction of the Court cannot be exercised on the ground that the decision of the Court was erroneous on merit. That would be in the province of a Court of Appeal. A review cannot be sought merely for fresh hearing or arguments or correction of an erroneous view taken earlier. A review proceeding cannot be equated with the original hearing of the case. The purpose of the review jurisdiction is not to provide a back door by which unsuccessful litigants can seek to re-argue their cases. The parties are not permitted to begin fresh litigations because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the Court of the legal result. If this was permitted, litigation would have no end, except when legal ingenuity is exhausted – see Hoystead v Commissioner of Taxation (LR 1926 AC 155 at 165) A power to review is not to be confused with appellate power which may enable an appellate court to correct all manner of error committed by a subordinate court."*** **(See also Evans Bwire v Andrew Ngida, Kisumu High Court Civil Appeal Number 103 of 2000 (Birech, CA on 25 June 2001): Daniel Macharia Karagacha v Monicah Watithi Mwangi, civil appeal number 159 of 2000 (Kwach, Omolo and Bosire, JJA on 18 May 2001): Godfrey Ajuang Okumu v Nicholas Odera Opinya, Kisumu High Court Civil Case Number 337 of 1996 (Mwera, J on 17 July 2008)**

The question is simply this, are there grounds in the motion and affidavit that constitute existence of the grounds enumerated in the above cases to entitle the applicant a remedy to reverse, or vary the decision on distribution of the marital estate. It is clear from the letter and spirit of the application the applicant is substantially and materially agree with the entire Judgment and is determined to have the proceedings re-opened with the sole purpose of re-writing a completely new Judgment. Despite this agitation by the applicant, no new evidence has been supplemented into the category of original facts that might directly or indirectly affect the events in this particular case. To address the pitfalls asserted by the applicant.

What is new evidence for purposes of this case? The basic definitions provide a starting point. First, evidence includes testimony of a witness, documents tangible or physical objects that tend to prove or disapprove the existence of an alleged fact in issue. Under Section 107 of the Evidence Act, a fact is something that actually exists what then constitutes part of the claim to be proved or disapproved. For purposes of this trajectory new evidence is information regarding an aspect of truth or reality to proof a fact in issue on a balance of probabilities. That which was not represented at the initial trial but has now been availed to the review Court. The focus of this notice of motion as expressed by the applicant will be for the Court to look for information regarding facts that may have changed in the period between the initial trial and the review Court's consideration. For instance, such an application will represent a scenario that the new evidence that is now available was legitimately unavailable due to circumstances beyond the control of the applicant. In this case, new evidence for purposes of this application does not include evidence that was considered and relied upon by the session Judge but it was inadvertently left out of the formal record because the parties failed to either have the evidence admitted or at least misapprehended its probative value.

So far as the concerns raised by applicant, it would appear that the contention on the existence and contribution to the acquisition of the marital estate largely remains vague and non-specific. It is not immediately clear why the applicant considers that he is entitled to 50% of the estate which is the name of the defendant without first asking the Court to inquire into any agreements of sale which may have taken effect in whole or in part of that particular property. Whether any changes made to the ownership of the marital estate was in agreement contemplated by the parties to render the agreement unfair or unreasonable has not been materially proved by the applicant. Where, during

the subsistence of a marriage or co-habitation any question arises between the spouses as to the title to or possession of property either spouse has a right to lodge summons against the other third party said to be in possession as bonafide purchaser to show cause why title should not revert to the estate. There was no such application made by the applicant against the purchasers for value in **Mtwapa Section (III).** It is difficult for this Court to make a declaration for a division of that property without hearing the current registered owners. It is that stage the Court may make such orders as it thinks fit to alter the interest of either spouse in a just and equitable manner. It is trite that the rights conferred on any spouse by the provisions of the Matrimonial Property Act shall always be subject to the rights when other persons entitled to the benefit of any such property.

Its implication in the manner which is expressed in the affidavit is on an account of marriage and its dissolution but key parameters on contribution remains scanty on the piece of paper and issued witness statement on oath. I find that this undermines the applicant's credibility to entitle him the whole of the estate at an apportionment of 50%. It seems clear that the cases where the Court can intervene by way of review under Order 45 (1) of the Civil Procedure Rules to correct errors of facts and admission of fundamental piece of evidence material to the basis of the decision must be extremely rare.

In the Judgment of this Court, it will be highly unsatisfactory to quash the earlier Ruling for the sole reasons that it was founded on error apparent on the face of the record or for the applicant being in possession of new evidence or material referred to in his affidavit of support to the motion. The Court accordingly finds that the notice of motion cannot be sustained and it is unnecessary to interfere with the Ruling in any event.

In the result, I am satisfied that this application discloses no error of Law, or fact on the part of the trial Court and at its review jurisdiction, it must fail and is accordingly dismissed.

DATED, SIGNED AND DISPATCHED VIA EMAIL ON 15THDAY OF SEPTEMBER 2021

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R. NYAKUNDI

JUDGE