



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.12 OF 2019

BETWEEN

PO (Suing as a next friend of GMO).....APPELLANT

AND

EAO.....RESPONDENT

(Being an Appeal from the ruling and order in Busia Chief Magistrate's Court Divorce Case No.3 of 2014 by Hon. J.N Maragia - Resident Magistrate).

JUDGMENT

1. PO, the appellant herein, had sued as a next friend of GMO, for divorce against EAO, the respondent herein.
2. In her judgment, the learned trial magistrate dismissed the petition with costs.
3. The appellant was aggrieved by the ruling which was delivered on 11th July 2017 and filed this appeal. She was represented by the firm of J.P Makokha & Company Advocates. She raised eight grounds of appeal as follows:
 - a) That the learned trial magistrate erred in law and in fact and in law by refusing to allow the application dated 23rd December 2019 when there was sufficient reasons as to why a doctor could not appear as a witness at the time the matter was being heard.
 - b) That the learned trial magistrate erred in law and in fact and in law by refusing to allow the application dated 23rd December 2019 which sought to introduce new information which had not be available to the Petitioner at the time the substantive suit was heard.
 - c) That the learned trial magistrate erred in law and in fact and in law by failing to consider the relevance, weight and significance to the concluded case of the new information the petitioner was requesting the court to have a look at.
 - d) That the learned trial magistrate erred in law and in fact by basing her ruling entirely on the record of proceedings particularly on the fact that the issue as to whether the petitioner could sire children or not is an issue that had been raised and dealt with at the main hearing of the Divorce Case and therefore totally ignored the petitioner's averment of her discovery of new information.
 - e) That the learned trial magistrate erred in law and in fact by not considering the weight or otherwise of the new information the petitioner had sought to introduce in the proceedings upon re-opening of the case.
 - f) That the learned trial magistrate erred in law and in fact by making a ruling outside the tenets of law applicable for review and or setting a side judgment.
 - g) That the learned trial magistrate erred in law and in fact and in law by not appreciating the import and effect to the purported marriage of the evidence adduced in court pertaining to the mental persisting mental incapacity of the petitioner in the context of the Exhibit marked P.O – 001 a,b,c annexed to the affidavit of one Praxedes Otieno dated 3rd April 2017, information therein having not been available at the time the substantive suit divorce was being heard.
 - h) That the learned trial magistrate erred in law by failing to appreciate that the proposed new evidence fills in the gaps apparent and inconsistencies in evidence of DW1 at pages 13 including the admission that the Petitioner was totally handicapped, that he used to be baby sat but that he has never seen him since 2013. The evidence of DW1 is contradicted by evidence of DW2 that Petitioner has

a slight problem but was normal and the Evidence of DW3 that the Petitioner was mentally challenged from birth which inconsistencies taken as whole make the entire judgment as delivered wanting and erroneous and thus amenable to review, variation and or setting aside.

4. The respondent was represented by the firm of Maloba & Company Advocates. She opposed the appeal on grounds that the appellant wanted to introduce new evidence contrary to the law.

5. This Court is the first appellate court. I am aware of my duty to evaluate the entire evidence on record bearing in mind that I had no advantage of seeing the witnesses testify and watch their demeanor. I will be guided by the pronouncements in the case of **Selle vs. Associated Motor Boat Co. Ltd. [1965] E.A. 123**, where it was held that the first appellate court has to reconsider and evaluate the evidence that was tendered before the trial court, assess it and make its own conclusions in the matter.

6. On 15th January 2020, parties sought and were given directions to canvass the appeal by way of written instructions. Both parties filed and exchanged submissions.

7. Though on the grounds of appeal the appellant refers to an application dated 23rd December 2019, my perusal of the record indicate that there was no such an application but it would appear the intended application is the one dated 23rd December 2016. What did the application dated 23rd December 2016 seek? The application was seeking the review of the judgment delivered on 29th November 2016 premised on the following grounds:

- a. That there was an apparent error on the face of record.
- b. There was new and compelling evidence which could not have been produced at the time of hearing of the petition.
- c. That there was conflict of interest on the part of the advocate for the respondent for he was still a family lawyer for the family of the appellant /applicant.

8. When a party alleges there was an apparent error on the face of the record, the same must be manifest. One does not need a toothpick to find one. The Court of Appeal in the case of **Nyamongo & Nyamongo vs. Kogo [2001] 1 EA 173** said:

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 a real distinction between a mere erroneous 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 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 apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review although it may be for an appeal.

In the instant case, I have perused the judgment dated 29th November 2016 and I have not noted any error, nor was any pointed out to the learned trial magistrate. The application dated 23rd December 2016 did not therefore satisfy the requirements for a review.

9. The appellant contended that the new evidence was in relation to in respect of Dr. J. Omondi. Order 45 Rule 1 provides:

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

For an application for review to succeed on this ground, an applicant has a duty to prove that the new evidence was not discoverable at the time of hearing even with the exercise of due diligence. In the instant case, the evidence of Dr. Omondi was not demonstrated to be such evidence and the application could therefore not turn on this ground.

10. I have perused the entire record and it comes as a surprise for the appellant to claim that the advocate for the respondent was a family advocate and therefore had a conflict of interest. This issue did not arise at any stage. This was therefore an afterthought.

11. From the foregoing analysis of the evidence on record, I find that the appeal lacks merit and the same is dismissed with costs.

DELIVERED and SIGNED at BUSIA this 8th day of April, 2020

KIARIE WAWERU KIARIE

JUDGE