REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

ELC CASE NO. 130 OF 2014

A N M……PLAINTIFF/RESPONDENT

VERSUS

D N M ……DEFENDANT/APPLICANT

RULING

The parties herein were former spouses having been married customarily in 1976 which union was solemnized in church in 1980. They however parted ways in 1992 before formerly divorcing in 2005 having been blessed with five (5) children.

Following their divorce, the respondent (as applicant) moved this Court under the then **Matrimonial Causes Act** citing a declaration that the applicant (as respondent) holds several matrimonial properties in trust for her.

After hearing the parties, this Court delivered a judgment on **4TH DECEMBER 2015** in which it declared that the respondent is entitled to half of some of the matrimonial properties including land parcel No. [particulars withheld] which was their matrimonial home. The applicant has not appealed against that decision. Instead, on **6TH JANUARY 2016,** the applicant moved this Court citing the provisions of Sections **3A, 34 and 80 of the Civil Procedure Rules** and other enabling provisions of the law seeking the following orders:-

1. ***That the judgment has been delivered on this case for those lands to be shared equally between the parties on 4TH DECEMBER 2015.***
2. ***That this Honourable Court may be pleased to make a review of the three registered lands.***
3. ***That this Honourable Court may be pleased to order the plaintiff to desist from claiming the share of [particulars withheld] 408 because that is where I live.***
4. ***That she moved from here (sic) reserve to Nairobi 2005. There she bought plot [particulars withheld] 5-428 Kayole.***
5. ***She lives there, she build her big home and business too.***
6. ***That these (sic) be no order as to the costs of the application***.

The application was based on the grounds set out therein and supported by the applicant's affidavit. His case is that he has lived on land parcel No. [particulars withheld] 408 for 33 years and has no other home. He adds that he agrees with the judgment but proposes that the respondent be given 1 ½ acres out of land parcel No. [particulars withheld] 1122 and 5/8 of an acre out of land parcel No. [particulars withheld] which would therefore entitle the respondent to 2 1/8 acres while the applicant's second wife **E W M** also retains 2 1/8 acres.

In opposing the application, the respondent **A N M** filed a replying affidavit in which she drew the

Court's attention to the applicant's averments in paragraph 4 of his supporting affidavit in which he says he agrees with this Court's judgment. She added that the applicant does not live on land parcel No. [particulars withheld] and infact lives with his second wife at **KAITHERI** near **KERUGOYA TOWN** and that it is their son **S K** who lives on that parcel of land. She deponed further that their other son **M K** (deceased) also used to live on that land and she had to obtain a Court order to have him buried there after the applicant had refused. She therefore asked the Court to dismiss the application with costs as being frivolous and an abuse of the process of the Court.

Since the applicant was in person, the Court directed that the application be canvassed orally.

When the application came up on **19TH APRIL 2016** and having looked at the prayers, it occurred to me that what the applicant was attempting to do was to make an offer to his estranged wife. As is my practice in family disputes, I gave them time to go outside the Court and perhaps try and agree on some amicable settlements. I had made a similar attempt prior to the hearing of the suit and advised the parties to take advantage of an adjournment to discuss and report to the Court. Unfortunately nothing was achieved. Tempers flared and at the end of the session, I had to intervene and provide Ms Fatuma and her client with Police Escort out of the Court premises. But that was after I had heard both the applicant and Ms Fatuma orally on the application.

In his submission, the applicant told the Court that he was offering the respondent a share out of land parcel No. [particulars withheld] and [particulars withheld] but insisted on retaining the matrimonial home on land parcel No. [particulars withheld] saying that is his only home and if he moves out, he will be rendered a destitute. He also added that he is the one who takes care of the grave of their son.

In response, Ms Fatuma counsel for the respondent told the Court that the applicant said he agreed with the Court's judgment and therefore his application should be dismissed. Counsel added that the applicant does not even live at the matrimonial home and instead has lived at **KAITHERI** near **KERUGOYA TOWN** since 1993.

I have considered the application, the rival affidavits and the oral submissions by the applicant and Ms Fatuma counsel for the respondent.

The applicant was acting in person and therefore his pleadings could have been better. He cites **Section 80 of the Civil Procedure Act** and is therefore seeking a review of this Court's judgment delivered on **4TH DECEMBER 2015**. He also seeks an order to direct the respondent to desist from claiming a share in land parcel No. [particulars withheld] because that is where he lives. The Court cannot of course grant him that prayer as it would amount to sitting on appeal over my own judgment.

Section 80 of the Civil Procedure Act provides as follows:-

"***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 an review of judgment to the Court which passed the decree or made the order, and the Court may make such orders thereon as it thinks fit".***

Order 45 of the Civil Procedure Rules which is the procedural provision states as follows under ***Sub-rule (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 the judgment to the Court which passed the decree or made the order without unreasonable delay".

For a party to be entitled to an order for review therefore, he must demonstrate the following:-

a. ***discovery of new and important matters 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, or***
b. ***on account of some mistake or error apparent on the face of the record, or***
c. ***for any other sufficient reason***

The application must of course be made "***without un-reasonable delay***". The judgment sought to be reviewed was delivered on **4TH DECEMBER 2015** and this application was filed on **6TH JANUARY 2016.** There was therefore no un-reasonable delay in filing this application.

The applicant did not annex a copy of the judgment or decree sought to be reviewed. However, the respondent annexed a copy of that decree to her replying affidavit and no prejudice was caused to the respondent and I would consider that omission to be a mere technicality curable by ***Article 159 (2) (d) of the Constitution.*** Besides, the overriding objective of the law is to do justice to the parties.

In moving a Court under the provision of ***Section 80 of the Civil Procedure Act*** or ***Order 45 of the Civil Procedure Rules***, a party must show that he is ***"aggrieved***" by the decree or order sought to be reviewed. And in order to do this, the applicant must point out exactly what part of the decree or order he is aggrieved about. It is clear from this application that the applicant has not shown what portion of the decree or order or indeed what portion of the judgment he is aggrieved by. If anything, and as demonstrated by the respondent, the applicant was not really aggrieved by this Court's decree arising out of the judgment dated **4TH DECEMBER 2015**. In paragraph 4 of his supporting affidavit, the applicant has deponed as follows:-

"***That I agree with the judgment of sharing the lands into equal shares of half – half"***

What the applicant appears to be seeking in his application is the Court's approval of an offer he is making to the respondent. And that is why I encouraged the parties to try and reach some amicable settlement which however they did not achieve. That is not what ***Section 80 of the Civil Procedure Act*** or ***Order 45 of the Civil Procedure Rules*** is meant to address.

Looking at the application closely, it does not disclose what "***new and important matter or evidence"*** the applicant has now procured which "***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 "***any other sufficient reason***". In short, the applicant has not come anywhere near what is required of him to warrant a grant of the order of review. His application is clearly devoid of merit.

The applicant's Notice of Motion dated **6TH JANUARY 2016** is accordingly dismissed. Each party to meet their own costs.

B.N. OLAO

JUDGE

3RD JUNE, 2016

Ruling delivered, dated and signed in open Court this 3rd day of June 2016.

Mr. Murigu for Fatuma Wanjiku for Plaintiff present

Defendant in person present.

JUDGE

3RD JUNE, 2016