



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL CASE NO. 165 OF 2009 (O.S.)

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

S K W.....APPLICANT

VERSUS

P N W RESPONDENT

RULING

1. Before this Court is the Notice of Motion dated 15.4.16 by which the Applicant seeks the following orders:

“1. *THAT* this Honourable Court be pleased to review/amend the judgement it issued on 28.9.15

2. *THAT* costs of this Application be provided.”

2. The background of this matter is that S K W, the Applicant herein filed an Originating Summons (OS) against her husband P N W, the Respondent dated 25.3.09 seeking **inter alia a declaration that the following properties were acquired solely by the Applicant with no financial contribution from the Respondent and that the same be valued and sold and the proceeds thereof be shared between the parties on a ratio of 90:10 in favour of the Applicant:**

a) Subdivision No. [particulars withheld] Section III Mainland North which is registered in the name of the Respondent, the development thereon being a 5 apartment block (the Apartments”);

b) Kilifi/Mtwapa/[particulars withheld] registered in the joint names of the Applicant and the Respondent the development thereon being a borehole, 3 water tanks and a 2 bedroomed house which she referred to as the Shamba.

3. On 26.11.14, the OS was amended to include **Subdivision No. [particulars withheld] Section III Mainland North as it had become apparent that the Apartments sat on this plot as well as Subdivision [particulars withheld] referred to above.** In a Judgement dated 28.9.15 and delivered on 28.10.15 by Emukule, J on her behalf, Odero, J. found that the Applicant and the Respondent herein are each entitled to an equal 50% share of the properties. She further directed that the same be valued by an independent valuer and sold and the proceeds thereof be shared equally between the parties.

4. The grounds upon which this Application is based are that the Judgement for which a decree was drawn has an error/mistake apparent on the face of it. The mistake is that in the Judgement, a determination was made in respect of Subdivision No. **[particulars withheld]** and Kilifi/Mtwapa/**[particulars withheld]** but Subdivision **[particulars withheld]** was omitted.

5. It is the Applicant's case that the Property was erroneously omitted from the judgement having been included in the claim on 26.11.14 when the learned Judge allowed an amendment to the OS to include the said property. That during his testimony, it became apparent that the Apartments sat on Subdivision **[particulars withheld]** and **[particulars withheld]** prompting the Applicant's counsel to apply for amendment of the OS to include Subdivision No. **[particulars withheld]**. The Application for amendment was allowed. The effect of the amendment is that Subdivision **[particulars withheld]** was included in the OS as an issue for determination. That the effect of this omission is to render the sale of the Apartments as directed by the Judge, impracticable.

6. It was submitted for the Applicant that the Judge at page 3 of the judgement described the property in question as "LR Subdivision **[particulars withheld]** being the Apartments". The judgement however made no mention of Subdivision **[particulars withheld]** even though the Court had noted that the Apartments rested on the two plots. It was argued that the effect of the Judgement as it reads is that the apartments cannot be sold if the Subdivision **[particulars withheld]** is not included thus rendering the Judgement impossible to execute and thus in vain.

7. The Respondent opposes the Application. He claims that he undertook a search of Subdivision **[particulars withheld]** and that to his surprise, the search revealed that the same is registered in the names of other parties, A Cand M C. He has since lodged a complaint with the Land registrar in Mombasa. Copies of the Certificate of Search and letter of complaint were annexed to his Affidavit. The Respondent further claims that there is nothing ambiguous about the Judgement of the Court as the Applicant sued him to share one piece of land on which the Apartments stand and directions were given for the sharing of the said property between the parties on a 50/50 basis.

8. It was submitted on behalf of the Respondent that there is no error apparent in the judgement. That the learned Judge referred to the block of apartments as the properties and was under no obligation to mention both Subdivision **[particulars withheld]** and **[particulars withheld]**. That if the Applicant is unhappy with the judgement then her remedy lies elsewhere and not in review which is not available in this case. It was argued that in the holding of *Kanyabwere v Tumwebaze* review is not available except in very specific circumstances. That the instant case requires extraneous matters to explain error as perceived by the Applicant. It was further submitted that the Court was being invited to rewrite the judgement of Odero, J. which is not the purpose of review. That analysis of evidence and conclusions cannot be reviewed in an application for review. It was submitted that this Court cannot sit on appeal of a decision of a Court of concurrent jurisdiction.

9. I have considered the Application as well as the submissions by counsel on behalf of the parties. The power to review its own decisions is conferred upon the Court by Section 80 of the Civil Procedure Act which provides:

"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."

10. Order 45 Rule 1 of the Civil Procedure Rules under which the instant Application is brought, sets out the grounds upon which an application for review ought to be based as follows:

“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.”

11. The Application for review herein is grounded on what the Applicant claims to be an error apparent on the face of the record. The error that she claims to be apparent on the face of the record, is that the learned Judge in directing that the Apartments be sold omitted Subdivision **[particulars withheld]** yet she acknowledged that the Apartments rested on Subdivisions **[particulars withheld]** and **[particulars withheld]**.

12. I agree with the submissions for the Respondent that the Applicant sued the Respondent for one piece of land on which the Apartments stand. The record is clear that the OS referred to ***“Certificate of Title Number CR [particulars withheld], Subdivision No. [particulars withheld] ... registered in the respondent’s name, and the developments thereon to include a 5 apartment block, altogether hereinafter referred to as The Family Home”***. However the record further shows that in the course of the Respondent’s testimony on 26.11.14, it became apparent that the Apartments are built on 2 plots namely Subdivisions **[particulars withheld]** and **[particulars withheld]** Section III Mainland North, prompting counsel for the Applicant to apply to amend the OS to include Subdivision **[particulars withheld]**. In allowing the amendment, the learned Judge stated

“It is clear to me that the real question in controversy is the house constructed on the land in Mtwapa. This is house covers Plot [particulars withheld] & [particulars withheld] by the Respondent’s own evidence”

The Judge then ordered that Respondent supply a certified copy of the title, which the he did. I agree with the Applicant that the effect of the amendment is that Subdivision **[particulars withheld]** became part of the properties the subject of the dispute and thereby became an issue for determination. Indeed the learned Judge stated in the introduction in the Judgment:

“Before court is the Originating Summons dated 25.9.09 and amended on 26.11.11”

13. In the Supreme Court of Uganda case of Kanyabwera v Tumwebaze [2005] 2 EA, cited by the Respondent, Oder, JSC stated

“In order for an error to be a ground for review, it had to be one apparent on the face of the record that did not require any extraneous matter to show its correctness. It had to be so manifest that no court would permit it to remain on the record”.

14. In the instant case, the learned Judge while considering the issues relating to the Apartments only referred to Subdivision **[particulars withheld]** and omitted Subdivision **[particulars withheld]** yet she herself acknowledged that the Apartments were built on both plots. Given that the learned Judge found that ***the real question in controversy is the house constructed on Subdivisions [particulars withheld] & [particulars withheld]*** the omission of Subdivision **[particulars withheld]** is in my view an error apparent on the face on the record and requires no extraneous matter to show its correctness.

15. In National Bank Of Kenya Limited v Ndungu Njau [1997] eKLR Kwach R.O, Akiwumi A. M & Pall G. S, JJA stated:-

“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 not require an 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.”

16. In the instant case, there is an obvious omission on the part of the Court. This omission is self-evident and does not require elaborate argument or a long drawn process to be established. The omission of Subdivision **[particulars withheld]** in the judgement appears to me to have been inadvertent. Had it not been, the learned Judge would not have referred to the amended OS and further she would have made a clear pronouncement on the same separately. The error is clearly one apparent on the face of the record and is in my view sufficient ground for review.

17. Courts of law exist to administer substantive justice. A review of the Judgement of 28.9.15 is necessary so as to give effect to what the intention of the Court was when Judgment was given. The intention of the Court as can be discerned is the sale of the Apartments which sit on both Subdivisions **[particulars withheld]** and **[particulars withheld]**. Allowing the Judgement to remain as it is would result in an absurdity and an injustice to the Applicant. Contrary to what was submitted for the Respondent, reviewing the judgement would not amount to rewriting the Judgement of Odero, J. nor would it amount to sitting in appeal over her judgement. I am satisfied that the justice of the case requires that the judgement be reviewed.

18. Before concluding, I wish to address the issue raised by the Respondent that Subdivision **[particulars withheld]** is no longer registered in his name. The certificate of official search annexed to his affidavit appears to confirm this position. The Court notes that Respondent is pursuing the matter with the appropriate authorities, as he should. The change in ownership however does not in any way negate the grounds for review of the Judgement.

19. In the result I find that the Applicant has demonstrated to this Court sufficient grounds to warrant the review of the Judgement of Odero, J., of 28.9.15 and delivered on her behalf by Emukule, J. on 28.10.15 to include Subdivision **[particulars withheld]** as one of the plots on which the Apartments are built.

20. Consequently, the Application dated 15.4.16 is hereby allowed as prayed but with no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 8th day of September, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**