



**REPUBLIC OF KENYA**  
**HIGH COURT AT NAIROBI**  
**MILIMANI LAW COURTS - FAMILY DIVISION**

**DIVORCE CAUSE NO. 200 OF 2014**

**BETWEEN**

**K C M M.....PETITIONER**

**AND**

**M A S M.....RESPONDENT**

**RULING**

**INTRODUCTION**

The Petitioner, K C S M (hereafter 'the Respondent'), filed the present divorce proceedings seeking to have his marriage with M A S M (hereafter 'the Applicant'), annulled. Subsequent to the hearing of the divorce Petition however, the Applicant filed a Notice of Preliminary Objection dated 11<sup>th</sup> March, 2015, primarily challenging the jurisdiction of this Court to hear and determine the matter. This Court, however, overruled the said Preliminary Objection, through a Ruling delivered on 28<sup>th</sup> July, 2015, in which the Court directed as follows:

- a) The Petition for divorce by the Petitioner filed on 8<sup>th</sup> October, 2014 to proceed for hearing and determination in the High Court and any of the Courts in the Family Division.***
- b) The Respondent to file an answer to the Petition and/or Cross-petition within 30 days from today and serve the same to the Petitioner.***
- c) The Respondent and Petitioner reserve the right to appeal the decision.***
- d) The Parties to obtain a hearing date for the hearing of the Petition once pleadings are done on a date to be obtained in the Registry.***
- e) Each of the Party to bear its own costs.***

Aggrieved by the said Ruling, the Applicant filed the Notice of Motion dated 27<sup>th</sup> August, 2015 seeking a review of the said decision and she has sought the following orders:

(1) ...

(2) ...

**(3) That the Ruling delivered on 28<sup>th</sup> July, 2015 be reviewed to exclude:**

**(i) Consideration relating to matrimonial property rights in the Ruling as the same was never pleaded by the Petitioner in the Petition for divorce.**

**(ii) Considerations relating to the payment of alimony in the Ruling as the same have not been pleaded in the Petition for divorce.**

**(iii) Considerations that the subject matter in two Environment and Land Court matters only relates to joint matrimonial property, which is untrue as the main issue before the Court is enforcement of an arbitral award to ensure that the Parties take equal parental responsibility towards payment of their son's school fee.**

**(4) That the cost of this Application be provided for.**

The Notice of Motion dated 27<sup>th</sup> August, 2015 thus forms the subject matter of this Ruling.

### **THE APPLICANT'S CASE**

In the Affidavit in support of the Application, sworn on 27<sup>th</sup> August, 2015, by Wangui Kathryn Kimani, Learned Counsel appearing on behalf of the Respondent, it was deponed that the said Counsel has been in conduct of this matter since 8<sup>th</sup> October, 2014 when the Petition was filed and subsequently when the his Application dated 11<sup>th</sup> March, 2015 was filed herein.

That the matter was heard by way of oral and written submissions culminating to the Ruling being delivered on 28<sup>th</sup> July, 2015 and hence, the issues raised in the present Application are purely on law. Further, that the said Ruling resulted to the grant of orders that were not pleaded and claimed in the present Divorce Petition and as such, the law on pleadings is to precisely set out reliefs sought in pleadings and for the Court to award the said reliefs as set out and proved.

The Applicant case was that the prayers in regard to the division of matrimonial property and payment of alimony were not pleaded and do not form part of the present Petition and as such, that is enough reason to deny the Petitioner the award for the reliefs not pleaded.

The Applicant stated that the Petitioner, with the knowledge that the above stated reliefs were an introduction deliberately, failed to serve the Respondent with his submissions and the information was not known to him until the Ruling was delivered and a copy of the Petitioner's submission obtained from the Court's file. Further, that the Ruling was made after the Court relied on information from the Petitioner that prayers for the division of matrimonial property and payment of alimony were made in the pleadings, information which, according to the Applicant, was intended to mislead the Court.

It was the Applicant's Counsel's final deposition that the Prayers granted are new introductions that the Court ought to consider as mistakes apparent on the face of the record and if the matter is reviewed, the Respondent is advised that she must pay further Court fees, which she is ready to pay.

### **THE RESPONSE**

In response to the Application, K C M (hereafter 'the Respondent') filed an Affidavit in response, sworn on 28<sup>th</sup> October, 2015. He contended that the present Application is misconceived, unmerited, baseless, unfounded and a gross abuse of Court process as it seeks to raise the same issues that had earlier been raised by him at the hearing of the Preliminary Objection that led to the Ruling the Applicant seeks to have reviewed.

He contended that in any event, the said Ruling does not award Prayers that were not pleaded and claimed as alleged. Further, that the Ruling does not in any way contravene the law on pleadings.

The Petitioner outlined the events and proceedings that occurred prior to the delivery of the Ruling and noted that on 25<sup>th</sup> June, 2015, when the present matter came up before this Court, the Court was engaged elsewhere and orders were given in the absence of both Parties that to the effect that the Respondent files a List of Authorities which she had relied on, while he was ordered to file his Written Submissions so that the Court could deliver its Ruling on 27<sup>th</sup> July, 2015. In that regard, he contended that there was no mention in the said directions that the Submissions were to be served upon the Respondent at all.

In the Petitioner's view, in light of the aforesaid, it is incorrect for the Respondent's advocate to allege that he deliberately failed to serve the Respondent with the Submissions and that the information contained therein was unknown to her until the Ruling was duly delivered and a copy of the said Submission obtained from the Court file.

Further, that no valid ground has been adduced herein to warrant the grant of a review of the Ruling as contemplated under **Order 45** of the **Civil Procedure Rules, 2010**, for the Court to interfere with the Ruling, there ought to have been a discovery of new and important evidence by the Applicant which was not within her knowledge or which could not be produced by her at the time the order was made, and that the Applicant cannot fault the Court for holding that the Petition contains not only issues regarding the divorce but also the division of matrimonial property.

It was the Respondent's other contention that in any event, the Petition herein raised issues of acquisition of property and payment of mortgage in relation to the matrimonial properties jointly acquired by them. Furthermore, that in the event that the Ruling is reviewed as sought herein, and the Parties are ordered to institute the case before a subordinate Court, the same is likely to create an absurd situation as the case will be delayed and legal costs will be too high for the Parties and hence prejudicial to them.

For the above stated reasons, the Respondent argued that it is only fair and just that the instant Application be disallowed, dismissed with costs, and the matter be set for hearing.

### **DETERMINATION**

The key issue for determination is whether the Applicant has made out a case to warrant the review of the Ruling of 28<sup>th</sup> July, 2015 rendered by this Court? In that context, the criteria to be met in an Application for review are outlined under **Order 45 Rule 1** of the **Civil Procedure Rules, 2010**, in the following terms:

***(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.***

***(2) ...***

**Order 45 Rule 3** further provides that:

***(1) Where it appears to the court that there is not sufficient ground for review, it shall dismiss the application.***

**(2) Where the Court is of the opinion that the application for review should be granted, it shall grant the same:**

***Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation.***

An application for review must therefore be premised on any one of the following grounds that:

- (1) There is an error or mistake apparent on the record;
- (2) The applicant has discovered a new and important matter in 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 order was made; and
- (3) There is sufficient reason to occasion the review.

It therefore follows that this Court is vested by such powers to review its decision. In the circumstances of the present case, the Court is satisfied that the present Application has been brought without unreasonable delay.

Has the Applicant made out a case for review? It will be noted that the Applicant's key grievance is that the Court placed consideration on issues relating to matrimonial property rights, which, according to her, were never pleaded in the Petition for divorce. In that regard, at pages 3 and 4, this Court rendered itself as follows:

***“The Court has considered the Petition filed on 8<sup>th</sup> October, 2014. The same was filed after the Marriage Act, 2014 which came into force in May, 2014. Therefore at the outset, the matter ought by virtue of Section 2 of the Act, be heard by the Magistrate's Court.***

***However, the content of the Petition contains not only issues regarding the divorce but those that relate to division of matrimonial property which falls within the purview of the High Court. Therefore, since the Petition raises issues regarding separation and divorce, maintenance and alimony, ownership and distribution of the matrimonial home and division of matrimonial property, these are compelling grounds that merit the instant case to be heard and determined in the High Court.***

***Instead of seeking the Petition to desegregate the issues for determination and have each filed in a separate Court, in the interests of justice, convenience of the parties, saving time and legal costs, it is appropriate the cause be ventilated and canvassed in the High Court...***

The findings of the Court in that regard were guided by the pleadings of the Parties and more specifically, the Petition herein which raised the aforementioned issues. For instance, at Para 9 of the Petition, he stated:

***(C) Prior to the Petitioner's redundancy on 31<sup>st</sup> March, 1997 and up to about two years thereafter, the Petitioner and Respondent shared in the payment of the basic bills equally. The Respondent paid the higher mortgage for the second new house while the Petitioner paid the old mortgage plus all utility bills and school fees. Surprisingly at the end of 1998, the Respondent forcefully demanded that the mortgages had to be paid fully and shared equally notwithstanding that the Petitioner who ended up having paid off both mortgages when the Respondent refused to refund or take into account what she owed the Petitioner for bills paid on her behalf.***

***(H) That during the subsistence of the marriage, the Petitioner and Respondent jointly acquired matrimonial property. The Respondent then forced the Petitioner to pay off all the mortgages and where after she constructively forced the Petitioner out of the matrimonial home, and she***

*has since denied the Petitioner enjoyment of any of the said properties as she lives in one and collects rent from the other...”*

The above depositions by the Respondent touched on issues relating to the marriage such as the matrimonial property among others. It will be noted, however, that in the said Petition, the Petitioner sought for two key Orders, namely:

*a) The marriage between the Petitioner and the Respondent be dissolved.*

*b) The costs of the Petition be borne by the Respondent.*

Whereas the Applicant’s Preliminary Objection challenged this Court’s jurisdiction to hear and determine the matter, this Court overruled the same and noted further that this would be the appropriate forum for determining the Petition and in the greater interest of justice that the matters be canvassed in the present proceedings save for the other two matters already pending in the Environment and Land Court, touching on the matters raised herein. The hearing shall be conducted by any Court within the Division. The trial Court shall determine the matter based on the evidence presented and prayers sought. There is no prejudice that will be occasioned to any party.

**DISPOSITION**

**a) The Notice of Motion Application dated 27<sup>th</sup> August, 2015 is hereby dismissed.**

**b) Let each Party bear its own costs.**

**DELIVERED, SIGNED & DATED AT NAIROBI THIS 10<sup>TH</sup> DAY OF NOVEMBER, 2016**

**M. W. MUIGAI**

**JUDGE**

**In presence of:-**