REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

Civil Suit No. 50 Of 2011

WARIDA MUTAI CHEPNG'ENO .... APPLICANT

VERSUS

ALI MUTAI MUREI .... RESPONDENT

RULING

Before this court for determination is the Notice of Motion dated 8th February, 2013 brought under Order 45 of the Civil Procedure Rules, Section 1 and 1A of the Civil Procedure Act and all other enabling provisions of the law. The Petitioner/Applicant prays that judgment delivered on 5th February, 2013 be and is hereby reviewed and for costs of the application.

It is based on the grounds that:-

(i) There is an error apparent on the face of the record.

(ii) The Honourable Judge failed to notice that the Applicant produced evidence to prove that she contributed to the acquisition of Langas Block 2/163.

(iii) The learned trial Judge granted the Respondent 25% of the share in Eldoret Municipality Block 14/188 without any basis as the Respondent did not prove any contribution to the acquisition of that property.

(iv) The learned trial judge granted the Respondent 25% share of the matrimonial property despite the Applicant proving that in fact she had contributed more than 125% to the acquisition and development of the property herself directly and had also made indirect contribution.

(v) In the interest of justice this application ought to be allowed.

It is further supported by the affidavit of Warida Mutai Chepng'eno, the Applicant herein sworn on 8th February, 2013. The gist of the Supporting Affidavit is that the trial court failed to appreciate the fact that the Applicant substantially contributed to the acquisition of both matrimonial properties namely Eldoret Municipality Block 14/188 and Langas Block 2/163. According to the Applicant she contributed Kshs 300,000/= which was 75% towards the acquisition of Eldoret Municipality Block 14/188 and Kshs 500,000/= which is 50% of the purchase price of Langas

Block 2/163. That in the event, the trial judge ought to have apportioned her a share equal to her contribution in respect of each of the properties.

It is important to note that the Respondent did not defend the suit and so this application also proceeded Ex-parte.

The genesis of this application is the result of the judgment delivered by Hon. Justice Mshila on 5th February, 2013 in which she ordered that the Applicant be apportioned 75% of one of the matrimonial properties namely Eldoret Municipality Block 14/188.

The suit was commenced by way of an Originating Summons. The Applicant had sought a prayer that the matrimonial property comprising the two parcels of land referred to herein above be shared between herself and the Respondent with whom she is currently divorced.

After perusal of the judgment I note that the figures indicated under paragraph (iv) of grounds in support of the Notice of Motion did not reflect the figures in the judgment. The same should read 25% and 75% respectively.

The learned Judge declared that the Applicant was only entitled to a 75% beneficial share or interest in Eldoret Municipality Block 14/188. She ordered that the property be valued to determine the market value after which the Applicant would be at liberty to purchase the 25% share or interest of the Respondent. The learned Judge explained that the Applicant did not produce evidence to show that she made 100% contribution and was therefore entitled to a 100% beneficial interest.

In respect of land Langas Block 2/163 the learned Judge noted that the Applicant had not shown any evidence of contribution towards its purchase and that since there was no interest in it expressed by either spouse she declined to make any apportionment.

The scope around which a review of an order or decree may be sought is provided by Order 45 Rule (1) of the Civil Procedure Rules which reads as follows:-

"1(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."

This rule presupposes that before an application for review is sought, the party making the application ought to first extract the order or decree. In the instant case, no decree was extracted by the Applicant. But again, this being a technicality hitch would not bar the court from considering the application on its merit. After all, what is sought to be reviewed can be clearly read from the judgment.

The review is sought majorly on only one ground - that there is an error apparent on the face of the record of the judgment. The error is explained in the sense that the learned trial Judge failed to notice that the Applicant produced evidence to prove that she contributed to the acquisition of land Langas Block 2/163 and also awarded the Respondent 25% of the value of plot Eldoret Municipality Block 14/188 to the Respondent who had not demonstrated any evidence or prove of acquisition of the same.

The Court of Appeal in **MWIHOKO HOUSING CO-OPERATIVE LIMITED -VS- EQUITY BUILDING SOCIETY CIVIL APPEAL NO. 316 OF 2002** held that ***"a review could have been granted whenever the court considered that it was necessary to correct an apparent error or omission on its part. The error or omission must have been self evident and should not have required an elaborate argument to be established."***

It is evident from the judgment that the learned Judge was alive to the fact that the Respondent had not contributed to the 25% share he was given in Eldoret Municipality Block 14/188. All she noted was that "***his share amounted to the 25%"***. She relied on evidence the Applicant produced in court in the form of an undertaking and two copies of Bankers cheques which showed that the Applicant had contributed a total of Kshs 300,000/=. The entire property cost Kshs 450,000/= hence it was only prudent to conclude that the Applicant's share of contribution was 75%. Then the question follows, who contributed the 25% share balance?

In this application, the Applicant alludes to the fact that the balance of Kshs 150,000/= towards the purchase of this plot remains unpaid to date to the seller one Nancy Toroitich. She did not however produce any prove in this regard. But this notwithstanding, I think, it was an error on the part of the court to find that the Respondent should be awarded the 25% share balance which he neither claimed nor tendered evidence of its acquisition.

As regards plot **Langas Municipality 2/163** the Applicant did not lead any evidence as to how she either acquired or contributed to its acquisition. I believe it is for this reason that the learned trial Judge declined to make any orders as to its distribution. I also find as unsubstantiated and without prove the Applicant's contention that she contributed to its construction. I note however that she took a loan of Kshs 450,000/= (Four Hundred and Fifty Thousand Shillings) from Kenya Commercial Bank towards some construction. I can only conclude that this money was applied to the construction of either plot and may not only be erroneous but also incorrect to deduce based on no evidence that it was applied to the construction of this plot. This is so because it was incumbent on the Applicant to prove which plot was constructed with the money. After all, both plots are currently fully built up.

Having said so, any errors sought to be corrected must be matters evident from the face of the judgment. They must be those blatant mistakes in calculation or trying errors.

For this reason, it is my view that the learned Judge did not take into account the fact that the Applicant took a bank loan for construction which she was likely to have applied in building the matrimonial home. She also failed to appreciate the fact that despite the Applicant having contributed 75% of the purchase price of plot Eldoret Municipality Block 14/188, the Respondent had not shown evidence of contribution of a single cent both towards its purchase and construction. It is for this reason I candidly think the Applicant is entitled to the said plot entirely. Further, as both parties are alive, it is only prudent to apportion the two properties.

Therefore, with regard to plot Langas Block 2/163 I would apportion it to the Respondent on two grounds. First, the Applicant provided no prove of its purchase or construction. Second, she was, ab initio willing to give it to the Respondent in the spirit of settling the matrimonial dispute.

In the upshot this application partly succeeds in the following terms:-

1. The court declares that the Applicant is entitled to a 100% beneficial share of the property known as Eldoret/Municipality Block 14/188 and is apportioned the same entirely.

2. The Respondent is apportioned the property known as Langas Block 2/163 entirely.

3. The Applicant shall bear her own cost of this application.

DATED and **DELIVERED** at **ELDORET** this 4th day of March, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Chanzu for the Defendant/Applicant

No appearance for the Plaintiff/Respondent