REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT KERICHO

E & L CASE NO. 67 OF 2018

LINUS NGETICH.....PLAINTIFF

VERSUS

CECILIA CHELANGAT NGETICH.....1ST DEFENDANT

PAUL KIPNGETICH KORIR.....2ND DEFENDANT

BOMET COUNTY LAND REGISTRAR....3RD DEFENDANT

RULING

Introduction

1. This Ruling is in respect of the Plaintiff/ Applicant's Notice of Motion dated 20th December 2018 brought pursuant to Order 9, Order 51 Rules 1,3 and 10 and Order 22 Rule 49 of the Civil Procedure Rules and sections 3A and 63 of the Civil Procedure Act Cap 21 of the Laws of Kenya. The Applicant seeks the following orders:

1. Spent.

2. Spent.

3. THAT the court be pleased to stay execution of the decree herein and any subsequent orders of the court and the Court do review and or set aside the orders dated 14th December 2018.

4. THAT the court do make any other or further orders in the interest of justice.

5. *THAT the costs of this application be provided for.*

2. From the outset, I must point out that the provisions cited in the Notice of Motion have nothing to do with the prayers sought but in view of Article 159 (d) of the Constitution, I shall not dwell on the procedural inadequacies.

3. The application which essentially seeks a review of the Ruling and orders issued on 14th December 2018 is predicated on the grounds stated on the face of the Notice of Motion and applicant's supporting affidavit sworn on the 20th December 2018 and Supplementary affidavit sworn on the 4th February 2019. The application is opposed by the 1st Defendant/Respondent through her Replying Affidavit sworn on the 23rd January 2019. The 2nd Defendant/Respondent filed Grounds of Opposition dated 14th January 2019.

The application was canvassed by way of written submissions and the Applicant, 1st and 2nd Respondents filed their submissions which I have considered.

Issue for determination

4. The main issue for determination is whether that Applicant has met the conditions for the review of the court's ruling and orders issued on 14th December 2018.

Analysis and Determination

5. Order 45 Rule 2 (1) of the Civil Procedure Rules provides as follows;-

> *(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 judgment the court which passed or made the order without unreasonable delay.*

6. In his supporting affidavits, the Applicant has raised a number of issues but the long and short of it is that he is aggrieved by the court's ruling as he feels the court did not address all the issues raised in his application dated 14th December 2018. In his submissions, counsel for the Applicant has taken issue with the court's findings on the law and facts and states that for these reasons, the court ought to review and set aside its ruling. The Applicant has not brought out any new and important matter or evidence that could not have been produced earlier after the exercise of due diligence. He has pointed out what he considers to be erroneous findings particularly with regard to whether or not the suit property is matrimonial property. However, Order 45 is clear that the error must be apparent on the face of the record.

7. What constitutes an error apparent on the face of the record was defined in in the case of **Antony Gachara Ayub V Francis Thinwa C.A No 92 of 2008** while quoting with approval the case of **Draft and Develop Engineers Limited V National Water Conservation and Pipeline Corporation Civil Case No 11 of 2011** the Court of Appeal stated as follows:

> "*An error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of undefinitiveness inherent in its very nature and it must be determined judicially on the facts of each case. There is a real distinction between a mere erroneous decision and an error apparent on the face of the record. Where an error on a 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 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 possible. Mere error or wrong view is certainly no ground for review though it may be one for appeal"*

8. Similarly, in the case of **National Bank of Kenya Limited V Ndungu Njau C.A No 211 of 1996** the Court of Appeal held as follows:

> "*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 would have arrived at a different view of the matter. Nor can it be a ground for review that the court proceeded on an incorrect conclusion of law. Misconstruing a statute or other provision of the law cannot be a ground for review".*

9. In the instant case the defendants are challenging the court's interpretation of Sections 6 (1) and 14 of the Matrimonial Property Act. As pointed out in the ruling the court was not expected to make final findings on contested facts at an interlocutory stage. At any rate, erroneous findings of law would constitute grounds of appeal and not grounds for review. The court cannot sit on appeal on its own ruling.

10. As was held in the case of **EVANS BWIRE –VS- ANDREW NGUDA KISUMU HC CIVIL APPEAL NO. 103/2000**

> "*An application for review will only be allowed on very strong grounds if it is effect will not amount to rehearing the original application afresh*."

11. In his submissions, counsel has also pointed out that the court did not address the issue of the orders made by the PM's court at Sotik. Again, the applicant opted not to appeal against the said orders and instead chose to complain about them in an application.

12. At the end of the day, an injunction is a discretionary remedy which is granted based on well established principles. It is not granted as a matter of right. Counsel for the Respondents have submitted that the applicant's application is an abuse of the process of the court and is merely intended to delay the finalization of this case and I am inclined to agree with them.

13. For the foregoing reasons, I find no merit in the application and I dismiss it. The costs of this application shall be in the cause.

Dated, signed and delivered at Kericho this 28th day of May, 2019.

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J.M ONYANGO

JUDGE

In the presence of:

1. Mr. J.K.Koech for Mr. Mugumya for the Plaintiff

2. Mr. Koech for the 1st Defendant

3. Mr. J.K.Rono for the 2nd Defendant

4. Court assistant - Rotich