REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

ORIGINATING SUMMONS NO. 1 OF 2019

FATUMA HANYARA …………………..……….………..…….……………………..APPLICANT

VERSUS

FESTO RANDU KOMBE……………..…………………...……….………..…….RESPONDENT

AND

AGNES BAHATI MASUMBUO
MIKE KITHI MASUMBUO…………………...………INTENDED INTERESTED PARTIES

RULING

1. The Intended Interested Parties by their Application dated 11.9.24, seek the following orders:
   1. ***Spent.***
   2. ***THAT this Honourable Court be pleased to join the interested parties to the suit.***
   3. ***Spent.***
   4. ***THAT this Honourable Court be pleased to set aside the judgment and decree issued on 8th October, 2021.***
   5. ***THAT this Honourable Court be pleased to set aside all proceedings that were conducted in exclusion of the Applicants herein matter be reopened for hearing on merit.***
   6. ***THAT costs of this Application be provided for.***

2. In her supporting affidavit sworn on even date, Agnes Bahati Masumbuo (Agnes) averred that she is the first wife of the Respondent having married him in 1990. Together, they have 2 children, namely Happy Sidi Festo and Mike Kithi Majumbuo (Mike). She stated that the plots indicated in the judgment were not bought by the Applicant or the Respondent but acquired through inheritance. She asserted that the plots existed since her marriage and the lifetime of the Respondent's mother who is buried at the homestead. Further that most of the properties are in the name of the Respondent in trust for the whole family and cannot be sold. She stated that Plot 966 which the judgment provides should be sold and proceeds shared between the parties is a family house to which she contributed and where her children stay. She stated that she will suffer irreparable loss if her family is evicted pursuant to eviction orders obtained by the Applicant (Fatuma).

3. Agnes further stated that the Respondent was unaware of the nature of the matter herein and thought it was a divorce. Agnes was informed by Mike that family properties are about to be sold leading to his eviction. She was surprised to learn of the suit and the judgment herein and has been greatly prejudiced by the irregular orders more so because Fatuma did not contribute to the putting up of the properties and was not even married at the time. Her contention is that the judgment was obtained through misrepresentation of facts as Fatuma was married in 2000 while she was married in 1994. The Respondent was working in the hotel industry and he and Agnes built the house that is about to be sold. Further that Fatuma did not disclose to the Court that a 10 bedroom house was built for her in Malindi by the Respondent as her matrimonial home. Agnes contended that she was entitled as the 1st wife to all the listed properties and she and her family will suffer if the judgment is not set aside.

4. The Application is opposed by Fatuma *vide* her replying affidavit sworn on 21.9.24. She averred that judgment herein was delivered on 5.8.21; that the Respondent then filed an application dated 13.10.21 seeking review and setting aside of the judgment which is a replica of the present Application; that the Respondent had in that application mentioned both Agnes and Mike; that the Respondent had stated that the properties were ancestral and inherited; that the said application was dismissed on 16.12.22; that the Application is an attempt by the Respondent to appeal through the back door in the cover of a purported wife. Fatuma further stated that the Application cannot be granted as a party can only be joined in proceedings during trial and not after the suit has been determined; that Agnes is not a wife to the Respondent and is married to someone else with whom he lives in Mnarani; that neither Agnes nor Mike live on the properties in question.

5. It is Fatuma's case that she will suffer great prejudice that cannot be compensated by way of costs if the Application is allowed; that despite the court order that Plot 966 be sold and proceeds be shared equally, the Respondent continues to solely collect the rent therefrom; that the Respondent has sold Plot No. KC/792 and continues occupying the house that Fatuma was awarded; that any further litigation will occasion her more harm.

6. I have given due consideration to the Application and response as well as the rival submissions.

7. I will begin with the prayers for setting aside the judgment and proceedings and starting the suit *de novo*. The jurisdiction of the Court for review of orders is provided for in Order 45 Rule 1 (1) of the Civil Procedure Rules provides:

45(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.

8. The foregoing provision stipulates the grounds upon which a review including setting aside of an order or decree may be obtained. These include discovery of new and important matters or evidence which after due diligence, was not within the knowledge of an applicant or could not be produced at the time an order was made. An order may also be set aside on account of a mistake or error apparent on the face of the record. Lastly, an order may be set aside for any other sufficient reason. The law requires that an application for setting aside of an order be made without unreasonable delay.

9. In the present case, it is not said that there is discovery of new and important matters or evidence which after due diligence, was not within the knowledge of Agnes and Mike or could not be produced at the time order was made. The Court has also not been told that there is a mistake or error apparent on the face of the record. The Application is probably hinged on what the provision refers to as *"for any other sufficient reason."*

10. What this Court is required to determine is whether the grounds upon which the Application is premised, are sufficient reason to warrant the grant of the orders sought.

11. In her affidavit in support of the Application, Agnes stated that she was the Respondent's 1st wife and had contributed to the acquisition of the properties in the judgment. For the Application to succeed, it was necessary for evidence to be laid before the Court to support the claims. Other than stating that she is the Respondent's 1st wife, which was denied by Fatuma, Agnes has not produced any evidence to support this claim.

12. Further, for Agnes to be entitled to the suit properties, she was required to demonstrate her contribution. This is because the basis upon which property, matrimonial or otherwise, is divided between spouses, is contribution. Section 7 of the Act makes provision relating to ownership of matrimonial property as follows:

    Subject to section 6(3), ownership of matrimonial property vests in the spouses <u>according to the contribution</u> of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved. *(emphasis)*

13. In <u>**JOO v MBO; Federation of Women Lawyers (FIDA Kenya) & another (Amicus Curiae) (Petition 11 of 2020) [2023] KESC 4 (KLR) (Family) (27 January 2023) (Judgment)**</u>, the Supreme Court reaffirmed this principle of contribution and stated:

    The guiding principle, again, should be that apportionment and division of matrimonial property may only be done where parties fulfill their obligation of proving what they are entitled to by way of contribution.

14. Agnes provided no proof of the contribution she made to entitle her to the suit properties. All she stated was that the plots indicated in the judgment were not bought by the Applicant or the Respondent but acquired through inheritance. She asserted that the plots existed since her marriage and the lifetime of the Respondent's mother who is buried at the homestead. Further that most of the properties are in the name of the Respondent in trust for the whole family and cannot be sold. She stated that Plot 966 which the judgment provides should be sold and proceeds shared between the parties is a family house to which she contributed and where her children stay. These are sweeping statements which lack substantiation. Agnes did not give details of each property and the manner and extent to which she contributed to its acquisition and development.

15. For the Application to succeed, Agnes was required to prove that which she alleged, in line with the time-tested principle that he who alleges must prove. Section 107 of the Evidence Act stipulates:

    (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

    (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

16. From the material placed before me, I find that Agnes failed to discharge the burden of proof placed upon her under the Evidence Act.

17. Additionally, the impugned judgment was delivered on 5.8.21, while the Application is dated 11.9.24. Agnes has not stated when she became aware of the suit and judgment. She has also not given any or sufficient explanation for the 3 year delay in bringing the present Application.

18. For the reason that Agnes has not proved that she is the wife of the Respondent or that she is entitled to the properties listed in the judgment and further for the unexplained delay in filing the Application, I find and hold that no basis has been laid for the setting aside of the judgment in question. Having so found, it follows that the prayers for stay of execution of the judgment and setting aside the proceedings and starting the suit *de novo* cannot be granted.

19. I now turn to the prayer for joinder. Order 1 Rule 10 of the Civil Procedure Rules provides:

    (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

20. As can be seen from the above provision, the court can order the joinder of a party at any stage of the proceedings. The circumstances herein are that Agnes and Mike seek joinder in the suit herein after judgment. Our courts have pronounced themselves on the issue of joinder after judgment.

21. In **Lilian Wairimu Ngatho & another v Moki Savings Co-Operative Society Limited & another [2014] eKLR**, Nyamweya, J. (as she then was) was of the view that joinder of a party may only be made before judgment. She stated:

    The provisions of Order 1 Rule 10(2) state that joinder of a party can be made "at any stage of the proceedings". "Proceedings' are defined in Black's Law Dictionary Ninth Edition at page 1324 as "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment". A party can therefore only be joined to a suit at any time during the pendency of the suit, but not after the same has been concluded. This finding is premised on the basis that the purpose for joinder is to enable the court effectually and completely adjudicate upon and settle all questions involved in a suit. It is

> ***therefore of no use if a party seeks to be joined when the court has already made its findings on the issues arising.***

22. The Court of Appeal was of a similar view and stated in **JMK v MWM & another [2015] KECA 524 (KLR)** as follows:

> ***We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court. Sarkar's Code, (supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings.***

23. There are instances where a party may be joined in a suit post judgment. In the cited case of **JMK v MWM**, the Court of Appeal considered such an instance and stated:

> ***It is not in dispute at all that when the appellant applied to be made a party to the proceedings on 10th June 2014, there were no pending proceedings before the Industrial Court to which he could have been made a party, the judgment having been delivered on 30th May 2014.***
>
> ***The appellant however had not applied solely to be added as a party to the suit; he had also applied for review and setting aside of the judgment of the court to give him an opportunity to be heard. In other words, the appellant was effectively applying for review and setting aside of the judgment of the Industrial Court and an order for de novo hearing of the suit, which would afford him an opportunity to be heard. The learned judge properly found, in our view, that the Court had jurisdiction to review and set aside its judgment.***

24. The circumstances in the cited case are similar to those herein, in that in addition to the prayer for joinder post judgment, there is a prayer for setting aside the judgment and starting the suit *de novo*. This Court has however found that Agnes and Mike have no demonstrable interest in the suit and that they are not entitled to the prayers for the setting aside the judgment and proceedings and to have the matter start *de novo*. In the premises, their prayer for joinder post judgment cannot be granted.

25. In the end and in view of the forgoing, I find that the Application dated 11.9.24 lacks merit and the same is dismissed with costs to the Applicant, Fatuma Hanyara.

DATED, SIGNED and DELIVERED in MALINDI this 30th day of January 2026

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M. THANDE
JUDGE