Ndiga v Said (Miscellaneous Civil Case E032 of 2022)
[2024] KEHC 964 (KLR) (31 January 2024) (Ruling)

Neutral citation: [2024] KEHC 964 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT SIAYA

MISCELLANEOUS CIVIL CASE E032 OF 2022

DO OGEMBO, J

JANUARY 31, 2024

BETWEEN

CHARLES OCHIENG NDIGA ..... APPLICANT

AND

NEREAH MICHAEL SAID ..... RESPONDENT

RULING

1. The Applicant/Respondent has moved this court by way of a Notice of Motion application dated 25.8.2023. The same is brought under Article 50 (1) and 159 (2) (d) of *the Constitution* and Orders 45 and 51 (1) of the *Civil Procedure Rules*.

   It seeks principally two prayers:

   i. That this Honourable Court be pleased to review, vary, vacate and or set aside the decision made by the Honourable Lady Justice Aburili that properties Uholo/Ugunja/1623 and Uholo/Ugunja/1726 were matrimonial and be shared equally by the parties herein.

   ii. That this Honourable court do find and hold that the properties Uholo/Ugunja/1623 and Uholo/Ugunja/1726 belong to the applicant Nereah Michael Said, absolutely.

   iii. The applicant has also prayed that costs of this application be provided for.

   In the Affidavit of the Applicant attached in support of the application, and sworn on 25.8.2023, the Applicant has sworn that the two properties belong to her absolutely and that the Petitioner, the Respondent to this application has no share in the same. That she has now recovered a piece of evidence which was not available at the hearing and which is likely to change the position held by the court, which evidence is an agreement. That the certificate of title issued to her upon transfer should be regarded as prima facie evidence that she is the absolute and indefeasible owner of the properties and the same should not be considered as matrimonial property. Attached to the Affidavit is a hand

written agreement between one Cleophas Awuor Odero and Nereah Michael Said over sale of land at Ksh.215,000/=.

The Respondent/Petitioner opposes this application. By agreement of the parties, this application was canvassed by way of written submissions. Both sides duly complied and filed their set of submissions.

In the submissions of the applicant dated 6/11/2023, the applicant has submitted that following the judgment of the court on 4/4/2022, the applicant has now discovered a new piece of evidence which was not available at the hearing and which is likely to change the position held by the court. Counsel relied on both Section 80 of the *Civil Procedure Act*, Cap 21 and Order 45, Rule 1 of the *Civil Procedure Rules*, that a review can be considered upon:

> "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 mistakes 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. That the new piece of evidence is a sale agreement which proves that the applicant solely purchased Uholo/Ugunja/1726, evidence she could not recover even after exercising due diligence at the time of hearing. That it is now clear that the petitioner never contributed to the purchase of the property hence the same cannot pass as matrimonial property subject to equal sharing.

3. On the issue of mistake on the face of the record, counsel submitted their paragraphs 139 and 140 of the judgment, the court only relied on the duration of acquisition of the property as the yardstick for holding in issue were matrimonial property, and in the process the court ignored all evidence on record including the certificate of titles in the name of the applicant, which is prima facie evidence of ownership of land. Counsel relied on *Grace Akinyi v Gladys Kamunto Ubiri & Another* (2016) eKLR,

> "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."

4. Counsel went further to submit on how it was erroneous for the court to order a 50:50 sharing of the property and that his application has been made without undue delay i.e. within 15 months.

5. The Petitioner, Respondent to this application, has submitted that under Section 80 of the *Civil Procedure Act*, to invoke jurisdiction of the court on review, one must be either aggrieved by the decree or order. And their without an extracted decree or order sought to be reviewed, the application is defective and ought to be dismissed. (*Fidelity Commercial Bank v Michael Ruraya Mwangi & Another* (2005) eKLR), and *Rose Njeri Muiruri v James Kiiru Chege & Another* (2009) eKLR in which the court held;

> "The mischief which is met in requiring an order be extracted is that the court would have the benefit of seeing the order which is required to be reviewed. Failure to attach the order to an application is not itself fatal. What makes an application fatal however, is failure to extract the order."

On the substantive prayer for review, counsel relied on *National Bank of Kenya Ltd v Ndungu Njau* (1991) eKLR, in which the court of Appeal held amongst others, that,

i. The error or omission must be self -evident and should not require elaborate arguments to be established.

ii. Misconstruing a statute or other provisions of the law cannot be a ground for review.

iii. In case of a wrong conclusion of law, it could be a good ground of appeal. Otherwise the Judge would be sitting on appeal on his own Judgment which is not permissible in law.

iv. That an issue which has been hotly contested cannot be reviewed by the same court which had adjudicated upon it.

6. Counsel relied on Mullce: the *Code of Civil Procedure*, 17th Edition, that it must be established that the applicant had acted with due diligence and the existence of the evidence was not within his knowledge. That in this case the applicant has not shown the due diligent expended by her to procure the supposed new evidence.

7. That in any case, the said new evidence (agreement) is signed before the chief who testified as PW2 and that the trial court considered the totality of the evidence in the judgment (paragraph 142 – 145) and the applicant can only challenge same on appeal and that the authenticity of the document is in doubt and the author would have to be examined on oath.

8. It was submitted that this application has been brought after inordinate delay of almost 1 ½ years. That the applicant does not state when she came about the new evidence, which in any case shows on the face of it that it has been used in another matter.

The court has been urged to dismiss this application with costs.

9. I have considered this application, the submissions made to it and the authorities relied on by the two sides. This application seeks orders of review of the judgment and decision made by this court (Hon. R.E. Aburili, J) on 4-6-2022 that the two subject property, Uholo/Ugunja/1623 and Uholo/Ugunja/1726 were matrimonial property subject of equal distribution as between the two parties.

10. Being an application for review, the guiding principles are admitted by the two parties to be Section 80 of the *Civil Procedure Act*, and order 45 Rule 1 of the *Civil Procedure Rules*, basically that a review may issue upon: -

> " 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 this decree was passed as order made or on account of some mistakes or error apparent on the face of the record, or for any other sufficient reason and that the application shall be made without undue delay."

11. The applicant has submitted that the new evidence is in the form of an agreement of sale of land. The agreement, attached to the Affidavit in support of this application shows it is between one Cleophas Owuor Odero (Identity number not shown) and the applicant. It is for sale of part of the seller`s land at Ksh215,000/=. It is signed before the Assistant Chief, Ugunja sublocation, West Uholo Location. This stamp of the Assistant Chief reads 11-9-2021.

12. It is that document that the applicant has submitted on as being new evidence that would justify a review of the judgment of the court. For this document to qualify as such new evidence, the applicant must convince this court that after the exercise of due diligence, this evidence was not within his knowledge and could not have been produced at the time the order was made.

13. It has turned out that the Assistant Chief before whom the agreement was made gave evidence at the trial as PW2. This means that the applicant had the opportunity to take up this issue of the agreement with the witness. The applicant cannot therefore be heard to say that this is new evidence which was not within her knowledge at the time when the court made the aggrieved orders. And in case for whatever reason the applicant could not have produced the evidence at the time of the hearing, again the applicant had the opportunity to indicate to the court the difficulty she faced in securing the same. Otherwise it is hard to believe that the existence of this document was not within the knowledge of the applicant at the time of the hearing of the case.

14. The applicant has not shown any due diligence she exercised in trying to secure this evidence during trial. Proof of due diligence is a pre-requisite for orders of review to issue absence of which really renders the application without basis.

15. I have further considered the impugned judgment dated 4-4-2022. It is clear that the Honourable Judge dwelt at length on the issue of any documentary or viva voce proof of payment of the consideration paid by the applicant for the property and considering also the evidence of PW3 (paragraph 143, 144 and 145). In view of the observations of the Honourable Judge, it is clear that the document the applicant refers to as new evidence, was in fact within her knowledge, if at all, and the Honourable Judge exhaustively dealt with the same in the Judgment. Again, the document would not qualify as new evidence under either Section 80 of the Act nor Order 45 of the *Civil Procedure Rules*.

16. In the submissions of the Applicant, it has been submitted that the said judgment had errors apparent on the face of the record. The applicant has gone on to submit that the said judgment offends the provisions of Sections 7 of the *Matrimonial Property Act* and also Section 24 and 26 of the *Land Registration Act*, No. 3 of 2012. In particular, the applicant has referred to Paragraph 143 of the Judgment. By these submission, the applicant is inviting this court to relook at the findings of the Honourable Judge and probably altar the same. If the court were to engage in this exercise as invited, it would be a sitting as an appellate court over the findings of a court of concurrent jurisdiction. This court would be engaging in an unconstitutional venture if it were to accept this invitation.

17. The parties have referred this court to several authorities, all agreed that for a review application, the court would not move into the arena of determining any possibility of fault in the impugned finding of the court. Just to requote a few of the decisions and cited:-

    i. *Grace Akinyi v Gladys Kemunto Obiri & Ano.* (2016) eKLR, that the error or omission must be self-evident and should not require elaborate argument to be established.

    ii. *National Bank of Kenya Ltd v Ndungu Njau* (1997) eKLR, that misconstruing a statute and other provisions of law cannot be a ground for review. And that if the Judge reached a wrong conclusion of law, it could be a good ground for appeal but not for review. Otherwise the Judge would be sitting in appeal on his own Judgment which is not permissible in law. And also that an issue so hotly contested as in this case cannot be reviewed by the same court which had adjudicated upon it.

    iii. *Francis Origo & Another v Jacob Kumali Mungala* (2005) eKLR, that an erroneous conclusion of law or evidence is not a ground for review but may be a good ground for appeal.

18. As to whether this application has been filed after undue delay, this court is of the considered view that the issue of delay depends on circumstances of each case. It is therefore, for the applicant to explain the special circumstances of his case. In this case, no attempt was made at pointing out the circumstances leading to the filing of this application almost 1 ½ years after the judgment of the court. This period is

rather long and constitutes undue delay in the absence of any explanation of the special circumstances by the applicant.

19. I must say that this court finds itself in a similar situation as that of the Hon. Lady Justice Kosango in *Rose Njeri Muiruri James Kiiru Chege & Another* (2009) eKLR.

20. Whereas it is not fatal to attach the extracted order or decree sought to be reviewed, failure to do so obviously leaves the application of the applicant superfluous. In this case, the judgment of the court constitutes upto 155 paragraphs. It has not helped the applicants` case that the applicant has not attached any extracted) decree to base his grievance on.

21. In all, I am not convinced that this application of the applicant dated 22.8.2023 merits the threshold for review under Section 80 of the Act nor Order 45 of the *Civil Procedure Rules*. I find no merit in the same and dismiss it wholly.

22. Costs of this application are awarded to the Respondent. Orders accordingly.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 31ST DAY OF JANUARY, 2024

D.O. OGEMBO

JUDGE

31/1/2024

Court:

Ruling read out in court (virtually) in the presence of Abidha for the Applicant and Mr. Mungla for the Respondent.

D.O. OGEMBO

JUDGE

31/1/2024

Mr. Abidha: We request for copy of the ruling and leave to appeal. We also pray for Preservation orders for 40 days to enable filing of a formal application pending appeal.

Mungla: Leave is automatic. On the 2nd issue, Judgment is clear. Court had made directions on valuation and sharing off. Parties were to share evaluation costs equally. They want this court to sit on appeal again. Let them explain why they have not paid their share.

Mr. Abidh.- We are likely to appeal. There will be no purpose of appeal if the property is sold. We only need 14 days.

Mungla: The suit is no more and no injunction order can issue. There is no substantive order in force.

Court: I have considered the submissions of both parties. I order as follows: -

Leave granted to applicant to file appeal.

Certified copies of this ruling to be supplied to the parties upon payment of the requisite charges.

Pending the filing of a formal application for stay, conservatory orders in the form of injunction is hereby issued to retain the property for 14 days as requested by the applicant since I see no prejudice to be suffered by the Respondent.

D.O. OGEMBO

JUDGE

31/1/2024