



**JIM v BMI (Civil Appeal E011 of 2021) [2024] KEHC 3152 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3152 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KITUI  
CIVIL APPEAL E011 OF 2021**

**RK LIMO, J  
MARCH 19, 2024**

**BETWEEN**

**JIM ..... APPLICANT**

**AND**

**BMI ..... RESPONDENT**

**RULING**

1. JIM, the applicant in the Notice of Motion dated 13<sup>th</sup> July 2023 has approached this court under Order 45 Rule (1) (a) of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A 63(e) of the Civil Procedure Code asking for the following reliefs namely;
  - i. Spent
  - ii. Spent
  - iii. That pending any action to comply with the judgment of this court in this case, this court be pleased to review, vary or clarify its order that the plaintiff/respondent do have property described as Kalwa/11xx together with matrimonial home.
  - iv. That pending any action in compliance with the judgment of the Court, the Honourable court be pleased to vary its judgment or order to the effect that portion of land Parcel No. Kyuso/Ngomeni/B12xx comprised of the matrimonial home be curved out or excised and title be issued in the name of the plaintiff/respondent in order to give effect to the judgment of the court.
  - v. That this Honourable court be pleased to review, vary, and/or adjust its final wording of its orders to give effect to its determination in the judgment, on the matrimonial home is in parcel Kyuso/Ngomeni/B/12xx and not in Kyuso/Ngomeni/B/11xx.
2. The applicant has premised this application on the following grounds namely:



- i. That the matrimonial home is situate in land parcel No. Kyuso/Ngomeni/"B"/12xx
  - ii. That the respondent was awarded land parcel Kyuso/Ngomeni B/11xx together with matrimonial home so it is necessary to review or vary/adjust the judgment so as to give effect to the determination of this court.
  - iii. That it is necessary to order that land Parcel No. Kyuso/ Ngomeni/ "B"/12xx comprises matrimonial home be curved out excised and /or subdivided in order to give the plaintiff/respondent the portion comprising the matrimonial home.
  - iv. That matrimonial home is situate in Kyuso/Ngomeni B/12xx and not Kyuso/Ngomeni "B"/11xx
  - v. That the applicant has no problem vacating the matrimonial home.
3. This application is supported by the affidavit of John Ikumba Musyoki sworn on 13<sup>th</sup> July 2023 where he has majorly reiterated the above grounds.
  4. He further avers and clarifies as follows; that
    - a. Kyuso/Ngomeni "B"/12xx measures approx. 29.68 and comprises matrimonial home
    - b. Kyuso/Ngomeni "B" /11xx measures 8.86 Ha.
    - c. Kyuso/Ngomeni/ "B"/12xx measures 2.24 Ha.
  5. The applicant through learned counsel Mr. Kilonzi submits that there was an error in the face of the record in the judgment and relied on the surveyor's report and sketches to buttress his assertions.
  6. The respondent has opposed this application contending that the applicant should have appealed if he was dissatisfied with the judgment of this court.
  7. The Respondent however conceded that during trial she did not know the actual description of the parcel of land that comprised the matrimonial home. She supports the finding of the Government surveyor sent by this court to clarify the parcel numbers on the ground and which property comprises the matrimonial home.
  8. This court has considered this application and the response made. When the parties appeared before me on 27.7.2023, this court urged the parties to explore out of court settlement in view of the apparent discrepancies in the pleadings and evidence tendered during trial. It should be noted that the parties during trial appeared in person and it was difficult to decipher the description of the properties in dispute.
  9. The plaintiff/respondent appeared passionate in her pursuit of justice which was quite evident when she passionately pleaded with this court to order the applicant does return that donkey which she claimed belonged to her but had been sold. This court being a court of Law could only determine matters based on evidence and the law and found no sufficient evidence in regard to the donkey. However, this court found that she deserved to get the matrimonial home together with half the parcel which she knew as parcel No. 11xx.
  10. When this present application was filed, this court found it just to order for a surveyor's report in order to get clarity on the description of the property. The sub-county surveyor known as Christopher M. Nzengu filed his report dated 15<sup>th</sup> September 2023 clarifying that the matrimonial home was situate at Kyuso/Ngomeni "B"/12xx.



11. The surveyors report in my considered view is material and only emerged after this court had rendered itself albeit on the erroneous belief that matrimonial home was in Kyuso/Ngomeni “B”/11xx.
12. The provisions of Order 45 (1) Civil Procedure Rules provides as follows;

“Application for review of decree or order;

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.”
13. The plaintiff/respondent being unrepresented and illiterate only knew the parcels comprising matrimonial properties but no details on the actual descriptions and that is why this court gave her the matrimonial home and half the land in Parcel No. 11xx. That was a clerical error and “not what this court intended”.

In the premises, this court finds that there is sufficient cause to warrant this court to exercise its revisionary powers in order to give effect to the true effect meaning of the judgment and dispense Justice to both parties.

The judgment of this court delivered on 24.5.2023 is hereby reviewed only to the extent that the Respondent/Plaintiff shall now be given the matrimonial home comprised in Kyuso/Ngomeni “B’/12xx and half of that parcel. The OCS Kyuso to give security to the Sub County Surveyor in subdividing Parcel No. Kyuso/Ngomeni “B”/12xx and ensure the plaintiff/respondent to be given vacant possession of half the parcel and the matrimonial home thereof. I will not make any order as to costs.

**DATED, SIGNED AND DELIVERED AT KITUI THIS 19<sup>TH</sup> DAY OF MARCH, 2024**

**HON. JUSTICE R. K. LIMO**

**JUDGE**

