



**MED v AAD (Matrimonial Cause E002 of 2020)
[2023] KEHC 22780 (KLR) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22780 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MIGORI
MATRIMONIAL CAUSE E002 OF 2020
RPV WENDOH, J
SEPTEMBER 29, 2023
IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY
AND
IN THE MATTER OF ARTICLE 45 (3) OF THE
CONSTITUTION OF THE REPUBLIC OF KENYA
AND
IN THE MATTER OF SECTION 16 (1) OF THE PROPERTY ACT, 2013
AND
IN THE MATTER OF SECTION 28 (1) AND 93
(2) OF THE LAND REGISTRATION ACT 2012**

BETWEEN

MED APPLICANT

AND

AAD RESPONDENT

RULING

1. The Notice of Motion for consideration is the one dated February 21, 2023. The applicant is seeking the following orders:-
 - a. Spent.
 - b. That this court be pleased to stay proceedings in this matter pending the hearing and determination of this application;
 - c. That the applicant be allowed to amend his Notice of Motion dated October 13, 2022 and filed in court on October 19, 2022;



- d. That costs of this application be provided for.
2. The application is based on the grounds on its face and the Affidavit of the applicant deposed on February 20, 2023. The applicant deposed that he instructed his Counsel on record to file an application for rectification and amendment dated September 21, 2022; that the application was dismissed by a ruling of this court dated February 14, 2023; that the dismissal was unjustified as justice ought to have been delivered without regard to technicalities as per the provisions of article 159 of the Constitution; that this court has powers under section 99 of the Civil Procedure Act to make corrections and amendments to their judgements.
 3. The applicant further stated that he gave his lawyers instructions to file an application for leave to appeal under order 43 rule 3 but he inadvertently omitted the words “extension of time” since such applications are made 14 days from the date of such orders; that this court has powers under the Interpretation and General Provisions Act to extend time for doing any Act; that the amendment will help the court to solve the issues in controversy between the parties. The applicant prays that the application be allowed.
 4. The application was opposed. The respondent filed a Replying Affidavit dated April 19, 2023. The applicant recounted her averments in paragraphs 6, 7 and 8 in her response dated November 18, 2022 for the application dated October 13, 2022. In relation to this Notice of Motion, the respondent stated that the applicant is attempting to steal a march by seeking to amend the Notice of Motion dated October 13, 2022 by inserting the words “to extend time” belatedly; that the application is an afterthought, meant to cure the glaring deficiencies in the notice of motion dated October 13, 2022; that this court made an order on February 14, 2023 that the Notice of Motion dated October 13, 2022 be canvassed by way of Written Submissions and directions given thereof; that in compliance, the respondent’s counsel filed their Submissions on March 9, 2023 and served a copy thereof on the applicant on March 10, 2023.
 5. It was further deposed that this court, without setting aside the orders made on March 9, 2023, it is inclined to hear and dispense the Application dated October 13, 2022; that the application is not seeking to correct an inadvertent defect but it is an afterthought made in an attempt to cure glaring deficiencies in the Notice of Motion dated October 13, 2022 which was raised in the respondent’s response dated November 18, 2022. The respondent stated that the condition upon which an amendment to a pleading should be allowed, is to determine the real questions in controversy between the parties and this application does not qualify, as it does not, even after the amendment clarify the issues between the parties.
 6. The applicant filed a further Affidavit dated May 4, 2023. In response to paragraph 8 of the respondent’s Replying Affidavit, he deposed that the application was merely struck out and therefore the court should hear it to conclusion. The respondent further urged that when giving directions, the court is not stopped from allowing an amendment.
 7. The application was canvassed by way of Written Submissions. The applicant filed his submissions dated May 4, 2023 in court on May 12, 2023. The respondent filed her submissions dated May 25, 2023 in court on May 29, 2023.
 8. I have carefully considered the application, the response and the submissions by both parties. The issues for determination are:-
 - a. Whether the applicant’s further Affidavit dated May 4, 2023 is properly on record.
 - b. Whether the applicant is deserving of leave to amend the Notice of Motion dated October 13, 2022.



Order 51 rule 14 (3) of the [Civil Procedure Rules](#) provides:-

“ Any applicant upon whom a Replying Affidavit or Statement of Grounds of Opposition has been served under subrule (1) may, with the leave of the court, file a Supplementary Affidavit.”

9. The provision states that an applicant who wishes to file a supplementary affidavit, should seek leave of court first. The respondent contended that the applicant did not seek the said leave to file the further affidavit and therefore this court should disregard the dispositions contained therein. The applicant did not respond to this issue.
10. Directions on the hearing of the applicant’s instant application, were given on April 24, 2023. From the directions given, the applicant did not seek leave to file a further Affidavit after being served with the applicant’s Replying Affidavit. The law provides that if a party wishes to file a further affidavit, he should first seek leave of the court. In the Court of Appeal case, [Kiru Tea Factory Company Ltd vs Stephen Maina Gitbiga & 13 others](#) [2019] eKLR the Court of Appeal stated that the further Affidavits filed without leave of the court, contravened rules 43 and 44 of the [Court of Appeal Rules](#) and they ought to be struck out.
11. This court is of the same view. Since the applicant did not seek leave to file the further Affidavit, he contravened the provisions of order 51 rule 14 (3) of the [Civil Procedure Rules](#) and therefore, the further Affidavit dated May 4, 2023 cannot be considered. It is hereby struck out. In allowing further Affidavits filed without leave of court, the court will be encouraging litigation by ambush by the opposing party. If an applicant states his intention to file a further Affidavit, it will give notice to the respondent while filing his response, to make exhaustive averments since he is not given corresponding leave to file another response after filing of the further affidavit.
12. On whether the applicant is deserving of leave to amend the Notice of Motion dated October 13, 2022, the general power to amend pleadings by the court, is derived from section 100 of the [Civil Procedure Act](#). The purpose of amendment is provided for under order 8 rule 5 (1) of the [Civil Procedure Rules](#) as follows:-

“ For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

13. Amendment of pleadings is a discretion of the court. The court should consider whether the amendment is necessary for the determination of the matters in controversy and whether the amendment would prejudice the other party. The applicant deposed that when his counsel was preparing his Submissions to the application dated October 13, 2022, they noticed that the words “extension of time” was inadvertently omitted. The gist of the Application dated October 13, 2022 is that the applicant sought to appeal to the Court of Appeal against this court’s order of June 28, 2022 which dismissed his preliminary objection.

Rule 75 (1) and (2) of the [Court of Appeal Rules](#) provides:-

“ A person who desires to appeal to the Court of Appeal shall give notice in writing to be lodged within fourteen days of the date of the decision against which it is desired to appeal.”



14. The subject Ruling and Order which the applicant sought to appeal from was dated and delivered on June 28, 2022. The Notice of Appeal should have been lodged on or before July 12, 2022. The time frame in which the applicant should have filed the Notice of Appeal had lapsed and the applicant could only invoke the jurisdiction of the Court of Appeal by seeking leave of the court to file the Notice of Appeal out of time. The respondent has not ably demonstrated what prejudice she is likely to suffer if the amendment is done to the Notice of Motion dated October 13, 2022 to include the words “extension of time.”
15. The applicant has the right to exhaust all the appeal avenues available at his disposal to ventilate his case. I am of the view that an amendment to the Notice of Motion dated October 13, 2022 to include the words “extension of time” is necessary for the court to be given an opportunity to interrogate the issues before it. The application dated February 21, 2023 is allowed to the extent that he is allowed to amend his notice of motion dated October 13, 2022 to include the words “extension of time.”
16. Since the respondent has already filed a Replying Affidavit to the application dated October 13, 2022 and submissions dated March 9, 2023, this court is of the view and for purposes of good order, the respondent’s Replying Affidavit dated November 8, 2022 and Submissions dated March 9, 2023, be and are hereby expunged from the court record to allow the respondent file fresh responses to the amended Notice of Motion. The same fate will befall the further affidavits of Maurice Ezekiel Dande and Walter Opiyo dated November 29, 2022 and November 30, 2022 respectively.
17. The following orders do issue:-
 1. The applicant do file and serve the amended Notice of Motion to the respondent within 7 days hereof, in default, the amended Notice of Motion stands dismissed.
 2. The respondent to file and serve a Replying Affidavit within 14 days of service.
 3. The applicant is granted leave to file a further Affidavit if need be, and Submissions within 14 days of service of the Replying Affidavit.
 4. The respondent to file and serve her Submissions within 14 days of service by the applicant.
 5. Time is of the essence in filing the above documents and if a party files and serves outside the stipulated timelines, the documents will remain struck out and will not be considered by this court.
 6. The matter will be mentioned on November 23, 2023 to take a ruling date.
 7. Costs will be in the cause.

DATED DELIVERED AND SIGNED AT MIGORI THIS 29TH DAY OF SEPTEMBER 2023.

R. WENDOH

JUDGE

Ruling delivered in presence of:-

Mr. Mwamu for the Applicant.

N/A for the Respondent.

Emma & Phelix - Court Assistants.

