



**EM v EWKK (Matrimonial Cause E07 of 2021)
[2023] KEHC 22584 (KLR) (25 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22584 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
MATRIMONIAL CAUSE E07 OF 2021
HM NYAGA, J
SEPTEMBER 25, 2023**

BETWEEN

EM PETITIONER

AND

EWKK RESPONDENT

RULING

1. Before me is the Applicant’s Notice of Motion dated July 26, 2023 filed on the even date. It is brought pursuant to Order 51 Rule1,Section 3A & 63(e) of the Civil Procedure Act wherein the Applicant seeks for ORDERS:-
 1. Spent
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 3. That the Honourable Court be pleased to set aside proceedings herein pending the hearing and determination of Divorce Cause No E08/2021 slated for hearing in September 2023.
 4. That the costs of this Application be provided for.
2. The Application is premised on grounds that:
 1. That the Respondent proceeded to prosecute her case in the absence of the Applicant.
 2. That the Respondent knew very well that the filed Divorce cause is yet to be heard and determined.
 3. That the Matrimonial cause proceeded without the knowledge of the Applicant.
 4. That the Applicant Advocate on record never alerted the Respondent about the hearing of this cause.



5. That it will be in the interest of justice that this Application is allowed.
6. That no prejudice will be occasioned to the Respondent should this Application be allowed.
3. The Application is supported by the Affidavit of EWKK dated July 26, 2023 reiterating the above grounds.
4. The Application is vehemently opposed by the Respondent vide her Replying Affidavit sworn on August 28, 2023. She averred that the divorce cause was fully heard and the judgement thereof delivered on August 14, 2023 by Hon. Ombatta.
5. She averred that there being no other reason for setting aside the proceedings, the entire Application has been rendered inapplicable/otiose.
6. It was her further averment that a hearing notice dated February 21, 2023 was served on the counsel for the Applicant on record on February 22, 2023 and when the matter came up for hearing on June 12, 2023 the Applicant was aware as his advocate had been duly served with the said hearing notice.
7. She prayed that the Application be disallowed with costs.
8. The parties thereafter left the matter for determination of court. None of them filed their submissions.

Analysis & determination

9. Having considered the Application, the affidavit in support and opposition, the singular issue for determination is whether the court should order stay of proceedings.
10. The issues for determination in an application of stay of proceedings are well settled. In the persuasive authority in *Global Tours & Travels Limited; Nairobi HC Winding up Cause No 43 of 2000* Ringera J, (as he then was) stated that: -

' As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.'

11. In the case of *Kenya Wildlife Service vs James Mutembei (2019) eKLR*, Gikonyo J held that:

' Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.'



12. *Halsbury's Law of England, 4th Edition. Vol 37 page 330 and 332*, on the principles upon which stay of proceedings may be granted are summarized as follows:

' The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.'

13. The Applicant's motion is pegged on two grounds. Namely; that the divorce cause between the parties herein is yet to be determined and that the matrimonial cause proceeded without the knowledge of the Applicant.

14. The Respondent has attached a lower court judgement delivered by Hon. Ombata on August 14, 2023 dissolving the marriage between the parties herein as such this argument is otiose as correctly submitted by the Applicant's counsel.

15. The Petitioner/ Respondent is not seeking division of matrimonial property but rather a declaration that the properties in issue solely belong to her. A Declaration under Section 17 of the *Matrimonial Property Act* is not necessarily pegged on the extinction of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce and this Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested.

16. However, by virtue of Section 7, this court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. (See the Court of Appeal case of *AKK v PKW [2020] eKLR*).

17. The Petitioner has provided an affidavit of service and a hearing notice annexed and marked as EMK 1(a) & (b) respectively which clearly show that the Applicant's advocate was served with a hearing date for June 12, 2023 when the Respondent's case was heard.

18. The Applicant's argument is that he was not aware of the date. Having instructed an advocate, service upon that advocate is deemed as sufficient. If the advocate did not inform him of the date, then the blame lies on the said advocate, not the petitioner.

19. Having considered the matter, I think that this calls for a look at who stands to be prejudiced if the application is not allowed. The applicant will have been shut out from the seat of justice. If the application is allowed, the only prejudice to be suffered is the delay in re-opening the case. I choose to go by the latter avenue.

20. Therefore, I allow the application and re-open the case but only to allow the applicant tender his evidence.

21. The costs of the application shall be borne by the applicant. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 25TH DAY OF SEPTEMBER, 2023.

H. M. NYAGA,

JUDGE.

In the presence of;



C/A Jeniffer

Mr. Simiyu for Respondent/Applicant

Mr. K. Mbugua for Petitioner/Respondent

