LWG v GBG (Matrimonial Case 6 of 2015)
[2023] KEHC 26305 (KLR) (28 November 2023) (Ruling)

Neutral citation: [2023] KEHC 26305 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

MATRIMONIAL CASE 6 OF 2015

SM MOHOCHI, J

NOVEMBER 28, 2023

BETWEEN

LWG .... PLAINTIFF

AND

GBG .... DEFENDANT

RULING

1. Before me is a Notice of Motion dated 13th July 2023 supported by the sworn Affidavit of LWG, filed pursuant to, Article 50 of the Constitution, Section 1A and 1B of the *Civil Procedure Act* and Order 8, and 51 Rule 1 of the *Civil Procedure Rules* 2010 seeking the following relief(s):

    i. Spent.

    ii. That the Petitioner be and is hereby allowed to amend the Originating Summons dated 3rd March, 2015.

    iii. That cost of this Application be in the cause

2. The Application is Premised on the following grounds:

    a. That the Petitioner/Applicant filed their Originating Summons dated 3rd March, 2015.

    b. That the parties were engaged in negotiations since then but the same was not fruitful.

    c. That the Petitioner/Applicant wishes to amend the Originating Summons dated 3rd March, 2015 to enable the Court make practical and appropriate orders.

d. That the real issue in this case is whether the Petitioner has legal rights in the suit properties which should be protected.

e. That the parties deserve to be heard on real issues and thus it is only fair and just that the Petitioner be allowed to amend their pleadings urgently so that the case can be heard and determined conclusively.

f. That the application has been brought without undue delay.

g. That the Matter is an old matter

3. The Application is opposed vide the Respondent's Affidavit dated 3rd August 2023 which contends that the issues at hand had been resolved and settled in the Court annexed AJS forum in Nakuru AJS E021 of 2022 and the application is being done 12 months after the AJS settlement.

4. That no reason is offered why come one year later whereas nobody contested the AJS process.

5. The Applicant further filed further Affidavits dated 23rd August 2023.

6. The only sole issue at play is that, can the Applicant be allowed to side step an AJS settlement to continue litigation?

Applicant's Case

7. That the Applicant filed this suit in 2015 via the Originating Summons dated 3rd March, 2015 seeking orders that the properties listed therein be declared as matrimonial properties and further that they be divided equally between the parties. The Respondent filed their response and pleadings closed.

8. The Applicant avers that thereafter parties proceeded to negotiations but the same did not result in closure of the matter. Since litigation must come to an end, the next step is for parties to return to Court for hearing and determination of the case.

9. That, Section 100 of the *Civil Procedure Act* provides as follows:

> " The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit: and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

10. That Order 8, Rule 3 and Rule 5(1) of the *Civil Procedure Rules*, 2010 provide as follows:

> [Order 8, rule 3.] (1) Subject to Order 1, rules 9 and 10, Order24 Rule 3, 4, 5 and 6 and the following provisions of this rule, the Court may at any stage of the proceedings, on Such terms as to cost's or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
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> 2) Where an application to the Court for leave to make an amendment such as is mentioned in sub-rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.
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> 5. General power to amend /Order 8, rule 5.)

1) For the purpose of determining the real question in controversy between the parties, or of correcting any detect 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.

11. That Section 17(1) of the *Matrimonial Properties Act* provides for declaration of rights to property:

1) A person may apply to a Court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.

That the Alternative Justice System process is not final

12. That the Respondent avers that the decision of the AJS is final and therefore the applicant is guilty of approaching the Court with unclean hands, for having failed to disclose that the matter was concluded during the AJS sessions.

13. That, it is a known fact, as stated on the AJS website, and we urge the Court to take judicial notice, that AJS is anchored on Article 159(2) (c) of the *Constitution* which requires the Judiciary to promote the use of alternative forms of dispute resolution. It is meant to supplement the work of the judiciary and reduce the workload. ADR is voluntary and a party cannot be forced to adopt a certain position. The AJS committee does not make decisions but simply encourages and facilitates discussions between the parties with a view to narrow down the Issues and come to a quick and fair settlement. If parties are unable to agree, then the matter must be returned to Court for determination.

14. That Article 50(1) of the *Constitution* guarantees the Applicant the right to be heard and to have her dispute decided in a Court of law or other appropriate venue by application of law. By returning to Court, the Applicant has not reopened the case, but simply seeks the Court's intervention in her case.

15. That the amendment sought is necessary and reliance is placed on the Court of Appeal case of *Central Kenya Ltd v Trust Bank Ltd &5 others* [2000] eKLR, the Court allowed an appeal over an application for amendment of pleadings which had been disallowed by the High Court. The Court held as follows:

> "The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P2245, of the Air Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state: "that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.'..............
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> As we stated earlier, the learned trial Judge took issue with the length of the proposed amendments In his view they were too long. Mere length of proposed amendments is not a ground for declining leave to amend. The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties Likewise mere delay is not a ground for declining to grant leave It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.'

16. The Applicant seeks to amend their Originating Summons to reflect that the parties are married and therefore prays for a declaration of legal rights on the properties listed. The facts and issues in dispute are still the same and the amendment simply allows the Court to make a determination over the appropriate orders in the circumstances and under Section17 the Matrimonial Properties.

17. Reliance is further placed on the Court of Appeal case of *Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Limite*d [2013] eKLR, the Court allowed the appeal holding that the proposed amendments would assist the Court to determine the dispute with finality. The Court allowed the same by holding as follows;

> "The law on amendment of pleadings in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed *Civil Procedure Rules* under which the application was brought, was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading 12th Edition, in the case of *Joseph Ochieng &2 others vs. First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:-
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> > " "The ratio that emerges out of what was quoted from the said book is that powers of the Court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the Court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts".

18. The Applicant submit that, the amendments are material to determination of the dispute with finality and do not change the character of the suit requiring a new suit. The Respondent will have a right to reply to the Amended Originating Summons.

19. The Applicant submit that, the Respondent has not demonstrated what prejudice they will suffer if the amendment is allowed and that it is in the interests of justice that she be allowed the amendments sought.

Respondents Case

20. The Application is opposed by the Respondent through a replying affidavit filed on 3rd August 2023 together with submissions dated 19th October 2023.

21. The Respondent contends that, the parties were once married but later on separated and the official separation was done in 2001. That, the Petitioner has claimed that he left in 1997 however the Respondent has always maintained it was in 1981 after an incident where he was beaten in his own house. Subsequently, the Respondent left and never came back.

22. That, the Petitioner thereafter filed this summons and all parties attempted to engage on the matter to no success. Sometime in 2092 when the matter was scheduled for hearing, parties agreed to attempt AJS, and after two sittings parties herein were able to settle the matter.

23. That, the Petitioner now wishes to reopen the suit concluded through a judicial process by amending the summons on the ground that the Court ought to determine if the legal rights in the suit properties which should be protected. In the further Affidavit, the Applicant admits that the parties went to AJS but she does not agree with the recommendation given.

24. The Respondent submit that, the application does not meet the threshold required for the orders sought.

25. That, the Alternative Justice System Baseline Policy identifies 6 operational doctrines of interaction between AJS and Courts. In the present application, there is no prayer before the seeking to set-aside the proceedings before the AJS Panelist. The mere fact that the Petitioner feels that she is not satisfied with the recommendation, is not a basis for the Court to overlook and or ignore the AJS proceedings that took place between the parties, in any case, the recommendations were an agreement between the parties herein.

26. Further the Petitioner herein has not contended anywhere in the affidavit that there was procedural impropriety. There is no claim by the Petitioner that she was forced to attend to the AJS process and or that during the proceedings she objected to the continuation of the same but was not forced to continue with the process. She has also not deponed that the panelists that heard the matter were in any way unfair to her and or they did not consider her evidence. She has not challenged the entire proceedings including the aspect of what was compromised by the parties.

27. That, neither is the Petitioner making a claim that the settlement reached at the AJS mechanism is, in any way disproportionate, irrational, and or violated any human rights or bill of rights and more specifically, her right. She is neither making a claim that there was procedural impropriety in reaching the settlement -which she voluntarily subjected herself to nor that the outcome of the AJS process is constitutionally disproportionate. The bottom line is, in absence of showing that the settlement which came after an AJS process in which she, the Petitioner willingly and in the exercise of their own agency participated in was procedurally suspect or disproportionate, the Petitioner is bound by the AJS outcome or settlement this Court should not allow her, to reopen the case through the amendment of the originating motion

28. That the Petitioner has also contended l that she wishes to be heard and a determination made. She has not averred that she was not heard by the panelist. In ensuring ga person's right to a fair hearing, Article 159 (2) (c) of the Constitution of Kenya encourages Courts to promote alternative forms of dispute resolutions, and those forms include reconciliation, mediation, arbitration, and traditional dispute resolutions mechanisms (in this case AJS).

29. The Respondent contends that, Parties voluntarily submitted themselves to the Court-annexed AJS forum and upon deliberations, agreed and urge this the Court to peruse Nakuru AJS E021 of 2022. That the application is coming more than a year after the AJS process was concluded. During this time and despite being represented by an Advocate, the Petitioner did not object to the said process. The Petitioner has not even given any reason why she never moved Court for more than one year. The Respondent submit that it is unfair for a party to now take a quick turn to continue with prolonged litigation after parties herein have agreed.

30. The Respondent urges the Court to take judicial notice of the signatures appended on the application and the further affidavit and compare the same with the signatures appended on the original originating summons as well as the witness statement by the Petitioner annexed in the further affidavit filed on 11th September 2023. That there is a very noticeable difference with no explanation suggesting a case of forgery.

31. That, litigation must come to an end. The proposed amendments do not raise any triable issues for determination by the Court. The Respondent urges the Court to find that the application is an indirect way of reopening a case that had been fully determined in the AJS process and that the Petitioner has not provided sufficient reasons to warrant the amendment of the originating Summons.

32. The Respondent further urges the Court to dismiss the application with costs, adopt the Report, and mark this matter as fully settled between the parties.

Analysis and determination

33. Having considered the present application, the affidavits in support and opposition of the said application, as well as the respective submissions of the parties, it is my view that the main issue for determination by this Court is;

    i. "If this matter is res-judicata, having been settled in Nakuru AJS E021 of 2022?"

    ii. "can the Applicant be allowed to side step an AJS settlement to continue litigation"?

34. This Court is surprised that, the applicant failed to disclose that the matter was concluded during the AJS sessions and it took swearing a further Affidavit where for the very first time she disagrees with the AJS recommendation casually stating her wish to continue litigation.

35. The Applicant contends that, the AJS is a voluntary informal process where parties are assisted to negotiate and that, the outcome of the process is not binding and must be presented to be adopted as a consent.

36. That, that AJS is anchored on Article 159(2) (c) of the Constitution which requires the Judiciary to promote the use of alternative forms of dispute resolution. It is meant to supplement the work of the judiciary and reduce the workload. ADR is voluntary and a party cannot be forced to adopt a certain position. The AJS committee does not make decisions but simply encourages and facilitates discussions between the parties with a view to narrow down the Issues and come to a quick and fair settlement. If parties are unable to agree, then the matter must be returned to Court for determination.

37. The motion to amend was without mention of the AJS Outcome and emerged in argument long after the standard motion to amend and I respectively disagree with the Applicant as follows;

    a. It the recommendation of the AJS doesn't have to have been adopted as an order of the Court for you to defer to it. The only question is if the parties exercised their agency in accepting to submit themselves to AJS.

    b. If they did, unless the party seeking to avoid the AJS outcome is making the claim that the settlement reached at the AJS Mechanism is, in any way disproportionate, irrational or violative of human rights or the Bill of Rights or that in there was procedural impropriety in reaching the settlement - which he or she voluntarily subjected herself to -- or that the outcome of the AJS process is constitutionally disproportionate, then the settlement is binding on her.

    c. The bottom-line is, absent of showing that, the settlement which came after an AJS process, which the applicant willingly, and in the exercise of their own agency participated in, was procedurally suspect or disproportionate, the party is bound by the AJS outcome or settlement whether it had earlier been adopted by the Court or not.

38. I have considered the AJS Panel Report No 2 of Nakuru AJS E021 of 2022 dated 5th July 2022 whereby the Respondent's proposal for division of property to all his 4 wives including the Applicant I need say no further.

39. The recommendation dated 5th July 2022 was never in challenge or contest until 23rd August 2023 when the Applicant disagrees with the AJS recommendation casually stating her wish to continue litigation this Court finds that the belated contest is ingenious and falls short of the principles allowable in contest.

40. In disagreeing with the recommendation, the Applicant has not alleged that the same is disproportionate, irrational or violative of human rights or the Bill of Rights or that in there was procedural impropriety in reaching the settlement.

41. In disagreeing with the recommendation, the Applicant has not alleged that, the outcome of the AJS process is constitutionally disproportionate.

42. The parties are thus bound by the AJS outcome or settlement whether it had earlier been adopted by the Court or not.

43. Parties are thus urged in view of their advanced ages, to implement the recommendations dated 5th July 2022.

44. The Constitutional predicate of, promotion of all forms of alternative dispute resolution mechanisms including the Alternative Justice Systems was not simplistically to compliment the judiciary and reduce backlog, but rather to foster long-term societal transformation in utilization of all available options in dispute resolution without delay for societal harmony and development.

45. This matter had been pending hearing and determination for eight (8) years from 2015 until the 5th July 2022 when the AJS Recommendation was made and until 23rd August 2023 when the Applicant has disagreed with the recommendation.

46. The one-year delay in contestation since the AJS Recommendation was made in without any explanation on the part of the Applicant

47. I thus find the Application dated 13th July 2023 to be without merit and the same is accordingly dismissed.

48. This being a family matter, parties shall bear their own costs.

It is so ordered

SIGNED, DELIVERED VIRTUALLY ON TEAMS PLATFORM ON THIS 28TH DAY OF NOVEMBER, 2023.

MOHOCHI S.M

JUDGE