



REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

DIVORCE CAUSE NO. 103 OF 2012

S.K.M.....PETITIONER

VERSUS

L.I.R.....RESPONDENT

RULING

1. The petitioner S.K.M. and the respondent L.I.R. solemnized their marriage at the District Commissioner's Office in Laikipia on 18th September 1989. The marriage was blessed with three children.
2. The petitioner filed a petition on 8th June 2012 seeking the dissolution of the marriage. The grounds were cruelty, wilful neglect, adultery and constructive desertion. It was also pleaded that the marriage had irretrievably broken down. The petition was filed through Z.M. Wandera & Co. Advocates. An application dated 11th October 2012 was filed to amend the petition. The application was allowed on 7th February 2013 and the amended petition admitted. The amendment was to correct the heading of the petition, from the Chief Magistrate's Court at Milimani to the High Court of Kenya at Nairobi.
3. It is not disputed that on 31st July 2012 the respondent had filed an answer to petition and cross-petition. They were dated 30th July 2012. The allegations in the petition were denied. The respondent relied on cruelty and constructive desertion in the cross-petition. She sought the dissolution of the marriage, among other prayers. It was pleaded that the parties had been living apart for over three years, and that the marriage was as good as ended.
4. On 7th June 2013 the petitioner applied for directions that the cause be heard as a defended one, now that the pleadings had closed. The application was not opposed. It was allowed by the Deputy Registrar on 27th June 2013. A hearing date was supposed to be taken at the registry.
5. No action was taken, and on 12th October 2017 the cause was dismissed for want of prosecution.
6. On 3rd October 2019 the petitioner through Muhuhu & Co. Advocates filed a motion under **Order 12 rule 1 and 7** of the **Civil Procedure Rules** and **sections 1A and 3A** of the **Civil Procedure Act** for the court to set aside the dismissal order and to readmit the cause to hearing. In the supporting affidavit, the petitioner stated that he had instructed P.M. Ndungu Advocates (this was done on 13th May 2013 to take over from Z.M. Wachira & Co. Advocates) to take over the matter but that they did not take any action. They did not set down the matter for hearing. On 6th April 2014 he filed a notice to act in person. He apparently took no action to prosecute the matter. On 4th December 2019 he instructed Muhuhu & Co. Advocates to act for him. She went on to file an application for the Registrar's Certificate and discovered the cause had been dismissed for want of prosecution. He deponed that he had not been served with the notice for the dismissal of his cause.
7. On 8th October 2019 the firm of Muhuhu & Co. Advocates were given the date of 21st November 2019 for the hearing of their application. On that date Mrs Judy Thongori was present for the respondent. The petitioner and his advocate were absent. The application was dismissed for non-attendance.
8. On 4th December 2019 the petitioner through his advocates applied to have the dismissal for his application to be set aside and the application reinstated for hearing. He also applied that his petition be reinstated. This is the present application. The respondent opposed the application through her replying affidavit sworn on 11th February 2022. She narrated the history of the matter. Her case was that the

conduct of the petitioner was inexcusable, and showed that he was not at all serious in prosecuting his petition. She stated that for four years he took no action to prosecute the matter, until it was dismissed on 12th October 2017. For 2 years after the dismissal of the cause, he took no action. When he applied for reinstatement of the cause he and his advocate did not attend hearing. The advocate had taken the date and served. She swore that it was not enough to blame the advocates then on record. She deponed as follows:-

“18. That I verily believe that the applicant is not keen on prosecuting the matter as it has been 10 years since the same was filed and only filed the application so as to vex me as I had already moved on from the matter.

19. That the court properly exercised its discretion in dismissing the suit in 2017 and I beseech the court to uphold that position.

20. That in the circumstances I verily believe that it is only fair and just that the petitioner’s application dated 26th November 2019 be dismissed with costs.”

9. The petitioner filed a notice dated 12th March 2020 to act in person.

10. **Order 51 rule 15** of the **Civil Procedure Rules** gives the court power to set aside any order that is made *ex parte*. This is the provision under which the petitioner has approached the court. It is important to point out that the discretionary power given under the provision has to be exercised judiciously with the overriding objective that justice is done to all the parties, and that there is expedition in the disposal of the matter at hand. In the application to set aside the *ex parte* order the court will consider the history of the matter, the conduct of the parties, the question whether costs will ameliorate the situation, but will not aid an applicant who merely wishes to obstruct or delay justice (**Shah –v- Mbogo [1967]EA116**).

11. It is also trite that where a party has instructed an advocate to represent him in a matter, he cannot be allowed to go to sleep, as it were. The matter essentially belongs to him and he has to show tangible steps taken by him to follow up his matter.

12. This matter has been in court for nearly ten years without prosecution. When it was dismissed for want of prosecution, it took two years before an application was made to set aside the dismissal and to reinstate the matter. The same was dismissed for non-attendance. The petitioner does not say what tangible steps he took at each stage to make sure that he remained interested in the matter as it was being acted upon by his advocates.

13. I agree with the respondent that, on the facts, the petitioner is not deserving of the exercise of the court’s discretion in his favour.

14. However, the respondent had a cross-petition for the dissolution of the marriage. That constituted a separate cause which she was required to prosecute, the petition notwithstanding. As she blames the petitioner, it is a fact that for all that period she failed inexplicably to prosecute her cause. She is equally guilty of indolent.

15. My other consideration is that, the parties despite the passage of time, are still legally married to each other. They cannot legally move on, even as the respondent claims that she has done so. From their pleadings, their marriage has broken down beyond repair. What holds them together is the marriage certificate. They have not lived together for years.

16. In the particular circumstances of this case, I allow the application. I reinstate not just the application dated 3rd October 2019 but also the petition and the cross-petition. Each side shall bear own costs.

17. Under **section 2 and 98** of the **Marriage Act, No. 4 of 2014**, I transfer this cause to the Chief Magistrate’s Court at Milimani Commercial Court for a priority hearing and disposal.

DATED and SIGNED this.....day of MARCH 2022

A.O. MUCHELULE

JUDGE

DATED and DELIVERED electronically at NAIROBI this 28TH day of MARCH 2022

A.O. MUCHELULE

JUDGE