



FM v EMM (Matrimonial Cause 1 of 2018) [2022] KEHC 233 (KLR) (24 March 2022) (Ruling)

Neutral citation: [2022] KEHC 233 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MATRIMONIAL CAUSE 1 OF 2018
MW MUIGAI, J
MARCH 24, 2022**

BETWEEN

FM APPLICANT

AND

EMM RESPONDENT

RULING

1. By a Notice of Motion dated 15th March 2021 filed under Certificate of Urgency on 17th March, 2021 the Applicants seek the following orders:-
 - a. Spent
 - b. THAT pending the hearing and determination of this application, this Hon. Court be pleased to stay further proceedings in this matter in the interest of justice.
 - c. That the Hon. Court to set aside and or vary its orders issued on the 26th January, 2021, directing this matter to proceed exparte in the absence of the defendant.
 - d. That this Hon. Court to order that the Plaintiff and her witnesses be recalled for the purposes of fresh examination in chief and cross – examination to enable the defendant participate as a party and to also cross-examine the Plaintiff.
 - e. That this Hon. Court to issue such further orders as it shall deem fit and just in the circumstances.
 - f. That the costs of this application be provided for.
2. The application is based on grounds inter alia that on the 26th January, 2021 when this matter was scheduled for hearing Mr. Opiyo, Counsel handling the matter was indisposed and had given instructions to Ms. Wambua Advocate to hold his brief and seek adjournment. The Court declined this



application for adjournment noting that since the institution of this suit, the Defendant/Applicant had not filed any response nor pleadings to defend the suit.

3. The Applicant contended that the directions given were not the true position of the matter since the Defendant had filed a Notice of Preliminary Objection dated 5th April 2018, a Replying Affidavit by the Defendant/Applicant and another affidavit by Peter Mutie Mwanja on 20th April 2018. Further that he had a good and triable defence and should be accorded his chance in Court to defend the suit and cross examine the Plaintiff. He deposed that the Defendant/Applicant was at risk of being condemned unheard in violation of his right to a fair hearing and the Plaintiff/Respondent will suffer no prejudice.

Respondent's Replying Affidavit Dated 11/06/2021

4. The Respondent swore the Replying affidavit in response to the Application deponing that the Applicant's Counsel had not bothered to explain why he failed and/or refused to attend Court on 26/01/2021 in the instant application. Counsel contended that the Applicant was not willing to prosecute the matter nor have it concluded as the matter came up for mention or hearing on diverse occasions and neither the Applicant nor his Counsel on record attended despite being aware of the hearing dates leading to numerous adjournments.
5. Further, that the Applicant has never complied with the Pre-Trial directions. Counsel deposed that the Plaintiff witness, Kitheka Musyimi is unwell and thus cannot be in a position to attend Court and testify again. In addition, the witness had already testified and already filed submissions and are now awaiting judgment hence recalling the Plaintiff to testify in chief is being vexatious and amounts to a waste of Court's precious time.
6. That the defence case was marked as closed by the Court on 26/01/2021 and setting aside the proceedings will be extremely prejudicial and will cause her mental anguish.

Applicant Further Affidavit Dated 22/06/2021

7. The Applicant opined that the Respondent is misleading the Court when Counsel for the Respondent says the Applicant has not shown any interest in prosecution of this case by failure to file pleadings and attend Court. The Applicant filed numerous pleadings as evidenced in the annexures of his supporting affidavit and on attendance. On 26th January, 2021 the Counsel for the Applicant had instructed an advocate to hold his brief and sought adjournment. The Applicant was desirous to prosecute his case.

Defendant/applicant Submissions Dated 15/03/2021

8. On the issue whether the applicant has any defence that raises triable issue it was submitted that it is trite law that the Court must consider whether the applicant has a defence which raises triable issues. Reference was made in the case of *CMC Holdings Limited -vs James Mumo Nzioki* [2004] eKLR the Court stated that:

“The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.”

9. The Applicant submitted that the suit should be heard on its merits and parties be allowed to canvass their case fully and the real issues in controversy be set out. The rights of the parties should be



determined as opposed to applying for judgment in default without affording the other party a chance to defend or show cause.

10. On the issue whether the Applicant has established sufficient cause to the satisfaction of the court, the Applicant submitted that sufficient cause is the cause for which the Defendant could not be blamed for his absence. The Defendant was prevented from attending Court where a sufficient cause was raised by holding brief Counsel and in this case was unavoidable that Counsel was indisposed hence amounts to sufficient cause. Reference was made in the case of *Wachira Karani –v- Bildad Wachira* [2016] eKLR.
11. On what prejudice will be occasioned the Plaintiff did not indicate what prejudice will be occasioned to her if application is allowed.
12. The Applicant further submitted that the Defendant should not be punished for the actions of his Counsel. In Court of Appeal case *Wenendeya –vs- Gaboi* – quoted in the case of *Alexander L. Shikond –vs- James Mureithi & Anor* HCCA 59 of 2011 – Nyeri in reinstating an Appeal that had earlier been dismissed for non – attendance, the Court stated that:

“Disputes ought to be determined on merits and that lapses ought not necessarily debar a litigant from pursuing his rights.”

13. Finally it was submitted that the Defendant/Applicant has demonstrated sufficient grounds for the grant of orders sought in his application dated 15th March, 2021 and sought the orders to be allowed.
14. From the record, the Respondent has not filed any submissions.

Determination

15. The Applicant sought that the Court considers the application to set aside and or vary its orders issued on the 26th January, 2021, directing this matter to proceed ex parte in the absence of the defendant.
16. The Applicant relies on the fact that there is a real risk and danger of being condemned unheard contrary to the client’s constitutional right to fair hearing under Article 50 of *Constitution of Kenya 2010*.
17. The Applicant stated that the Court Orders of 26/01/2021 where the Court dismissed the application for adjournment where Counsel was said to be indisposed should be set aside.
18. The Applicant submitted that pleadings had not been filed and there are triable issues that necessitate hearing of the matter interpartes.
19. The Court has perused the Court File and proceedings and notes with concern that the Applicant has not filed response to the Originating Summons despite ample time granted by the Trial Court. The Applicant failed to file Pleadings, Defence and/or Response and advanced no grounds for non-compliance. The Court has observed that the Applicant was not ready to proceed on several occasions as confirmed by the Court Record as follows;
 - a. Court Ruling dated 12th June, 2018 - Defendant Absent
 - b. Mention for Directions on 19/02/2019 – Defendant Absent
 - c. Mention on 19/06/2019 – Defendant Absent
 - d. Hearing on 25/09/2019 – Mr. Muumbi Holding brief for Mr. Opiyo stated - Mr. Opiyo Counsel for defendant is not ready as he is before Court of Appeal Case No. 172/2016. The matter rescheduled to 17/12//2019 by consent.



- e. Hearing of 17/12/2019 – Mr. Opiyo indisposed
 - f. Mention on 8/10/2020 – Mr. Opiyo Absent – to be served with a hearing notice of 1/12/2020
 - g. Hearing of 1/12/2020 – Mr. Opiyo Absent though served. Court orders the hearing to commence exparte. Further hearing fixed for 26/01/2021 and defendant to be served.
 - h. Hearing of 26/01/2021 – Mr. Opiyo Absent. The Counsel holding brief prays for an adjournment as Mr. Opiyo was indisposed. Adjournment declined and hearing continued.
 - i. Mention on 22/02/201 – Mr. Opiyo absent
 - j. Mention on 30/06/2021 – Mr. Opiyo absent
 - k. Mention on 29/07/2021 – Mr. Opiyo Absent
20. The Court’s observation is also supported by the Respondent’s extensive Replying Affidavit on the chronology of events previously by the Trial Court and parties as above stated.
21. The Applicant did not offer any explanation, challenge or apprehension, with regard to the filing of pleadings and hearing of the matter interpartes for the Court to consider except the application for adjournment on 26/01/2021 as Counsel was indisposed. This Court finds the Trial Court granted the said order of exparte hearing as required by Section 1A, 1B & 3A of Civil Procedure Act and Article 159 (b) CoK 2010.

(S. 1A (1) Civil Procedure Act) -OVERRIDING OBJECTIVE

" 1A.

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
- (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the Court;
- (c) the efficient use of the available judicial and administrative resources;.....”

(Art. 159(2)(b) –CoK 2010.

S. (2) in exercising judicial authority, the courts and Tribunals shall be guided by the following principles—



- (b) Justice shall not be delayed;
22. Be that as it may, as Court of law is mandated to comply with Art 22, 48 & 50 of CoK 2010 as this Court is taking over the matter it also considers that it is in the interest of justice not to lock out any party or prejudice any party by ensuring the proceedings are conducted interpartes.

Disposition

23. Going forward, the exparte proceedings shall halt, not set aside and the application is granted on the following terms and conditions;
1. The Court proceedings shall be typed and availed to parties/Counsel through DR MHC.
 2. The Applicant shall file and serve Response to the Originating Summons within 21 days of the Ruling.
 3. The Respondent shall have corresponding leave to file any response upon service of Replying Affidavit within 14 days.
 4. The parties'/Counsel shall at the close of pleading attend Pre-Trial Case management before the DR MHC for 30 days.
 5. The parties' Counsel may consider mediation during the said 30 days.**
 6. If not plausible the matter maybe mentioned in the New Term on a date to be agreed on by parties' Counsel before Deputy Registrar Machakos High Court.

DELIVERED SIGNED & DATED IN OPEN COURT ON 24TH MARCH 2022 (VIRTUAL CONFERENCE).

M. W. MUIGAI

JUDGE

IN THE PRESENCE OF:

No Appearance - For Applicant

No Appearance - For Respondent

Geoffrey - Court Assistant

