Nyamu v Mugambi (Civil Case E005 of 2021) [2022] KEHC 405 (KLR) (21 April 2022) (Ruling)

Neutral citation: [2022] KEHC 405 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT CHUKA

CIVIL CASE E005 OF 2021

LW GITARI, J

APRIL 21, 2022

IN THE MATTER OF MATRIMONIAL

PROPERTIES ACT 2013

AND

IN THE MATTER OF SECTION 6 AND 12 OF THE

MATRIMONIAL PROPERTIES ACT 2013

AND

IN THE MATTER OF MATRIMONIAL HOUSE AND

MATRIMONIAL HOME

BETWEEN

ELIAS NJAGI NYAMU ..... APPLICANT

AND

NELLY WANJA MUGAMBI ..... RESPONDENT

RULING

1. By a Notice of Motion application dated 26th August 2021 and filed in court on 20th September 2021, the Applicant herein seeks for the following orders that:

    a. Spent.

    b. The honourable court be pleased to issue an order of stay to stay execution of its orders issued on 20th August 2021.

    c. The honourable court be pleased to set aside its orders issued on 20th August 2021 and let the application dated 16th August be heard on merit.

2. The application is based on the grounds on the face of it and it is supported by the affidavit of the Applicant sworn on 26th August 2021 and a further affidavit also sworn by the Applicant on 1st November 2021. He deposed that he was served with the pleadings in this case on 18th August 2021 via Whatsapp. At the time, the Applicant contends that he was on his way to Mombasa to attend Civil Suit No. E048 of 2021 that was scheduled on 19th August 2021. The Applicant thus claims that the hearing notice for the application dated 16th August 2021 was short and that he has been aggrieved by the ex parte orders that were made on 19th August 2021 and issued on 20th August 2021 in respect to the said application. It is thus his contention that he stands to suffer irreparable loss unless the orders issued on 20th August 2021 are set aside and the application dated 16th August 2021 is heard on merit.

3. The application is opposed by the Replying Affidavit sworn by the Respondent on 23rd September 2021 and the Supplementary Replying Affidavit sworn in 9th November 2021. According to the Respondent, the Applicant is in contempt of the impugned court orders as the same have not been vacated. She thus contends that the Applicant should not be given audience because of her disobedience of the said orders. The Respondent further contends that the present application is an afterthought that was brought before this court after inordinate delay and that the Applicant has not produced sufficient evidence to demonstrate that he was attending court in Mombasa on the material day.

4. The application was canvassed by way of written submissions.

Applicant's Submissions

5. The Applicant filed his written submissions on 6th January 2022. It is his submission that he is likely to suffer irreparable loss if the impugned orders are not set aside as the same are conclusive in nature and he was not given proper opportunity to advance his case on merit. According to the Applicant, he was served with the pleadings on 18th August 2021 with a notice that the application dated 16th August 2021 was scheduled for hearing on 19th August 2021. He thus contends that the hearing notice was too short for him to instruct a counsel and for that reason, he prays that said orders be set aside.

Respondent's Submissions

6. The Respondent filed her written submissions on 20th January 2022. It is her submission that the Applicant is an indolent litigant as the present application was brought, in his view, after inordinate delay. The Respondent further contends that the Applicant is in contempt of the said court orders and should therefore not be given audience.

Issues for determination

7. From the pleadings on record, the main issues for determination are:

    a. Whether the execution of the orders issued on 20th August 2021 should be stayed.

    b. Whether the orders issued on 20th August 2021 should be set aside.

Analysis

8. The present application prays that the orders of this court issued on 20th August 2021 be stayed and set aside. The application is expressed to be brought under the provisions of Sections 3, 3A of the *Civil Procedure Act* (Cap 21 of the Laws of Kenya), Sections 6 and 12 of the *Matrimonial Properties Act* 2013, Order 51 Rule 1 of the *Civil Procedure Rules* (Cap 21 of the Laws of Kenya) and Article 159 (2)(d) of *the Constitution*.

9. Order 51, Rule 15 of the Civil Procedure Rules provide that the court may set aside an order made ex parte. It provides:

> " The court may set aside an order made exparte."

10. While considering the circumstances under which an ex parte order may be set aside, the Court of Appeal in Richard *Nchapi Leiyagu v IEBC & 2 others* [2013] eKLR expressed itself as follows:

> " We agree with those noble principles which go further to establish that the court's discretion to set aside an exparte judgment or order for that matter, is intended to avoid injustice or hardship resulting from an accident, inadvertence or inexcusable mistake or error but not to assist a person who deliberately seeks to obstruct or delay the course of justice."

11. The power to set aside ex parte orders is discretionary and the court must use its discretion judiciously while also ensuring that justice has been done. In exercising its discretion and deciding whether to grant the orders sought, the court should also be guided by the principle of whether there is sufficient cause for non-attendance and whether an injustice will be occasioned if the application is allowed. The burden is on the applicant to prove that he had sufficient cause for not attending court. The reason given by the applicant to attend court must therefore be considered. The applicant should therefore satisfy the court that none attendance was due to want of proper service or that there was sufficient cause.

12. The Applicant was therefore required to satisfy the court that he had a good and sufficient cause for his failure to attend court. The Court of Appeal of Tanzania in the case of The Registered Trustees of the *Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & others,* Civil Appeal No. 147 of 2006 discussing what constitutes sufficient cause had this to say:-

> " It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

Here at home, in the celebrated case of *Shah-v- Mbogo C.A (1968)* E.A 93 while dealing with the issue of sufficient cause it was stated: `

....."What Constitutes 'Sufficient Cause' not to prevent a defendant from appearing in court, and what would be the fit conditions for the court to impose when granting such an order necessarily depend on the circumstances of each case."

Courts should therefore give a liberal interpretation of what constitutes sufficient cause and address its mind to the applicant's case so that if he has a good case/defence and the reason for none attendance is satisfactory, discretion be exercised in his favour so as to prevent injustice. The principle of natural justice that no person should be condemned without being given an opportunity to be heard must be guarded where sufficient cause has been shown.

Section 1A &1B as well as Section 3A *Civil Procedure Act* calls for determination of cases on merits and grants court discretion to make orders as may be necessary for the ends of justice and to prevent abuse of court process. They provide;

> " 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.

B. (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

(d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respectiveparties;and

(e) the use of suitable technology.

3A. Nothing in this Act shall limit or otherwise affect the inherent.

power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

Article 159 (2) (d) supports the view that disputes should be heard and determined on merits and discourages over reliance on procedural technicalities.

See Court of Appeal Uganda in *Wahendeya William Giboi v Gaboi* Civil Application No. 8 of 2002 where it was stated "Disputes ought to be determined on merits and that lapses ought not necessarily set a litigant from prusing his rights."

In Patel v East African Cargo Handling Services (1974) E.A 75 a Ugandan case which considerd the principles of setting aside interlocutory Judgment (orders) Duffs –V.P stated 'inter alia'.

" The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given by the rules."

That the court has unfettered discretion to set aside is not indisputed. What the court will therefore seek to determine is whether the applicant has satisfied this court that he had sufficient cause for none attendance in court when the order was issued to warrant me to exercise discretion in his favour.

13. In this case, the Applicant admits that he was duly served with the application dated 16th August 2021 on 18th August 2021. The Applicant contends that he could not attend hearing of the application dated 16th August 2021 on 17th August 2021 because he was on official duty in Mombasa. The said application dated 16th August 2021 was certified as urgent on 17th August 2021 and heard on 19th August 2021 when ex parte orders were issued. The Respondent however contends that the Applicant's contention that he was in Mombasa on the material day is a mere allegation as no genuine evidence has been produced to substantiate such a contention. Although the Applicant was duly served, the notice to attend court was short and was precipitated by the fact that the application was under a certificate of urgency, the intention was to give him an opportunity to be heard. This not withstanding the short notice prejudiced the applicant.

14. The bone of contention in this case resolves around a matrimonial property. The Respondent maintains that the Applicant demolished her matrimonial home which she was living in with her children and which she has called home for around 19 years. The Respondent further contends that despite her contribution in the construction of the suit property, the Applicant took away her personal effects and those of her children which items are for daily use. On his part, the Applicant contends that the said ex parte orders are conclusive in nature and yet the Respondent did not demonstrate that she was the Applicant's wife or that she had been living on suit property.

15. It is trite that a party should not be condemned unheard. This right is provided under Article 50 of *the Constitution*. In the case of Richard Nchapi Leiyagu (supra), the Court of Appeal held as follows on the issue of the right to be heard:

> " The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

16. In my view, therefore, the Applicant has given sufficient cause to explain why the orders issued on 20th August 2021 should be set aside. The time within which the Applicant would have prepared for the hearing of the application dated 16th August 2021 was not sufficient.

17. Finally, I take note of the Respondent's averment that there has been inordinate delay in bringing the present application. The exercise of this court's discretion is intended to avoid injustice. The Respondent will not be prejudiced if the application dated 16th August 2021 is reinstated as both parties will have an equal opportunity to present their case. As such, I find that the present application warrants the exercise of the discretion of this court in favour of the Applicant.

Conclusion

Having considered the application, the averments in the affidavits and the submissions, I find that this is a proper case for the exercise of discretion by this court in favour of the applicant. I find that the application has merits and I therefore allow it. I order as follows:

1. The orders of this court issued on 20/8/2021 are set aside.
2. The application dated 16/8/2021 shall be heard and determined on merits.
3. Costs shall be in the cause.
4. The applicant to file a replying affidavit to the application dated 16/8/2021 within 14 days
5. The respondent to have corresponding leave to file a further affidavit if need be within seven (7) days.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 21STDAY OF APRIL, 2022.

L.W. GITARI

JUDGE

21/4/2022

The ruling has been read out in open court.

L.W. GITARI

JUDGE

21/4/2022