EH v CSM (Civil Appeal 16 of 2020) [2022] KEHC 11740 (KLR) (29 July 2022) (Ruling)

Neutral citation: [2022] KEHC 11740 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 16 OF 2020

JN ONYIEGO, J

JULY 29, 2022

BETWEEN

EH ..... APPELLANT

AND

CSM ..... RESPONDENT

((Being an appeal from the judgement and decree of Honourable Magistrate M.O RABERA, SRM dated 4th September 2020 at the Chief Magistrate's Court at Mombasa in Mombasa Divorce Cause No.48 Of 2016 between the parties herein))

RULING

1. The respondent herein petitioned the Chief Magistrate's Court for dissolution of her marriage with the appellant *vide* petition dated September 8, 2016. The matter proceeded to full trial after which the court pronounced itself through its judgement delivered on September 4, 2020 thus dissolving the marriage between the two. A *decree nisi* was subsequently issued on the October 16, 2020.

2. The appellant feeling aggrieved by the judgement of the subordinate court appealed to this court through his memorandum of appeal dated September 22, 2020 and filed the same day. The appeal having been admitted, parties appeared for directions whereof they by consent agreed to dispose the matter by way of written submissions. Having filed their submissions, the court on November 4, 2021 fixed the matter for judgment on December 17, 2021.

3. Before delivery of the judgement, the appellant filed a notice of motion application under certificate of urgency dated February 8, 2022 seeking to arrest the judgement and leave to introduce additional evidence through a supplementary appeal. The court certified the application urgent, directed service upon the respondent and consequently arrested delivery of judgment pending hearing and determination of the application.

4. On March 22, 2022, the application dated February 8, 2022 came up for hearing. Unfortunately, neither the respondent nor her counsel appeared. Nevertheless, hearing of the same proceeded in their absence. The court then fixed a ruling date for the said application for May 11, 2022.

5. By virtue of the *exparte* proceedings of March 22, 2022, the current notice of motion application dated March 23, 2022 by the respondent which is the subject of this ruling was born. The said application is seeking the following orders;

   (a) Spent

   (b) The court be and is hereby pleased(sic) to review and set aside its order made on March 22, 2022 closing and fixing for ruling the appellant's application dated February 8, 2022 and to reopen the same for hearing.

   (c) Consequently, the parties be allowed to canvass the application by way of written submissions upon directions to be issued by the court.

   (d) Costs in the appeal.

6. The application is based on the grounds stated therein and the supporting affidavit of the respondent's counsel Mr Omagwa Angima sworn on March 23, 2022. Mr Omagwa averred that when the matter came up for hearing on March 22, 2022 through virtual platform, he tried to join but in vain. He stated that; his two smart phones whose provider was safaricom failed to connect as the network indicators were blank; he was also unable to get an advocate to hold his brief and; that he couldn't get through to the respondent his cliient.

7. He further stated that; it was the respondent who called and informed him at around 1pm of what had transpired in court; the respondent informed him that she had tried to reach him with no success and that; although he was absent, the respondent was in court.

8. Counsel stated that it was on the above circumstances that they were seeking to review the court's order directing hearing of the application exparte and fixing it for ruling. He further stated that it was important that the court gets to hear the rival arguments of the parties which could be through written or oral submissions. Counsel averred that the appellant stood to suffer no prejudice if the application which was brought without undue delay is grant.

9. In response, the appellant filed a replying affidavit on April 19, 2022 stating that no good reason nor evidence had been tendered for the non-attendance by the respondent and her counsel on virtual court proceedings on March 22, 2022. That the alleged attendance of the respondent in court was irrelevant as she lacked the capacity to act in person considering that she had an advocate on record acting as her agent. He further stated that contrary to the practice directions to standardize practice and procedures in the high court issued on January 24, 2022, the respondent and her advocate did not connect to the court's virtual link 15 minutes before the stipulated time of the court session nor were they in attendance when the matter was called out.

10. He further stated that the application dated February 8, 2022 was set for hearing on March 22, 2022 a date taken in court by consent of the parties on March 1, 2022 thus non-attendance by the respondent could not hold the court hostage in conducting its duties. That in the wake of virtual court proceedings, advocates as officers of court were to ensure by all means possible good connectivity hence such failure could not be construed as denial to a fair opportunity to be heard. He urged the court to dismiss the respondent's application with costs.

11. The application was canvassed by way of oral submissions.

12. Counsel for the respondent/applicant Mr Angima basically adopted averments contained in the affidavit in support of the application. He contended that his non-attendance and that of his client was due to the fact that they were unable to access the court online which was not their fault but a technical error. He urged the court to allow the application.

13. Counsel for the appellant in her submission reiterated the position in the appellant's replying affidavit thus opining that non-attendance was deliberate hence the application should be dismissed. That the respondent will suffer no prejudice as she had already filed a replying affidavit to the application dated February 8, 2022.

14. In his rejoinder, counsel for the respondent/applicant submitted that they had suffered connectivity challenges severally and that technical challenges affect even the court.

15. I have considered the application, response thereof and rival submissions by both counsel. The only issue which emerge for determination is; whether the court should review and or set aside its orders of March 22, 2022 and reopen the application dated February 8, 2022 for hearing.

16. The power to review a court order or decision is derived from section 80 of the *Civil Procedure Act* cap 21 Laws of Kenya which provides;

> " Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

17. On the other hand, grounds for review are provided for by order 45 rule 1(1) and (2) of the *Civil Procedure Rules 2010* which provides;

> 1.
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> (1) Any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

18. The above provision was emphasized by the Court of Appeal in the case of *Otieno, Ragot & Company Advocates v National Bank of Kenya Limited* [2020] eKLR where it stated that;

> " section 80 of the *Civil Procedure Act* and order 45 rule 1 of the *Civil Procedure rules* gives the court unfettered discretion to make such order as it thinks fit on sufficient reason being given for review of its decision. However, as it has been constantly stated this discretion should be exercised judiciously and not capriciously."

19. Further, the Court of Appeal in the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR discussed what an application for review should disclose as follows;

> " On an application for review, it is particularly necessary that the application should disclose in the body of the notice of motion the ground or grounds on which the review is being sought."

20. In this case, it's the respondent/applicant's counsel's argument that their non-attendance was due to the fact that they were unable to access the court online which was not their fault but a technical error. Further, that the matter came up for hearing on March 22, 2022 through the virtual platform which he tried to join with no success as his two smart phones whose service provider was Safaricom failed. That he couldn't get an advocate to hold his brief nor get through to the respondent.

21. The key question for consideration is, has the respondent/ applicant met the requisite criteria to review the impugned orders. From the pleadings, the applicant does not plead discovery of any new evidence, mistake nor apparent error on the face of the record. With that in mind, the only ground left is whether there is any sufficient cause to set aside the order directing hearing of the application dated 8th September *exparte*. It is incumbent upon the court to evaluate the excuse given for non-attendance in court to make a determination on whether it is convincing to set aside the *exparte* orders made on that day.

22. In the case of *PMM v JNW* [2020] e KLR, the court expressed itself regarding proof of sufficient cause before reviewing a court order as follows;

> " In setting aside ex parte orders, the court must be satisfied of one of two things, namely, either that the respondent was not properly served with summons or that the respondent failed to appear in court at the hearing due to sufficient cause. (See – Philip Ongom, Capt v Catherine Nyero Owota Civil Appeal No 14 of 2001 [2003] UGSC 16 (20 March 2003).
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> ... In Ongom v Owota (supra) the court stated thus:
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> > "...However, what constitutes "sufficient cause", to prevent a defendant from appearing in court, and what would be "fit conditions" for the court to impose when granting such an order, necessarily depend on the circumstances of each case."

23. Further in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others* Civil Appeal No 147 of 2006, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

> " 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 imputable to the appellant."

24. In the case of *Wachira Karani v Bildad Wachira* [2016] eKLR the court came up with the test to be applied in determining sufficient cause in setting aside orders as follows;

> " The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application.[14]Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

25. In the instant case, the reasons advanced by the respondent/applicant's counsel for his absence in court on the material day are that he was unable to access the virtual court due to network failure and or challenges on his two gadgets whose service provider is Safaricom. He further argued that the respondent was present in court on the March 22, 2022. However, no reasons have been advanced as to why the respondent did not notify the court of her presence in court when the matter was called out. On the other hand, the court proceedings of March 22, 2022 indicate that there was no appearance by the respondent resulting to the matter proceeding ex-parte.

26. I must note that with the wake of Covid -19 pandemic courts moved from physical court to virtual courts and to date most matters proceed through the virtual platform. Further, I also take judicial notice that courts do also experience network failure due to poor internet connectivity. With this in mind and considering the fact that the respondent moved with speed the following day to file the instant application, that that is a genuine excuse on the part of counsel for the respondent/applicant in failing to turn up in court on March 22, 2022.

27. Having found that non-attendance by counsel was not deliberate, it is my conviction that the appellant/respondent will not suffer any prejudice by setting aside the impugned orders. Besides, it is in the interest of justice that the respondent/ applicant be accorded her right to be heard which is an inalienable right under the *constitution*. See *PMM v JNW* (supra) where the court stated;

> " In the circumstances thereof, it would be unjust and a miscarriage of justice to deny the applicant a chance to advance his case when as demonstrated, he has expressed a desire to be heard on the application dated January 30, 2020. The right to be heard is a well-protected right in our constitution and is also the cornerstone of the rule of law. This right should therefore not be taken away by the strike of a pen, where sufficient cause has been shown. (See - Richard Ncharpi Leiyagu v Independent Electoral Boundaries Commission & 2 Others Civil Appeal No 18 of 2013 [2013] eKLR)."

28. For the reasons above stated, the application herein is allowed with orders that;

(a) The ruling in the appellant's application dated February 8, 2022 is hereby suspended and the application reopened for hearing.

(b) The application dated February 8, 2022 to be canvassed by way of oral submissions on September 20, 2022.

(c) Costs to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 29TH DAY JULY 2022.

J.N. ONYIEGO

JUDGE