SMK v GWM (Civil Case 78(OS) of 2014)
[2022] KEHC 14497 (KLR) (Family) (27 October 2022) (Ruling)

Neutral citation: [2022] KEHC 14497 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL CASE 78(OS) OF 2014

AO MUCHELULE, J

OCTOBER 27, 2022

BETWEEN

SMK ..... APPLICANT

AND

GWM ..... RESPONDENT

RULING

1. The history of this dispute is that, in divorce cause No 14 of 2012 at Thika Chief Magistrate's Court the respondent G.W.M petitioned for the dissolution of the marriage that had been contracted between her and the applicant S.M.K under Kikuyu customary law in 2007. The petition was served but did not receive a response. It was heard and on November 12, 2013 the marriage was dissolved.

2. On December 16, 2014 the respondent came before this court under section 17 of the *English Married Women Property Act 1882* seeking the determination that Juja/Juja East Block 1/5 in Kimunchu was matrimonial property that she and the applicant had jointly acquired and that she was entitled to half share of the same. On March 20, 2015 the applicant filed a response through Mbiyu Kamau & Co Advocates stating that the respondent was his niece and that there was no relationship of marriage or an affair between them. He denied knowledge of the divorce proceedings. He stated that he had been married for 53 years to one S.N; and he was 78 of age and a retired civil servant. He went on that he knew the respondent to be married to one Muigai. He denied that the property in question was matrimonial property, or that the respondent was its joint owner.

3. On November 29, 2018 this suit was heard when the respondent gave evidence. The applicant and his lawyers were absent. The lawyers had been served. At the conclusion of the hearing the respondent's counsel was given time to file written submissions for highlighting on December 20, 2018. On December 20, 2018 he was asked to serve the advocates for the applicant and come on January 31, 2019. He served for January 31, 2019. The matter was mentioned and he indicated he was going to rely

on his submissions. The matter was set down for judgment which was delivered on March 28, 2019. The originating summons was allowed as prayed.

4. The applicant's present application is dated June 30, 2021 and sought that the *exparte* hearing and resultant judgment be set aside and the mater be reheard on merits. The application was brought under sections 1A, 1B and 3A of the *Civil Procedure Act* and order 22 rule 25 and order 12 rule 7 of the *Civil Procedure Rules*. His case was that he had a defence to the claim, but that he had been failed by his advocates who had not informed him of the hearing of the case, or that a judgment had been delivered. He learnt of what had transpired when surveyors came to his land seeking to share it into half in accordance with the judgment. He stated that he was 84 years old and had for 10 years lost his vision and had completely relied on his advocates who had, however, failed him by not going to court or informing him of the hearing date. He stated that he had a good defence as he was never married to the respondent who was his niece, and who was not involved in the acquisition of the parcel of land.

5. The application was served on the respondent but did not elicit any response.

6. The applicant's counsel filed written submissions in which he persuaded the court to set aside the judgment and to allow the re-hearing of the originating summons on merits. I have considered what he had to say on the application.

7. Order 12 rule 7 of the *Civil Procedure Rules* provides as follows:-

> " Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just."

8. It is now accepted that the discretion to set aside an exparte proceeding or decision is wide and unfettered, and that all that the court is interested in is the justice of the case (*Shah v Mbogo and another* [1967] EA 116). The applicant has to sufficiently explain why he found himself in the present circumstances where the case that he had filed a response to came to be heard and determined without his participation. He has to demonstrate that he was not acting negligently or in a manner that was not diligent (*Auto Selection (K) Ltd & 2 others v John Namasaka Famba* [2016]eKLR); that he has a defence that raises a triable issue; and that the setting aside will not unduly prejudice the respondent in a manner that costs will not provide adequate compensation. All the time, the court should bear in mind that justice is best served when a dispute before it is determined on merits.

9. It may be true that a party should not be punished for the negligence of his advocate (*Lee Muthoga v Habbib Zurich Finance (K) Ltd & another*, civil application No 236 of 2009 at Nairobi), but the party should remember that the case was his and has to show that he was always concerned about the expeditious disposal of the matter by being in constant touch with the advocate. The applicant did not indicate when he had last been in touch with his advocate from the time he filed the response to the claim to when he learnt of the judgment. I, however, note his age and the fact that he was blind. His averments did not receive any challenge.

10. Even as he denies that he was ever married to the respondent, I do not know what he will do to the judgment at the subordinate court that determined that he was married to her under Kikuyu customary law. The court then dissolved the marriage. I am, however, mindful that the fact only of marriage does not entitle a spouse to matrimonial property. The spouse has to establish contribution to either its acquisition or its improvement. In the filed response, the applicant stated he was the sole buyer of the property in question without the respondent's contribution. He raises a defence that should be investigated at hearing.

11. In conclusion, I determine that the applicant has sufficiently shown why he did not participate in the *exparte* hearing that led to the judgment now subject to the application. He has demonstrated that he has a defence that should go to trial. Consequently, I allow the application, set aside the *exparte* proceedings of January 29, 2018 and the judgment of March 28, 2019. I ask that the matter be served and mentioned on March 6, 2023 to take a convenient hearing date.

12. The applicant has been indulged. Although the application was not defended, he will pay all throw away costs.

DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 27TH DAY OF OCTOBER 2022

A.O. MUCHELULE

JUDGE