



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NUMBER 3 OF 2017

JMW.....PLAINTIFF/APPLICANT

VERSUS

LWK.....RESPONDENT

RULING

1. The plaintiff /Applicant has filed three applications;

1. *The application dated 30th January 2020 seeking review of the Consent order issued herein on 5th July 2018.*
2. *The application dated 13th February 2020 seeking the transfer of the Divorce cause from Nyahururu CM's Court to this court.*
3. *The application dated 1st February 2021 seeking leave to file submissions out of time in the two applications cited herein above.*

2. I will look at each application in turn beginning with the last one.

3. Directions were given for the hearing of the two other two applications but Covid-19 happened. The 1st hearing date for both of them was set for 9th April 2020. The applicant never followed up the matters when the date passed and counsel for the respondent had the same mentioned on the 9th July 2020. On this date the Applicant did not attend court and also did not attend court on subsequent mention dates of 21st July, 2020 and 12th October, 2020.

4. The directions to have the Application disposed of by way of written submissions were taken on 12th October, 2020 and this Court directed the Respondent to serve the Applicant with this date. The Respondent complied as evidenced by Affidavit of Service filed 12th October 2020. The respondent filed hers. While the matters were pending ruing he filed the application dated 1st February 2021. It was heard on 11th February 2021.

5. He sought for leave to file his submissions out of time. On grounds that he had not been served with notices of prior mention dates. He alleged that this was a scheme to ensure he was not heard and that the respondent was out to enrich herself by obtaining orders prejudicial to him with regard to the property in question in the application dated 30th January 2020.

6. The respondent counsel responded orally to the application by pointing out that the applicant had been served and the record would bear her out. That in any event there was sufficient affidavit and other evidence upon which the court could rely on to determine the issues raised in the two applications.

7. The issue for determination is: Whether the Applicant should be granted leave to file his submissions.

8. It important to point out that submissions are not evidence. I agree with the holding of **Mwera, J (as he then was)** in **Erastus Wade Opande vs. Kenya Revenue Authority & Another Kisumu HCCA No. 46 of 2007:**

“Submissions simply concretise and focus on each side’s case with a view to win the court’s decision that way. Submissions are not evidence on which a case is decided.”

9. The same Judge in **Nancy Wambui Gatheru vs. Peter W Wanjere Ngugi Nairobi HCCC No. 36 of 1993** expressed himself as follows:

“Indeed and strictly speaking submissions are not part of the evidence in a case. Submissions, to this court’s view, are a course by which counsel or able litigants focus the court’s attention on those points of the case that should be given the closest scrutiny in order to firmly establish a claim/charge or disprove it. Once the case is closed a court may well proceed to give its judgement. There are many cases especially where parties act in person where submissions are not heard. Even some counsel may opt not to submit. So submissions are not necessarily the case.”

10. Similarly, in Ngang’a & Another vs Owiti & Another [2008] 1KLR (EP) 749, the Court held that:

“As the practice has it and especially where counsel appears, a Court may hear final submissions from them. This, strictly speaking, is not part of the case, the absence of which may do prejudice to a party. A final submission is a way by which counsel or sometimes (enlightened) parties themselves, crystallize the substance of the case, the evidence and the law relating to that case. It is, as it were, a way by which the Court’s focus is sought to be concentrated on the main aspects of the case which affect its outcome. Final submissions are not evidence. Final submissions may be heard or even dispensed with. But the main basis of a decision in a case, we can say are: the claim properly laid, evidence fully presented and the law applicable.”

11. The Court of Appeal in Daniel Toroitich Arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR:

“Submissions are generally parties’ “marketing language”, each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented.”

12. In the two applications before me, both by the applicant, one is on the transfer of the divorce cause from Nyahururu CM’s Court to this court; the other is on the review of a consent order. In each of them the applicant has filed his Supporting Affidavit and annexures, He cannot claim that he has been denied the right to be heard as he has not indicated that there is more evidence that he wishes to add, that will add value to his application.

13. In any event if they were his applications. He took no action. The other party did and served him. He did not respond. I do not see what prejudice he will suffer. I find that there is no merit in the application and the same is dismissed.

14. That brings me to the application dated 30th January, 2020, the applicant sought the following orders:

3. Spent
4. Spent
5. That this Honourable Court be pleased to remove Order No. 3 of the Orders issued on 5th July 2018.
6. THAT costs of this Application be in the cause.

15. The grounds for the application are set out on the face of the application and the affidavit in support by the applicant viz:

1. THAT PLOT NO. [particulars withheld] is where I stay.
2. THAT the execution of the said Order i.e. (Order No. 3) will mean that I pay rent for premises that I use as my place of abode.
3. THAT the said premises is where the Respondent sought the assistance of this court to remove her belongings.
4. THAT I urge this court to grant the Orders sought and no prejudice will be occasioned to the Respondent.
5. Annexed Affidavit of JMW.

16. In the Supporting Affidavit the applicant attaching the order, depones, inter alia that on the 5th of July, 2018, this Honourable Court issued Orders that Legacy Auctioneers Services collect rent on [Particulars Withheld]. However these are the premises where he lived with the Defendant/Respondent; that the record will bear him out as these are the same premises the Defendant/Respondent urged this Honourable Court and the court granted her an Order to access the said premises and collect her belongings. Hence it was not right for him to pay rent for the said the premises which he was still occupying, and in any event the property in question solely belongs to him.

17. Vide a Replying Affidavit sworn on 24th June 2020 the respondent attaching the same order, opposed the application stating that orders referred to by the applicant were entered into by consent of parties, and he was bound by the said consent. That the auctioneers had established that there were rental units for which the applicant was collecting rent and it was not true that he was in occupation of the specified premises. In any event he had not established any grounds for review or setting aside of the consent.

18. Parties agreed to dispose of the applications by way of written submissions.

19. The applicant did not file any submissions as indicated herein above.

20. The respondent did file submissions dated 4th August, 2020 in which the respondent set out the brief history behind this application; That on 12th June 2018, counsel for each of the parties herein, acting under their respective instructions entered a consent order stating *inter alia*; that the Applicant herein collect's rent from the parcel of land known as L.R. NO. [xxx] while the Respondent collects rent from [particulars withheld] and [particulars withheld]. The parties also agreed that [particulars withheld] would collect rent from [particulars withheld] with effect from 1st July 2018 as well as the lease amount for [particulars withheld] with effect from 1st January 2019. In a subsequent order issued on 5th February 2020, court ordered that the rental income collected be deposited in court. In line with the consent order, each party collected rent from their respective parcels of land without any complaints from either party. However, when [particulars withheld] attempted to collect rent from the parcel of land known as [particulars withheld], there was a problem which they explained in their letter dated 12th February, 2020 that the Applicant had been and continued to collect rent from the four (4) rental units on the parcel of land known as [particulars withheld]. It was upon the realisation that he was in contempt of the consent order that he filed this application in a bid to seeking the review and/or setting aside the orders issued on 5th July, 2018.

21. Having considered all the affidavit evidence on record and the annexures thereto, and the submissions by the respondent the issue for determination are whether the applicant is entitled to the order sought.

22. The application is brought under **Order 10 rule 11 and Order 22 rule 22(1) Order 50 rule (1) of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.**

23. **Order 10 rule 11 of the Civil Procedure Rules** provides for the setting aside of judgment entered consequent to the non-attendance of a party, while **Order 22 rule 22(1)** is about the stay of execution by the court to which a decree has been sent for execution and **Order 50 rule 1** relates to the definition of month to mean, calendar month. **Section 3A of the Civil Procedure Act** provides for 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 court.

24. Counsel for the respondent has submitted at length on the issue of review and setting aside of consent orders citing **Order 45 rule 1 of the Civil Procedure Rules** together with the applicable authorities.

25. The application by the applicant seeks the removal of **Order No. 3** from the order issued on 5th July 2018.

The whole order reads;

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J MW..... PLAINTIFF/RESPONDENT

VERSUS

LK..... DEFENDANT/APPLICANT

ORDER

THIS MATTER coming up for mention to record consent on 12th June, 2018 before HON. A. K. NDUNG'U J AND UPON hearing counsel for both parties in the presence of the parties.

IT IS HEREBY ORDERED BY CONSENT:-

1. **THAT** the Plaintiff does collect monthly income from **L.R. NO. [xxxx] NAKURU.**
2. **THAT** the Defendant to collect monthly rent from **NAIROBI/UMOJA BLOCK [xxxx] and BAHATI KABATINI BLOCK [xxxx].**
3. **THAT M/S LEGACY AUCTIONEER SERVICES** does collect rent for **CII B CO SITE NYAHURURU MUNICIPALITY** with effect from 1st July 2018 subject to 10% commission and the lease amount for **NYAHURURU/SILIBWET/[...]**with effect from **1st January, 2019** subject to **10%** commission.
4. **THAT** the amount collected to **M/S LEGACY AUCTIONEERS** shall be deposited in Joint Account of the parties Advocates at a bank to be agreed.
5. **THAT** hearing be on **17th December, 2018.**

GIVEN under my hand and the SEAL of this Honourable Court this 12th day of June, 2018.

A. K. NDUNG'U

JUDGE

NAKURU HIGH COURT

ISSUED at NAKURU this 5TH day of JULY, 2018.

DEPUTY REGISTRAR

NAKURU LAW COURT

PENAL NOTICE:

TAKE NOTICE that in default of compliance with this order you will be liable for punishment for Contempt of Court and you may be imprisoned for a period up to 6 months."

26. From the applicant's application this is the consent judgment he seeks review and or setting aside. He appears to suggest in his application that the consent was made in his absence hence his application to have the same set aside.

27. A reading of the order clearly indicates that the court heard both counsel for parties, that the court heard these counsel in the presence of the parties, then the court proceeded to make the consent order in their presence. Clearly therefore the order was not made consequent to the applicants non-attendance of court.

28. It is submitted by counsel for the respondent, that if the applicant's intent was to have the consent order reviewed so that Legacy Auctioneers would not collect rent, as indicated in the consent, then the proper application would have been an application for review and or setting aside of the consent judgment /order under **Order 45 rule 1 of the Civil Procedure Rules**. It was also submitted by counsel for the respondent that this court can proceed under **Article 159 (2) (d) of the Constitution** to indulge the applicant and determine his application, as if he had brought it under **Order 45 rule 1 of the Civil Procedure Rules** which states:

"Application for review of decree or order.

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(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.

29. It was argued that it was upon the applicant to establish that he had discovered new and important matters, which were not within his reach at the time the consent was adopted, or demonstrate that there had been some error on the face of the record and to file his application without unreasonable delay.

30. It was further submitted that the consent order is dated 5th July 2018. The application for review is dated 30th January 2020, hence the delay is clearly inordinate, and unexplained and the only explanation was because he had failed to comply with the court order. That it was not an acceptable reason for review, as he cannot be allowed to choose to obey court orders only when it is convenient to him. The respondent cited the case of **Francis Njoroge vs Stephen Maina Kamore [2018] eKLR** where it was held :

"Indeed, if parties were allowed to seek review of decisions on grounds that they are not in a position to carry out the orders sought to be reviewed, or rather that the orders are not convenient to them, then a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the court in which they were made under the guise of review.

It should be noted that the grounds for review are very specific as discussed herein above. The Appellant herein has not demonstrated that he discovered new evidence which was not within his knowledge, neither that there was an error apparent on the record This is a court of justice but not court of convenience such that it has to consider the conflicting interest of the parties. And in so considering, courts have to be guided by the laid down principles of law. The Respondent has a decree which he is desirous of executing and it is the court's duty to ensure that the decree is secured pending the determination of the Appeal.

31. That besides, the grounds upon which a consent judgment or order will be set aside are settled. See generally East African Portland Cement Company Limited vs Superior Homes Limited [2017] eKLR and Samuel Mbugua Ikumbu vs Barclays Bank of Kenya Limited [2015] eKLR where the Court of Appeal cited the following cases:

i. Brooke Bond Liebig Ltd vs Mallya [1975] EA 266 where the Court stated that:

"a consent order cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, or if consent was given without sufficient material facts or in misapprehension or in ignorance of material facts, or in general for a reason which would enable the court to set aside an agreement."

ii. Hancox JA (as he then was) in the case of Flora Wasike v. Destimo Wamboko (1982 -1988)1 KAR 625, said in his judgment at page 626 -

"It is now settled law that a consent judgement or order has contractual effect and can only be set aside on grounds which would justify setting a contract aside, or if certain conditions remain to be fulfilled, which are not carried out... in Purcell vs F C Trigell Ltd [1970] 2 All ER 671, Winn LJ said at 676;

"It seems to me that, if a consent order is to be set aside, it can really only be set aside on grounds which would justify the setting aside of a contract entered into with knowledge of the material matters by legally competent persons, and I see no suggestion here that any matter that occurred would justify the setting aside or rectification of this order looked at as a contract."

32. The applicant has not demonstrated that the consent that led to that order was obtained by way of *"fraud or collusion or an agreement contrary to the policy of the court."* He has not demonstrated that he gave his consent *"without sufficient material facts or misapprehension or ignorance of the facts."* (See SNM & ZMS & 3 Others [2017] eKLR where Kenya Commercial Bank Limited vs Specialized Engineering Company Limited [1982] KLR 485 is quoted with approval).

33. The applicant simply wants the order removed or set aside because it is not convenient to him yet there is evidence to the contrary which evidence, he has not controverted.

34. In view of the foregoing the application has no merit and the same is dismissed with costs.

35. On the application dated **13th February, 2020** the applicant sought the following orders;

1. Spent

2. THAT this court be pleased to withdraw NYAHURURU CM DIVORCE CAUSE NO. 2 OF 2019 JMW VS LWK from Nyahururu Chief Magistrate's Court and the same be transferred to this Court.

3. THAT upon transfer of NYAHURURU CM DIVORCE NO.2 OF 2019 to this Court, the same be and is hereby consolidated with this matrimonial property suit for hearing and determination.

4. THAT the cost of this Application be in the cause.

36. The application is supported by the grounds on the face of the Application the annexed Affidavit of the applicant. Mainly that Nyahururu Chief Magistrate's Court Divorce Cause No. 2 of 2019 involving the same parties is yet to be determined. That it would be convenient for both parties if the divorce proceedings were to be determined at the same time with this suit for division of matrimonial property. That the transfer and consolidation of the two matters will save court's time and no prejudice is likely to be suffered by the respondent as the orders sought are in the interest of justice.

37. The Application is opposed vide the Respondent's replying affidavit where she avers that the application is bad in law, frivolous, malicious, vexatious and a total abuse of the Court process.

38. That it is the Applicant who on his volition, filed Nyahururu CM Divorce Cause No. 2 of 2019, and the matrimonial cause in this court. That it is now evident that this was a calculated move as he anticipated the chance of making this application.

39. That the applicant seeks to use this application to complicate this suit and delay its determination yet the Chief Magistrate's Court at Nyahururu has the jurisdiction to hear and determine the divorce cause. That the applicant has not demonstrated why this Honourable Court should exercise its discretion and transfer the divorce cause from the Chief Magistrate's Court at Nyahururu to Nakuru.

40. Parties agreed to canvass the application through submissions. The applicant did not file his, as pointed out hereinabove.

41. The Respondent in her submissions referred to this Court to **Section 18 and Section 1A (1) of the Civil Procedure Act** as read with **Order 50 rule 1 of the Civil Procedure Rules** and submitted that the application to transfer the Nyahururu CM Divorce Cause 2 of 2019 offends the said provisions does not promote the just, expeditious, proportionate and affordable resolution of the divorce cause in question.

42. The respondent also submitted that Nyahururu Chief Magistrate's Court is clothed with the relevant jurisdiction to hear and determine the

divorce proceedings. Additionally, the applicant is the one who filed the two suits separately in Nakuru and Nyahururu respectively. It is therefore curious that the applicant who had the option of filing the divorce cause in Nakuru chose to file it in Nyahururu only to apply for a transfer of the same.

43. This matter has been in court since 2014 as **High Court Civil Case Number 84 of 2014**. This application cannot be in good faith as the process of transfer if allowed further delays the determination of this cause.

44. In any event the divorce cause would have to be determined before this cause on the determination and distribution of the matrimonial property could be heard. This Honourable Court stayed the matrimonial proceedings to allow the hearing and determination of the divorce cause.

45. The Respondent relied on the case of **DOK vs JEN alias JEK (2016) eKLR** which cited with approval the case of **Kageny vs Musiramo (1986) E A 24**; that it was the onus of the party seeking transfer of the case to make a strong case to the satisfaction of the court. The applicant had not demonstrated sufficient ground to warrant the exercise of the court's discretion in his favour.

46. The issue for determination is **whether this court should withdraw Nyahururu Cm Divorce Cause No. 2 of 2019 JMW Vs LWK** from Nyahururu Chief Magistrate Court and order the same be transferred to this Court for consolidation with this Matrimonial Cause for expedient determination.

47. This power of the Court to transfer suits to/from subordinate courts is provided for in **Section 18 of the Civil Procedure Act**: which states :

“On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court may at any stage—

(a) Transfer any suit, appeal or other proceeding pending before it for trial or disposal to any court subordinate to it and competent to try or dispose of the same;

(b) withdraw any suit or other proceeding pending in any court subordinate to it, and thereafter—

i. try or dispose of the same; or

ii. transfer the same for trial or disposal to any court subordinate to it and competent to try or dispose of the same; or

iii. re-transfer the same for trial or disposal to the court from which it was withdrawn.”

48. In the instant case the Applicant's grounds to have the case at Nyahururu transferred to this court is that the parties are the same, that it is convenient for both parties have the matter determined at the same time with this suit for division of matrimonial property as that will save court's time and no prejudice will be occasioned to the Respondent.

49. To begin, **Section 7 of the Matrimonial Property Act No 49 of 2013** provides;

“Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
(Emphasis mine)

50. Matrimonial property can only be distributed after dissolution of marriage thus it goes without saying that the divorce cause will have to be determined first before the matrimonial property cause. In the event that the marriage is not dissolved the matrimonial cause would die a natural death. Hence the notion that these two matters can be consolidated and heard and determined together is misconceived. That is the reason why the matrimonial property cause has been stayed pending the hearing and determination of the divorce cause. Noting that the applicant filed both matters, he ought for the sake of expediency, and in the interests of justice, concentrate on the hearing and determination of the divorce cause so as to pave the way forward for this cause.

51. With that in mind the reasons given by the applicant in his affidavit do not warrant the exercise of this court's discretion, as the same is limited by the application of the law.

52. The application is not merited and is dismissed with costs.

53. In the upshot none of the three applications is merited, and each is accordingly dismissed.

54. Right of Appeal within 30 days.

Dated and delivered virtually this 25th day of February 2021.

Mumbua T. Matheka

Judge

In the presence of:

Court Assistant: Edna

Plaintiff/Applicant in person:

Mrs. Mukira for the Defendant/Respondent.

Mention to confirm the position of the divorce cause on **12 of April 2021** to confirm the position of the Divorce Cause.