REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL CASE NO. E099 OF 2020

ALPHONCE MWENDWA NYALITA.....PLAINTIFF/RESPONDENT

- VERSUS -

CAROLINE WANYUA MWENDWA.....1ST DEFENDANT

JOHN NJAGI KARINGE.....2ND DEFENDANT

RULING

Before this court for determination are two applications. The defendants' application dated 9th October, 2020 and the plaintiff's application dated 2nd November, 2020. When the matter came before court, the parties consented to having both applications considered together. The parties also agreed to have the applications disposed off by way of written submissions.

PLAINTIFF'S APPLICATION DATED 2ND NOVEMBER, 2020

In the application dated 2nd November, 2020 the plaintiff (applicant) is seeking the following orders;

> **1. THAT this Honourable Court be pleased to strike out the 1st and 2nd Defendants/Respondents' Defence dated 9th October 2020 as it is an abuse of the court process since it was filed out of time without seeking leave of the court.**
>
> **2, THAT judgement be entered against the 1st and 2nd Defendant/Respondents herein in favour of the Applicant as prayed in his plaint.**
>
> **3. THAT the costs of this application be borne by the 1st and 2nd defendants/Respondents herein.**

The application is anchored on Order 7 rule 1 and Order 2 rule 15 of the Civil Procedure Rules and all other enabling provisions of the law. It is supported by the affidavit of Alphonce Mwendwa Nyalita, the plaintiff/applicant herein. The application is opposed via a replying affidavit sworn by Leah Wanjiku Kiguatha, an advocate in the firm of Kiguatha & Co. Advocates on the 11th November, 2020 on behalf of the defendants/respondents.

The plaintiff/ applicant submits that the application raises two issues. First, is whether the defence should be struck out and judgment in default be entered against the defendants/respondents. Secondly, is whether the plaintiff/applicant is entitled to any reliefs. It is the plaintiff's/applicant submission that the defence is an abuse of the court process and simply a ploy by the defendants to delay justice for the plaintiff. Reliance has been place on case of **Daniel Mburu Gichamba & Another v Eliud Mbugua Kimani [2015] eKLR,** where the court stated as follows:-

> **"This court is alive to the provisions of Article 159(d) of the Constitution that justice shall be administered without undue regard to procedural technicalities. As much as I agree to the above, where other enacted statutes provide for procedure that ought to guide the courts procedural administration of justice, such provisions ought not be sacrificed under the guise of the Constitutional provision above, otherwise it would make nonsense of all the statutes that govern the fair administration of justice in courts and tribunals. See Nicholas Kiptoo Arap Korir Salat -vs- IEBC and 6 Others (2013) KLR where the Court of Appeal held that rules of procedure must be respected and courts cannot aid in circumventing justice and shifting goals as this would harm the party who strives to abide by the rules."**

Reference has been made to the provisions of Order 2 Rule 15 of the Civil Procedure Rules, 2010 which provides as follows;

(1) At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.

In the replying affidavit dated 11th November, 2020 sworn by the defendants'/respondents' advocate, the defendants/respondents confirm that indeed the defence and objection on a point of law was filed one day late. That the late filing and failure to seek leave was a result of an oversight on the part of the advocate and not an attempt to offend the provision of the law. The defendants/respondent's advocate avers that the defence filed raises pertinent issues that deserves to be ventilated before the court to ensure just determination, timely and efficient disposal of these proceedings. The defendants/respondents in their submissions dated 9th December, 2020 argue that the plaintiff/applicant has failed to disclose any of the statutory grounds required to suceed in an application to strike out defence. It has been further submitted that the condition under Order 2 Rule 15 (1) (d) cannot be validly employed by the plaintiff/applicant to support his application. The defendants/respondents have cited the case of **County Council of Nandi v Ezekiel Kibet Ruto & 6 Others[2013]eKLR and the case of Julius Kiambati Mbura v Benard Kirimi Thirunga & 2 others [2019]eKLR.**

The issue before this court is whether the defence should be struck out and judgement in default of filing defence enetered against the Defendants/Respondents and whether the defence raises triable issues.

Order 7 Rule 1 of the Civil Procedure Rules, 2010 provides that;

"(1) Where a defendant has been served with a summons to appear he shall, unless some other or further order be made by the court, file his defence within fourteen days after he has entered an appearance in the suit and serve it on the plaintiff within fourteen days from the date of filing the defence and file an affidavit of service."

The remedy being sought by the plaintiff though available in law has far-reaching effect of prematurely terminating the defendant's defence. The Court of Appeal in the case of **Kivanga Estates Limited v National Bank of Kenya Limited [2017]eKLR** stated

"... Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious."

It is not in dispute that the defence was filed on 9th October, 2020, one day after the expiry of the statutory limit. The failure to file a defence within the specified period and to apply for leave of court is occasioned by the advocate on record who has admitted to the same. This being the mistake and or oversight on the the part of the advocate, the same should not be visisted upon the defendants/respondents. I am guided by the courts' decisions in the case of **Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR,** where the Court of Appeal stated that;

"I think a distinguished equity judge has said:

"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits."

I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."

Similarly, in the case of **CFC Stanbic Limited v John Maina Githaiga & another [2013] eKLR,** the Court held that;

"On the issue of the mistake of counsel, it is not in dispute that the appellant gave instructions to its advocates in good time once it was served with the pleadings and summons to enter appearance. Therefore, the failure to enter appearance and file a defence is clearly attributable to its advocate who failed to enter appearance and file defence in good time. This being the mistake of counsel, the same ought not to be visited upon the appellant.

This Court is guided by the case of *LEE G MUTHOGA V HABIB ZURICH FINANCE (K) LTD & ANOTHER*, *CIVIL APPLICATION NO. NAI 236 OF 2009*, where this Court held:

"It's a widely accepted principle of law that a litigant should not suffer because of his advocate's oversight."

In the instant appeal, we are of the view that the appellant should not suffer because of the mistakes of its counsel."

Additionally, the plaintiff/applicant has not revealed how the late filing of the defence will prejudice his preparation for the trial. Further, the defence raises triable issues and also a preliminary objection, which would require adjudication.

It is for the foregoing reasons that i am satisfied that the ends of justice will be better served if the defence is admitted. Consequently, i will exercise my discretion and admit the defence out of time but subject to the defendants/respondents paying the plaintiff/applicant throw away costs of Kshs. 10,000.

The upshot is that the plaintiffs/applicant's Notice of Motion dated 2nd November 2020 fails and it is hereby dismissed with no orders as to costs.

DEFENDANTS' APPLICATION DATED 9TH OCTOBER, 2020

Having admitted the defence filed out of time, this court will now consider the defendants' application dated 9th October, 2020 seeking the following orders;

> **1. That this Honourable Court be pleased to strike out the plaintiff's pleadings**
>
> **2. That the costs of this application and generally for this suit be awarded to the Defendants against the plaintiff, together with interests thereon.**

The application is brought under Articles 31 (c) and 159 (2) (b) of the Constitution of Kenya, 2010, Section 1A,1B and 3A of the Civil Procedure Act, Cap 21, Order 2 Rules 15, Order 51 rules 1 and 3 of the Civil Procedure Rules, 2010. The 1st defendant has sworn an affidavit in support thereof dated 9th October, 2020. A verifying affidavit signed by the 1st defendant dated on 9th October, 2020 and an Authority to Act dated 9th October, 2020 by the 2nd defendant made to the 1st defendant was also attached.

The defendants/applicants submit that the pleadings before court are an abuse of the process of the court as the same is *sub judice*. The defendants/applicants alludes to the existence of a matrimonial property suit No. HCC (OS) 26 of 2019 filed at the Nairobi High Court Family Division between the plaintiff and the 1st defendant. That as per the Originating Summons annexed and marked 'CWM1', the subject matter is the matrimonial property acquired during the marriage and jointly owned by the plaintiff and the 1st defendant. To buttress this position the defendants/applicants have referred to the case of **Benjoh Amalgamated Limited v Halkanoo Molu & 4 others[2009]eKLR** and the case of **County Council of Nandi v Ezekiel Kibet Rutto & 6 Others [2013] eKLR**. In the latter case, Justice Munyao Sila observed as follows:-

> **"A pleading that is an abuse of the process of court in my view encompasses scandalous, frivolous, or vexatious pleadings but goes a little further to take care of situations that may not otherwise be encapsulated in the definition of the three preceding words. They can encompass situations where a litigant is using the process of court in the wrong way, not for purposes of agitating a right, but for other extraneous reasons."**

The defendants/ applicants further submit that the pleadings are scandalous and vexatious as they contain matters that are immaterial and only made to offend and embarrass the defendants. That the pleadings have no chance of succeeding as the plaintiff/respondent has raised claims for dowry and school fees without anchoring the same on law.

Lastly, the defendants/applicants argue that the pleadings herein may prejudice, embarass or delay the fair trial of the action. It has been submitted that the 1st defendants interests in the Matrimonial Property suit will be inevitably delayed as the plaintiff/applicant intends to use the orders of this court as a shield against any adverse orders in the other suit.

On his part, the plaintif/ respondent has submitted that his case is a stand-alone suit not capable of being struck out as sought by the defendants/respondent. It is the plaintiff's/applicant's argument that the dispute in Nairobi HCCC(OS) No. 26 of 2019 is with regards to distribution and ownership of immovable properties under the matrimonial laws while the plaint in this case involves civil transactions. The plaintiff/respondent also argues that the 2nd defendant is not a party in the matrimonial case and that the case raised against him is civil in nature. The plaintiff/respondent has relied on the cases of **Daniel Mburu Gichamba & Another v Eliud Mbugua Kimani[2015] eKLR** ,**Kivanga Estates Limited v National Bank of Kenya Limited Nairobi Court of Appeal Civil Appeal No. 217 of 2015 [2017] eKLR** and **Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others [2017]eKLR.**

The issue before court is whether the plaintiff's pleadings should be struck out. The defendant has argued that the pleadings are an abuse of the court process as the same is *res sub judice* in view of Nairobi HCCC(OS) No. 26 of 20019.

The *res sub judice* rule is codified in Section 6 of the Civil Procedure Act as follows:

> **6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.**

I have perused the Originating Summons dated 2nd May 2019 in Nairobi HCCC(OS) No. 26 of 2019, the 1st defendant/applicant is *seeeking for the following Orders:*

> **1. THAT the joint ownership in respect of the following properties be severed and that the same be held by the parties herein**

as tenants in common in equal shares.

i. LR12715/2386

ii. LR12715/2385

iii. Plot No. 56 on L.R 9731 (Emali/Sultan Hamud)

iv. Plot No. 63 on L.R 9731 (Emali/Sultan Hamud)

v. 5 Acre sub-division of Plot No. 949(Emali-Wote Road)

vi. Title Number Ngobit Supuko Block 5/1972

vii. Title Number Ngobit Supuko Block 5/1973(South Imenti)

viii. Two (2) Acre subdivision of L.R 9731(Emali)

2. THAT the said properties be sold and the proceeds shared equally between the parties herein.

3. THAT the family company Emasun Farm Limited be valued and wound up and the proceeds be shared equally between the parties.

4. THAT the Deputy Registrar High Court of Kenya be authorized to sign any documents that the respondent may refuse to sign.

5. THAT the respondent be condemned to pay the costs of this suit.

In his plaint dated 27th August, 2020 the plaintiff/respondent seeks judgment against the defendants as follows;

i. An order of return of bride price by the defendant to the plaintiff in the sum of Kshs. 180,000

ii. An order of payment of dowry and other incidentals by the defendants to the plaintiff in the sum of Kshs. 1,200,000

iii. A declaration that motor vehicle registration number KCE 478F was matrimonial property merely held in trust for the plaintiff by the 1st defendant.

iv. An order of return of Kshs. 4,000,000 by the defendant to the plaintiff over the purchase of motor vehicle KCH 221R or in default the immediate return of the said motor vehicle to the plaintiff by the defendants.

v. An order that the 1st defendant does return to the plaintiff motor vehicles registration numbers KCE 478F or in default the 1st defendant pays Kshs. 4,000,000 to the plaintiff.

vi. Return by the 1st defendant to the plaintiff of Kshs. 960,000 paid for the 1st defendant at KMA Sacco.

vii. Payment of Kshs. 559,080 to the plaintiff by the 1st defendant being 60% of the plaintiff's contribution to the All purpose Tents Business.

viii. Payment to the plaintiff in respect of Emerald Medical Centre in the sum of Kshs. 12,200,000.

ix. Costs incurred on the 1st defendant as education fees at Kansas State University at Kshs. 4,000,000.

x. Amount not returned to the plaintiff from KCB account of Kshs. 18,000,000

xi. Total of Kshs. 45, 099,080 in aggregate be paid by the defendant to the plaintiff.

xii. Costs of the suit.

In determining whether the matter is *sub judice*, i will be guided by the Supreme Court of Kenya in ***Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] eKLR*** on the subject of s*ub judice* stated: -

***[67] The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the Court or Judge for determination." The purpose of the* sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with**

competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

From the Originating Summon provided to the court, it is evident that the matrimonial property suit was instituted way before the present suit was filed. Additionally, the matrimonial property suit is only between the 1st Defendant and the Plaintiff which can be distinguished from the present suit where John Njagi Karinge has been enjoined as a 2nd Defendant. However, the claim against the 2nd Defendant emanates from transactions during the subsistence of the marriage. The core dispute is matrimonial property and the addition of the 2nd defendant in this case does not alter the nature of the dispute.

NAIROBI HCCC (OS) No. 26 of 2019 is seeking the distribution of the immovable matrimonial properties acquired during the subsistence of the marriage between the applicant and the respondent. The same is properly before the High Court Family Division. The plaintiff/respondent in HCC NO. E099 OF 2020 is seeking a refund of the dowry and bride price paid, movable properties and monies transacted during the subsistence of the marriage. Although, the plaintiff insists that the said transactions were civil in nature and that they are properly before this court. However, this court is of the view that some of the prayers should have been made during the divorce proceedings and the others fall squarely under the provisions of **Section 6 (1) (c)of the Matrimonial Property Act** provides as follows:

6 (1) For the purposes of this Act, matrimonial property means—

(a) The matrimonial home or homes,

(b) Household goods and effects in the matrimonial home or homes; or

(c) <u>Any other immovable or movable property jointly owned and acquired during the subsistence of the marriage.</u> (emphasis added)

It is clear to me that the dispute involves rival claims for properties acquired during the subsistence of the marriage or claims which are attributed to the relationship between the two parties either before or after they became married. Such claims are ordinarily litigated before the Family Court. Upon hearing each party, the family court will be in a position to declare how the properties and claims in each suit should be shared. The court will equally be in a position to know how each party contributed towards the acquisition of the properties, be it immovable or movable. For this reason, I do hereby transfer this matter to the Family Division so that it can be consolidated with file No. 26 of 2019 (O.S). The defendant's application dated 9th October, 2020 is hereby dismissed with no orders as to costs.

In the end, the respective applications herein lack merit and the same are hereby dismissed with no orders as to costs. This matter is hereby transferred to the Family Division to be heard together with file number 26 of 2019 (O.S).

DATED AND SIGNED AT NAIROBI THIS 24TH DAY OF FEBRUARY, 2021

.....

S. CHITEMBWE

JUDGE