



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

ORIGINATING SUMMONS 14 OF 2020

MILLICENT MUTHONI KIGIRA APPLICANT

VERSUS

JOSHUA OTIENO NDERE..... RESPONDENT

RULING

1. Vide an Originating Summons dated and filed on 30th January, 2020, the applicant herein Millicent Muthoni Kigira prayed for orders to declare several properties as matrimonial properties acquired during the subsistence of her marriage with the respondent one Joshua Otieno Ndere. In the same Originating Summons, the applicant sought orders by way of temporary injunction preserving the subject properties pending the hearing and determination of the substantive suit.
2. Having been served with the Origination Summons, the respondent through the firm of Kamunda advocates filed a replying affidavit sworn 27th October, 2020 opposing the Originating summons. On 30th July 2020, the Originating Summons filed under certificate of urgency was placed before the duty Judge for directions. Upon perusal, the Judge directed for service to be affected upon the respondent and a hearing date be taken at the registry
3. On 3rd August, 2020, Frederick a court clerk from the firm of Osino appearing for the applicant took an ex parte hearing date at the registry. The Originating Summons was fixed for hearing on 29th October, 2021. According to the record, on that day the court did not sit hence Fredrick a court clerk from the firm of Osino for the applicant and Lenjo a court clerk from the firm of Kamunda appearing for the respondent took a date by consent thus fixing the matter for hearing on 26th November, 2020.
4. On the hearing date, there was no appearance for the respondent. M/s Osino for the applicant sought leave to file a further affidavit in respect to the replying affidavit. She also sought a temporary injunction pursuant to prayer 4 of the Originating Summons preserving the subject properties pending hearing and determination of the Originating summons. Accordingly, the court granted prayer 4 of the Originating Summons being a temporary injunction to preserve the properties in question. The applicant was also granted leave to file a further affidavit.
5. On 2nd December, 2020 the respondent moved to this court vide a Notice of Motion dated 30th November, 2020 seeking the court to vacate and or set aside the ex parte proceedings orders issued on 26th November, 2020. The application is premised upon grounds set out on the face of it and an affidavit sworn on 30th November 2020 by David Onsare an advocate representing the respondent/applicant in place of Kamunda Advocates.
6. It is the respondent's/applicant's case that the ex parte interim orders made on 26th November, 2020 preserving the property in question were irregularly issued as they were issued under a substantive Originating Summons which is yet to be heard. According to Mr Onsare, the orders were issued without a properly filed application for a temporary injunction. Further, counsel stated that the orders should not have been issued without the participation of 3rd parties as evidenced from the applicant's /respondent's title deeds attached to the Originating Summons.
7. Mr Onsare further claimed that the reason for his non- attendance as counsel for the respondent /applicant was that upon filing their notice of change of advocate on 19th November, 2020 replacing the firm of Kamunda advocates, they were not notified of the hearing date fixed for 26th November 2020.
8. According to Onsare, after filing a notice of change of advocates, they engaged the firm of Kamunda to handover their client's file and also give them an update of the case which information they failed to get due to Kamunda's reluctance to Co-operate. That the blame should be placed at the door step of Kamunda advocates and that the respondent's application should not be prejudiced as a consequence. In his view, this court has jurisdiction to vary the orders in the interest of justice to avert a miscarriage of justice.
9. During the hearing, Mr Onsare for the respondent/applicant literally reiterated the averments contained in the affidavit in support of the

application.

10. In her reply, the applicant /respondent filed a replying affidavit sworn on 2nd February, 2020 opposing the application. She deponed that, the firm of Onsare having come on record on 19th November, 2021 ought to have known that there was a hearing scheduled for 26th November, 2020 hence their non-attendance is not excusable.

11. She further stated that the interim orders were procedurally issued during the interpartes hearing pending hearing and determination of the Originating Summons. She also averred that there is no prejudice likely to be suffered in preserving the properties as all title deeds are in the respondent's/applicant's names or companies associated with him. Further, that the respondent /applicant has not invited any 3rd party to make a claim over any property as an interested party.

12. Regarding the question that the orders could not be issued under a substantive suit, she stated that there are no rules governing the procedure under matrimonial property Act. Hence, Section 17 of the Matrimonial Property Act is applicable. That the court has powers to issue orders where matrimonial property is registered in the name of a company.

13. She contended that the application is bad in law, mischievous, vexatious and otherwise an abuse of the court process. During the hearing, M/s Osino for the applicant/respondent merely adopted the content contained in their replying affidavit.

Determination

14. I have considered the application herein and response thereof. I have also considered oral submissions by both counsel. Issues that arise for determination are;

- a. Whether the absence of the respondent's/applicant's counsel on 26th October, 2020 when the impugned orders were issued was justified;**
- b. Whether an order of injunction can issue under a substantive originating summons in lieu of a separate application;**
- c. Whether the exparte orders are irregular and prejudicial for adversely affecting 3rd parties who have not been enjoined in the suit.**

15. There is no dispute that on 29th October 2020, the hearing date of the Originating Summons herein was fixed for 26th November, 2020 in the registry in the presence of Court Assistants from both the firm of Mrs Osino and Mr Kamunda advocates then on record for the respondent. However, on 19th November, 2020, the firm of Onsare filed a notice of change of advocate thus replacing the firm of Kamunda.

16. When the matter came up for hearing, there was no appearance for the respondent. Mrs Osino then urged the court to proceed with the hearing exparte by granting prayer 4 of the originating Summons which seeks a temporary injunction preserving the subject properties.

17. The court having found that the application was not opposed, proceeded to grant prayer 4 which is a temporary injunction preserving the properties in question. According to Mr. Onsare, his failure to attend court on 26th November, 2020 was not deliberate but rather, he was not aware of that hearing date.

18. He apportioned the blame on the respondent's former counsel Mr Kamunda for not disclosing to him of the pending hearing date. That Mr. Kamunda never disclosed to him nor his client that the suit had a hearing date. That his effort to get an update on the case and submission of the client's file were fruitless as Mr Kamunda proved to be un-cooperative. He urged the court to set aside the exparte orders to accord the respondent an opportunity to be heard.

19. On the other hand, the respondent claimed that Mr. Onsare did not act diligently. That had Mr Onsare perused the court file, he would have known that there was a hearing date in place.

20. The question that begs an answer is whether non-attendance of the respondent's counsel was excusable. It is trite law that the fundamental duty of the court is to do justice after according parties an opportunity to ventilate their case. To the extent that each party has an inalienable constitutional right not to be condemned unheard, a court of law is enjoined to lift exparte orders if convinced that justice will be done by so doing.

21. In the case of **Wachira Karani V Bernard Wachira (2015) eKLR** the court had this to say in regard to setting aside an exparte judgment;

“The fundamental duty of the court is to do justice between parties. It is, in turn, fundamental to that duty that parties should be allowed a proper opportunity to put their cases upon the merits of the matter. It is fundamental principle of natural justice, applicable to all courts whether superior or inferior, that a person against whom a claim or charge is made must be given a reasonable opportunity of appearing and presenting his case. If this principle be not observed, the person affected is entitled, ex debito justitiae, to have any determination made against him set aside”.

22. In the instant case, there was change of advocates appearing for the respondent between the date of fixing the hearing date and the hearing itself. There is no proof that the firm of Onsare which had just come on record a week before the hearing date was aware of the hearing date. Counsel explained that he did not peruse the court file as he thought that the logical thing to do was to get an update from his

predecessor. Although a diligent counsel ought to have ascertained the status of the case from the court file before resting, he took a different approach which equally would have revealed the position of the case had his colleague Mr. Kamunda co-operated.

23. Was the failure to peruse the court file by Mr Onsare an excusable mistake in the circumstances? It is trite that where there is excusable mistake a court can set aside an ex parte judgment or order. See Shah Vs Mbogo (1967) E A 166 where the court held that;

“...this discretion to set aside an ex parte judgment is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or reasonable mistake or error but is not designed to assist the person who has deliberately sought whether by evasion or other wise to obstruct or delay the course of justice.”

24. Considering the speed with which Mr. Onsare moved this court to set aside the ex parte orders, one would discern a conduct of a party not intending to avoid or obstruct the course of justice or delay this matter. Further, considering the lapse occasioned by the change over from the previous counsel, one would understand the inevitable consequence on confusion caused by the exiting counsel. The reason or ground given for non- attendance is excusable and convincing.

25. However, I am alive to the fact that the mistake of counsel where excusable should not be visited on an innocent litigant(client). In this case the litigant is innocent and will definitely be prejudiced by the wrong committed by his lawyers. See Belinda Muras and 6 Others V Amos Wainaina (1978) KLR where Hon. Madan J A as she then was defined what constitutes genuine a mistake as follows;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate step. It is not less pardonable because it is committed by senior counsel. Though in the case of a Junior counsel court might feel compassionate more freely. A blunder on a point of law can be mistake. The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but ought certainly to do whatever is necessary to rectify if the interest of justice so dictate.”

26. Similar position was held in Philip Chemwolo and another Vs Augustine Kubende (1982-88) KLR 103 at 1040 where Apoloo J /A stated;

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that party should suffer the penalty of not having his case heard on merit”.

27. This is a suit involving close family members although separated. The most prudent thing this court is enjoined to do is to grant both parties an opportunity to ventilate their case on merit. The respondent should not be condemned unheard purely because his counsel made a mistake by not perusing the court file early enough. I do not find any prejudice if parties are given an opportunity to each tell his or her side of the story before a decision is made on merit.

28. For the above reasons stated, this ground is upheld and orders made on 26th November 2020 set aside to enable parties argue their cases inter partes.

29. Concerning the two-remaining issues regarding the question whether a temporary order can issue under an Originating Summons, that will be one of the key issues to be argued hence I cannot make a finding on it as it will prejudice the outcome of the substantive argument. Equally, I will not delve on the issue whether the orders affecting 3rd parties were properly issued without first enjoining them. This is also an issue key to the application for injunction due to be heard.

30. Having held as above, it is my finding that the respondent's/applicant's application dated 30th November,2020 is merited and the same is allowed with orders that;

- a. **The ex parte orders made before this court on 26th November, 2020 be and are hereby set aside.**
- b. **That the Originating Summons herein shall be set down for hearing and determination made on merit.**
- c. **Each party to bear own costs.**

DATED SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 19TH DAY OF MARCH 2021

J. N. ONYIEGO

JUDGE