REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO. 31 OF 2015

EMP...PETITIONER/APPLICANT

VERSUS

FNM...RESPONDENT

RULING

1. Judgment in this case was delivered on 5th May, 2020 and matrimonial properties in question effectively shared out. Vide application dated 6th June 2020, the Applicant sought to stay execution of the decree thereof. On 9th October, 2020 the court dismissed the said application for stay.

2. On 5th February, 2021, the Respondent moved this court for eviction orders to issue against the Applicant. Despite every effort to oppose the application, the court pronounced itself on 23rd April, 2021 thus allowing the application for eviction on grounds that there was no stay order in place. The applicant was given 21 days within which to vacate the premises. It is worth noting that since inception of the suit, Ms Osino has been on record for the Respondent while the firm of Kipsang and Co. Advocates has been appearing for the Applicant.

3. Following issuance of the said eviction orders, Isaac Ntongai Samuel a court bailiff moved into the disputed premises, broke open the locks and doors thereby removing the respondent's items. The said items were allegedly kept in a warehouse pending collection by the respondent. Through an "affidavit in execution" sworn on 16th June, 2021 by the court bailiff, it was confirmed that the decree was duly satisfied pursuant to the instruction letter of M/s Osino in obedience to the eviction order.

4. However, on 10th June, 2021, the firm of Obara and Obara filed a notice of appointment of advocates thus purporting to come on record for the Applicant. On the same day, the Applicant filed a Notice of Motion dated 10th June, 2020 seeking;

a. **Spent;**

b. **That the Honourable court be pleased to restrain the Defendants, his agents or employees or any other person acting on his behalf from executing orders of the court issued on the 23rd April, 2021 pending the hearing and determination of this application**

c. **That the Honourable court be pleased to review, set aside and or stay orders issued on the 23rd April,2021 pending hearing and determination of the application dated 6th August, 2020 pending before the court of appeal.**

5. The application is hinged on the grounds stated on the face of it and averments contained in the affidavit in support sworn on 1st June, 2021 by EMP. It is her case that judgment was delivered in her absence hence the delay in filing a notice to appeal out of time.

6. She averred that she was dissatisfied with the said judgment hence the intended appeal which might be rendered nugatory should the application herein be disallowed. That she has since filed an application before the court of appeal seeking the same to be allowed out of time. She further contended that the fact that there is a pending application before the court of appeal, it amounts to discovery of new evidence.

7. When the application was placed before the Judge on duty, exparte interim orders were granted pending interpartes hearing on16th July, 2021. In reply, the respondent filed a replying affidavit sworn on 15th June 2021 arguing that the application is incompetent on grounds that; counsel on record for the applicant (Kipsang and Co. advocates) had no knowledge of the application; application has been filed by an advocate who is a stranger in these proceedings; no ground for review has been established by the Applicant ; the court has no

jurisdiction as it has become functus officio and lastly; execution is complete following the eviction of the applicant on 9th June 2021. Further, that the applicant has never applied for proceedings nor judgment for purposes of lodging an appeal hence proof that she has no intention of appealing.

8. During the hearing, M/s Kipsang distanced herself from the application. Mr Amukan appearing for the applicant basically reiterated the averments contained in the affidavit in support of the application. Counsel submitted that the applicant has a right to exhaust her right of appeal.

9. M/s Osino equally adopted the content contained in the replying affidavit. Counsel submitted that the orders sought to be stayed relate only to execution and not the judgment decree which is still in force. Learned counsel further submitted that the firm of Obara and Obara is not properly on record pursuant to order 9 Rule 7 of the Civil Procedure Rules in that there is already a judgment on record hence they ought to have sought leave to come on record for the applicant instead of filing a Notice of appointment. That Kipsang advocate are still on record hence their consent was necessary.

10. Regarding the application pending before the court of appeal, M/s Osino contended that the same issue was considered during the hearing of the application for stay of execution and eviction hence nothing new. According to learned counsel, the issue is res-judicata and that execution by way of eviction is complete hence nothing to stay.

11. Basically, she urged the court to find that the applicant has not proved the elements for stay and review of the court orders inter alia; discovery of new evidence, proof of mistake or apparent error on the face of the record. In support of this proposition, counsel made reference to the holding in the case of **Assets Recovery Agency VS Charity Wangui Gethi & 3 others (2020) e KLR and Wilson Amuge Lagat V Kiprono Kapteberewo and 4 others (2018) e KLR.**

12. In his rejoinder, Mr Amukan contended that order 9 rule 7 of the Civil Procedure Rules does not apply as the firm of Obara was not coming on record in place of any counsel since Ms. Kipsang was still on record.

13. As regards the court becoming functus officio, Mr Amukan submitted to the contrary. When the court sought clarification on whether eviction had taken place, counsel submitted that it was not true. Consequently, the court gave parties time to consult their clients on the true position regarding the status of eviction. When the court reconvened at 2.00pm, Mr Amukan insisted that eviction had not been carried out. On the other hand, M/s Osino maintained that eviction had been carried out.

14. The court then adjourned to 18th June, 2021 for the court bailiff who carried out the eviction process to file a report. On 17th June, 2021 the court bailiff one Ntongai Samwel from Malindi law courts filed an “affidavit in execution” attaching an inventory of the applicant’s items removed from the house and how the house was broken into and several photos showing broken locks and empty rooms. He signed a handing over report which was counter signed by the Respondent.

15. Strangely, M/s Osino wrote a complaint letter dated 18th June ,2021 addressed to Kipsang advocate complaining that her client(respondent) had on 16th June ,2021 been harassed and attacked by her client(applicant) accompanied by people armed with guns thus forcing themselves into the premises. In response, Mr Bunde, holding brief for Amukan insisted that his client was not aware of the said attack.

Analysis and Determination.

16. I have considered the application herein, affidavit in support and response thereto. I have also considered oral submissions by both counsel. Issues that arise for determination are;

a. **Whether the firm of Obara and Obara is properly on record as appearing for the applicant.**

b. **Whether this court has become functus officio**

c. **Whether the matter is res-judicata**

d. **Whether review orders can issue**

Whether the firm of Obara and Obara is properly on record for the applicant.

17. The firm of Obara and Co. advocates has come on record after entry of judgment in this matter. The original advocate Kipsang and Co. Advocates appearing for the Applicant has not ceased from acting for the applicant. Kipsang however claimed that she had no knowledge of the instant application filed by Obara and Co.Advocates. The key question is, is the firm of Obara and Co. advocates properly on record? M/s Osino argued that the firm of Obara should have sought leave to come on record. According to M/s Osino, it is only under order 9 rule 7 of the Civil Procedure Rules where a notice of appointment of advocate is applicable if the party was acting in person before judgement is passed.

18. Under Order 9 rule 9 of the Civil Procedure Rules, where there is change of advocate, or where a party intends to act in person after judgment has been passed, such change has to be done through the leave of the court upon filing a notice. In this case, the firm of Obara is coming on record after judgment but he is not replacing the counsel on record.

19. From my assessment and in my honest opinion, the obtaining scenario is not expressly covered in the Civil Procedure Rules. Therefore, I

would say there is a procedural lacuna which is curable under Article 159 (2) (d) of the Constitution which stipulates that courts should not determine matters based on procedural technicalities. It is trite that where there is a gap in the application of the law, the court must adopt a purposeful approach or interpretation which serves the best interest of justice. Having said that the filing of a notice of appointment in view of the said lacuna is a procedural technicality which is not substantially fatal, I must go further and find whether the firm of Obara was supposed to file any pleadings while the firm of Kipsang is still on record?. As a matter of law and practice, a party can have several firms representing him or her but, each firm does not file its own pleadings. They will have to agree as to which firm would be filing the pleadings and who is to be the lead counsel.

20. In this case, Mr Amukan did specify that they are not replacing the firm of Kipsang Advocates. To that extent, they should have filed necessary documents through Kipsang Advocates and specify their position in prosecuting the application either as a lead counsel or otherwise.

21. From the above stated reasons, it is my finding that the application is fatally defective and incompetent hence ought to be dismissed. Assuming for a moment that I am wrong in my finding, I will proceed to address the remaining issues as hereunder.

Whether the application is res-judicata.

22. The application herein is seeking stay of execution orders. Similar application was subject of the ruling of 9th October, 2020.The grounds therein cited in support of the previous application for stay being an application for leave to appeal out of time allegedly pending before the court of appeal, is the same reason being advanced in this application.

23. Section 7 of the Civil Procedure Act does provide that;

> "**No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"**.

24. I do agree with M/s Osino that the application before me amounts to res-judicata the same having been determined by a competent court between same parties.

Whether this court has become functus officio.

25. As stated earlier, judgment was delivered on 5th May 2020. An application for stay was filed but dismissed and an eviction order issued and now executed. According to the court bailiff's report, execution took place on 9th June 2021 a day before this application was filed. On that ground alone, there is nothing remaining to continue engaging this court on. Litigation must come to an end at some point in one way or the other. See **Patrick Gathenya Vs Esther Njoki Murigi and another (2008) Eklr.** Consequently, it is my finding that this court has become functus officio.

Whether review orders can issue.

26. Under Order 45(1) of the Civil Procedure Rules, an order for review can issue if there is discovery of new and/important matter or evidence which after the exercise of due diligence was not within the knowledge of the applicant and could not be produced by him at the time when the decree was made or passed; the order was made on account of some mistake or apparent error on the face of the record or that, there is sufficient cause to warrant such review. See **National Bank of Kenya Limited vs Ndungu Njau Civil appeal No 211/1996 (UR)** where the court reiterated the above principles.

27. Similar position was held in the case **of Assets Recovery Agency Vs Charity Wangui Gethi& 3 others (Supra)** where the court stated that ;

> **"In an application for review, as envisaged under Order 45 of the Civil Procedure Rules, the grounds which ought to be established are conclusive. An applicant must establish: that there has been a 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 made; that there has been a mistake or error apparent on the face of the record or: any "other sufficient reason". The ground "other sufficient reason" has been held to be consonant with the first two grounds: See Kuria v Shah [1990] KLR 316. Additionally, the applicant must exhibit that he acted expeditiously…"**

28. According to Mr Amukan, there is discovery of new mater which is "there is a pending application before the court of appeal seeking extension of time to appeal out of time" There is nothing new about this application. It has been alluded to in the application for stay of execution and the application for eviction all of which were dismissed. There is nothing new nor mistake or error apparent on the face of the record to justify a review.

29. In a nut shell, execution having taken place and the court having become functus officio, the criminal element surrounding the forceful re-entry into the premises is an issue for the relevant organs of the state like the police to deal with. Accordingly, the application herein is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF JUNE, 2021

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J N ONYIEGO

JUDGE