



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

SUCCESSION CAUSE NO 37 OF 2019 (OS)

RMG.....APPLICANT/RESPONDENT

Versus

NG.....RESPONDENT/APPLICANT

RULING

NG, the Applicant in this Notice of Motion, has brought this application dated 11th November, 2020 basing it under Section 1A, 1B, 3, 3A of the Civil procedure Act, Order 10 rule 11 of the Civil Procedure Rules and seeking the following orders:

- 1. That the time for filing the Respondent's Response to the Originating Summons be enlarged/extended.***
- 2. That the Respondent be granted leave to enter Appearance and file his Response to the Originating Summons.***
- 3. That there be no order for costs.***

This application is supported by grounds found on the face of it and in the Supporting Affidavit sworn by the Applicant and dated 13th November, 2020 to the effect that the Originating Summons was served on him on or about June or July 2019 when the same was placed on his dining table; that upon perusing the documents he discovered that they related to decrees nullifying his marriage to the Respondent in Divorce Cause No. 15 of 2014 which divorce had been determined undefended and that he instructed his advocates to enter appearance and seek to reopen the divorce proceedings. He further states that while he concentrated on the divorce proceedings he forgot about the present proceedings and misplaced the original pleadings in his archives. He states that he is 75 years old and that failure to enter appearance was an honest mistake and oversight by him and was not deliberate; that he has an intention to defend the present proceedings and it is in the interest of fairness and justice to allow him to defend it; that the properties claimed by the Respondent are registered in the name of the Applicant and that it is in the interest of justice to excuse this mistake and delay in filing response and allow the Applicant to defend the Originating Summons and that no prejudice will be suffered by the Respondent given that the Originating Summons has not been set down for hearing.

In his Supporting Affidavit, the Applicant has reiterated the grounds in support of this applicant and deposed that he was formerly married to the Respondent and that it was his mistake in misplacing the pleadings in his office and in failing to instruct his advocates to enter appearance. He deposed that he learned about these pleadings when his advocate informed him about seeing this matter in the Court's Cause List with a Mention Date for the 5th November 2020; that this is when he searched for the pleadings and instructed his counsel to appear for him and prepare a Response. He urges that this application be allowed.

The Application is opposed by the Respondent. She filed her Replying Affidavit dated 17th November, 2020 in which she deposed that the Application is an afterthought and that it is aimed at delaying the resolution of this suit. That she is advised by her counsel that failure by the Applicant to file a response on time amounts to inordinate delay which should not be excused by this Honourable court. That the Application is based on serious mistruths and misrepresentations as the Applicant contradicts himself in his Supporting Affidavit by stating at paragraph 4 and 5 that he forwarded the pleadings to his counsel in July 2019 and requested for their advice and yet at paragraph 12 of the Supporting Affidavit he stated that he remembered the pleadings when his advocates saw his name in the Cause List in the late 2020 whereupon he searched for the pleadings and instructed his counsel to appear for him. That the court should therefore not exercise discretion in his favour as his hands are not clean.

This matter was canvassed orally through virtual proceedings held on 15th July 2021. Mr. Onderi for the Applicant made brief submissions in support of the Notice of Motion. He reiterated the grounds relied on by the Applicant in support of his application and urged that the Applicant has shown bona fide intention to defend the suit and therefore he should be allowed to do so. Mr. Kiarie for the Respondent also reiterated the grounds in opposition of the Notice of Motion found in the Replying Affidavit and urged that the delay was inordinate and that this court should not exercise its discretion in favour of the Applicant. He urged that this Notice of Motion be dismissed with costs.

In reply, Mr. Onderi submitted that they were instructed by the Applicant on the Divorce pleadings only and that no instructions were given to them in respect of the Originating Summons. He submitted that the Applicant has pleaded forgetfulness and ought to be listened to.

I have analyzed the Application, the supporting Affidavit, the Replying Affidavit and oral submissions made by both counsel. The power of this court to extend time is donated by Section 95 of the Civil Procedure Act also provides that:

Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.

Further to this, Order 50 Rule 6 of the Civil Procedure Rules provides as follows:

Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:

Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.

The Originating Summons relate to division of Matrimonial Property and was filed on 26th June, 2019. The same was brought under the Matrimonial Property Act. The Law under Section 18 of the Matrimonial Property Act 2013 provides that:

Provisions on delegated powers

(1) The Rules committee established under the Civil Procedure Act (Cap. 21) shall make rules to regulate any matter of practice or procedure under this Act.

(2) Without prejudice to the generality of subsection (1), such rules may prescribe—

(a) the procedure to be followed and the forms to be used under this Act;

(b) the time within which documents are to be filed and served under this Act.

The applicable principles in respect of the extension of time include the following:

(a) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;

(b) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;

(c) The Court's exercise of its discretion to extend time, is a consideration to be made on a case-to-case basis;

(d) Where there is a sensible reason for the delay, the delay should be explained to the satisfaction of the Court;

(e) Whether there will be any prejudice suffered by the respondents if the extension is granted;

(f) Whether the application has been brought without undue delay; and

(g) Whether in certain cases, like election petitions, public interest should be a consideration for extending time (see Nicholas Kiptoo Arap Korir Salat v IEBC & 7 others

The question in this matter is therefore whether the Applicant has given sufficient reason to warrant the enlargement/extension of time to file his response. In this instant matter the Applicant in his Supporting Affidavit gave reasons for his delay. The Applicant's failure to file Response to the Originating Summons is attributed to forgetfulness. The Applicant has explained that failure to file a response was due to an honest mistake and was not ill intended. He stated that he is elderly and that he was concentrating on the Divorce proceedings in respect of Divorce Cause No. 15 of 2014 and regrettably forgot about the present proceedings and misplaced the original pleadings in his archives. He has stated that the failure to enter appearance was not deliberate but an honest mistake and an oversight. He also stated that he has an intention to defend the proceedings and that it is in the interest of fairness and justice to allow him to defend it.

I have read the Originating Summons. It is clear to me that the suit relates to property claimed to be matrimonial property acquired by joint efforts. For all intents and purposes I doubt that the Applicant would deliberately fail to defend a suit of the nature of this Originating Summons.

As stated by the Respondent in opposition to this Application, there are contradictions in Paragraphs 4 and 5 and Paragraph 12. These contradictions have not been explained in the brief submissions in court. Neither did the counsel for the Respondent bring this issue out. However, I am satisfied with the reasons for delay advanced by the Applicant. I am guided by the case of *Nicholas Kiptoo Arap Korir Salat* cited above that the delay in meeting the time deadlines is to be considered on a case-to-case basis. As I have stated above this Originating Summons relate to division of Matrimonial property. The nature of the case would require that the Applicant files his response as he claims that the properties under dispute are registered in his name and should be allowed to defend the same. It is my considered opinion that in the interest of justice it is in order to accord both parties their day in court in respect of this matter. I note that the Applicant has already prepared

a draft and has attached the same to this Application. I therefore exercise this court's discretion in favour of the Applicant and allow this Notice of Motion. For avoidance of doubt I have granted prayers (1) and (2) as prayed. In respect of costs I order each party to bear their own costs of this Application. The Applicant is allowed 14 days within which to file and serve his Response. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 27TH DAY OF SEPTEMBER 2021.

S. N. MUTUKU

JUDGE