

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL SEPARATION CAUSE NO. 157 OF 2010

MWG.....PETITIONER/APPLICANT

VERSUS

JWM..... DEFENDANT/RESPONDENT

RULING

The Petitioner, who is the Applicant in the Notice of Motion dated 23rd February 2021, seeks to have this file re-opened for purposes of filing a Notice to Show Cause and costs of the Application. She has sworn an affidavit in support of the application in which she has stated that the Respondent travelled to the United States of America to see his other family in December, 2016 and that he has been in and out of the country; that the Respondent has been making false promises of disposing one of his properties to settle her claim; that they have planned meetings to discuss this matter but the Respondent has failed to honor; that the matter was closed on 8th March, 2018 before Hon. Mr. Justice W. Musyoka for want of prosecution and that it is in the best interest of justice that the Honorable court do issue an order to re-open the court file to enable her file a Notice to Show Cause.

The application is opposed by the Respondent through his Replying Affidavit dated 14th April 2021. He has stated that paragraph 2 of the supporting affidavit has no basis as his visit to the United States of America was before the case was closed in 2018. He stated that he is a man of modest means and without regular income as his photo studio has been affected by competition and the Covid 19 Pandemic. He further stated that he is not familiar with the properties referred to in para. 4 of the supporting affidavit and that he confirmed that he has made all efforts to raise funds to pay for the maintenance and has attached a cheque of 500,000/- paid to the Applicant. That he had paid all of his son's school fees and annexed a letter from the school confirming the fees for 2021 which was his final year had been cleared. That he continues to take care of the son's education, medical and related expenses as the son is currently living with him. That he has informed the Applicant and her lawyers of his present financial challenges. That the Applicant has on occasion returned a cheque for 200,000/- and insisted on a lumpsum amount. He has annexed a letter to this effect. That the Applicant is seeking a Notice to Show Cause yet she has refused to accept part payment. He also stated that the Applicant's condition does not bar her from sustaining herself and that she owns and operates various businesses as previously shown in this court. That this court has jurisdiction to vary terms of any agreement as to the maintenance. That his circumstances have changed as his business proceeds which were used to determine maintenance have dwindled, that he now has another son and that their son who was then a minor is now an adult and resides with him. He further states that a maintenance order is not meant to be a punishment but a means to balance the interest of the parties involved.

The Applicant filed further affidavit dated 29th April, 2021 where she stated that on diverse dates in 2020 her advocates on record filed an application dated 21st September, 2020 under certificate of urgency and that Justice J.N Onyiego directed that they take a hearing date from the registry. That when her advocates approached the registry to take a hearing date, they were informed that through the e-filing system the file was closed on 8th March, 2018. She stated that the Respondent on diverse dates in 2018 purchased a very expensive car Volkswagen Tuareg KCC 788G and also moved to Lenana View Apartments where he is paying rent of Kshs.80,000/- per month. That the contents of paragraph 6 and 7 of the Replying Affidavit are not true and the matters in question are being handled in the children's court where she has moved the court for the Respondent to comply. That the contents of paragraph 11 of the Replying Affidavit are true and that she returned the cheque as she required a substantive amount for capital for her business a fact she had communicated to the Respondent. That she admits the contents of paragraph 12 of the Replying Affidavit to the extent that she does not need part payment due to the above-mentioned reason and that the Respondent ought to have saved the entire amount of Kshs. 1,050,000/- for the last 4 years but instead failed to comply. That the contents of paragraph 15 of the Replying Affidavit are inept, malicious and an attempt to curtail her entitlement while alluding to harassment. That the Respondent has not shown any proof to his changed financial circumstances to warrant the court to vary the consent order duly adopted by the court.

This court directed that the Application be disposed of by way of written submissions. The Applicant filed her submissions dated 3rd May, 2021 and the Respondent filed his submissions dated 8th June, 2021. I have read these rival submissions. They form part of court record and I need not replicate them in this ruling.

Analysis and Determination

From the outset I wish to state that the Applicant and the Respondent have submitted at length on matters that are outside this Notice of Motion. The application simply seeks orders of this court to re-open the file and costs of the application. A lot of energy has been spent on arguing other matters that are not relevant to this application as it stands. The Applicant and the Respondent seem to be arguing the Notice to Show Cause which is not the application under consideration. In respect of the Notice of Motion dated 23rd February 2020, the Applicant claims that the file was closed on 8th March 2018 by Hon. Mr. Justice W. Musyoka for want of prosecution. In her Supporting Affidavit, she repeats the same statement in paragraph six. In her submissions she states as follows:

***“.....the Applicant through her advocates on record filed an application dated 21st September 2020 under certificate of urgency which the Honourable Justice J. N. Onyiego directed that the Applicant takes a hearing date from the Registry as the said application was not certified urgent.*”**

Upon requesting for a hearing date for the said application through e-filing system, the portal indicated that the file was closed by Honourable Justice W. Musyoka on 8th March, 2018 hence the instant application.”

I have read the court file. I have noted a document marked “MWG 1” referred to in paragraph 5 of the Applicant’s Further Supporting Affidavit. The document shows that on 8th March 2018 this file was placed before Honourable Mr. Justice W. Musyoka who closed the case. This is proof that this matter was closed as stated by the Applicant. For ends of justice to be met, this court will, and does hereby allow this Notice of Motion dated 23rd February 2020 in terms of prayer one (1). Prayer two (2) is denied. Each party shall bear own costs.

This matter shall be mentioned before the Presiding Judge in the Family Division for directions as to which Judge should handle this file. Orders to issue accordingly.

DATED, SIGNED AND DELIVERED THIS 22ND DAY NOVEMBER 2021

S. N. MUTUKU

JUDGE