



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

MATRIMONIAL CAUSE NO. 1 OF 2019 (O.S)

BAM.....APPLICANT/RESPONDENT

VERSUS

TOO.....RESPONDENT/APPLICANT

RULING

The application dated 26th October 2021 was filed by the Defendant.

1. He requested the Court to allow the parties to give *viva voce* evidence in the case.
2. The application was supported by an affidavit sworn by the Defendant. In his affidavit the Defendant pointed out that the case had been heard by the Court through affidavits, as the means through which evidence was tendered to Court.
3. He said that the matter did not proceed by way of *viva voce* evidence due to the fact that the directives and protocols which had been issued by the Ministry of Health, did not permit a physical hearing.
4. It was his case that the lack of a physical hearing could occasion him a great injustice.
5. He also said that;

“..... such sensitive matters like the current one, which touches on the interest and right of property”

ought to be heard when both parties can testify orally.

6. The Defendant deponed that technicality should not be the premise upon which a decision is rendered.
7. The Defendant went on to state as follows;

“7. *THAT I am further advised by my advocates on record, advice I verily believe to be true, that since the judgement may be entered without my evidence, and may include loss of property and other fundamental freedoms protected under the Constitution, it is important that*

I am given sufficient opportunity to defend myself and that all documents that may absolve myself are not also admitted to evidence and that the rights enshrined under Article 50 of the Constitution are scrupulously adhered to.”

8. When canvassing the application, the Defendant said that because the parties did not orally address the Court, the parties may not have adequately addressed their issues.
9. He pointed out that at the material time, he was in the Sudan, where he was working. Having returned to Kenya, the Defendant wished to address the matter substantively.
10. But he also pointed out that he had no intention of changing either his Replying Affidavit or the Submissions.
11. In answer to the application the Plaintiff submitted that the parties were given a reasonable opportunity to be heard.

12. I have given due consideration to the application. I note that on 11th December 2019, Miss Mwalo advocate, who was representing the Applicant in the substantive action, told the Court that she was agreeable to Issues which had been drafted by the Respondent.
13. She also told the Court that the parties had the intention of relying on their respective affidavits.
14. It was on the basis of that information that the Court directed that the Originating Summons herein, be heard through affidavit evidence.
15. The Court then set the case for hearing on 20th February 2020.
16. However, on the said scheduled hearing date, both parties required more time, so that they could file and exchange their respective Bundles of Documents, together with Witness Statements.
17. It is notable that whilst the Defendant was reported to be out of the country as at 20th February 2020, on 17th November 2020, Mr. Miller advocate informed the Court that the Defendant was in Kisumu. On the said 17th November 2020, the Defendant's advocate told the Court there was an agreement, that they would file submissions.
18. Miss Abir, the learned advocate for the Applicant also told the Court that the parties had agreed to rely on their respective affidavits and documents.
19. In the light of the consensus between the parties, the Court directed them to file their respective submissions.
20. By 26th January 2021, the Applicant had not yet filed her submissions. And although she did not attend Court on that date, the learned advocate for the Respondent informed the Court that he had no objection to having the Applicant allowed more time to file her submissions.
21. From the foregoing record of the proceedings, it is crystal clear that it is not the Court that imposed upon the parties, the decision to have the evidence adduced through affidavits.
22. It is also clear that the Respondent was already back in the country before the parties consented to file their submissions.
23. In the event, I find that it was not just because the Respondent was out of the country that the hearing proceeded on the basis of affidavit evidence.
24. It is a matter of common notoriety all over the world, that the Corona Pandemic has affected the way things are done in every sphere of life.
25. Even persons who are within the borders of our country, have had to make conscious decisions to have virtual court sessions. Therefore, just because one party or a witness was outside the country does not prejudice him or her.
26. In this case both parties agreed to proceed to trial through evidence tendered by way of affidavits.
27. They accommodated each other when it was necessary to ask for more time to file their Witness Statements and their respective Bundles of Documents.
28. None of the parties has gained any advantage over the other; and none of the parties has suffered any prejudice.
29. The Court did not limit any of the parties about the nature of the documents or scope thereof, that they could adduce in evidence.
30. The Court also did not restrict the Respondent about the length or scope of the evidence which he could tender through his affidavit.
31. I therefore find that the parties were not only accorded a reasonable opportunity to present their cases; they actually did present their respective cases.
32. The fact that the Respondent indicated that he has no intention of changing either his Replying Affidavit or his Submissions, is an affirmation that the Respondent had already put forward his case.
33. In conclusion, I find no merit in the application dated 26th October 2021. It is therefore dismissed, with costs to the substantive Applicant in these proceedings.
34. Finally, I am obliged to mention that although each and every party is entitled to be heard on an application he or she has lodged in Court, I find that the belated institution of the present application appears to have been deliberately calculated to cause a delay in the determination of the case.
35. I consider it to be unfortunate.
36. Nonetheless, having penalized the substantive Respondent, by ordering him to pay costs of the application, the Court will proceed to give an objective determination to the Originating Summons.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER 2021

FRED A. OCHIENG

JUDGE