



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

HCCC CAUSE NO. 64 OF 2017

NBA.....APPELLANT

VERSUS

AAA.....RESPONDENT

RULING

1. The Application coming for consideration is dated 15.11.2019 which seeks the following Orders:

(i) THAT this Court do grant an order to set aside, vacate or discharge the order issued against the Respondent on 15.9.2017.

(ii) THAT Costs of the Application be provided for.

2. The Orders issued by this Court on 15.9.2017 were pursuant to the Application dated 7.9.2017 and they were issued ex parte in the following terms:

(i) THAT the Application shall be served upon the Respondent.

(ii) THAT the Respondent shall file a Replying Affidavit and serve.

(iii) THAT the Appeal shall be filed and served within the requisite period.

(iv) THAT the best interest of the 10 children shall be held under Article 53 of the Constitution of Kenya 2010 until hearing and determination of the Appeal.

(v) THAT the Applicant shall remain in the Matrimonial home with the 10 children until hearing and determination of the Appeal.

3. The Application dated 15.11.2019 is supported by the Affidavit of AAA of even date in which he has deposed that the impugned orders were issued ex parte and further that the period for filing the Appeal has long lapsed.

4. The Respondent NBA filed a Replying Affidavit dated 20.2.2019 in which she stated that the orders that were stayed were devastating and would have rendered the Applicant and the 10 children destitute.

5. The Parties were directed to file written submissions in the Application dated as 15.11.2019 and the Applicant's submissions were as follows:

(i) THAT the impugned orders were issued ex parte and further that the Appellant who obtained Stay of Execution of the Orders of the Kadhi's Court has failed to file and serve the Appeal within the requisite period.

(ii) THAT the Appellant has not demonstrated sufficient reason for the delay in filing the Appeal for a whole year.

(iii) Further that the hearing of the Case at the Kadhi's Court cannot proceed due to the delay and further that the Applicant has been left in limbo.

(iv) THAT the doctrine of equity is against the Appellant and further that the Appellant is time barred from filing the

Appeal.

6. The Appellant/Respondent stated in her submissions as follows:

(i) **THAT the impugned orders had a devastating effect of rendering her and the 10 children of the marriage homeless since the orders directed that they leave the matrimonial home.**

(ii) **THAT the Appellant instructed her lawyer to file the Appeal but the lawyer has failed and ceased to work for the firm representing her and never handed over the file hence this state of affairs.**

(iii) **THAT since issuance of the said orders the Appellant's life has been shrouded with a lot of problems which affected her and the children psychologically since she is now the sole bread winner feeding for 10 children without support from the Applicant.**

(iv) **THAT the divorce Petition is still pending determination in the Kadhi's Court and the orders stayed required her to move from House No. 34 on LR No. 209/12565 Janna Villa Estate to LR. NAIROBI/BLOCKxxxxxx at Donholm Phase xxx which order the Appellant wishes to appeal against.**

(v) **THAT setting aside of the Orders would render the Appellant and the 10 children whom the Applicant has abandoned homeless.**

(vi) **THAT the Appellant contributed to the purchase of the Matrimonial home and therefore the orders requiring her to vacate the house would be prejudicial and unfair to her.**

(vii) **THAT the Appellant who has attached a draft Memorandum of Appeal should be granted time to proceed with this Appeal.**

7. I have considered the Submissions by both parties and I find that it is not in dispute that the divorce case before the Kadhi's Court has not yet been determined. The issue for determination in this Court should set aside, vacate and/or discharge the orders issued against the Respondent on 15.9.2017 by this Court.

8. There is no indication that the Proceedings at the Kadhi's Court were stayed.

9. I also find that there are children involved in this case and setting aside the Orders granted on 15.9.2017 will not be in the interest of the Children.

10. In **MA vs. ROO (2013) eKLR**, it was held that:-

' ... What is the best interest of the child has not been defined by the law. This is as it should be because the best interest of each particular child will depend on the circumstances of each particular case at any one particular time. What is not in dispute, however, is that there are certain minimum requirements that have universally been accepted to constitute the best interest of the child. This includes the right of a child to be provided with shelter, food, clothing and education. The child is entitled to medical care. The child's welfare should be taken care of under the best possible circumstances. The child is also entitled to parental guidance. This guidance shall where possible, be provided by both parents. The child is further entitled to be given a suitable, conducive and loving environment in which to grow up in. '... This court agrees with the Respondent that his right as the biological father of the child should not in the circumstances be ignored. However, such right shall be subject to what constitutes the best interest of the child. As an adult, the right of the respondent as the father of the child cannot be considered to be of paramount importance to that of the best interest of the child ... '

11. In **KMM vs. JIL (2016) eKLR**, it was stated that -

' ... At the International level, the legal instruments on rights of the child, the International Convention on Rights of the Child (UNCRC) and the African Charter on Rights and Welfare of the Child (ACRWC) focus on child's best interests, welfare and considerations as paramount. Secondly, both parents of the child shall contact, access and interact with the child irrespective of whether parents are married or not or if they reside in different states for purposes of the child's upbringing and development. The member states are obligated to facilitate an expeditious process for the parent to contact access and interact with the child ... '

12. I find that the Appellant has explained that the delay was due to the failure of her Advocate to expedite the Appeal.

13. To allow the Application dated 15.11.2019 would be tantamount to punishing the Appellant for the mistakes of her Counsel.

14. In the Case of **Lucy Bosire -vs- Kehancha Div. Land dispute Tribunal & 2 Others** (supra) Odunga J held as follows:-

"It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits. See Philip KeiptoChemwolo & Another -vs- Augustine Kubende [1986] KLR 492; [1982-88] 1 KAR 1036 at 1042; [1986-1989] EA 74."

15. I also find that the welfare of the 10 children involved is of paramount importance.

16. I accordingly dismiss the Application dated 15.11.2019 and direct as follows:

(i) THAT the Kadhi's Court proceeds with the Divorce Petition since this Court did not stay the proceedings but only stayed the trial Court's Orders issued on 25.8.2017.

(ii) THAT the Appellant prosecute the Appeal within 30 days of this date.

(iii) THAT the Costs of the Application to abide in the Cause.

DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 24TH DAY OF JANUARY, 2020

ASENATH ONGERI

JUDGE OF THE HIGH COURT OF KENYA, NAIROBI.