



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CAUSE NO 2 OF 2018

IN THE MATTER OF MATRIMONIAL PROPERTYIES ACT, 2013

IN THE MATTER OF ARTICLES 45 (3) AND 48 OF THE CONSTITUTION OF KENYA 2010

IN THE MATTER OF DECLARATION OF MATRIMONIAL PROPERTIES

SNK.....PLAINTIFF/APPLICANT

VERSUS

MBK.....1ST DEFENDANT/ RESPONDENT

KISUMU DISTRICT LAND REGISTRAR.....2ND DEFENDANT/ RESPONDENT

RULING

1. On the 16th December 2019 the plaintiff/ applicant filed a Notice of Motion dated the 13th December 2019. The application seeks to have the order of dismissal made on the 28th June 2019 set aside and that the suit be reinstated. The application is brought under Sections 1A, 1B & 3A of the Civil Procedure Act Cap21 Laws of Kenya and Article 159 of the Constitution 2010.
2. The application is supported by the applicant's affidavit dated the 13th December 2019 and the grounds on the face of the application. The application was opposed. The 1st defendant filed a replying affidavit dated the 4th March 2020.
3. The applicant depones that on the 28th June 2019 the matter was fixed for hearing but unfortunately their representative misdairised it for the 28th October 2019. That he did not attend court on the 28th June 2019 as he was not aware and his advocate did not attend as they were of the mistaken view that the same was fixed for hearing on the 28th October 2019. That they got to know that the matter was dismissed on the 28th October 2019 when they appeared in court and noted that the matter was not called out and upon inquiring at the registry they were told that the matter had been dismissed for non-attendance of the parties. That the non-attendance was occasioned by an honest mistake and not out of spite for the court process and a mistake on the side of his advocate which should not be visited on him. That he is ready to proceed with his case, the dismissal violates his right to be heard and a fair trial, that it has caused him great prejudice and that the reinstatement will not prejudice the respondent.
4. The 1st respondent's response to the application is that the Originating Summons was filed on the 6th November 2018 and she filed a response on 9th March 2019. That considering the lapse of time it is evident that the applicant has developed cold feet in pursuing the matter. That she has been informed by her advocate that he was not invited to take a hearing date, that despite taking the hearing date exparte the hearing notice was not served on her advocate. That the applicants action is in bad faith and must not be excused. That there was undue delay in filing the application as it was filed two months after the dismissal order.
5. The applicant filed written submissions which I have read and considered. The applicant seeks that the dismissal order dated 28th June 2019 be set aside. I have considered the reason advanced that his advocate misdairise the matter for 28th October 2019. Though a copy of the diary has not been attached I note that the applicant moved to court immediately he realised that his suit had been dismissed. This court has unfettered discretion to set aside a dismissal. In doing so I have to considered if the applicant will be prejudiced if the order is not set aside. The Originating Summons seeks orders of declaration over properties acquired during the marriage between the applicant and the 1st defendant. Matters related to properties are very emotive. To allow the dismissal order to subsist would prejudice the applicant and the 1st defendant too. No prejudice shall be occasioned to any of the respondents in any way. Further a party should not be punished for the mistake of his counsel. I will give the applicant the benefit of doubt and set aside the dismissal order of 28th June 2019. The suit is reinstated for

hearing. To get this matter moving the parties shall appear via zoom on the 21st September 2020 for direction on the hearing of the Originating Summons. Costs shall be in the cause.

Dated, signed and delivered at KISII this 5th day of August 2020

R.E. OUGO

JUDGE

In the presence of:

Mr. Mwamu

For the applicant

Absent

For the 1st Respondent

Absent

For the 2nd Respondent

Ms. Rael

Court Assistant.