REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

DIVORCE CAUSE NO. 79 OF 2005

PTK.....PETITIONER

VERSUS

JKN.....RESPONDENT

RULING

1. This matter has a long history. The applicant and the respondent got married on 9th August 1991 at the Registrar of Marriages Office in Nairobi. The applicant was a prisons officer and the respondent was an army officer. The marriage was blessed with three children who are now adults.

2. On 23rd November 1999 the respondent petitioned the Chief Magistrate's Court at Milimani in **Divorce Cause No. 136 of 1999** seeking the dissolution of the marriage on grounds of cruelty and adultery. The applicant filed an answer to the petition dated 10th December 1999 and denied the averments in the petition. She alleged that the respondent had left the matrimonial home out of a reckless decision and lack of care and commitment to her and the children of the marriage. On 14th October 2004 she amended the answer to petition and cross-petitioned for judicial separation of the grounds of adultery, cruelty and desertion. The matter was in 2005 transferred to this court and became **Divorce Cause No. 79 of 2005**.

3. It was not until 29th November 2018 that the hearing of the cause begun before Justice A. Ongeri. On that day the respondent, while represented, testified in chief. The applicant was not represented. She asked to be allowed an adjournment to cross-examine the respondent on another date. The court allowed the request and asked that hearing resumes on 20th December 2018. When the court reconvened, the respondent was present. The applicant was absent, without word. The court allowed the respondent to close his case and adjourned the matter for the preparation and delivery of judgment. The judgment was delivered on 25th January 2019. The court found that the respondent had proved his case. It was found that cruelty and adultery had been established against the applicant. It was also found that the parties had lived separately since 1999 and therefore the marriage had irretrievably broken down. On these grounds, the marriage was dissolved. Decrees *nisi* and absolute have since issued.

4. On 21st February 2019 the applicant filed the present application the setting aside of the judgment. She sought to be allowed to re-open the cause so as to cross-examine the respondent and to be allowed to testify in the matter. In the meantime, she asked that the execution of the judgment and all consequential orders be stayed. Her case was she suffers from ill-health, she is very weak and has excruciating pain. She stated that she did not come to court on 20th December 2018 because she has just been discharged from hospital, was still recuperating and was too weak to even stand. Therefore, she stated, her failure to come to court was not intentional. She sought an opportunity to be heard in the matter before the case is fully determined. She annexed medical evidence to her supporting affidavit.

5. The respondent filed a replying affidavit to oppose the application. He stated that this matter has been in court for 20 years, and all that time the parties have lived apart. He was of the view that the request to re-hear the matter was not genuine, that the applicant was holding onto a marriage that died 20 years ago. According to the records by the applicant, he stated, she had been admitted to hospital on 6th January 2019 and discharged on 11th January 2019 to attend as out-patient on 22nd January 2019. There was therefore, he continued, no explanation why she had not come to court on 20th December 2019 to continue with her case.

6. The applicant had notice that the continued hearing of this cause was going to be on 20th December 2018. She did not attend. Her explanation that she did not attend because she had just been discharged from hospital, and was therefore too weak to attend, was unsupported by her own medical evidence. The medical evidence showed she was admitted on 6th January 2019 and discharged on 11th January 2019. There was no medical evidence that she was sick on 20th December 2018, leave alone being admitted.

7. Nonetheless, the setting aside of an *exparte* judgment is a matter for the discretion of the court. It is a wide discretion which has to be exercised judicially. In **Evans –v- Bartlam [1937] A.C. 473**, at **page 489** Lord Wright stated as follows:-

> **"In a case like the present, there is a judgment, which though by default is a regular judgment, and the applicant must show grounds why the discretion to set aside should be exercised in his favour. The primary consideration is whether he has merits to which the court should pay heed; if the merits are shown, the court will not *prima facie* desire to let a judgment pass on which there has been no proper adjudication…….The court might also have regard to the applicant's explanation why he neglected to appear after being served, though as a rule his fault (if any) in that respect can be sufficiently punished by the terms, as to costs, or otherwise, which the court, in its discretion is empowered by the rule to impose."**

8. In local decisions, the prominent ones being **Patel –v- E.A. Cargo Handling Services Ltd [1974] E.A 75, Mbogo –v- Shah [1968] I E.A. 93, Chemwolo & Another –v- Kubende [1986-89] I E.A. 74** and **Express Kenya Ltd –v- Manju Patel [2000] I E.A. 54)**, the principles governing the setting aside of an *exparte* judgment are now settled. Where there was no service, or the service was not proper, the court has no discretion in the matter. The *exparte* judgment has to be set aside as a matter of cause. Where the applicant was served, the *exparte* judgment is regular. In the exercise of its discretion to set it aside, the court will consider whether the applicant has a reasonable defence to the claim and whether his explanation why he did not file the defence or attend court for the hearing is acceptable. The main concern is to do justice between the parties, and justice is best served when the matter is decided after considering the merits of the case of each side.

9. I have found in the foregoing that the applicant did not candidly explain why she did not attend her hearing which she had notice of.

10. As for her defence, this matter has caused me a lot of anxiety. The applicant and the respondent have lived apart for 20 years, since 1999. In 1999 the respondent filed for divorce on grounds of cruelty and adultery. In 2004 the respondent filed for judicial separation on grounds of cruelty, adultery, and desertion. The respondent had deserted the applicant in 1999. Under **section 6(d)** and **(e)** of the **Marriage Act,** a marriage is considered to be irretrievably broken down if the spouses have been separated for at least two years, whether voluntarily or by a decree of the court; or where a spouse has deserted the other spouse for at least three years preceding the date of presentation of the petition. The parties herein would be pretending if they considered that they still have a marriage.

11. I have also considered that the dispute has been in court for 20 years. It has taken 20 years for them to know whether they can be allowed to each move on with life.

12. In conclusion, I find that there is no reasonable basis to exercise my discretion in favour of the applicant, or to re-open the matter. I dismiss the application.

13. This was a family dispute. Each side shall bear own costs.

DATED and DELIVERED at NAIROBI this 26TH day of SEPTEMBER, 2019.

A.O. MUCHELULE

JUDGE