REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 19 OF 2013 (O.S)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY.

AND

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT.

FWNM.....**APPLICANT**

VERSUS

SMM .....**RESPONDENT**

RULING

1. SMM is the respondent in the Originating Summons dated 18th April 2013, ideally he should have been named as the defendant, while FWNM is named as the applicant, she should have been the plaintiff. I shall refer to the two as respondent and applicant, receptively, as they are referred to in the Originating Summons.

2. The respondent filed an application dated 27th July 2016, seeking the following orders:

a. that there be stay of further proceedings herein and the matter be heard *de novo inter partes*;

b. that the filing of submissions be stayed pending hearing *inter partes*; and

c. that the affidavit and information contained in the application be deemed as a part of the record of this suit.

3. Directions were given on 1st September 2016, by consent of both sides, that the said application be canvassed by and determined on the basis of written submissions to be filed by both sides. The respondent did not file submissions. The applicant, on her part, did file a response to the application, by way of a replying affidavit, and also filed written submissions in compliance with the directions.

4. In her written submissions, she argues that the prayers sought in the application are not tenable in law. She avers that written submissions are incapable of being stayed and that the information in the affidavit in support of the interlocutory application cannot be regarded as evidence in the suit as the pleadings had already closed. She further submitted that the respondent has not offered to the court any explanation as to his absence during the hearing despite being served, and has not given the court sufficient cause to warrant issuing the prayers sought.

5. The following is an account of the proceedings that preceded the filing of the application the subject of this ruling. The applicant herein moved the court on the 18th April 2013, by way of an originating summons. The record is not very clear as to service of the originating summons, but in a replying affidavit, sworn on 14th May 2014 and filed herein on even date, the respondent avers that he had the read the originating summons dated 18th April 2013. The respondent responded to the interlocutory summons dated 24th June 2013, through the affidavit sworn on 12th May 2014, but he did not reply to the suit by way of originating summons. On 8th May 2014, directions were given by the court, in the presence of advocates for both sides, to the effect that the originating summons would proceed by way of affidavit and oral evidence and that the respondent had been granted leave to file a reply to the application within seven days. The matter was then scheduled for mention to confirm compliance on the 15th May 2014. On the said date the advocate for the respondent did not attend court and by then a response was yet to be filed in reply to the originating summons. The matter was then fixed for hearing of the suit, on the 12th May 2016 but the matter could not proceed due to pressure of work on the part of the court. The matter eventually proceeded on 30th June 2016 when the applicant testified and closed her case. There was notice of the hearing scheduled for 30th June 2016, served on 16th May 2016, on

the advocate for the respondent, who acknowledged receipt by stamping and signing on the copy of the notice returned to court through the affidavit of service sworn on 31st May 2016 and filed herein on 3rd June 2016. The matter was thereafter fixed for mention to confirm filing of submissions on the 28th July 2016, on which date the instant application was filed.

6. The only issues for determination are whether the court can grant orders as sought by the respondent and whether the respondent is entitled to those orders.

7. The application herein is brought under the provisions of sections 5, 6, 7 and 13 of the Matrimonial Property Act, No. 49 of 2013. These provisions provide as follows:

> "Section 5.
>
> Rights and liabilities of a person.
>
> Subject to section 6, the interest of any person in any immovable or movable property acquired or inherited before marriage shall not form part of the matrimonial property.
>
> Section 6. Meaning of matrimonial property
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> (1) For the purposes of this Act, matrimonial property means—
>
> (a) the matrimonial home or homes;
>
> (b) household goods and effects in the matrimonial home or homes; or
>
> (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
>
> (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.
>
> (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
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> (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion e
>
> Section 7. Ownership of matrimonial property
>
> Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
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> 13. Separate property of spouses
>
> Subject to this Act and any agreement between the spouses before the marriage, marriage does not affect the ownership of property other than matrimonial property to which either spouse may be entitled, or affect the right of either spouse to acquire, hold or dispose of any such property."

8. These provisions of the law have no relation whatsoever to the orders sought herein. Be it as it may, the respondent has also anchored his application on sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, and quoted authorities under the Civil Procedure Act that invoke the inherent powers of this court.

9. When it comes to setting aside of court orders, the court has unlimited discretion. In *Phillip Kiptoo Chemwolo & Mumias Sugar Co. Ltd vs. Augustine Kubende* (1982-88) KAR 1036**,** the Court of Appeal in adopting the principles set out in the English case of *Evans vs. Barltam* [1937]AC 437], stated:

> "The discretion is in terms unconditional. The courts however, have laid down for themselves rules to guide them in the normal exercise of their discretion. One is that where the judgment was obtained regularly there must be an affidavit of merits, meaning, that the applicant must produce to the court evidence that he has a prima facie defence. The reason, if any, for allowing judgment and thereafter applying to set aside is one of the matters to which the court will have regard, in exercise of its discretion. The principle is that unless and until the court has pronounced a judgment upon the merits or by consent, it is to have the power to revoke the expression of its coercive power where that has only been obtained by a failure to follow any of the rules of procedure."

10. In *CMC Holdings Limited vs. Nzioki* [2004] eKLR, the Court of Appeal reiterated: -

> "That discretion must be exercised upon reasons and must be exercised judiciously… In law the discretion that a court of law has,

> in deciding whether or not to set aside ex parte order was meant to ensure that a litigant does not suffer injustice or hardship as a result of amongst others an excusable mistake or error. It would not be proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would be wrong principle …"

11. The respondent herein seeks to have the proceedings set aside and the matter to start *de-novo*. It should be noted that the respondent herein has not filed any response to the Originating summons filed by the applicant. In granting the orders sought in the instant application, the court in exercising its discretion should consider whether the respondent was properly served and whether he failed to appear in court at the hearing due to sufficient cause.

12. I will start by considering whether or not the respondent was properly served with the summons. It is respondent's position that he had been aware of the matter and that he has been playing, what he describes in his application as, an active role in the matter. According to the proceedings, the respondent, through his advocates on record, was on the 8th May 2016 granted leave to file a response to the Originating Summons. On the 12th May 2016 when the matter was slated for hearing both the respondent and his advocate were absent, and the matter was adjourned to the 30th June 2016.They were also absent when the matter came for hearing on the said date and the matter proceeded *ex parte*. It is the applicant's position that she at all times served the respondent with the requisite notices of hearing and mention dates. My perusal of the court records shows that the applicant filed an affidavit of service on the 10th May 2016 for a hearing notice for the 12th May 2016. There is also an affidavit of service filed on the 3rd June 2016 for a hearing notice for the 30th June 2016. The hearing notice was received by the respondent's advocates on record. These two affidavits are sufficient proof that the respondent, through his advocates, was served with the requisite hearing notices.

13. Next I will consider whether there was sufficient reason for the respondent to fail to appear in court at the date appointed for hearing. In *Wachira Karani vs. Bildad Wachira* [2016] eKLR, the court observed that:

> "Mulla, The Code of Civil Procedure [2] has illuminated the grounds for setting aside an ex parte decree and what constitutes sufficient cause for setting aside an ex parte judgement/decree. Essentially, setting aside an ex parte judgement is a matter of the discretion of the court. In the case of Esther Wamaitha Njihia & two others vs. Safaricom Ltd [3] the court citing relevant cases on the issue held inter alia: -
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> "the discretion is free and the main concern of the courts is to do justice to the parties before it (see Patel vs E.A. Cargo Handling Services Ltd. [4]) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (see Shah vs. Mbogo [5]). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration vs Gasyali. [6]) It also goes without saying that the reason for failure to attend should be considered."

Counsel for the Respondent referred to the case of Shah vs Mbogo. [7] Also relevant is the case of Ongom vs Owota [8] where the court held inter alia that the court must be satisfied about one of the two things namely: -

> (a) either that the defendant was not properly served with summons;
>
> (b) or that the defendant failed to appear in court at the hearing due to sufficient cause.

It's important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me: -

> "Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.

Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions"

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others [9] discussing what constitutes sufficient cause had this to say: -

> "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

In Daphene Parry vs Murray Alexander Carson [10] the court had the following to say: -

> 'Though the court should no 'doubt' give a liberal interpretation to the words 'sufficient cause,' its interpretation must be in

> accordance with judicial principles. If the appellant has a good case on the merits but is out of time and has no valid excuse for the delay, the court must guard itself against the danger of being led away by sympathy …" (Emphasis added)

Examining the provisions relating to setting aside ex parte judgements, Justice Adoyo of the High Court of Uganda in Transafrica Assurance Co Ltd vs Lincoln Mujuni [11] stated that: -

> "The rationale for this rule lies largely on the premise that an ex parte judgement is not a judgement on the merits and where the interests of justice are such that the defaulting party with sound reasons should be heard then that party should indeed be given a hearing."

The well-established principles of setting aside interlocutory judgements were laid out in the case of Patel vs East Africa Cargo Handling Services [12] where Duffus, VP stated;

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgement unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication"

The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated "sufficient cause" to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase "Sufficient cause" mean. The Supreme Court of India in the case of Parimal vs Veena observed that: -

> ""sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

The court in the above case added that while deciding whether there is a sufficient cause or not, the court must bear in mind the object of doing substantial justice to all the parties concerned and that the technicalities of the law should not prevent the court from doing substantial justice and doing away with the illegality perpetuated on the basis of the judgement impugned before it.[13] The test to be applied is whether the defendant honestly and sincerely intended to remain present when the suit was called for hearing. Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. [14] Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause."

14. That position was reiterated by the Court of Appeal in *Wilson Cheboi Yego vs. Samuel Kipsang Cheboi* [2019] eKLR, where court stated that:

> "The second condition requires that 'sufficient cause' be shown by the applicant. But what is 'sufficient cause'? It is a question of fact and the court has to exercise its discretion in the varied and special circumstances of each case. The same question was posed by this Court in the case of Okiya Omtata Okoiti & another v Okiya Omtata Okoiti & 4 others [2016] eKLR and was answered as follows:
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> "In The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur) Musinga, JA saw sufficient cause to be:
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> "Sufficient cause" or "good cause" in law means:
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> "... the burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused."

See BLACK'S LAW

DICTIONARY, 9th Edition, page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."

The Court of Appeal in Tanzania had this to say on "sufficient cause" in The Registered Trustees of the Archdiocese of Dar es Salaam vs. The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006 in discussing what constitutes sufficient cause:

> "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)"

And the Supreme Court of India on the same issue in the case of Parimal v Veena [2011] 3 SCC 545 observed that:

> "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore, the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously."

15. The face of the application herein does not disclose any grounds for the respondent's absence neither does his affidavit in support thereto. The respondent states that he has, since inception of the case, played an active part, however the records show otherwise. He and his advocate rarely attended court, and the respondent is yet to file a response to the originating summons despite being granted leave to do so by the court. He has offered absolutely no reason for not attending court, and, therefore, no sufficient cause for the non-attendance has been demonstrated.

16. For the reasons that I have stated above, I am not persuaded that a case has been made out for the orders sought. Parties have a responsibility to take court, or judicial, proceedings seriously, otherwise the court process would be exposed to disrespect. The application dated 27th July 2016 is without merit. The same is hereby dismissed, with costs to the applicant. As the applicant has complied with the directions for filing of written submissions, I direct that the file be returned to me for the purpose of preparing judgment. Any party aggrieved by the orders that I have made herein is at liberty to move the Court of Appeal appropriately, within twenty-eight days. It is so ordered.

DATED AND SIGNED AT KAKAMEGA THIS 8TH DAY OF October, 2019

W MUSYOKA

JUDGE

DELIVERED DATED AND SIGNED IN OPEN COURT AT NAIROBI THIS 24th DAY OF October,2019

A O. MUCHELULE

JUDGE