REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO. 132 OF 2014

M C S……..…..PETITIONER

VERSUS

J O O…….…… RESPONDENT

RULING

1. The application I am called upon to determine is dated 6th May 2015. It seeks stay of the ruling delivered on 23rd January 2015; a review and setting or varying of the said ruling; and a review or setting aside of the prayer 4 of the petitioner's application. It is premised on the grounds set out on the face of the application, being that the prayers sought in the application dated 30th May 2014 have been overtaken by events, that the application was not heard *inter partes* and the petitioner would not be prejudiced if the orders sought in the application are granted.

2. In the affidavit in support, the applicant goes over the events that led up to the orders being made, suggesting that he and his counsel were blameless for their inability to attend court. He further avers that he and the respondent were working out a settlement of the matter. He says they had agreed to sell the house, only for the respondent to rent it out. He states that he is not working and therefore he is not in a position to maintain the respondent. He also urges that there is a children's matter at Mombasa over the children. He further urges that prayer 5 of the impugned application was the subject of a civil suit.

3. There is a reply by the respondent. She avers as to what transpired before the ruling of 23rd January 2015 was delivered. She states that to date the applicant has not complied with the orders made in the impugned ruling. It is also said that there are orders in place by the Children's Court that the applicant is not complying with. There are various other allegations made in the affidavit in reply which are not germane to the application.

4. The application was urged orally on 24th September 2015. Counsel appearing took me through the facts as deposed in the affidavits of the parties. None of them cited any case law, or pointed me to any statutory provisions.

5. The application is couched in language that I find quite curious. It seeks stay of execution of a ruling. A ruling is not capable of being stayed. What can be stayed are the orders made in the ruling. A prayer for stay of a ruling is in the circumstances vague, and an order made in those terms would be incapable of execution. It also seeks review, setting aside or the varying of the said ruling. What should be sought to be reviewed or varied or set aside is the order or orders in that ruling. There is also a prayer for review of a prayer in the petitioner's application which culminated in that ruling. The application which forms the

basis of a ruling is the property of the party who filed it. The court cannot review it; it is up to the person filing it to amend it. The best the opposite party can do to pleadings filed by its opponent is to ask the court to strike them out. It is clear at the very outset that the application before me stands on very slippery ground. It is not properly conceived. It appears to me to be ripe for dismissal *in limine*.

6. I note that the application is founded on section 12(3) and 14(A) of the Matrimonial Property Act, 2013, and section 77 of the Marriage Act, 2014. I see nothing in section 12(3) that provides for the filing of an application of the kind that is before me. Section 14(A) does not exist. Section 77 provides for maintenance but not for the filing of applications to stay execution and to, review and set aside rulings.

7. When counsel appeared before me at the time of urging the application, none of them addressed me on the law on stay of execution, review of orders and setting aside. I have looked at the affidavits filed in the matter. None of them have sought to disclose facts that would support a case for stay of execution of a ruling or its review and setting aside.

8. I have noted from the record that the orders made on 23rd January 2015 required the applicant to do certain things. The respondent has averred that the applicant has not obeyed the said orders. The applicant himself has not demonstrated that he has obeyed or attempted to obey the orders, what he avers instead is that he made an effort to alter the circumstances so as to defeat the orders. He talks of having reached settlement with the respondent which entailed disposing of the property by sale, which he says was defeated when the respondent rented out the property. That to me means that there was no meeting of the minds at all over the matter.

9. Court orders are meant to be obeyed. Parties should endeavour to comply with them, however oppressive they deem them to be, unless they are able to move the court at the earliest opportunity for review. In this case the impugned orders were made on 23rd January 2015. The application dated 6th May 2015 was brought nearly five months thereafter. The duration between when the orders were made and when the application was lodged in court is in my view unreasonable. The applicant is no doubt coming to court with unclean hands.

10. The case *classicus* for setting aside of orders is *Shah vs. Mbogo and another* (1967) EA 116. The principle stated therein was that the court's discretion to set aside an *ex parte* judgement is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but not to assist a person who has deliberately sought to obstruct or delay the cause of justice.

11. The principle relates to *ex parte* orders or judgements. The applicant urges that the impugned orders were made *ex parte*. The issue then that arises is whether he had opportunity to present his case. Was he denied that chance by anything that he could not control?

12. The impugned application was in court for the first time on 12th June 2014, when the respondent was directed to serve, and the matter put down for hearing *inter partes* on 3rd July 2014. There is an affidavit of service on record sworn on 30th June 2014 and filed herein on 2nd July 2014. It indicates that the applicant was served personally with the application on 14th June 2014. Both parties appeared before me on 3rd July 2014, and he was given fourteen (14) days to file his reply to the application. The court then moved the *inter partes* hearing to 17th July 2014. On 17th July 2014, the applicant did not attend court, and the hearing was pushed to 24th July 2014 with the direction that the applicant be served. Come 24th July 2014, Miss Wanyonyi held brief for counsel on record for the respondent, while Mr. Webale expressed himself to be holding brief for the counsel on record for the applicant. The application was urged by Miss Wanyonyi, while Mr. Webale indicated that he had no instructions to reply. A reply to the application had not been filed by the time the application was heard although the seven (7) days allowed on 3rd July had expired, and Mr. Webale did not apply to have the matter adjourned.

13. From the record before me I am persuaded that no injustice was occasioned in the circumstances. The applicant had been granted sufficient time to file his reply to the application, but he did not avail himself of the opportunity, neither did he seek extension of time to file one in the event he was facing any

difficulty in doing so. When the matter came up for hearing on 17th July 2014, a date that had been given in court on 3rd July 2014 in the presence of his advocate, neither he nor his advocate attended court, the matter was adjourned to accommodate him, and orders were made that he be served. Come the next hearing, which he admits he was aware of, an advocate held brief for his counsel, but he did not ask for adjournment and simply indicated that he had no instructions. To be fair to the said advocate he could not urge the applicant's opposition to the application for the applicant had not yet filed any reply to the application coming up for hearing.

14. To my mind a case has not been made out for the setting aside of the orders made on 23rd January 2015.

15. The principles for review of court orders are notorious. Review is available where there is a glaring error on the face of the record, or there has been discovery of new important matter of evidence that was not available at the hearing which culminated in the order, or for any other sufficient reason. The applicant has not sought to demonstrate that there was any error on the face of the record, nor that he discovered some material that was of importance, so important as to change the course of things. What I think he has attempted to do is to show that there was some other sufficient reason. He talked of discussions with the respondent to dispose of the property the subject of the proceedings; however, he himself went on to say that that course of action was subverted by the respondent when she let in a tenant into the premises. Whatever sufficient reason there was meant to be was thus lost. A case for review has therefore not been made out.

19. The short of it is that the application dated 6th May 2015 is wholly without merit. I hereby dismiss the same with costs.

DATED, SIGNED and DELIVERED at NAIROBI this 26TH DAY OF OCTOBER, 2016.

W. MUSYOKA

JUDGE