REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

DIVORCE CAUSE NO. 13 OF 2007

J W A……..……..PETITIONER

VERSUS

A H L……..……RESPONDENT

RULING

By an Application entitled Chamber Summons dated 24th March 2010 and expressed to be brought under the provisions of **Order XXI, rule 22, IXA rule 10, IXB rule 8** of the **Civil Procedure Rules,** and **Section 3, 3A** and **63(e)** of the **Civil Procedure Act** *(Cap. 21, Laws of Kenya)* and all enabling provisions of the law, the Applicant sought prayer 1 (which is spent), and prayers 2-4 thereof are subject of this ruling -

(1) that the judgment obtained herein on 16th day of November 2009 be set aside, with all consequential orders thereof;

(2) that pending the hearing and determination of this application there be a stay of execution of the decree together with all consequential orders thereof.

(3) costs of the application be in the cause.

The Application was supported by the Applicant's affidavit sworn on 24th March 2010 and the sole ground that the applicant was never notified of any hearing date by his counsel.

The Application was opposed, and in a Replying Affidavit sworn by the

Respondent on 19th May 2010 and filed on 20th May 2010 the Respondent depones inter alia that -

(1) the application is brought under wrong provisions of the law;

(2) the applicant has not appealed against he judgment herein;

(3) the applicant was represented throughout the trial by counsel who also tendered written submissions.

I have considered the application herein, and in particular the applicant's sole ground on the face of the application that he was never notified of any hearing date by his counsel.

It is a cardinal principle of the common law that no person may be condemned unheard. It is also a cardinal principle of our procedural law that a party to a suit or litigation may either act in person, or by a duly briefed Advocate who is his mouth-piece or pleader. There are many authorities or precedents in our law reports that an Advocate once on record for a party may compromise his client on any matter in the suit, and that the actions of the Advocate bind the client.

In this application the applicant claims that his Advocate never notified him of any hearing date of the suit. Whether this is so or not is a matter of record.

When this matter proceeded to hearing on 16th February 2009, the Applicant was represented by counsel who cross-examined the respondent herein, and put on record the respondent's earnings, the fees for children, and the fact the applicant paid the children's fees.

Thereafter the matter was stood over to 23rd March 2009. The matter did not proceed on that date, and also on 27th April 2009 and 11th May 2009 when the matter was fixed for hearing on 8th June, 2009.

On 8th June 2009, the Applicant was well represented by Mr. Githui - his counsel on record. This is what his counsel told the court -

Githui - " I had informed my client that the case was coming up today but he is not here. He only said he would not be available without assigning a reason. I cannot give reasons for him and do not wish to cause prejudice to the other side. The case can conclude on the evidence at hand and we take a date for submissions."

Mrs Njoroge for Respondent responded -

"The offer by my learned friend suits me. We pray to be allowed to file written submissions."

Mr. Githui: That would be in order."

The court then made the following order: -

Court: By consent -

(1) The Respondent having chosen not to tender any evidence the case is marked as closed;

(2) Written submissions to be exchanged and filed on or before 29th June 2009 when the matter will be mentioned to give a date for judgment."

On 29th June 2009, the Applicant was represented by Mr. Githui while the Respondent was represented by Ms Nancy Njoroge, and noted and recorded that submissions having been filed, judgment would be delivered on 13th November, 2009. Judgment was duly delivered in the presence of counsel for both the Applicant and the Respondent, and at no time did the court proceed without or in the absence of the Applicant's counsel. Until the 24th March 2010 when the applicant filed a **Notice to Act in Person**, the Applicant was represented by counsel who had full authority and mandate to represent him. As noted above, the said counsel told the court that he had informed the Applicant to attend court on 8th June 2009, and that the Applicant had declined to attend, and did not assign any reasons therefor. It is therefore not true, and it is perjury for the Applicant to say on oath that his counsel never informed him of any hearing date.

It seems to me therefore, that the Applicant ignored his Advocate's information to attend court as required, and as they say, ***if you make your bed you must lie on it, the consequences will follow the Applicant.***

It is clear from above analysis of the dates when the matter was heard, and when the Applicant was required to come and testify he totally ignored his counsel's summons to come to court, and the court proceeded as by law provided, directed counsel to file and exchange written submissions, and on the basis of the Respondent's evidence, both in-chief and in cross-examination by the Applicant's Counsel, the court wrote and delivered its judgment as scheduled on 16th November 2009. It is therefore not open for the Applicant in the mouth to say he was never notified by counsel of any hearing date. And that being

the only ground for seeking the setting aside of the judgment and all consequences arising thereunder, the Applicant's application must fail.

Turning to the various provisions under which the application is brought I agree with counsel for the Respondent's contention that the application is incompetent and should for that reason be as well struck out.

Commencing with **Order XXI rule 22**, no order of stay of execution can be made under that provision. This rule is only applicable where a decree is sent from one court to another for execution. It does not apply where the decree is being executed through or by the same court which issued it.

Neither **Order IXA** nor IXB is applicable in this case. Those orders respectively relate to consequences of non-appearance and default of Defence (Order IXA) and Hearing and Consequences of Non-Attendance (Order IXB).

In this case, there was an Answer to Petition by the Applicant, and the Applicant responded to all pre-hearing applications, and cannot rely on either Order IXA or Order IXB.

The Applicant's Chamber Summons of 31st March 2010 is a sad after thought. Apart from being totally incompetent as demonstrated above, it totally lacks any merit.

It is dismissed with costs to the Respondent.

Dated, signed and delivered at Nakuru this 23rd day of July 2010

M. J. ANYARA EMUKULE

JUDGE