



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 16 of 1999

G.H.W PETITIONER

AND

R.N.K..... RESPONDENT

RULING

The application before the court is a Chamber Summons dated 11.7.2008. it seeks the following reliefs –

1. That this court set aside, nullify and/or reverse the decree nisi and decree absolute issued on 21.5.1999 and 23.9.1999, respectively.
2. That the applicant be given leave to file her Answer and Cross Petition.
3. That this court be pleased to order the matter to proceed for fully hearing
4. That this court do issue a temporary injunction restraining the petitioners, his servants and/or agents from threatening, interfering and coming near the Applicant's residence and/or place of work or in any other way interfering with applicant.
5. That this court do give custody and control of the three children of the marriage to the applicant.
6. That this Honourable court do order the Petitioner to provide accommodation and maintenance for applicant and the three children.
7. That the Honourable Court do order the Petitioner to release to the applicant' used Motor vehicle.
8. That the court does order Petitioner to provide for school fees and school related expenses for the three children of the marriage.
9. That the court do order the petitioner to release all clothes and other personal effects belonging to the applicant.
10. That the Petitioner be condemned to pay the costs of this application.

The applicant relies on her supporting affidavit sworn on 11.7.2008 and the supplementary affidavit sworn on 24.7.2008, together with the grounds on the face of the application and exhibits annexed to the affidavits. The applicant was represented by Mrs. Abida Ali. The facts as advanced by the applicant are as follows: - That she and the respondent are husband and wife for the last 18 years and have three children, J.W 17, E.K.W, 13 and T.N.K, 10. That their marriage has not been a happy one because of the respondent's dehumanizing treatment.

On 24.6.2008, the situation became so unbearable that the applicant had to leave their matrimonial home situated in Nairobi in a hurry and without carrying with her, her personal effects. She left the children at the matrimonial home where they reside to date. That having decided to file a divorce case against the respondent she inspected the family documents file in which she was shocked to find documents which indicated that the respondent had in 1999, filed this divorce Cause which she handed over to her present advocates and the advocates advised her as follows:-

That this cause had gone to court while she had gone to England, to escape from his cruel conduct towards her in 1999. That she was and has never been served with the court summons or proceedings. That the applicant had briefly left for England in February, 1999 and was persuaded by the respondent to return home which she did. That she joined the respondent in the matrimonial home and continued to live with him as wife until 23.6.2008 when she had to flee the home to escape serious harm from the respondent.

The applicant further deposes, that, even then the respondent has throughout their marriage treated her with cruelty. That he rarely had time for her and the children. He went to work early and never returned home early to give company to the family. That he always came home late in the night while drunk. That he refused the applicant's friends and members of her family to visit her at the matrimonial home. That several times the respondent physically and mentally assaulted her, even when he occasionally took her and the children out. That sometimes he even abandoned her in town or on the road while going home. That he often uses vulgar language to the children and to her at home, which discouraged the children and led to their poor performance at school. That he has very little respect or regard for the applicant as a result of which he registered jointly acquired family properties in his lone name to the exclusion of her and the children. That she is a co-director in family business companies but the respondent disregards her views, stating that she as well as the properties are owned by him.

Turning to the mode of service by the respondent/petitioner' concerning this Divorce Cause; the applicant avers that the respondent herein had not served her with the petition in February or March, 1999. She avers that she left the matrimonial home very temporarily to go to England, but that she soon after came back and joined the respondent at the matrimonial home. That the respondent did not inform her that he had filed a divorce cause against her. That even when the ex-parte hearing was taking place in this court on 20th and 21st May, 1999, she was peacefully living with him at the matrimonial home without being informed by him of the proceedings going on at court. That similarly, when the respondent was obtaining the decree nisi and the decree absolute on 23.6.1999 and 23.9.1999, respectively, he was leaving her at home to go to court to collect these documents, without informing her.

The applicant accordingly avers that the respondent/petitioner's conduct aforesaid, was not only deceptive but fraudulent. She further avers that had she been served or been informed of the proceedings at court, she would definitely have defended the cause and/or would have applied earlier to set the orders aside.

It is upon the above facts that the applicant seeks the setting aside and/or the nullification of the divorce decree aforesaid.

This application is strongly opposed by the respondent who is the petitioner in the cause. He, in his replying affidavit sworn on 22nd July, 2008, deposes that the applicant's averments in her

affidavits are not true. He, in particular denies that he has at any time threatened the applicant and/or their children with assault or physical injury.

The respondent depones that the applicant deserted their matrimonial home and escaped to the United Kingdom to live with another man. He does not state the exact time but states that for that reason, he filed this Divorce Cause. That he properly sought and obtained leave to serve outside this jurisdiction through Fedex Express on her last known address. The purported postage receipt is annexed to the replying affidavit. That the court was during the hearing of the case satisfied of the proper service and proceeded to hear the divorce case as undefended. He avers that the service was proper.

The respondent also stated that because of the service of the petition on her in the United Kingdom, she hurriedly came back to Kenya and filed a Separation and Maintenance Cause at Milimani Commercial Courts which is still pending. He denies subjecting the applicant to any dehumanizing treatment, particularly on 24.6.2008 when she moved out. He concedes the fact that the applicant soon after the filing of this case, returned home from U.K. and continued living with him but that they did not reconcile. He denies that the applicant was residing with him when the hearing of the case took place or when he obtained the decree nisi and absolute.

The respondent also avers that he loves and cares for his children and that he always governs his temper. He has never physically assaulted the applicant nor the children and that their children are happy with him at the matrimonial home.

Concerning their properties, the respondent avers that the properties belong to the family corporations and that each spouse has her/his share as shown in the documents of incorporation. That the applicant has fraudulently taken company property and funds to set up a supermarket at Kikuyu. That she is at liberty to collect her personal effects from the matrimonial home at any time. The respondent also avers that the applicant has other properties and business and that he never interferes with her. That a monthly sum of 100,000/= is adequate for rent and maintenance, especially because she lives alone and has her independent income from her business. That he maintains and pays the children school and other financial needs.

For the above reasons the respondent seeks the dismissal of the application before the court.

I have carefully considered the arguments placed before the court by both sides. I have examined carefully all the material in support of either case. The main issue is whether or not there was proper service upon the applicant of the divorce papers in February, 1999.

The Respondent/petitioner had in person filed the petition on 12.2.1999. The petition does not bear the address of the respondent where the summons would be served. The affidavit refers to the address of the applicant on the Chamber Summons application filed together with the petition as [PARTICULARS WITHHELD] United Kingdom.

When the application was placed before the Judge on the same day, 12.2.1999 the court clearly treated it very casually. But it was granted as prayed. To prove that service was effected, the respondent annexed a Fedex, Federal Express receipt of 12.2.1999. It shows that whatever parcel it was that was received by Fedex, it came from G.H.W The amount paid by G.H.W was Kshs.1937/=. The receipt itself does not show what the parcel was nor to whom it was to be delivered and the address. Below the receipt an address of R.N.K earlier mentioned above is shown in the photocopy receipt annexed by the respondent in this application. A careful scrutiny shows that the small piece of paper carrying the address, has been superimposed on the photocopying paper before the photocopy was taken. The address, as well, has been altered by hand. It must have been dated 4.2.1998 before it was altered to the year, 1999.

It is upon the above receipt that the respondent filed an affidavit of service sworn by him on

17.3.1999. In the affidavit the respondent deponed that pursuant to the court order of 12.2.1999 for substituted service he delivered a petition dated 12.2.1999, a Notice of Petition, an affidavit and an order for substituted service to Fedex Express Service, for service on the Respondent thereon through her last known address. He then avers that the documents were delivered on the said last known address in accordance with the court order.

Was the above a proper service? The respondent/petitioner had not at any time shown how he had obtained that address and ensures that it was the applicant's last genuine address. He did not even say when the applicant lived in that address, especially when she had recently left Kenya. Had the applicant written back to him after arriving at the U.K.? Had she given it to him on phone from there? Nothing is explained. Secondly the respondent did not explain how he got to know that the parcel, if one was actually sent, actually arrived and if so, when. Supposing it was for some reason not actually delivered at the address. Should a party be condemned for such omission? Supposing the parcel arrived in England at the address when the applicant, as story tells, had already come back home and had joined the respondent who did not inform her of the proceedings, as claimed in this case?

Interestingly, the affidavit of service was filed in court on 17.3.1999. At that time, it would appear, the applicant had already returned to Kenya and was filing Judicial Separation & Maintenance Cause No. 15 of 1999. This was done on 25.2.1999. In the affidavit of support to the above suit the applicant reveals that she visited Britain on 19.1.1999 and returned to Kenya On 15.2.1999, the same day the respondent/petitioner was filing this Divorce Cause. In it she complains that on her return he refused to allow her to the matrimonial home and also refers to one of the reasons for her visit to Britain as being cruel conduct of the respondent who locked her out of their businesses. Interestingly again, the applicant herein did not refer to this divorce proceedings. Had she been served with the divorce papers by the time, she could not have failed to refer to the divorce case, however cool she could be. The affidavit aforesaid sworn by the applicant on 25.2.1999 does reveal clearly that the marriage had many problems, but confirms to this court that the applicant had not been served with the divorce papers before she left Britain. Indeed if she arrived back in Kenya the same day, it would mean that the respondent G.H.W was pretending to send the documents while probably knowing she had returned or would return the same day. What is important however, in all this is that she was not in Britain to receive the petition papers purportedly sent by the respondent who as well apparently, deliberately failed to disclose the case to her.

It will be observed also that the respondent/petitioner herein has not at any stage denied the fact that soon after her return, the applicant resumed cohabitation in the matrimonial home and that that kind of life continued so until recently when serious differences once more arose and separated them. The respondent tried to categorise the nature of their relationship since the final divorce had been obtained in September 1999. He called it post divorce or business relationship. He did not deny that they lived together in the same matrimonial home, sharing everything including sex, happiness, trips, business and anything that portends marriage. While that kind of life may not under this application, lead to any marital relationship presumption, nevertheless it stresses the fact that the applicant may not have been aware that her marriage had not been terminated. It also leads to the conclusion that the respondent totally failed to inform the applicant of the true situation then prevailing.

In the English, case **Manners v. Manners and Fortescue** (1936) 1 All E.R 40 the applicant/respondent in the divorce case had been actually served. But at the time of service she was not clearly informed that the papers being pushed into her hands were husband's divorce papers. She did not look at them and when she entered the court, she dropped them. The papers were picked given to her but is shown that she left them on the bench where she sat inside the court. The suit was decided undefended as she had not filed an Answer or Cross-Petition. When she much later was informed that a divorce had been obtained against her and a decree nisi given, she applied to court to set aside the trial and sought a retrial with leave to her to file an Answer and Cross-petition, if she so wanted. The court found that she

was actually served physically, but actually the service never came to her mental notice.

The court (Lovington, J) at page 47, stated:-

“Whether in truth and in fact the step was complied with formally in that service was made does not, I think, affect what is asked for here, because whether in truth and in fact the petition was actually put into the hands of the respondent, or not, there is, I think, sufficient in the material before us to make us feel at least gravely dissatisfied as to whether she had any real knowledge of what was going on. That in itself seem to me a good ground for a rehearing.”

In the case of **Wiseman v. Wiseman** [1953] 1 All E.R. 601 the wife/applicant's address was not properly known. Attempt to serve her was unsuccessfully made in various cities in Europe. Finally the divorce cause was made a subject of publication in the United Kingdom of a newspaper but it was not certain that the respondent/applicant read the same before the divorce matter went into an undefended hearing. It was accepted by the court also that inquiries of Mrs. Wiseman's current place of residence was merely perfunctory. The divorce was granted and decree absolute was obtained. Infact the petitioner proceeded to marry a new wife and a child was born with her. The second court found that failure to effect proper service by Mr. Wiseman upon Mrs. Wiseman was not really fraudulent. It was found that methods of communication which were reasonably obvious could have been and were not either used or brought to the knowledge of the court which originally heard the suit. The second court also was of the view that the trial court should have been properly informed of the nature of service done before the hearing. The court referred to the case of **Craig v Kanseen** [1943] 1 All E.R 113, where the issue concerned with failure to serve and where the court had stated:-

“In my opinion, it is beyond question that failure to serve process where service of process is required, is a failure which goes to the root of our conceptions of the proper proceedings in litigations. Apart from the proper ex-parte proceedings; the idea that an order can validly be made against a man who has had no notification of any intention to apply for it- has never been adopted in this country.”

The **Wiseman** case then proceeded to stress and I agree with the principle, that the obligation rests on those who seek an ex-parte hearing an order to satisfy the trial court that service was properly and satisfactorily conducted upon the respondent. In the case of **Lazard Bros & Co., v. Midland Bank Ltd** [1933] A.C. 289 on a similar point, bad faith was read in a service out of the jurisdiction and Lord Wright stated at page 307-

“The court has discretion to set aside an order made ex-parte when the applicant has failed to make sufficient or candid disclosure.”

The court in the **Wiseman** case also found that the husband who obtained the divorce ex parte, failed to inform his wife of the fact. It was believed that had he done so, the wife could have applied to court to set it aside much earlier. The court, by Sommerset, L. J concluded at page 607 –

“ I am led to the conclusion that the decrees should be set aside and a new trial ordered by the importance which ... should be attached, particularly in divorce proceedings, to effective service which will, and does, in fact, bring the matter to the knowledge of the respondent ... Very relevant facts were, albeit by inadvertence, not disclosed to the court.”

Lord Denning in the same case agreed that Mr. Wiseman was not fraudulent in his conduct of the service upon his wife. He however stated that that the latter failed in their duty to the court when they applied for and obtained the order for substituted service after failing to take the available simple steps to reach the respondent for service. Furthermore Mr. Wiseman and his

counsel failed to fully make a full and frank disclosure to the trial court of the deficient nature of the service they had undertaken after getting the order for substituted service which disclosure they had a duty to make. He declared the order for substituted service voidable and the decree granted by the court also voidable.

Reverting to this case now before me, the respondent as earlier stated, just filed the application for substituted service together with the petition of divorce on 12.2.1999. The application was placed before the Judge a few minutes or hours after such filing. The applicant did little to explain to the Judge the circumstances why he required substituted service or how he obtained the so called respondent's last known address. The court as well appears to have done little in investigating whether or not the case deserved the order for substituted service. Nor indeed did the petitioner's supporting affidavit to the application itself carry much.

Further more, the court on the day of hearing of the petition appears to have not been satisfied that proper service of the summons had been effected before it could proceed to conclude that the Petition was undefended and should so proceed. The record also shows that even on 23.3.1999 when the Registrar gave her certificate of the pleadings being in order, Mr. Thiongo who by then was representing the petitioner, said nothing about the kind of service. Nor were the Registrar's attention drawn to the issue of the propriety of the service.

In a similar situation in Wiseman case Lord Hodson J. stated at page 609 –

“I am of the opinion, however, that this is a case in which, according to the established principles governing ex parte orders, the court is entitled to say that the information laid before it was wholly insufficient to justify an order of substituted service being made. This is not to say that in such circumstances an order for substituted service is to be treated as a nullity.”

The court proceeded to treat the order for such service as merely irregular and accordingly, voidable. On the above authorities on the relevant principles, I hold the petitioner/respondent's substituted service as irregular and voidable. This is because the petition upon which he obtained a decree of divorce was never brought to the attention of the wife, the applicant herein, until long after the decree absolute had been pronounced. As also earlier pointed out, in this strange case and circumstances, the husband most probably, and subject to final proof, resumed cohabitation with his wife without choosing to inform her of the divorce proceedings going on in court inclusive of the obtaining of the decree for dissolution of their marriage.

The result is that I am satisfied that, the substituted service, and later the ex parte proceedings, order and decrees, granted to the respondent/petitioner should and are hereby set aside. It follows accordingly that the applicant who is the respondent in that petition, has a right to file and Answer and/or Cross-Petition before other procedural steps are taken.

Concerning the issue of temporary injunction, the evidence is clear that the applicant has not revealed to this court the situation of her current residence. She argued that she was afraid to reveal this lest her husband goes there to harass her. In the circumstances it would not appear logical to restrain the respondent/petitioner from threatening interfering or coming near her when her residence is unknown. In that respect, the applicant has not proven the likelihood of the respondent interfering with her either at her residence or place of work. No restraining orders are accordingly, necessary.

The court now turns to the issue of custody of the children. Having taken into account the facts and circumstances prevailing, I note that the first child, J.W.K is 17 years old, almost an adult, he can only choose whether he wants to stay with his father at the matrimonial home where he presently resides or not. The court will invite him.

E.K.W and T.N.K are 13 and 10 years old. They presently live in their matrimonial home. I am

conscious that they are still young and should stay with their mother if conditions are good and it is in their best interest, particularly E.K.W being a female child.

On the other hand it might not be good to separate the three children, especially from their home where they presently stay and attend their school nearby. In addition, their mother the applicant had not given evidence to the court that she presently has a proper home where any of the child or children can live. I also would wish to see and hear the children personally. I presently would wish to withhold making any firm order of custody.

The applicant wishes that the respondent should be ordered to provide an accommodation and maintenance for the applicant and the children. My view is that getting a suitable accommodation to the applicant should be her own duty. She alone knows what would be best and reasonable for her personal taste. As to the children the issue as earlier stated, will be decided after the issue of custody is decided after the court sees and hears the children.

Should the respondent release the car to the applicant? Yes, if this is the car she was using before leaving the matrimonial home. There is evidence that the family has four cars, two of which are Mercedes. Since the larger Mercedes is used by the respondent whether as a spouse or a director of any of the family companies, the other in my view should be given to the applicant for her use. Indeed I did not hear the respondent deny that the applicant was using it before she left. I accordingly order that it be given to her for her use pending the finalization of this case.

From the evidence on record the respondent still lives with the children and takes care of their needs including school related needs. Ordering him to continue doing so is not really necessary, but it is nevertheless not harmful. The court orders him to provide for the children all their needs and requirements.

The applicant wanted an order to enable her collect her personal belongings from the matrimonial home. The respondent saw no reason for such order as she has never been prevented to access the matrimonial home. Indeed she will have to have some access to the matrimonial home to see the children unless the latter are released to her custody. She is at liberty to make arrangements with the respondent for her free access to the matrimonial home and an order to that effect is hereby made.

Finally the issue of costs arises. I have carefully considered it. It is the misconduct of the respondent in handling the divorce proceedings which led to this application to set aside the divorce decree being made. In my view the costs as a whole should be borne by the respondent.

To every relief given or refused herein, orders are hereby accordingly given.

Dated and delivered at Nairobi this 13th day of November, 2008

D.A. ONYANCHA

JUDGE