



REPUBLIC OF KENYA



**EM v EWKK (Matrimonial Cause E07 of 2021)  
[2024] KEHC 1591 (KLR) (21 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1591 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
MATRIMONIAL CAUSE E07 OF 2021  
HM NYAGA, J  
FEBRUARY 21, 2024**

**BETWEEN**

**DR. EM ..... PETITIONER**

**AND**

**EWKK ..... RESPONDENT**

**RULING**

1. The Applicant through an application dated 13<sup>th</sup> October 2023 expressed to be brought under Order 51 of the *Civil Procedure Rules* and Section 3A and 63(e) of the *Civil Procedure Act* seeks leave to file list of documents and further witnesses' statement and for costs of the Application.
2. The Application is premised on the grounds on its face and supported by an affidavit of the Applicant sworn on the even date.
3. In a nutshell, the Applicant is seeking leave to file list of documents and further witness statements for reasons that the matter proceeded without his knowledge whereupon he was forced to engage the service of his current advocate to represent him and that upon perusing the file he noted no documentary evidence was filed to support his case.
4. He believes the application will not occasion any prejudice to the Applicant if allowed.
5. In opposition to the Application, the Respondent Dr. EM filed a Replying Affidavit dated 25<sup>th</sup> October, 2023 wherein she deposed that this court on 12<sup>th</sup> October 2021 had certified the matter ripe for hearing and granted leave to the applicant on 7<sup>th</sup> July, 2022 to file all such documents he would desire before the main hearing of the petition.
6. She averred that on 21<sup>st</sup> July, 2022 the applicant herein filed and served a replying affidavit to the petition together with all documents he desired to rely on during the hearing of the petition and thereafter



when the matter came up for hearing she tendered her evidence and closed her case having regard to the Applicant's documents filed in this matter.

7. She contended that if the applicant is allowed to introduce additional documents she will be highly prejudiced as she will have no opportunity to rebut on the new documents considering she has closed her case.
8. She stated that this court's vide a ruling dated 25<sup>th</sup> September, 2023, allowed the applicant's application to the extent that she shall not be recalled to give evidence afresh and her case stood as closed with the applicant being given the opportunity to give his evidence.
9. The application was canvassed through written submissions.
10. Only the Applicant's submissions are on record.

### **Applicant's Submissions**

11. The applicant contended that his then advocate did not bother to consult him on the relevant documents to be filed after leave to file documents he desired to before the main hearing was granted by the court on 7<sup>th</sup> July, 2022.
12. He argued that the respondent will not be prejudiced as she will have a chance to cross examine him on the documents availed and that this court by dint of section 3A of the [Civil Procedure Act](#) has discretion to allow the prayer sought.

### **Analysis & Determination**

13. The sole issue for determination is whether the instant application is merited.
14. Order 50 Rule 5 provides that;

“Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require; and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed. Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application unless the court orders otherwise.”
15. Similarly, Section 95 of the [Civil Procedure Act](#) confers upon the court discretion to enlarge time even though the period originally fixed or granted for the doing of an act under the Act has expired.
16. Equally in [Nicholas Kiptoo Arap Koriri Salat vs Independent Electoral and Boundaries Commission & 7 others](#) (2014) eKLR, the Supreme Court articulated the factors a court should consider in exercising its discretion to extend time as follows;
  - a. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
  - b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court;
  - c. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;



- d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
  - e. Whether there will be any prejudice suffered by the respondent if the extension is granted;
  - f. Whether the application has been brought without undue delay; and
  - g. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
17. The suit herein was certified ready for hearing on 12<sup>th</sup> October, 2021. On 7<sup>th</sup> July, 2022, the Applicant's erstwhile advocate sought for 30 days to respond to the petition and Prof. J. Ngugi as he then was granted the Respondent/Applicant final opportunity to file and serve a response to the Originating Summon within 10 days and fixed the matter for hearing on 22<sup>nd</sup> July, 2022.
  18. Subsequently, the matter was adjourned on 22<sup>nd</sup> July, 2022 and 3<sup>rd</sup> August, 2022 at the instance of the Applicant herein.
  19. On 12<sup>th</sup> June, 2023 when the matter came up for hearing, the Applicant herein was absent and the court upon satisfying itself that he had been duly served, ordered that the matter proceeds for hearing. The Applicant/Respondent adduced her evidence and thereafter closed her case and a judgement date of 31<sup>st</sup> July, 2023 was set.
  20. Before the judgment was delivered, the Applicant herein filed an application seeking to set aside the proceedings of 12<sup>th</sup> June, 2023 pending the determination of the Divorce Cause No. E08 of 2021 and vide a ruling delivered on 25<sup>th</sup> September, 2023, I allowed the application and reopened the case only to allow the Applicant to tender his evidence.
  21. The Applicant now seeks to file documents to prove his contribution towards the acquisition of the matrimonial property. The documents in issue ought to have been filed with the Respondent/Applicant's response to petition and cross petition. The Applicant has stated that upon perusal of the court file he learnt that no document had been filed in support of his case. He appears to blame his erstwhile advocate for not advising him on the documents to file after he was granted leave to do so by the Court on 7<sup>th</sup> July, 2022. The Applicant however does not disclose whether he ever availed the said documents to his erstwhile advocate and he failed to file.
  22. In the circumstances therefore there are no good grounds advanced as to why he did not file the documents in issue within the time he was granted by the court. The Applicant has a duty to follow up on his case and ensure all the documents he intends to rely on are filed within time. Be that as it may, the interest of justice demands that the Respondent/Applicant be allowed to avail all the evidence that he may have in his possession to enable the court make an informed decision. I have previously indulged him and re-opened the case and it would not seem right to allow him to come and give his evidence and not give him a chance to avail his documents. The Applicant/Respondent will not be prejudiced in any way as she will have the chance to cross-examine the Applicant on the documents brought forth.
  23. As to further witness statements, the applicant has not specified who intends to call. Allowing a blanket prayer on this will open a Pandora's box, with no certainty as to who is to be called. There cannot be an open ended leave to call witnesses. The applicant ought to have at least stated who he wishes to have file a statement to allow the respondent also prepare, if necessary, any further witnesses. I find that application is tantamount to a fishing expedition and I disallow that aspect of the application.
  24. In view of the above, I will grant prayer (1) but only to the extent that the applicant is allowed to file his documents.



25. The Applicant is to file and serve the list of documents within 15 days from the date of this ruling failing which he will be deemed to have forfeited his right to do so. Any document filed after this period will be expunged from the court record.
26. As a consequence, the respondent's case will be re-opened to enable her address the documents she will be served with and if necessary, file further documents herself.
27. Costs shall be borne by the applicant in the present application.
28. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 21<sup>ST</sup> DAY OF FEBRUARY, 2024.**

**H. M. NYAGA,**

**JUDGE.**

**In the presence of;**

C/A Oleperon

Mr. K. Mbugua for Plaintiff/Respondent

Mr. Simiyu for Defendant/Applicant

