



REPUBLIC OF KENYA



**JWK v KW (Matrimonial Cause E017 of 2022)
[2024] KEHC 7484 (KLR) (Family) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7484 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
FAMILY
MATRIMONIAL CAUSE E017 OF 2022
HK CHEMITEI, J
JUNE 20, 2024**

BETWEEN

JWK APPLICANT

AND

KW RESPONDENT

RULING

1. In her application dated 14th June 2023 the applicant prays for the following reliefs:-
 - (a) That this court be pleased to set aside the orders issued on 27th April 2023 or such other day in which this entire suit was dismissed and reinstate the same.
 - (b) That this court be pleased to grant an order reinstating the injunctive orders dated 14th May 2022 pending the hearing and determination of the main suit.
2. The application is based on the sworn affidavit of Dorine Kalii counsel for the Applicant sworn on 15th June 2023.
3. The Respondent has opposed the application vide the grounds of opposition dated 7th June 2023 and the replying affidavit sworn on 26th June 2023.
4. The issues as raised in the affidavit in support of the application are clear and straight forward.
5. The deponent who is the counsel for the Applicant stated that she was unable to attend court on the material day when the matter was due for hearing because she had just delivered her baby and was therefore nursing her. In support of her case she attached the hospital /medical documents to that effect.



6. She further stated that being a single practitioner the only legal assistance in the office was basically answering issues and correspondences. She was not qualified to attend court. She went on to depone that she notified counsel for the Respondent of her status at that time and that she requested for the matter to be adjourned.
7. She deponed that the counsel whom she had requested to attend court was not able to as she was bereaved. Consequently, it was not her making that she was unable to participate in the proceedings.
8. She prayed that the application be allowed and that mistakes of a counsel should not be visited upon the litigant.
9. On his part the Respondent opposed the application stating among others that since the matter proceeded online nothing stopped the Applicant's counsel from joining the case online as well. He blamed the Applicant for using delay tactics in this matter and for a long time enjoying the interim orders.
10. He further accused the Applicant of not communicating to his counsel via an official email and that the email she used was in fact a wrong and a different address altogether.
11. At any rate he went on, the suit property had long been disposed to the purchaser and was thus unavailable for litigation. This took place after the suit had been dismissed.
12. He therefore prayed for the application to be dismissed as it was not going to serve any useful purposes if the suit is reinstated.
13. The parties as directed have filed their written submissions. The court has perused the same together with the cited authorities and does not see the need to reproduce here save to state that they both gravitate over the issues raised in the rival affidavits.
14. What is important to note however is that the Applicant is not contesting that she was not aware of the hearing date and that this court dutifully and rightfully dismissed her case for want of prosecution.
15. Is the reason given by her counsel plausible? Was the application filed within a reasonable time or there was inordinate delay?
16. The first issue can be answered by the attachment of the medical documents showing that indeed during the material time the Applicant's counsel was attending to her pregnancy and subsequent delivery of her baby. It appears that hers was not a normal delivery but went through a caesarean section (CS).
17. The medical reports clearly show that she was advised to rest till she could heal well. This has not been counteracted by the Respondent.
18. I think to the extent that the counsel was able to exemplify to this court her private medical records, in my view, the reasons whichever way one looks at is plausible. It is not daily that one comes into such open but private evidence. I find a sign of good faith on the part of the Applicant's counsel.
19. I find that it will be going too far for the Respondent to argue that she ought to have appeared online during that particular moment. This was actually a time to recuperate and bond with the new baby who according to her was her firstborn.
20. In any event the application was filed less than two months after dismissal and with the above reasons I think it is worth considering reinstating the suit.



21. This is a case of not blaming the litigant for the reasons of the failure of the advocate not to attend court. it will be sending away the Applicant from the mercy seat if the same is not allowed.
22. This is a matter that begs for the discretion of the court. See *[Patriotic Guards Ltd v. James Kipchirchir Sambu](#)* (2018) eKLR.
23. This court however does not find prayer two tenable for now for the undenied reason that the suit property has already been disposed immediately after the suit was dismissed. For whatever it is worth nonetheless the suit ought to proceed to its logical conclusion.
24. Consequently, I think I have stated much to show that the application succeeds and order as follows:-
 - (a) That application is allowed only to the extent that the orders of 27th April 2023 are hereby set aside and the suit is hereby reinstated.
 - (b) Costs to the Respondent.

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAIROBI THIS 20TH DAY OF JUNE 2024.

H K CHEMITEI

JUDGE

