



**NGV v CNV alias CHM (Matrimonial Cause 6 of 2021)
[2023] KEHC 20091 (KLR) (7 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20091 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MATRIMONIAL CAUSE 6 OF 2021**

G MUTAI, J

JULY 7, 2023

BETWEEN

NGV APPLICANT

AND

CNV ALIAS CHM RESPONDENT

RULING

1. The parties hereto are former spouses their union was dissolved pursuant to divorce proceedings in the subordinate court. Vide an Originating Summons dated May 20, 2021 the Applicant sought to have properties registered in their joint names divided. In particular, in paragraph 1 of the said Summons he sought: -

“a declaration that the money held in the various bank accounts in Mombasa and Nairobi in the joint names of the parties herein and or in the name of Plasma Diagnostics Limited, more particularly set out in schedule below, which the parties herein by claim to, belongs to the Applicant and is not matrimonial property. The Respondent is not entitled to any portion thereof and her name should be removed from the said Accounts”.

2. Schedule A of the said Originating Summons listed various accounts that the parties herein had. Of interest, in respect of the application before me, are items 4, 5, 6, 7 thereof, that is to say account number 3001xxxxx (United States Dollar account), account number 3003xxxxx(United Kingdom Sterling Pound account), account number 3001xxxxx (United Kingdom Sterling Pound fixed deposit account) and account number 30010xxxx in the name of Plasma Diagnostics Ltd (a United States Dollar fixed deposit account).



3. In her replying affidavit sworn on June 29, 2021 the Respondent traversed most of the averments of the Applicant. In paragraph 16 of her said affidavit she stated as follows: -

“that in response to paragraph 22 and 23 the amounts in these accounts are all matrimonial property. The bank account having been opened and operated during the pendency of the marriage as joint accounts between the parties and further by virtue of the Respondent being an equal shareholder to the Applicant in the business”.

4. The Respondent deposed in paragraph 17 that:-

“further the Applicant has failed to list the following joint personal FD accounts: -

- i. HDFC Bank of India joint account number 5030016208xxxx;
- ii. Prime Bank Mombasa Kes FD account linked to joint personal account number 200002xxxx;
- iii. Prime Bank Mombasa USD joint FD account linked to joint personal account number 300105xxxx; and
- iv. Prime Bank Mombasa account for the company Plasma Diagnostics Limited GPB Account number 300305xxx, Kes account number 300001xxxx.

5. She sought in paragraph 40 of her replying affidavit, in prayer (c), for “an order directing that the assets in schedule A and B are matrimonial property and be divided equally amongst the parties”.

6. The foregoing then is the summary of the relevant parts of the dispute that my brother judge was called to determine. Having heard the parties and upon considering their submissions Mr. Justice Onyiego in his judgment dated December 6, 2022 determined as follows in paragraph 69 (b) of the judgment: -

“The funds in bank accounts listed under paragraph 56 herein above and listed here below are hereby declared as matrimonial property to be shared out in the ratio of 75 % to 25% in favour of the applicant: -

- i.
- ii.
- iii. Prime Bank Mombasa branch joint personal savings account number 200002xxxx in joint names;
- iv. Prime Bank personal savings USD currency account number 3001xxxxx in joint names;
- v. Prime bank Mombasa branch GBP currency joint personal account number 3003xxxxx in joint names; and
- vi. Prime Bank Mombasa branch fixed deposit in joint names GBP currency account number 3001xxxxx.

7. I have referred to the determination of my brother judge in regard to the joint accounts held by the parties hereto in Prime bank as they are relevant to the matter presently before me.

8. Vide a Notice of Motion dated March 15, 2023 the applicant sought the following orders;



1. Spent;
2. That pending the interpartes hearing of this application this honourable court be pleased to stay further execution of decree dated 6th December 2022 by preserving the money held in Prime Bank account numbers: -
 - i. Kes FD account numbers 4000018xxxx and 40000196xxxx;
 - ii. USD FD account number 40010199xxxx; and
 - iii. GBP FD account number 40020192xxxx.
- (3) That this honorable court be pleased to order that the bank accounts listed below were not part of the subject matter of this case and are not subject to appointment as ordered in the judgment delivered on 6th December 2022
 - i. Kes FD account numbers 4000018xxxx and 40000196xxxx;
 - ii. USD FD account number 40010199xxxx; and
 - iii. GBP FD account number 40020192xxxx.
9. The contention of the applicant is that the above listed accounts were not the subject of the court's judgment. Attempts by the Respondent to have them apportioned on 75:25 ratio was therefore not tenable. When the application came before me under a certificate of urgency, I allowed prayers numbers 1 and 2. I am therefore called upon to determine prayer number 3 and costs at this point.
10. In support of the application the Applicant annexed a copy of the judgment, the decree and a letter dated March 14, 2023 written by a Mr. Hasu Silverra, the Assistant General Manager of Prime Bank Ltd, whose reference was "GBPDFD account 40020192xxxx. Paragraph two of the said letter stated thus: -

"in view of the court decree served upon the bank and as advised by our head office 25% of the funds held in the accounts specifically mentioned in the said decree, including 25% of the GBP fixed deposit created from GBP account No 3003xxxxx will be released to Ms. Chetna".
11. The Respondent opposed the said application. She contended that the Applicant was attempting to mislead the court with a view to defeating justice. She deposed that the GBP fixed deposit account number 40002019xxxx was created from GBP account No 3003xxxxx. She averred that: -

"this account has clearly been listed out in page 32 of the Applicant's annexures being judgment at paragraph 69 (vi) and also on the decree page 35 of the Applicant's annexure at (b) (vi)".
12. She denied that the bank intended to release funds in Kes. FD account numbers 4000018xxxx and 40000196xxxx and USD FD account number 40010199xxxx and stated that the "inclusion of these accounts in this application is a mere way of confusing the honourable court and to obstruct the fair dispensation of true justice."
13. The Respondent deposed in paragraph 11 of the replying affidavit that "...the applicant is being economical with facts by not clarifying the account which were disputed and the ones accidentally omitted by the judgment. Further the applicant fails to expound on the fate of the amounts held in joint bank account and accidentally omitted in the judgment despite being personal property and pleaded by



both parties”. She therefore sought to have the stay order set aside and for Prime Bank to be directed to release the amounts held in accordance with the decree.

14. I have read the submissions of the Applicant and the Respondent. Both rehash the contents of the respective affidavits. I will very briefly set out what I consider to be the salient submissions in the succeeding paragraphs of this ruling.
15. The Applicant submits that the judgment of Onyiego J, made reference to only 4 accounts jointly held by the parties in Prime Bank these are account numbers 200002xxxx (personal savings account), USD account number 3001xxxxx (joint personal savings account), GBP account number 3003xxxxx (personal saving account) and GBP account number 3001xxxxx (Joint fixed deposit account). The Applicant thus argues that Kes FD account numbers 4000018xxxx and 40000196xxxx, USD account number 40010199xxxx and GBP FD account number 40020192xxxx were not listed in the said judgment.
16. It is submitted that this court cannot add disputed accounts under the slip rule as to do so would amount to accepting further evidence, after the delivery of judgment and thereby reviewing the said judgment. The Applicant argues that the object of the slip file is merely to give effect to the manifest intention of the decision and not to change its substance. In support of the said contention I was referred to the decision of the court in *Moraa versus Constance & Another* KEHC 10227 (KLR).
17. The respondent submitted, on the other hand, that KES FDA account numbers 4000018xxxx and 40000196xxxx and USD FD account number 40010199xxxx were not the subject of the bank’s letter and were added to create confusion. Regarding GBP FD account number 40020192xxxx the Respondent avers that it is listed in the judgment as bank account No 3003xxxxx. She argues that the same was subjected to the bank’s internal process whereby fixed deposit accounts are issued with new reference numbers all of which are attached to main account number.
18. The Respondent identified 5 issues for determination by the court to wit:-
 1. Whether GBP FD account number 40020192xxxx is part of the judgment and decree;
 2. Whether the funds in the said account ought to be disposed of in accordance with the formula set out in the judgment and decree;
 3. Whether KES FD account numbers 4000018xxxx and 40000196xxxx and USD FD account number 4000019xxxx are the subject of instructions to the bank;
 4. Whether the Applicant has taken steps that amount to an abuse of the court process;
 5. Who should have costs of the application.
19. The Respondent submitted that GBP FD account number 40020192xxxx was created out of GBP account number 3003xxxxx and should be shared out as per the formula set out in the judgment. Reliance was placed on exhibit “NV-2” annexed the Applicant’s supporting affidavit where it is stated that:-

“In view of the court decree served upon the bank and as advised by our Head Office 25% of the GBP fixed deposit created from the GBP account number 3003xxxxx will be released to Ms. Chetna”.
20. On the 3rd and 4th issues the Respondent argued that no other account stated in the application was the subject of the bank’s letter. She submitted that the applicant made averments in his application which are at variance with what exhibit “NV-2” states. The court was thus asked to find that the Applicant



abused the court process. Reliance was placed on the decision of Monica Mbaru J in *James Mulinge versus Freight Wings Limited and 3 Others* [2016] eKLR for the proposition that courts should not condone abuse of its process.

21. I have looked at the judgment of Onyiego J. I have also perused the pleadings by the parties. The learned judge set out the assets which were listed in schedule A of the Originating Summons in paragraph 56 of the judgment. The 4 accounts held in Prime Bank were listed as being account numbers 200002xxxx, USD account number 3001xxxxx, GBP account number 3003xxxxx and GBP account number 3001xxxxx. His determination on the said accounts is in paragraphs 69 (b) (iii) (iv) (v) and (vi).
22. The said judgment makes no reference to account numbers KES account numbers 4000018xxxx and 40000196xxxx, USD FD account number 400105990257 and GBP FD account number 40020192xxxx. It must therefore follow that the said accounts were not the subject of his judgment and cannot therefore be apportioned as set out therein.
23. In making his determination the learned judge looked at the pleadings of the parties. I have already set out what the Applicant sought in schedule A of his Originating Summons. In her replying affidavit at paragraph 17 she accused the Applicant of not listing the following accounts: -
 1. Prime Bank Mombasa Kshs. joint FD account linked to joint personal account number 200002xxxx;
 2. Prime Bank Mombasa USD joint FD account linked to joint personal account No 300105xxxx; and
 3. Prime Bank Mombasa account for the company Plasma Diagnostics Ltd GBP account number 300305xxx and Kshs. account number 300001xxxx.
24. In her prayer the Respondent sought (in prayer C) that an order do issue “directing that assets in schedule A and B were matrimonial property and be divided equally amongst the parties”. It is therefore clear the accounts the subject of the application were not listed in the response filed by the Respondent in opposition to the Originating Summons.
25. It is trite law that parties are bound by their pleadings. Courts are required to make determinations on the basis of the pleadings before them. As the question of the accounts the subject of the instant application were not pleaded the learned judge could not have made a decision on them. It follows that at his judgment has no effect on the disposition of the said accounts.
26. The Respondent has submitted that Prime Bank has internal process whereby fixed deposit accounts are issued with new reference numbers all of which were attached to the main accounts numbers. With respect I am not persuaded by this. It was the duty of the Respondent in her response to set out all the joint accounts she held with the Applicant, which the Applicant had omitted in his Originating Summons and to convince the court that Prime Bank has internal processes that result in new reference/account numbers on maturity. With the benefit of evidence and submissions of the parties the court could then have made a decision by apportioning the same in accordance with its findings.
27. It does not follow, automatically, in my view that the 4 accounts could have been apportioned in the said 75:25 ratio. The court in my humble view would have been guided by the evidence.
28. The letter dated March 14, 2023 does not state unequivocally that GBP FD account number 40020192xxxx was created out of GP account number 3003xxxxx. In those circumstances I am unable to find that GBP FD account number 40020192xxxx is the same account as GBP account number



3003xxxxx. I agree with the Applicant that were I to do so I would be going beyond what Section 99 of the Civil Procedure Act provides. The said Section provides: -

“... Clerical or arithmetical mistakes in judgments, decrees or orders, or errors arising therein from any accidental slip or omission, may at any time be corrected by the court either of its own motion or on the application of any of the parties”.

29. For a finding to be made in favour of the Respondent the court would have called for evidence, establish what the custom and practice at Prime Bank exists regarding fixed deposit account and whether the said customs and practices applied in the instant case. I don't think that would be within the ambit of the slip rule. In Moraa versus Constance & Another (*supra*) the court held as follows:-

“In the sense of the law, an error apparent on the face of the record is anerror or omission (which is) self-evident and should not require an elaborate argument to be established Substantial matters say production of evidence or joinder of parties or amendment of cause of action etc should never be handled under the slip rule.”

30. Having made the above finding I do not think the Applicant abused the court process I therefore find and hold that the decision of Monica Mbaru J in James Mulinge versus Freight Wings ltd and 3 Others [2016]eKLR is inapplicable in the circumstance of this case.

31. I have made my determination on the questions that were before me. The joint accounts the parties had, and which were not pleaded in the Originating Summons and the Replying Affidavit and whose disposition was not determined by Onyiego J remain the assets of the parties. Parties are at liberty to approach the court appropriately for determination on how these should be apportioned.

32. It is therefore my finding that the application filed by the applicant is merited. The accounts mentioned in the application were not the subject of the dispute between the parties. They were not referred to in the judgment that my brother Judge delivered. Those accounts cannot therefore be lawfully apportioned between the parties pursuant to the said judgment.

33. I do not think that an order on costs is appropriate in the circumstance of this matter. Each party will therefore bear own costs.

34. Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 7TH DAY OF JULY, 2023 VIA MICROSOFT TEAMS.

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GREGORY MUTAI

JUDGE

In the presence of:-

Mr Arthur Ranyundo - Court Assistant;

Ms. Maiga holding brief for PJ Kakad for the Respondent;

No appearance for the Applicant.

