



**WAH v JWH (Miscellaneous Cause E046 of 2022)  
[2023] KEHC 20121 (KLR) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20121 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MISCELLANEOUS CAUSE E046 OF 2022**

**G MUTAI, J**

**JULY 14, 2023**

**IN THE MATTER OF SECTIONS 2, 6, 7, 12 & 17  
OF THE MATRIMONIAL PROPERTY ACT, 2013**

**AND**

**IN THE MATTER OF AN APPLICATION FOR THE DIVISION OF  
MATRIMONIAL PROPERTY TITLE NO. KIEGOI/KINYANKA/1993**

**BETWEEN**

**WAH ..... APPLICANT**

**AND**

**JWH ..... RESPONDENT**

**RULING**

1. What is before this court is a Notice of Motion dated 16<sup>th</sup> December 2022. The same is supported by the affidavit of the applicant sworn on the same date. The application seeks the following orders: -
  - ii. Spent;
  - iii. That the honourable court be pleased to grant leave to the applicant to file the matrimonial property suit out of time;
  - iv. That the honourable court be pleased to allow the annexed Originating Summons dated 16<sup>th</sup> December 2022 and Supporting Affidavit sworn by the Applicant and be deemed as properly filed;
  - iv. The costs of this application be provided for.
2. The Applicant’s case is that he got married to the Respondent on 7<sup>th</sup> April 2004 and that the marriage was dissolved on 23<sup>rd</sup> January 2018. That the marriage was not blessed with any issues. That he bought



property known as Kiengoi/kinyanka/1993 which was transferred to the respondent's name to hold in trust for him. Further he paid the full purchase price of Kes.6,000,000/- and developed the same by building a three bedroom house without the support of the respondent. That he tried to pursue the claim in the suit property but was not successful since the respondent had unlawfully transferred the title to her sister. He then filed Mombasa ELC *No. 60 of 2014* against the respondent and her sister Emily Kerendi Mbogo to have the transfer cancelled.

3. He further stated that he has a valid claim which ought to be heard and determined on merits. That the respondent will not suffer any prejudice since she has not appealed the decision by the ELC court.
4. That he instructed the firm of J.A Abuodha & Co. Advocates to institute a suit, which he later learned was not filed and thus the mistakes of his former advocate ought not to be visited upon him. Further it is in the interest of justice that leave be granted.
5. In response the respondent filed a notice of preliminary objection dated 1<sup>st</sup> February 2023 and filed on 15<sup>th</sup> February 2023, on the grounds that this honourable court lacks jurisdiction to hear and determine the application in view of Rule 6 of the *Matrimonial Property Rules*, 2022; that the applicant's application is fatally defective and ought to be dismissed with costs.
6. She also filed a replying affidavit sworn on 1<sup>st</sup> February 2023. She stated that this court lacks jurisdiction to hear and determine this suit by virtue of the location of the property in question which is located in Maua Town, Meru County and thus the court with jurisdiction is Maua Chief Magistrate Court.
7. She stated that they have three children with the applicant namely; OH; MH and LEH. Further she bought the suit property solely.
8. She averred that she only learnt of the decision of the ELC Court in Mombasa ELC *No.60 of 2014* when she was served with the application herein. That the orders were obtained ex parte. That she has already requested the ELC Court Registry for the proceedings to enable her take the next step.
9. She contended that the evidence adduced to show the failure to file suit by the applicant's advocate is not sufficient as it is not proof of appointment of an advocate.
10. She urged the court to dismiss the application with costs.
11. The applicant filed a supplementary affidavit sworn on 26<sup>th</sup> April 2023 vide which he denied the allegations in the respondent's affidavit. He stated that there is no limitation on territorial/geographical jurisdiction under the *Matrimonial Property Act* and the *Matrimonial Property Rules*, 2022. That this honourable court has unlimited original jurisdiction under Article 165(3) (a) of the *Constitution* of Kenya. That at the time of filing this suit, Rule 6 (1) (b) of the *Matrimonial Property Rules* was not operational. That the respondent will suffer no prejudice if the suit is heard in Mombasa.
12. He stated that he should not be condemned unheard due to the mistake of his former advocate. He urged the court to grant leave which will enable the parties to be heard and matter determined on merit.
13. When the matter came before court on 22<sup>nd</sup> March 2023 the court directed that the application be canvassed by way of written submissions.
14. The applicant through his advocate Mwashushe & Company Advocates filed his written submissions dated 27<sup>th</sup> April 2023 and submitted on four issues; whether or not the honourable court has jurisdiction to hear the matrimonial property claim; whether or not leave should be granted to the applicant to file the matrimonial property suit out of time; whether or not the annexed Originating Summons dated 16<sup>th</sup> December 2022 and supporting affidavit be deemed properly filed; who should bear the costs of the application.



15. On the 1st issue counsel submitted that the High Court has unlimited original jurisdiction under Article 165(3) (a) of the Constitution of Kenya. That no limitation on territorial/geographical jurisdiction under the Act or rules as rule 6 addresses pecuniary jurisdiction.
16. Counsel relied on the case of *Shah v Shah* (No. 2) 2KLR 607 and submitted that Section 12 of the Civil Procedure Act do not apply in matrimonial property proceedings unless imported by the Act or Rules. On pecuniary jurisdiction counsel submitted that by the time of filing this suit Rule 6(1) (b) of the Rules was not operational and all matrimonial property claims were being filed at the High Court registry. Counsel urged the court to find that it has jurisdiction and that the suit was properly filed.
17. On the 2<sup>nd</sup> issue counsel submitted that Rule 5 (2) of the rules requires a matrimonial suit to be commenced within 12 months of the decree absolute. That in this case decree absolute was issued on 23<sup>rd</sup> January, 2018. That the delay in filing the suit was due to factors beyond his control as there was failure on the part of the advocate he instructed to institute the claim. Counsel relied on the case of *Millicent Muthoni Kigira v Joshua Otiemo Ndere* [2021] eKLR where it was held that the mistake of the advocate should not be visited on innocent client and submitted that the applicant is an innocent litigant and the mistake of his former advocate should not be visited on him and leave be granted for the substantive originating summons to be filed and matter heard on merit.
18. On the 3<sup>rd</sup> issue counsel reiterated her submissions on the first and second issue and urged the court to deem as duly filed the originating summons together with supporting affidavit both dated and sworn on 16<sup>th</sup> December 2022.
19. On the 4<sup>th</sup> issue counsel submitted that this being a family matter each party to bear their own costs. In conclusion counsel urged the court to allow the application.
20. The respondent did not file any submissions.
21. I have considered the application, the responses therein and the applicant's submissions and the issues that emerge for determination are:
  - a. Whether this court has jurisdiction; and
  - b. Whether leave to file suit out of time should issue.
22. On jurisdiction, Article 165 of the Constitution of Kenya ,2010 provides;
  - (1) There is established the High Court, which—
    - b. shall consist of the number of judges prescribed by an Act of Parliament; and
    - c. shall be organised and administered in the manner prescribed by an Act of Parliament.
  - (2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
  - (3) Subject to clause (5), the High Court shall have—
    - a. unlimited original jurisdiction in criminal and civil matters;
    - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
    - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;



- d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
    - i. the question whether any law is inconsistent with or in contravention of this Constitution;
    - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
    - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
    - iv. a question relating to conflict of laws under Article 191; and
    - v. any other jurisdiction, original or appellate, conferred on it by legislation.
  - (4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.
  - (5) The High Court shall not have jurisdiction in respect of matters—
    - a. reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
    - b. falling within the jurisdiction of the courts contemplated in Article 162 (2).
  - (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
  - (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.
23. Nyarangi, J in the locus classicus case of The Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR stated:-
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
24. Further the Supreme Court in the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR stated:-
- “A Court’s jurisdiction flows from either the *Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the *constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings.”



25. Rule 6 of the *Matrimonial Property Rules* 2022 provides: -
1. An application to enforce a claim relating to matrimonial property may be made in any proceedings under the *Act* —
    - a. to the High Court in any case where the value of the matrimonial property which is the subject matter of the claim exceeds the pecuniary jurisdiction of a magistrate's court; or
    - b. to a magistrate's court having civil jurisdiction to adjudicate matters within the court's pecuniary jurisdiction.
  2. Where the spouses profess the Muslim faith, the court to which an application is made may, on the request of the parties, be guided by Muslim law.
26. The main dispute on jurisdiction is the issue of geographical and pecuniary jurisdiction of the court. The respondent argues that in respect to Rule 6 of the rules the court clothed with jurisdiction is the Maua Chief Magistrate's Court as the value and location of the property is within the pecuniary and geographical location of the said court. The applicant on the other hand argues that at the time of filing this suit Rule 6(1) of the *Rules* was not operational.
27. The location and purchase price of the suit property has not been disputed. Further the application herein was filed on 16<sup>th</sup> December, 2022 after the commencement of the *Matrimonial Property Rules* 2022 which commenced on 29<sup>th</sup> July, 2022. Article 165(3) (a) provides that the high court has unlimited original jurisdiction in criminal and civil matters.
28. Rule 6 is not couched in mandatory terms and only touches on pecuniary jurisdiction. Initially matters were being filed in the High Court. The *Constitution* being the supreme law of the land, it's my finding that this court has jurisdiction to hear and determine this matter and may do so where it is just and expedient.
29. On whether leave to file matrimonial suit out of time should issue, the rules require any claim over matrimonial property to be commenced within 12 months from the date of issuance of decree absolute. Rule 5 provides: -
1. A spouse or former spouse may apply to a court for the determination or declaration of any right or claim over matrimonial property in accordance with rule 7—
    - a. at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the *Marriage Act*, 2014 (No. 4 of 2014);
    - b. as part of the relief sought in a matrimonial cause under section 17 of the *Marriage Act*, 2014 (No. 4 of 2014), where the applicant is seeking a declaration of rights to any property that is contested between the applicant and the applicant's spouse or former spouse; or
    - c. with respect to the persons specified in rule 4 (b) and (c), during the subsistence of a marriage.
  2. An application under paragraph (1) (a) shall be filed within twelve months from the date on which the decree absolute is given.
  3. Without prejudice to the generality of paragraph (2), a court may, for good cause, extend the time for making an application under paragraph (1) (a) after hearing —
    - a. the applicant; and



- b. any other person interested in the property who is likely to be affected by the order sought and who the Court considers as having a right to be heard.
4. An application made in a matrimonial cause under section 17 of the *Marriage Act*, 2014 (No. 4 of 2014) as contemplated in paragraph 1 (b), shall be in accordance with the *Matrimonial Proceedings Rules*, 2020 (LN 122 of 2020).
30. Further Rule 18 provides
1. No party may file any pleading or other process out of time except with leave of the court on application for extension of time for that purpose, and on such terms as the court may think just.
  2. An application for leave to file pleadings or other process out of time may be made by way of notice of motion supported by affidavit, or orally at any stage in the proceedings.
31. The decree absolute herein was issued on 23<sup>rd</sup> January, 2018 whereas the application herein was filed on 16<sup>th</sup> December, 2022. The applicant has stated that he took several actions since then to protect his rights over the suit property which included prosecuting Mombasa ELC *No. 60 OF 2014* and instructing the firm of J.A Abuodha & Co. Advocates to institute a suit on his claim to the suit property. He further stated that he unfortunately later learned that the said firm of advocates had not filed any suit. He has attached an acknowledgement note marked WAH-4 dated 15<sup>th</sup> December, 2018 from the firm of J.A Abuodha & Co. Advocates on receipt of Kes.85,000/- being filing fees of a division of property matter. He also attached the decree from the Environment and Land Court given on 19<sup>th</sup> June 2018 and issued on 10<sup>th</sup> December 2018. That it was the mistake of his former advocate that caused the delay in filing the matrimonial suit and the same should not be visited upon him.
32. The court in the case of *Rupa Savings & Credit Cooperative Society Ltd v Violet Shidogo* [2022] eKLR stated: -

“The question therefore is, is the mistake of the advocate in this case reasonable or bona fide and has it been explained to the satisfaction of the Court? I think not in this case. The Applicant has merely cited a failure to be updated over the matter and had produced correspondence where it has sought information severally from its advocate. However, the failure to update them has not been explained well as this could have been triggered by any number of reasons. Merely claiming inaction on the part of its advocate is not sufficient reason and this is a position that was also taken by the Honourable Justice Odunga in *Dilpack Kenya Limited v William Muthama Kitonyi* [2018] eKLR which decision I cite with approval. He stated that:

- “33. In this case the applicant has not expounded on the nature and quality of the inadvertence alluded to. This seems to be a case of mere inaction and as was held in *Berber Alibhai Mawji vs. Sultan Hasham Lalji & 2 Others* [1990-1994] EA 337, inaction on the part of an advocate as opposed to error of judgement or a slip is not excusable. Therefore, pure and simple inaction by counsel or a refusal to act cannot amount to a mistake, which ought not to be visited on the client.”

Further, the Applicant has produced two letters addressed to Magut and Sang Associates Advocates. The said letters do not contain full addresses of the Advocates in question.



They do not contain any receiving stamp by the said firm. They also are not addressed to a specific advocate in the firm. This Court notes that to date, the applicant has failed to cite a specific advocate in the firm above who handled the matter and who failed to act. If the mistake of counsel alleged cannot be identified with specificity and even the advocate in question cannot be identified, it becomes extremely difficult for this court to be satisfied that the Applicant is deserving of this Court's orders. Therefore, I find that the entirety of the allegations that the failure to file an appeal on account of mistake of counsel is unproven on a balance of probabilities.

I wish to restate that enlargement of time is a matter of judicial discretion which is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice. To this end, courts have repeatedly emphasized that mistakes of counsel not amounting to bona fide mistakes are punishable as professional negligence.

Further, the Applicant remains the owner of the suit and the prosecution thereof is his responsibility. It is for this reason that the Court of Appeal in *Rajesh Rughani v Fifty Investments Limited & Another* [2016] eKLR which decision I cite with approval, declined to simply blame inaction on the mistake of counsel instead stating:

“Our re-evaluation of record lead us to conclude that no credible, satisfactory and sufficient explanation for delay has been given. It is insufficient to blame previous counsel on record without an explanation as to the action taken by the litigant to show he did not condone or collude in the delay”

In *Edney Adaka Ismail v Equity Bank Limited* [2014] eKLR, the court similarly declined to exercise its discretion simply because the Applicant claimed a mistake of counsel. The Court stated:

“It is true that where the justice of the case mandates, mistake of advocate even if they are blunders, should not be visited on the clients when the situation can be remedied by cost ....However, it is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of the court”.

The Court went on further to state:

“I fully agree with the above holding. It is not enough for a party to simply blame the advocate but must show tangible steps taken by him in following up his matter”.

33. The applicant in this case has not explained to this court the actions he took from December, 2018 to December, 2022 when the application herein. He is also not clear on when he discovered the failure to file a suit by his advocate. He has argued that he thought that the suit stalled due to Covid -19. This court takes judicial notice that Covid 19 hit the country in 2020. In March 2002 the courts were closed, however, things went back to normal after a few months and the courts re-opened. The applicant has not given sufficient explanation on action taken the period between December, 2018 and March 2020 and or 2021 to December, 2022.



34. Accordingly, it's my finding that this is a case of inaction by both the firm of J.A Abuodha and the applicant who by law is the owner of the suit with the responsibility of prosecution of the same. The applicant herein has not given sufficient reasons to show he did not condone or collude in the delay.
35. Rule 3 of the Matrimonial Property Rules 2022 Rules provides: -
1. The objective of these Rules is to facilitate the just, expeditious, proportionate and affordable resolution of disputes relating to matrimonial property.
  2. A court to which an application is made under the Act shall, in the exercise of its powers or interpretation of any of the provisions of the Act, seek to give effect to the spirit and principles of the Constitution.
26. The upshot of the above is that the applicant has not satisfied this court on the cause of the delay in filing the matrimonial suit on time. However, in exercise of this honourable court's discretion and in the interest of justice I do hereby allow the applicant's application dated 16th December 2022. As the Applicant was indolent in prosecution of his claim I award the Respondent costs of the application.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 14<sup>TH</sup> DAY OF JULY 2023 VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Ms. Mwashushe for the Applicant;

No appearance for the Respondent

Mr. Arthur Ranyundo – Court Assistant

