



**HRR v RMR (Matrimonial Cause 10 of 2015)  
[2023] KEHC 24687 (KLR) (13 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24687 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
MATRIMONIAL CAUSE 10 OF 2015**

**G MUTAI, J**

**OCTOBER 13, 2023**

**BETWEEN**

**HRR ..... PLAINTIFF**

**AND**

**RMR ..... DEFENDANT**

**RULING**

1. This Court delivered a judgment on 23<sup>rd</sup> September 2023, vide which it found and declared the Plaintiff/Respondent herein has a 40% share of the matrimonial properties identified by the Court in the said judgment.
2. The Defendant/Applicant was aggrieved by the said decision as it was arrived at without hearing his evidence. Consequently, he filed a Notice of Motion application dated 19<sup>th</sup> April 2023, brought under sections 1A, 1B & 3A of the *Civil Procedure Act*, order 12 rule 7 of the *Civil Procedure Rules* and Articles 48, 50 of and 159 (2) of the *Constitution* of Kenya, 2010. Vide the said application the Defendant/Applicant seeks the following orders:-
  1. Spent;
  2. Spent;
  3. This honourable Court be pleased to set aside the judgment entered on 23<sup>rd</sup> September 2022 against the Defendant/Applicant and allow the case to be heard afresh; and
  4. Costs of the application be provided for.
3. The application is supported by the annexed affidavit of the Defendant/Applicant, to which is attached two annexures being a letter from the firm of Marende Necheza & Co. Advocates and a decree extracted on 23<sup>rd</sup> September 2022. The Defendant/Applicant raised 15 grounds in support of the application. On the main, the grounds assert that he has always been keen to prosecute the matter as evidenced by



the fact that all adjournments, in its opinion, up to and including 29<sup>th</sup> April 2021 were at the instance of the Plaintiff/Respondent.

4. According to the Defendant/Applicant, the last time the matter was due for hearing, to the best of his knowledge, was on 10<sup>th</sup> July 2021. On that date, the Court didn't sit, and the parties were asked to take dates at the Registry. The Defendant/Applicant claims that he heard nothing further until 14<sup>th</sup> April 2023, when the Defendant/Applicant's advocate was served with a decree showing that judgment was delivered on 26<sup>th</sup> September 2022. He avers that he was not aware he was not aware of the hearing date and was surprised by the turn of events.
5. The application is opposed. The Plaintiff/Respondent deposed in an affidavit sworn on 25<sup>th</sup> May 2023 that the Defendant/Respondent's counsel was served. The Plaintiff/Respondent annexed copies of the mention notice dated 18<sup>th</sup> November 2021, the Plaintiff/Respondent's Written Submissions dated 1<sup>st</sup> December 2021, highlighting notice dated 17<sup>th</sup> December 2021, together with an affidavit of affidavit of service and a printout of an email sent by the counsels for the Plaintiff/Respondents to yusufabouabakar@yahoo.com. Most of these documents bear the receiving stamp of the Defendant/Applicant.

### **Proceedings Before the Court**

6. The Application came for directions on 27<sup>th</sup> July 2023. On the said date, I directed that the application would be canvassed by way of Written Submissions. On 21<sup>st</sup> September 2023, upon confirming that one party, the Plaintiff/ Respondent, had complied, I set down the matter for ruling on 6<sup>th</sup> October 2023.

### **The Submission of the Defendant/Applicant**

7. The Defendant/ Applicant did not file Written Submissions.

### **Submissions of the Plaintiff/ Respondent**

8. The Plaintiffs / Respondent filed submissions dated 1<sup>st</sup> August 2023. In the said submissions, she urged this court to dismiss the application as it was aimed at delaying the conclusion of the case. She referred me to her Affidavit wherein a chronology of events was given showing that the Defendant/ Applicant was aware of the matter but deliberately refused to attend court.
9. The Plaintiffs/ Respondent identified one issue as coming for determination, to wit, whether the application should be allowed. Although it was admitted that under Order 12 Rule 7 of the Civil Procedure Rules, a court may set aside or vary the judgment or order on such terms as may be just, it was urged that this discretion shouldn't be used in this case unless the Defendant/ Applicant demonstrated that he is deserving of it. I was referred to the case of *Yamko Yadpaz Industries Limited v Kaila Flowers Limited*; Nairobi HCCC No. 591 of 2012, where the court noted as follows:-

“Secondly, this discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct as or delay the course of justice.”
10. The Plaintiffs/ Respondent submitted that the Defendant/ Applicant didn't deserve the orders sought as he had deliberately sought to delay the hearing of this matter. She accused the Defendant/ Respondent of misleading the court on who caused the previous adjournments.



## Analysis and Determination

11. I am being asked to exercise my discretion and set aside a judgment. Being an exercise of discretionary power, I must make the said determination on the basis of sound principles and not whimsically.
12. I note that the Defendant/ Applicant was, at the very least, aware of the fact that the matter was heard when highlighting notice was served on this counsel. As a matter of fact, all the documents I have seen bear the receiving stamp of the firm of Aboubakar Mwanakitina & Co. Advocates. Even after filing this application, they failed to file Written Submissions in support of the application, notwithstanding the fact that the directions were given in the presence of Mr. Khamisi Salim from the said firm.
13. The above notwithstanding I have looked at the Defense filed by the Defendant/ Applicant. In my view, the same raises triable issues. I have also taken note of the fact that a hearing notice in respect of the day the matter came up for hearing was not annexed to the Replying Affidavit despite being identified as exhibit "RR1". Given the nature of the cause before me, it would serve the interest of justice if the determination of each party's share of the matrimonial properties was made on merits rather than on the basis of the evidence of one party.
14. In the case of *Patel v EA Cargo Handling Services Ltd* (1974) EA 75, the Court held that:

“There are no limits or restrictions on the judge’s discretion except that if he does vary the judgment, he does so on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose condition on itself or fetter wide discretion given to it by the rules. The principle obviously is that unless and until the court has pronounced judgment upon merits or by consent, it is to have the power to revoke the expression of its coercive power where that has obtained only by a failure to follow any rule of procedure.”
15. The Court *Rayat Trading Co. Limited v Bank of Baroda & Tetezi House Ltd* [2018] eKLR listed the matters to be considered when exercising this discretion as being: -
  - i. the defendant has a real prospect of successfully defending the claim; or
  - ii. it appears to the court that there is some other good reason why the judgment should be set aside or varied, or the defendant should be allowed to defend the claim.
16. In *Philip Kiptoo Chemwolo and Mumias Sugar Company Ltd v Augustine Kubede* (1982-1988) KAR, the Court of Appeal held that: -

“The court has unlimited discretion to set aside or vary a judgment entered in default of appearance upon such terms as are just in the light of all facts and circumstances both prior and subsequent and of the respective merits of the parties. *Kimani v MC Connell* (1966) EA 545 where a regular judgment had been entered the court would not usually set aside the judgment unless it was satisfied that there is a triable issue.”
17. Applying the principles I have gleaned from the above authorities, it is my considered opinion that I should exercise my discretion in favour of the Defendant/Respondent. He has a defence which raises triable issues. It would therefore be fair and just if he is allowed to ventilate it.



## **Disposition**

18. I therefore find and hold that it would be in the interest of justice to allow the Defendant/ Applicant to defend himself on merits. In the circumstances, I allow the application, set aside the judgment and order that the suit be heard afresh.
19. As the Defendant/ Applicant is the author of his own Misfortune. I order that he pays Plaintiff/ Respondent's costs in the sum of Kes. 30,000.00 within 30 days of the date of this ruling.

Orders accordingly.

**DELIVERED, DATED AND SIGNED THIS 13<sup>TH</sup> DAY OF OCTOBER 2023 AT MOMBASA VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of:-

Mr. Munzyu holding brief Aboubakar for the Defendant/Applicant;

No appearance for the Plaintiff/Respondent; and

Mr. Arthur Ranyondo – Court Assistant

