REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

MATRIMONIAL CAUSE NO.1 OF 2017

MAR.....APPLICANT

VERSUS

MAR.....1ST RESPONDENT

ARH.....2NDRESPONDENT

RULING

1. The applicant is the current wife to the 2nd respondent while the 1st respondent is a former wife to the 2nd respondent, them having divorced when their marriage was dissolved by the Kadhi`s Court at Marsabit in 2017. After the divorce the 1st respondent filed this matrimonial cause praying for distribution of their matrimonial property which comprised of plot no. 37 Marsabit Town. After a full hearing the court (Chitembwe J.) vide a judgment delivered on the 23rd July 2018, declared that the 1st applicant is entitled to 30% of the plot as her contribution towards the property whereas the 2nd respondent was entitled to the remaining 70%. The 1st respondent then commenced execution proceedings to get her share of the property. Numerous applications were made by both parties culminating in the court making an order dated the 3rd February 2020 that the 1st applicant buys out the share of the 2nd respondent by paying him a sum of Ksh 11,500,000/=. Soon after, the 2nd respondent moved to the Court of Appeal and lodged a Notice of Appeal on 14th February 2020. This was followed by an application for stay of execution pending appeal which application was dismissed by Justices Warsame, Kiage and Ole Kantai of that court vide a ruling delivered on the 7th August 2020 on the groups that there was no arguable point in the intended appeal.

2. Then on the 27th October 2020 the applicant approached this court and filed an application dated the 12th October 2020 seeking for orders that:

> **(1) Spent.**
>
> **(2) That the Applicant be granted leave and be enjoined in this matter (no matter the stage it is in currently) and that on granting leave to be enjoined, the Applicant be heard and for purposes of natural justice to be exercised.**
>
> **(3) That the Honourable court be pleased to issue an order for stay of execution of ruling/decree and all consequential orders in Marsabit High Court Matrimonial Cause No. 1 of 2017 pending the hearing and determination of the intended appeal.**
>
> **(4) That pursuant to granting leave, the Honourable Court be pleased to issue an Order of setting aside the judgement of this Honourable Court made in July 2018.**
>
> **(5) That the annexed cross originating summons be deemed as properly filed and served upon payment of the requisite court fees.**
>
> **(6) That the costs of this application be provided for**.

It is this application that is the subject of this ruling.

3. The application was accompanied by a cross-originating summons seeking for prayers that:

> **(1) That there be a declaration that PLOT NO. XX is not matrimonial property but property held in trust for the mother who is ill and cannot manage her affairs.**

(2) That the property known as PLOT NO. XX is held as trust property to take care of the needs of the family and should not be sold but retained as such.

(3) That the cross-originating summons be provided for.

4. The grounds in support of the application are, inter alia, that the 1st respondent has already commenced execution proceedings to the detriment of the applicant; that the delay in filing the cross-originating summons was not inordinate and was occasioned by the delay by the court registry in supplying the applicant with certified copies of the proceedings and ruling within time and that due to the current pandemic all functions have been slowed down or rendered stagnant therefore making advocates and their clients` contacts limited and not sufficient to fast track such important matters.

5. The application was opposed by the 1st respondent vide her replying affidavit sworn on the 21st January 2020 (should have been 2021) in which she states that the applicant was all along aware of the court proceedings since the divorce at the Kadhi`s Court and the matrimonial cause in the High Court and never raised any issue despite her attending the proceedings in court. That there is then no reason why the applicant did not file an application to be enjoined in the suit in time. That the applicant is lying that the delay in filing the application was due to outbreak of corona pandemic as judgment in the matter was delivered long before the advent of the pandemic. That she has already paid the whole amount required of her to buy off the 2nd respondent and therefore that the applicant should be engaging the 2nd respondent of how they could make good use of the money. That the application is brought at the behest of the 2nd respondent after he failed through various applications in his attempt to deny the 1st respondent the fruits of the judgment.

6. The 1st respondent annexed to her replying affidavit copies of various documents among them a ruling of the Court of Appeal marked **"MAA10"** dismissing the 2nd respondent`s application for stay of execution pending appeal.

7. The applicant was represented by Mr. **Kiget,** advocate, while Mr. **Kiogora** acted for the 1st respondent. The firm of **Wangira Okoba & Co Advocates** acted for the 2nd respondent.

8. The advocate for the applicant submitted that the applicant is a necessary party in the matter whose presence before court is required to enable the court to effectually adjudicate on all the issues in question in the suit. They relied on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules that provide that:

> **"The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added."**

9. Counsel further relied on the case of **Skov Estate Limited & 5 Others v Agricultural Development Corporation & Another (**2015)eKLR where it was held that:

> **"In my view, for one to convince the court that he/she needs to be enjoined to the suit as interested party, such person must demonstrate that it is necessary that he/she be enjoined in the suit, so that the court may settle all questions involved in the matter. It is not enough for one to merely show that he/she has a cursory interest in the subject matter of litigation. Litigation invariably affects many people. A judgment or order in most cases does not only affect the litigants in the matter. It does have ramifications for others as well and one may very well argue that these others have an interest in the litigation. That is a fair argument, but a mere interest, without a demonstration that the presence of such party will assist in the settlement of the questions involved in the suit, is not enough to entitle one be enjoined in a suit as interested party.**
>
> **In other words, there needs to be a demonstration that the interest of the person goes further than "***merely being affected"* **by the judgement or order. It must be shown that the presence of that person is necessary, so that the issues in the suit may be settled, and that if the person is not enjoined, the court may not be fully equipped to settle the questions in the suit or may be handicapped in one way or another. A joinder may also be allowed if the intended interested party has a claim of his own, which in the circumstances of the matter, needs to be tried, or is convenient to be tried alongside the claims of the incumbent plaintiff and defendant. The threshold for joinder of an interested party should not be too low, or else, this is prone to open doors for busybodies to be joined to proceedings, merely to spectate or confuse the issues in the matter. Apart from the above, whether or not to enjoin a person as an interested party, must be looked at within the context and surrounding circumstances of each particular case.**

10. Counsel submitted that the court has discretion to set aside any order issued by it *ex parte* as long as sufficient cause has been shown. He relied on Order 51 Rule 15 of the Civil Procedure Rules which gives the court power to set aside any order made ex parte. Counsel submitted that the court has inherent power under Section 3A of the Civil Procedure Act to make such orders as may be necessary to meet the ends of justice. He submitted that the court`s discretionally power should however be exercised judiciously with the overriding objective of ensuring that justice is done to all the parties. That sufficient cause has been shown on the part of the applicant. That no prejudice shall be suffered if the applicant is enjoined as a party to the suit.

11. Counsel further submitted that the court had given the respondents 7 days to respond to the application. That the 2nd respondent filed a replying affidavit on the 24th November 2020 indicating that he was not opposed to the application. That the 1st respondent did not comply with the timelines given by the court but filed her replying affidavit without leave of the court long after the time given had lapsed. That the said replying affidavit is improperly in record and ought to be expunged as it contravenes Order 8(1) of the Civil Procedure Rules, 2010.

12. The advocates for the 1st respondent relied on the pleadings and did not make any submissions. The advocates for the 2nd respondent also did not make submissions.

13. I have considered the application, the grounds in support thereof, the grounds in opposition thereto and the submissions. The issues for determination in the application are:

(1) Whether the replying affidavit of the 1st respondent is properly in record.

(2) Whether the court can entertain the application at this stage.

14. The advocates for the parties appeared before the court on the 24/11/2020 when Mr. Kiogora asked for 7 days for his client to file a reply to the application which request was granted. However, they did not comply with the order of the court. The 1st respondent came to file her replying affidavit on the 21/1/2020 which was way long after the timelines given by the court had lapsed. Mr. Kiget submits that the replying affidavit is improperly in record and should be expunged from the record.

15. Article 159(2) (d) of the constitution of Kenya 2010 requires of courts of law to administer justice "without undue regard to procedural technicalities". In **Raila Odinga & 5 Others vs Independent Electoral & Boundaries Commission** (2013)eKLR, the Supreme Court explained the flexibility of the said article and the need to determine each case on its own merits while taking into consideration the unique circumstances of each case. Though the 1st respondent filed her replying affidavit long after the time given by the court had lapsed, the door was not shut to the applicant as she could still seek for leave of the court to file a reply to the replying affidavit. In my view the late filing of the replying affidavit by the 2nd respondent was a procedural technicality that should not lead to an automatic expulsion of the document unless it is shown that the applicant did suffer prejudice from the act. Having not utilized the option to reply to the same, the applicant has no cause to complain that she was prejudiced by the late filing. The prayer to expunge the 1st respondent`s replying affidavit from the record is declined. I find that the same is properly in record.

16. The applicant wishes to be enjoined in the suit so that she can be heard on the grounds that the suit property is not matrimonial property but family property held in trust for the family. She is also seeking that pursuant to being enjoined in the suit that the court sets aside Justice Chitembwe`s judgment delivered on 23/7/2018 and issue an order for stay of execution of all the subsequent orders made pursuant to the said judgment pending the hearing and determination of the appeal.

17. The application is basically made under Order 1 Rule 10(2) of the Civil Procedure Act that grants the court power to order the addition to the suit of any party who ought to have been joined or any person whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate or settle all the questions involved in the suit.

18. The guiding principles that are applicable in joinder of parties is as was stated by the Court of Appeal in the case of **JMK v MWM & Another (2015)**eKLR (Msa Civil Appeal No.15 of 2015) that:-

> **We would however agree with the respondent that Order 1 Rule (10) (2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar's code, (Supra) quoting as authority, decisions of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10 (2) of our Civil Procedure Rules, in *TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS (2014) EA 448*, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after Judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.**

19. It is then clear that the only time that a trial court can allow a party to be enjoined in a suit is during the trial. It is not open to the trial court to allow such an application where the suit has been disposed of and moved out of its hands.

20. In the present case, the applicant is a wife to the 2nd respondent. It is clear from the record that she was all along aware of the case between her husband and the 1st respondent. In an earlier application dated 29/4/2020 where she was seeking similar orders as in this application safe for the prayer to be enjoined in the suit, she did state in her supporting affidavit to that application that she had been aware of the court case all along but that she did not want to intervene since it was a matter between a man and his wife. The statement speaks for itself. There is no doubt that the applicant had the opportunity to be enjoined in the suit and decided to leave the matter to her husband. She cannot now turn around after her husband lost the case to want to be enjoined in the suit when the suit is finalized and is no longer in the hands of the court. It would appear that it is her husband who is appealing to this court by the back door in the cover of his wife.

21. The applicant`s husband has filed an appeal with the Court of Appeal. The said court has made some orders in respect to the appeal. It would be highly irregular and without jurisdiction for this court to poke its nose in a matter that is now at the hands of a court of higher jurisdiction than itself. Perhaps the applicant should try her luck with the said court.

22. In view of the foregoing, I find the application to be misconstrued, legally untenable and without merit. I accordingly dismiss it in its entirety with costs to the 1st respondent.

DELIVERED, SIGNED AND DATED AT MARSABIT THIS 17TH DAY OF JUNE 2021.

JESSE N. NJAGI

JUDGE

In the presence of:

..... for Applicant

..... for 1st Respondent

..... for 2nd Respondent

Parties:

Applicant -

1st Respondent -

2nd Respondent -

Court Assistant .....

30 days R/A.