REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

MATRIMONIAL CAUSE NO. 43 OF 2017 (O.S)

IN THE MATTER OF SECTION 6 AND 17 OF THE

MATRIMONIAL PROPERTY ACT 2013

PIO.....PLAINTIFF/RESPONDENT

VS

BO.....1ST DEFENDANT/APPLICANT

TN.....2ND DEFENDANT/APPLICANT

RULING

1. The application dated **27th November 2020** and filed in court on the same date has been bought under **Order 10 Rule 11 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act** by the defendant. He seeks the following orders:-

(1) …spent.

(2) That pending the hearing and determination of this Application, there be a stay of proceedings herein.

(3) That the Honourable Court be pleased to set aside the proceedings conducted in this case on the 13th October 2020.

(4) That the hearing of this case commences de novo.

(5) That costs of this application be provided for.

2. The application is supported by the affidavit of the defendant which he swore on **27th November 2020.** The grounds upon which the application is made are that the firm of M/S Wachira Waiganjo & Co. Advocates had instructions to defend this matter on his behalf but failed to attend court for hearing on the 13th October 2020 and the matter proceeded ex-parte to his detriment; that the said proceedings be set aside on the ground that mistakes of his advocate should not be visited upon him. That due to the nature of this matter it is in the interest of justice that he should be granted a chance to present his case and evidence for the meritorious determination by this court. That no prejudice will be occasioned to the Respondent.

3. In response to the Application the plaintiff filed her Replying Affidavit sworn on 27th November 2020. She a gave the chronological events preceding the closure of the defendant's case on the 15th October 2020, and deposed further that the Application does not meet the threshold for grant of the orders sought therein and it is only fit for dismissal and/or striking out with costs to her; that the 2nd defendant TN is a stranger to this suit.

4. She deponed that on the said date of 15th October 2020 both the defendant and his advocate were duly served with the Hearing Notice of the 15th October 2020 but they deliberately failed to attend court for hearing on 15th October 2020. That the defendant being a party to these proceedings had a legal duty to assist this Honourable Court to further the overriding objective by not only participating in the processes of this court but also complying with the directions and orders of the court but in the instant case, he failed to do so and is thus approaching this Honourable Court with unclean hands.

5. That the Applicant declined to record consent on undisputed properties contrary to court orders that issued on 14th October 2019.

6. Further that the actions of a properly instructed advocate are binding on his client and therefore the defendant was legally barred from

filing an application in which he sought to distance himself from his advocate previously on record, that he had not demonstrated to the satisfaction the court why he did not attend court to prosecute his own case, and hence did not merit to exemption from the consequences of his advocate's failure to attend court on the appointed date. That in the event his previous Advocate acted negligently in executing his the instructions he had recourse against the Advocate under the law of tort and as such he would not suffer any irreparable damage.

7. Further that upon closure of both parties cases, Mention Notice for confirmation of filing of Submissions dated 30th October 2020 was served on the said advocate who received it under protest on grounds that he intended to file an application to cease acting.

8. She also deponed that she would suffer prejudice because she had already served the applicants counsel with her submissions and had been subjected into incurring unnecessary legal expenses in pursuit of justice and defending this frivolous application.

9. The applicant swore a Further Affidavit on 5th March 2020 to the effect that that the 2nd respondent was his current wife and the registered owner of Motor Vehicle Registration number number [Particulars Withheld] which was mentioned by the respondent in the proposed consent. He claimed that it was the respondent who had scuttled the out of court settlement by refusing to speak to him on the ground that he was not supposed to speak to her personally but through her lawyer.

10. That he had not visited his advocates office due to the Covid restrictions and had relied on the information from his advocates that court processes had been slowed down. It is only later that he learnt that the advocate in the firm of Waiganjo Mwangi who was seized of his matter had left the firm leaving his matter unattended leading to the hearing in his absence.

11. The applicant framed his issues for determination as follows;

a) Whether the mistakes of an advocate should be borne by an innocent litigant.

b) Whether the defence in the cause raises triable issues.

c) Whether this Honourable Court has discretion to set aside its ex-parte orders.

12. On the first issue, he submitted that the matter herein proceeded for hearing without his participation as his previous advocate kept him in the dark and or failed to timely inform him over the proceedings of 15th October 2020.

13. The Applicant relied on the below cases of ;

FM vs EKW [2019] eKLR where the court stated;

"In my considered view, the excuse tendered by counsel for the Appellant for his failure and that of Appellant to attend court is plausible and ought to have been a sufficient reason to persuade the trial magistrate to set aside the exparte proceedings and not drive the Appellant from the seat of justice without being given an opportunity to be heard. The justice of this case mandates the mistake of the counsel should not be visited on the appellant. This is in recognition of the fact that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case heard on merits."

Lucy Bosire -vs- Kehancha Div. Land dispute Tribunal & 2 *Others* *Odunga J* held as follows:

"In this case the blame is placed at the doorsteps of the applicant's erstwhile advocates. It is true that where justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognized that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined on its merits...."

Sangram Singh vs. Election Tribunal,Koteh,AIR 1955 SC 664,at **711:**

"There must be ever present to the mind the fact that our laws** of procedure are **grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their** backs, that **proceedings that affect their lives and** properly **should not continue** in their **absence and that not be precluded from participating in them. "

Ann Atieno Adul V Patrick Lang'at & Another [2020] eKLR while setting aside interlocutory judgment the court held that,

"Having said so, it is trite law that no party should be penalized just because there was a blunder particularly by his or her advocate."

The Judge cited **Republic vs Speaker Nairobi City County Assembly & Another Ex Parte (2017) eKLR**

"it has been held that blunders will continue being made and that just because a party has made a mistake does not mean that he should not have his case heard on merit."

14. In the view of the foregoing the Applicant submitted that he had relied fully on the previous advocate to update him on the progress of

the *ca*se, he had also made a series of follow ups only to be misinformed on the correct position o*f* the case; that his explanation to this court met the threshold of being good, excusable and of sufficient cause.

15. On the second issue, the Applicant submitted that he duly filed his defence which raises triable issues. He relied on the cases of;

SNK v MBK [2020] eKLR where the court stated as follows;

"I note that the applicant moved to court immediately he realized that his suit had been dismissed. This court has unfettered discretion to set aside a dismissal. In doing so I have to consider if the applicant will be prejudiced if the order is not set aside. The Originating Summons seeks orders of declaration over properties acquired during the marriage between the applicant and the 1st defendant. Matters related to properties are very emotive. To allow the dismissal order to subsist would prejudice the applicant and the 1st defendant too. No prejudice shall be occasioned to any of the respondents in any way. Further a party should not be punished for the mistake of his counsel. I will give the applicant the benefit of doubt and set aside the dismissal order of 28th June 2019. The suit is reinstated for hearing."

Patel vs East African Cargo Handling Services (supra) where Sir William Duffus, P**.** held that**: -**

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgment as is the case here, the court will not usually set aside the judgment unless it is satisfied that there defence on the merits. In this respect defence on the merits does not mean in my view, a defence that must succeed. It means as Sheridan J put it "a triable issue" that is, an issue which raises a prima facie defence and which should go to trial for adjudication"

Ann Atieno Adul vs Patrick Langa't & Another [2020] where the court quoted with approval the case of **John Peter Kiria & Another Vs. Pauline Kagwiria [2013] eKLR & Kenya Pipeline Company Limited Vs. Mafuta Products Limited [2014] eKLR** where the court observed that;

"Amongst several other cases where their gist was that no party should be shut out from ventilating its defence, that a court may set aside interlocutory judgment if a party had a reasonable defence and that at all possible times, cases should be heard on merit, this court was persuaded to find and hold that despite the very poor handling of this matter by the 2nd Defendant's Legal Officer, it was only fair and just to allow the Defendants to exercise their fundamental right to be heard as enshrined in Article 50 (1) of the Constitution of Kenya.

The fact that the Defendants filed the present application in an attempt to be given an opportunity to defend the case herein persuaded this court to find and hold that it would not be in the bests interests of justice to deny them an opportunity to be heard. The prejudice that the Plaintiff would suffer for the delay in the conclusion of his case by having it heard on merit was one that could be compensated by way of costs"

Mbaki & Others vs Macharia & Another (2005) 2 EA 206, at page 210, Court st*ated as follo*ws**:**

"The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard."

16. Flowing from above, the Applicant submitted that his case was merited and raised triable issues since the matrimonial properties in question are registered in his name.

17. On the last issue, the Applicant relied on **section 1B of the Civil Procedure Act** and the cases of;

- **Shah vs. Mbogo (1967) EA 166,** court held that;

"This discretion to set aside an ex parte judgment is intended to be *exercised* ***to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. However, the discretion of the court must always be exercised judiciously with the sole intention of dispensing justice to both or all the parties. Each case must therefore be evaluated on its own unique facts and circumstances. Among the factors to be considered is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit."***

- **CMC Holdings Limited -VS- James Mumo Nzioki (2004) KLR**, that:

"The law is now well settled that in an application for setting aside ex parte judgment, the court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues."

- **Patel V. East African Cargo Handling Services Ltd [1974] LA A** Court opined that:

"I am satisfied that the failure to attend the hearing by the applicant was due to his negligence but a genuine error on the part his lawyer. Consequently, I hold that the applicant has demonstrated a sufficient Cause upon the court can exercise its

discretion.

However, before the court can set aside its ex parte decision or proceeding is trite law that it must consider whether the applicant has any defence which raises triable issues".

· In **MKV MWM & Another [2015] eKLR** it was held that;

"The courts of this land have been consistent on the importance of observing the rules of natural justice and in particular hearing a person who is likely to be adversely affected by a decision before the decision is made."

· In the case of **Joswa Kenyatta vs Civicon Limited [2020] eKLR,** court also relied on the case of **Patel vs East Africa Cargo Handling Services Ltd (*1*974) EA 75,** where **Duffus P.** held that:

"The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. I agree that where it is a regular judgement as is the case here the court will not usually set aside the judgment unless it is satisfied that there is a defence on the merits. In this respect defence on merits, does not mean in my view, a defence that must succeed, it means as Sheridan J. put it "a triable issue" that is an issue which raises a prima facie defence and which should go to trial for adjudication."

18. The applicant urged that his application be allowed as prayed.

19. The respondent framed and submitted on the following issues:-

(a) Whether the Defendant/Applicant is entitled to the orders sought.

(b) Who should bear costs?

20. On the first issue, it was the respondent's submissions that **Order 10 Rule 11 of the Civil Procedure Rules** provides for setting aside when a judgment has already been entered hence inapplicable in this case.

21. That an application for setting aside involves the exercise of the court's discretionary powers which must be exercised judiciously in order to achieve the paramount need to do real and substantial justice to the parties in this suit.

22. The respondent relied on the case of **Patriotic Guards Ltd. V. James Kipchirchir Sambu, NAIROBI CA NO. 20 OF 2016, (2018) KLR** where the court stated:

"It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously... judicious because the discretion to be exercised is judicial power derived from the law and as opposed to judge's private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in the suit."

23. The Respondent submitted that the Defendant/Applicant had a legal duty to demonstrate to the satisfaction of the court that he was deserving of the orders sought.

24. The respondent submitted that the applicant was undeserving of the orders sought herein as he had failed to offer a cogent explanation as to why he and his advocate had not attended court for hearing and could not merely blame his former advocate for his failure to attend court on the 15th October 2020**.**

25. The Respondent relied on the case of **Neeta Gohil vs Fidelity Commercial Bank Limited 2019 eKLR** which quoted with approval the case of **Savings and Loans Limited vs Susan Wanjitu Muritu Nairobi Milimani HCC NO. 397 OF 2002** where *Kimaru J* expressed himself as follows:

"….it is trite that a case belongs to a litigant and not her advocate. A litigant has a duty to pursue the prosecution of his or her case. The court cannot set aside [dismissal of a suit] on the sole ground of a mistake by the counsel of the litigant on account of such Advocate's failure to attend court. It is the duty of the litigant to constantly check with her Advocate the progress of her case….she has been indolent…it would be a travesty of justice for the court to exercise its discretion in favour of such a litigant…….

It is not in every case that a mistake committed by an advocate would be a ground for setting aside orders of court….it is not enough for a party to simply blame an advocate for a mistake but a party must show tangible steps taken by him in following up this matter."

26. The respondent urged this court to be persuaded by the decision in the above case. She submitted that it was on record that this matter was fixed for hearing on the 19th March, 2020 but was unfortunately affected by the pandemic. That notwithstanding, the matter was subsequently mentioned on various dates including the 21st July, 2020, when it was fixed for hearing on the 15th October, 2020. That the Applicant had not shown the tangible steps he undertook in following up the prosecution of his case; that had he visited the office of his former advocate around July 2020 as alleged at paragraph 13 of his Further Affidavit. He would have learnt that that this matter was

mentioned on 9th July 2020, 21st July 2020 and fixed for hearing on 15th October 2020.

27. The respondent relied on the provisions of **section 3A of the Civil Procedure Act** on the overriding objectives set out under **section 1A,** and the fact that parties to a civil dispute are duty bound by dint of section **1A(3) of the said Act** to assist the court in furthering the overriding objective by not only participating in the process of the court but also complying with the directions and orders thereof and argued that the Applicant did not comply with the court orders of attending court for hearing on 15th October 2020; and had failed to demonstrate that he was entitled to the orders sought. She also relied on the cases of; **FWNM -V- SMM (2019) KLR** the learned judge held that;

> ***"The fact that setting aside is discretion of the court is not disputed. What is contested is whether the Applicant has demonstrated "sufficient case" to warrant the exercise of the court's discretion in its favour."***

- Supreme Court of India case of **Parimal-V-Veena [2011] 3 SCC 545**

28. **On whether hearing of this suit should commence de novo,** the respondent submitted that the Applicant, having failed to demonstrate that he was deserving of the orders for setting aside of the proceedings herein, was not entitled to the grant of this prayer.

29. On costs, the respondent submitted that the award of the same is discretionary and ordinarily follow event under **Section 27 of the Civil Procedure Act** and she prayed that this Court do award costs to her.

Analysis & Determination

30. I have carefully considered the affidavit evidence and the rival submissions. It is not disputed that the Counsel for the applicant was served with a Hearing Notice. It is also not in dispute that upon service on counsel neither counsel nor the applicant appeared on the hearing date for the hearing.

31. Under **Order 51 rule 15 of the Civil Procedure Rules** the court has the discretion to set aside an order made ex parte. The fact the applicant cited the wrong rule of procedure would not be a reason to deny him a hearing. It is very clear that what he is seeking is the setting aside of the ex parte proceedings.

32. It is trite the setting aside of judgment or proceedings is an exercise of the Court's discretion as was stated in **Shah vs Mbogo & Another [1967] EA 116** the discretion is to be exercised ***to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error.*** This discretion must be exercised for the purpose of dispensing justice to the parties, with each case getting its individual consideration on its own unique facts and circumstances, and among the factors for consideration ***is whether the applicant will suffer any prejudice if denied an opportunity to be heard on merit.***

33. To move the exercise of this discretion in his favour the applicant is required to demonstrate sufficient cause. Sufficient cause has been defined in the authorities set out herein above including in **The Hon. Attorney General vs the Law Society of Kenya & Another, Civil Appeal (Application) No. 133 of 2011 (ur)** *Musinga, JA* saw sufficient cause to be:

> ***"Sufficient cause" or "good cause" in law means:***
>
> ***"... The burden placed on a litigant (usually by court rule or order) to show why a request should be granted or an action excused."***

And in **Black's Law Dictionary, 9th Edition, page 251** which defines it as;

> ***"Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events."***

34. According to the applicant the reason he did not show up for the hearing is because he was not made aware of the date after counsel was served and even when he visited the firm as deponed in his affidavit he was not informed of the developments because the counsel in that firm who was dealing with his case had left the firm. This was also contributed to by the fact of the COVID 19 pandemic restrictions to movement and the resultant slowing down of court processes.

35. It is correct as argued by the respondent that a case belongs to a litigant and it is upon the litigant to follow up his case, and show the steps he took to do so. However there is also the obligation on the counsel to inform his client of the date fixed as most times when counsel fixes dates for hearing it is upon their own availability as per their diary and not necessarily that of their client. The possibility that a date could be fixed and the litigant not be informed due to inadvertence on the part of counsel is not farfetched, and is excusable to a certain extent, depending on the facts of the case. I find guidance in **Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others [2015] eKLR**, the Court observed as follows;

> ***"From past decisions of this court, it is without doubt that courts will readily excuse a mistake of counsel if it affords a justiciable, expeditious and holistic disposal of a matter. However, it is to be noted that the exercise of such discretion is by no means automatic. While acknowledging that mistake of counsel should not be visited on a client, it should be remembered that counsel's duty is not limited to his client; he has a corresponding duty to the court in which he practices and even to the other side."***

36. It was argued that the applicant could sue his counsel for failing him. However, much as that is the truth, that would be a different cause from this one where the applicant's interests are in the matrimonial property. It goes without saying that while that is within his rights, by the time he would be through with that suggested pursuit he would have already suffered prejudice in this case.

37. The circumstances of this case involve contest over matrimonial property. It is highly doubtful that the applicant or any other party to such a matter would be disinterested in the proceedings and its outcome.

38. I am persuaded by the authorities cited that the role of courts is to do justice in cases before them, and that can only be achieved when each party has been heard, except in the exceptional circumstances where the court is forced to proceed ex-parte. Every case must be considered on its own circumstances. I find further guidance in the persuasive authority of the Ugandan case ***Sebei District Administration vs Gasyali*** **[1968] EA 300,301,302** in which the words of *Ainsley J,* (as he then was) in ***Jamnadas Sodha vs Gordandas Hemraj*** **(1952) 7 ULR 7** were adopted. That;

> ***"The nature of the action should be considered, the defence if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court."***

39. What prejudice would the respondent suffer? The respondent has definitely suffered loss in terms of costs. There will be delay. The respondent can be compensated by way of costs.

40. Should the matter proceed *de novo*? I have considered the record. The parties had been directed by court to enter into a consent over the properties that are not in dispute. A proposed consent was prepared by the counsel for the respondent. The excuse given by the applicant for bringing the 2nd defendant into this matter, albeit irregularly, is that there is a motor vehicle mentioned therein that belongs to her. The proposed consent is clear that that motor vehicle is not considered matrimonial property. There is no excuse for the respondent not to consider the consent.

41. Nevertheless, during the exparte proceeding the respondent relied on her Originating Summons and the Supporting Affidavit. The applicant will have the opportunity to cross examine the respondent on those.

42. The following orders issue:

> **i. The application is allowed. The proceedings of 15th October 2020 closing the plaintiff and defendant's case are set aside.**
>
> **ii. The order for filing of submissions is set aside**
>
> **iii. The Plaintiff's case is reopened for purposes of cross examination by the defendant, and the hearing of the defendant's case.**
>
> **iv. The applicant to pay the respondent thrown away costs of Ksh 20,000 to be paid within 30 days hereof**
>
> **v. The parties will have 45 days from the date hereof to report on the progress of the proposed consent.**
>
> **vi. Orders accordingly.**

DATED AND DELIVERED VIA EMAIL THIS 7TH DAY OF JUNE 2021.

Mumbua T. Matheka

Judge

Court Assistant Edna

Njeri Githae & Co. Advocates for the Applicant

Elizabeth Wangari & Co. Advocates for the Respondent