



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISC. CAUSE NO. 114 OF 2018

IN THE MATTER OF RECOGNITION OF DECREE OF DIVORCE OF A FOREIGN COURT AND REGISTRATION OF THE DECREE IN THE REGISTER

ENM.....APPLICANT

VERSUS

PMM.....RESPONDENT

RULING

1. The background of this dispute is that the applicant ENM and the respondent PMM got married in church in Kenya on 16th December 2006. They relocated to the State of Nevada in the United States of America. The applicant petitioned for divorce at the District Court, Clark County, State of Nevada. Following trial on 23rd August 2016, the Judge granted an absolute Decree of Divorce thereby dissolving the marriage between them. The respondent was granted absolute and separate ownership of the following properties in Kenya:

- a) L.R No. Kabete/L.Kabete/xxxx;
- b) L.R No. Kajiado/Kaputiei/xxxx; and
- c) L.R No. xxxx Kiambu

2. The respondent on 15th August 2018 came before this court under **section 61(1)(2) and 3(a) and (b)** of the **Marriage Act, 2014** and asked for the recognition and registration of the decree of divorce issued by the Court in Nevada. She further sought the enforcement of the order in regard to the property by having the Deputy Registrar empowered to sign all the necessary documents to effect the transfer of the parcels to her. The application was heard *ex parte* on 2nd November 2018 by Justice Asenath Ongeri who gave orders recognising the decree of divorce and the separate and absolute ownership of the stated property granted to the respondent. The Deputy Registrar was authorised to execute papers to effect the transfers. The respondent was directed to present the decree of dissolution of the marriage to the Registrar of Marriages for registration.

3. The applicant was aggrieved by the orders of 2nd November 2018. His case was that the judgment by the court in Nevada was not enforceable in Kenya because Kenya and the United States of America had no reciprocal arrangement; the judgment of the Court in Nevada was not enforceable since it could not have been enforced entirely in the United States of America; that the **Marriage Act** only provided for the recognition and registration of the decree, but not its execution; and that his right to a fair hearing and his right to property had, as a result, been put in jeopardy. On 22nd April 2021 I determined that I had no jurisdiction to question the decision of a court of concurrent jurisdiction.

4. The present application dated 21st May 2021 seeks the stay of the execution of the orders contained in the ruling dated 2nd November 2018 and that the applicant be granted leave to file an appeal to the Court of Appeal against the orders of 2nd November 2018. The application was brought under **Order 42 rule 6** of the **Civil Procedure Rules** and **sections 1A, 1B, 3A and 79G** of the **Civil Procedure Act** and **Article 159** of the Constitution.

5. The applicant's supporting affidavit indicated that he had not been served with the notice of entry and subsequent proceedings in relation to the decision of 2nd November 2018; that he came to know of the ruling through a response to a divorce petition that he filed in **Cause No. 97 of 2020** at Milimani Commercial Courts. When he instructed his then advocates, they filed the application that was dismissed on 22nd

April 2021. His advocates did not inform him of the ruling until 4th May 2021 when he visited their offices. He immediately filed the instant application through new advocates that he was forced to instruct. He stated that his property is at great risk of alienation if stay is not granted and he is not allowed to challenge the orders in question on appeal.

6. The respondent's response was that the applicant was raising the same issues that he had raised in the application that was dismissed on 22nd April 2021. Further, Justice Asenath Ongeru's ruling on 2nd November 2018 had only adopted the orders of the Court in Nevada. Lastly, that the orders of the Court in Nevada were by consent and the applicant could not appeal against them.

7. Ideally, a stay of execution can only be granted where there exists an appeal. In this case, there is no appeal yet. The applicant is seeking leave to appeal out of time.

8. The ruling and orders sought to be appealed against were rendered on 2nd November 2018. The present application was dated 21st May 2021. The applicant was late by about 2 ½ years in bringing the application.

9. It is now well settled that the decision whether or not to extend time for appeal is essentially discretionary. The court will take into account several facts, including the length of the delay; the reasons for the delay; the nature of the dispute; the degree of prejudice to the respondent; and whether such prejudice may reasonably be compensated by the payment of costs. **(Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi, Civil Application No. Nai 255 of 1997).**

10. In **Salat –v- IEBC & 7 Others [2014]KLR – SCK**, it was emphasised that extension of time is not a right of a party; it is an equitable remedy that is only available to a deserving party at the discretion of the court. The discretion is unfettered, but has to be exercised judicially, not on a whim, sympathy or caprice. All the time the court has to balance the interests of the party who has a decision in his favour and the right of the applicant to appeal the decision he is not satisfied with **(Karny Zaaharya & another –v- Shalom Levi, Civil Application No. 80 of 2018).**

11. It is not for this court to estimate the chances that the proposed appeal will have, but I bear in mind that the applicant did not challenge the United States of America the order of the Court in Nevada.

12. Two and a half years is a long time of delay. The applicant does not say when it was that he learnt of the impugned ruling. He said it was through a response to a divorce petition he had filed in Kenya. From the date of the petition, that was in 2020. He got his then advocates to file an application, which was heard and determined on 22nd April 2021. He changed advocates who filed the present application.

13. I am alive to the nature of the dispute, and the issues that the applicant seeks to raise on appeal.

14. However, I determine that the time taken to bring the application was inordinately long, and the reasons advanced for the delay are not sufficient in the circumstances.

15. The result is that I dismiss the application with costs.

DATED AND DELIVERED AT NAIROBI THIS 11TH DAY OF NOVEMBER 2021.

A.O. MUCHELULE

JUDGE