



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

ORIGINATING SUMMONS NO.9 OF 2017 (OS)

IN THE MATTER OF: SECTION 6,7,9,13,14 AND 17 OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND

IN THE MATTER OF: QUESTIONS ARISING BETWEEN HKM, BKC CONCERNING THE OWNERSHIP AND DIVISION OF HOUSE, CAR, HOUSEHOLD GOODS AND ACCOUNTS ACQUIRED DURING MARRIAGE

HKM.....APPLICANT

VERSUS

BKC.....RESPONDENT

RULING

1. The Notice of Motion application before this court is dated 7<sup>th</sup> June, 2021. The application seeks the following orders:
  - a. That the honourable court be pleased to set aside and vacate the orders issued on 26<sup>th</sup> May 2021 by HON. JOHN ONYIEGO dismissing the suit for non-attendance.
  - b. That this court be pleased to hear the said application and the plaintiff's suit be reinstated for hearing.
  - c. That the costs of this application be provided.
2. The application is premised on the grounds therein and the supporting affidavit of Dr. John Khaminwa (undated). The applicant's case is that when the matter came up for hearing on 26<sup>th</sup> May, 2021, Dr. Khaminwa who was personally handling the matter, was in Milimani High Court attending to another matter and by the time he was accessing the link, the matter had been called out. That upon follow up, his clerk informed him that the matter had been dismissed for non-attendance. That the order of dismissal made on 26<sup>th</sup> May, 2021 was made through no fault or wrongdoing of the applicant. That the applicant has always attended court and is desirous of finalization of her case.
3. The applicant urged the court to set aside the dismissal order and reinstate the suit.
4. In response, the respondent filed a replying affidavit sworn on 22<sup>nd</sup> September, 2021 stating that the last time the matter came up for hearing was the 19<sup>th</sup> September, 2019 when the applicant sought an adjournment as Dr. Khaminwa had just been instructed. That since then, the matter has been mentioned severally inter alia 5/3/2020, 7/5/2020, 16/6/2020 and 30/6/2020 which dates the respondent attended faithfully.
5. That the matter remained dormant until the respondent took the 26<sup>th</sup> May 2021 for hearing and served the same on 16<sup>th</sup> April 2021. It was averred that although the hearing date was taken ex parte, hearing notice was not received under protest nor did Dr. Khaminwa write or call the advocate for the respondent to inform them that he would not be able to proceed. The respondent further averred that this matter has taken long to be finalised with the applicant seeking adjournments severally to the detriment of the respondent who is keen to finalise this matter. Further, that no good reason has been shown for an order of reinstatement of this suit to be issued. That there has been inordinate delay in filing and bringing before this honourable court this application for reinstatement and urged the court to dismiss the application with costs.
6. In the alternative, he urged the court to grant reasonable advocates' costs, an early hearing date and clear timelines on the hearing and finalisation of this matter in case this honourable court is inclined to set aside the orders made on the 26<sup>th</sup> May 2021.

7. I have considered the application and the response thereof. The only issue that emerge for determination is whether the orders of 26<sup>th</sup> May, 2021 should be set aside and the suit herein reinstated.

8. Order 12 rule 7 of the civil procedure rules provides that,

**“Where under this Order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”**

9. It is incumbent upon the applicant to prove that non-attendance in court was not deliberate but occasioned by reasonable excuse or omission. It is however noteworthy that to grant or not to grant an order for reinstatement of a dismissed suit is within the discretion of the court. In the case of Kenya National Private Service Workers Union v Security Guards Services Limited [2019] eKLR the court had this to say;

**“It is trite that, the court exists to do justice to all the parties and it has unfettered discretion to set aside its judgments upon terms. In Shah Vs. Mbogo and another [1966] EA 166, Harris J. set out the guiding principle on a Judge’s discretion in setting aside a judgment, thus:**

**“I have carefully considered the principles governing the exercise of the courts’ discretion to set aside a judgment obtained ex parte. This discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertent or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”**

10. Dr. Khaminwa advocate for the applicant in his supporting affidavit indicated that by the time he was accessing the court’s link the matter had been called out and on learning of the same he followed up with his clerk who confirmed at 2.30 pm that the matter had been dismissed for non-attendance.

11. In his oral submissions, Dr.Khaminwa contended that on the said date when this matter came up and got dismissed for non-attendance, he was involved in other cases namely **Petition 9 of 2009**, commercial dispute before Judge Okwengu and a family dispute matter in Nairobi. That his absence was not deliberate and that he was overwhelmed with three matters in other courts. It is however clear that no evidence say by way of a cause list was produced and or annexed to the supporting affidavit to prove the same and thus it’s difficult for this honourable court to confirm the reasons advanced by counsel for the applicant.

12. I have perused the court file and noted that the last time this matter was in court before the respondent took the initiative to fix it for hearing was on 28 July, 2020 when both parties together with their advocates were absent and the court gave orders that the parties do move the court when ready. No explanation was given regarding the delay between 28<sup>th</sup> July, 2020 and 8<sup>th</sup> April, 2021 when this matter was fixed for hearing.

13. The applicant’s advocate was served with the hearing notice on 16<sup>th</sup> April, 2021. As to why he didn’t inform the other counsel or court of the inconvenience suffered no reason has been advanced. Although Dr. Khaminwa has not to the satisfaction of the court advanced good reasons for non- attendance, I will give him a benefit of doubt. At least he showed effort in following up the status of the case almost immediately the suit was dismissed. He also filed this application the soonest possible demonstrating a sign of seriousness.

14. Further, I have noted from the issues in controversy that the applicant’s suit raises serious triable issues and it would be unfair for this court to deny her an opportunity to ventilate her case and have the same determined on merit. On the other hand, the respondent is agreeable to throw away costs as a condition to reinstatement of the suit.

15. In the upshot, I am satisfied that there is good reason to justify reinstatement of the suit and therefore do make orders as follows;

- a. The orders of 26<sup>th</sup> May, 2021 are hereby set aside.**
- b. The applicant’s suit is hereby reinstated.**
- c. The parties to fix the suit for hearing at the registry on priority basis.**
- d. The applicant to pay throw away costs of Kshs 10,000 to the respondent.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5<sup>TH</sup> DAY OF NOVEMBE, 2021**

**J.N.ONYIEGO**

**JUDGE**