



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SUCCESSION CAUSE NO. 12 OF 2014

IN THE MATTER OF THE DIVISION OF MATRIMONIAL PROPERTY

IN THE MATTER OF SECTION 17 OF THE MATRIMONIAL PROPERTIES ACT

MWB.....APPLICANT/RESPONDENT

VERSUS

CMG.....RESPONDENT/APPLICANT

RULING

1. Before this court are two applications for determination. The first is the Notice of Motion dated **6th October 2020** by which the Applicant **MWB** sought the following orders:-

“a) THAT this Honourable court be pleased to issue orders that the Deputy Registrar to sign all relevant documents to effect the transfer of half share matrimonial property to wit;

(i) DAGORRETTI/KINOO/xxxx

(ii) KJD/KAPUTIEI-NORTH/xxxxx

(iii) KJD/KAPUTIEI-NORTH/xxxxx

(iv) MOTOR VEHICLE REGISTRATION NUMBER KBAxxxS-TOYOTA PRADO

(v) MOTOR VEHICLE REGISTRATION NUMBER KAQ xxxD NISSAN CARAVAN.

b) An order that the Respondent render a full, accurate and upto to date accounts from the year 2013 of rent collected from the developed matrimonial properties to wit;

(i) DAGORRETTI/KINOO/xxxx

(ii) KJD/KAPUTIEI-NORTH/xxxxx

(iii) KJD/KAPUTIE-NORTH/xxxxx

(c) Costs of this Application be provided for.”

2. The application was premised upon **section 1A,1B, 3A and 5** of the **Civil Procedure Act. Orders 55 Rules** of the **Civil Procedure Rules** and all other enabling provisions of the law and was supported by the Affidavit of even date sworn by the Applicant.

3. The Respondent **CMG** opposed the application and filed grounds of objection dated **14th May 2021**, which raised the following grounds:-

“1. The Application is frivolous and has no merit.

2. **The Motion dated 6th October 2020 has not met the Jurisdictional threshold for the grant of the relief sought.**

3. **The Motion is based on misapprehension of the relevant facts.**

4. **The application dated 6th October, 2020 is an abuse of the process of the Court as the matter has not been decided on merit.**

5. **The Respondent's Constitutional rights under Article 25(c) of the Constitution and Article 50(1) will be infringed by the grant of the said Motion."**

4. The second application for determination is the Notice of Motion dated **14th May 2021** filed by the Respondent **CMG** in which he seeks the following orders:-

"1. Spent

2. Spent

3. The exparte judgment entered on 22nd November 2019

and consequent decree and execution process herein issued, be set aside together with all consequential orders.

4. Upon the setting aside the exparte judgment, the defendant/respondent and his witnesses be heard on merit on the basis of that of the defence affidavits filed and provision be made for arising throw away costs.

5. Costs of this motion be in the cause."

5. The application was premised upon the **Articles 25 (c), 48 & 50(1)** of the **Constitution of Kenya, section 34, 63 (e)** of the **Civil Procedure Act and Order 12 Rule 7, Order 22, Rule 22** of the **Civil Procedure Rules 2010**, and was supported by the Affidavit of even date sworn by the Respondent.

6. The applicant **MWB** opposed the application of **14th May 2021** through her Replying Affidavit dated **12th July 2021**.

7. The court directed that the two applications would be heard together and that the same be canvassed by way of written submissions. The Applicant filed the written submissions dated **26th July 2021** whilst the Respondent relied upon his written submissions dated **29th June 2021**. Counsel for the Applicant appeared online to highlight the submissions on **4th August 2021**.

BACKGROUND

8. The Applicant herein filed in the High Court the Originating Summons dated **24th February 2014** which summons was amended on **28th February 2019** in which she sought order in respect of property which she alleged had been acquired during the subsistence of her marriage to the Respondent.

9. The Applicants case is that she and the Respondent got married to each other on **8th April 2000** and that their union was blessed with **four (4)** children. That during the subsistence of their marriage the couple acquired the following properties:-

(i) DAGORRETTI/KINOO/xxxx

(II) KJD/KAPUTEI-NORTH/xxxxx

(iii) KJD/KAPUTEI-NORTH/xxxxx

(iv) Motor Vehicle Reg No. KBA xxxS- Toyota Prado

(v) Motor Vehicle Reg. No. KAQ xxxD – Nissan Caravan

10. The marriage between the Applicant and the Respondent was dissolved on **7th August 2014** and a decree absolute was issued on **12th March 2015**.

11. The Applicants suit was duly heard and on **22nd November 2019** **Hon Lady Justice Asenath Ongeri**, delivered a judgment in which she made the following orders:-

"The Originating summons is allowed in the following terms:-

(i) THAT an injunction do and is hereby issued restraining the Respondent, his servants and/or agents from selling, transferring, charging, wasting, damaging or alienating and/or otherwise dealing with the following matrimonial properties and/or those properties herein below tabulated:-

- a) DAGORRETTI/KINOO/xxxx
- b) KJD/KAPUTIE-NORTH/xxxxx
- c) KJD/KAPUTEI-NORTH/xxxxx
- d) Motor Vehicle Registration Number KBA xxxS-Toyota Prado
- e) Motor Vehicle Registration Number KAQ xxxD Nissan Caravan.

(ii) THAT the developments and improvements on all the properties known as DAGARETTI/KINOO/xxxx, KJD/KAPUTIEI-NORTH/xxxxx, KJD/KAPUTIEI-NORTH xxxxx and all the above mentioned properties registered in the name of the Respondent are owned jointly by the Applicant and the Respondent.

(iii) THAT 50% of the properties aforesaid, is held by the Respondent in trust and for the beneficial interest of the Applicant.

(iv) THAT the Respondent is accountable to the Applicant in respect of all the income derived from the said properties and applied to the Respondent's exclusive use.

(v) THAT all rental income derived by the Respondent from the aforesaid matrimonial properties be distributed equally with the Applicant herein.

(vi) THAT the Respondent is accountable to the Applicant for the income derived from the sale, if at all, of the property herein named DAGORETTI/KINOO/xxxxx to the extent of 50%.

(vii) THAT the properties and the income aforesaid be settled and proportioned at the ratio of 50:50%.

(viii) THAT the Respondent to pay the costs of this suit.”

12. It is this judgment that forms the basis of the two applications now before this court. I will now proceed to deal with each application individually.

(I) Notice of Motion dated 14th May 2021

13. By this application the Respondent seeks that the judgment delivered on 22nd November 2019 be set aside and that the Respondents case be heard on its merits. The Respondent averred that in the event the orders sought are not granted, he stands to lose his personal property. He argues that the suit proceed *ex parte* and a determination was reached without the court having the benefit of his evidence. That the notice of delivery of judgment was issued during the COVID – 19 lockdown and that he was not aware of the date of delivery of the judgment.

14. On her part the Applicant submits that the allegation by the Respondent that he was unaware of the hearing date was misleading, false and dishonest. That, neither the Respondent nor his advocate appeared on the date set for hearing, without any reason any and/or apology and that the Honourable Judge decided to proceed with the matter.

15. The Applicant submits that this application seeking to set aside the judgment ought to be dismissed as the same was filed more than one and a half years after the judgment in question was delivered. That this application is merely a ploy by the Respondent to deny the Applicant the fruits of her judgment and that the Respondent continues to collect and enjoy rental income from the properties in question to her exclusion. The Applicant urges that the application has not met the threshold for setting aside and ought to be dismissed.

16. Order 51 Rule 15 of the Civil Procedure Rules 2010 grants to the court the discretion to set aside an order made *Ex parte*. In the case of SHAH-VS MBOGO[1967] E.A. 116 the Court held thus-

“(iv) applying the principle that the court’s 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, but not to assist a person who has deliberately sought (whether by evasion or otherwise) to obstruct or delay the cause of justice, the motion should be rejected.” (own emphasis)

17. The discretion must be exercised by a court on the basis of the particular circumstances of each individual case. In order to merit the exercise of the courts discretion in his favour the Respondent must demonstrate sufficient cause. In Black’s Law Dictionary, 9th Edition, page 251 sufficient cause is defined thus:-

“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.”

18. In **Auto Selection (K) Ltd & 2 others v John Namsaka Famba [2016] eKLR** the court went to state as follows:-

“Sufficient cause is thus the cause for which an applicant cannot be blamed. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, an applicant must demonstrate that he was prevented from taking the steps in question by a sufficient cause”. (own emphasis)

19. Likewise in the case of **WACHIRA KARANI – vs BILDAD WACHA [2016] eKLR**, the court stated:-

“The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated, “sufficient cause” to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase “Sufficient cause” mean. The Supreme Court of India in the case of Parimal v Veena observed that: -

“Sufficient cause” is an expression which has been used in large number of statues. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously.”(own emphasis)

20. What constitutes **“sufficient cause”** is clearly therefore, a matter of fact and the court must look at the circumstances of the case at hand.

21. The Respondent has complained that the judgment in question was rendered *ex parte*. That he was not given an opportunity to present his case and/or to call his witnesses. The question this court must answer is whether on the facts of this particular case there is evidence that the Respondent fully intended to present a defence and was denied a chance to do so.

22. A look at the record herein reveals that the Respondent and his advocate were present when the Applicant presented her case. Indeed counsel for the Respondent Mr Kinyanjui cross-examined the Applicant at length on **7th October 2018**. The hearing was thereafter adjourned to **14th October 2019**. The relevant order reads as follows:-

“ORDER

It is now approaching 5 pm. This hearing is adjourned to proceed on 14/10/2019 at 2 pm”

23. On that date neither the Respondent nor his advocate appeared in court. No reason and/or explanation was tendered to the court for their absence. On that date the court observed that

“This date was taken by consent. The Respondent and his counsel are absent with no explanation.”

24. The court then proceeded to give directions for filing of written submissions as the Applicant had closed her case.

25. In the application of **14th May 2021** the Respondent dwells at length about the question of the notice of delivery of judgment which he claims was sent out during the **COVID** lockdown when there was much confusion. However, the Respondent maintains a loud silence regarding his failure to attend court on the date scheduled for further hearing of the matter. To date no reason and/or explanation has been tendered for the failure of the Respondent to appear before the trial court on **14th October 2019**.

26. The Applicant having closed her case the Respondent was scheduled to present his case on that date. The date had been taken by consent in the presence of both parties thus the Respondent cannot claim to have been unaware of the hearing date. Therefore, the Respondents averment that he was unaware of the hearing date is a blatant untruth. The failure to attend court was his own doing. The Respondent cannot claim that he was denied an opportunity to present his defence. The Respondent himself decided not to avail himself of the opportunity granted to him to present his case to the court. He cannot blame the court or the Applicant for that.

27. Even if for some unavoidable reason the Respondent and his advocate had been unable to appear on the hearing date of **14th October 2019** he had the option to move the court and seek to have the matter re-opened to enable him present his case. The Respondent did not do this.

28. Moreover, I note that the judgment in question was delivered on **22nd November 2019**. The Respondent made no move to challenge the said judgment or to seek its setting aside until **May 2021** more than **1 ½** years **after** the said judgment had been delivered. The argument that the Respondent was not aware of the date of delivery of the judgment is not plausible. I do not believe that for the past **1 ½** years or more the Applicant has been unaware of the judgment. This application was not filed in a timeous manner.

29. The Respondent has submitted that due to the interruption in court processes due to the Covid-19 pandemic he was not able to file this application in a timely manner. The Covid Pandemic and the subsequent lockdown did not occur in **Kenya** until sometime in **March 2020**. That is about **four (4) months after** the judgment in question had been delivered. Moreover, even during the lockdown the courts did (after a brief interruption) continue to operate online. In my view, there has been unreasonable and unexplained delay by the Respondent in filing this application.

30. I therefore find that no sufficient cause has been advanced by the Respondent to persuade this court to set aside the judgment. The Respondent was given an opportunity to present his case but for reasons best known to himself declined to avail himself of the opportunity given. The Respondent then went to sleep only to awaken more than **1 ½ years** later when the Applicant sought to enforce the said judgment. In the circumstances, I find no merit in the notice of motion dated **14th May 2021**. The same is hereby dismissed in its entirety.

(vi) **Notice of Motion dated 6th October 2020**

31. The Applicant by this application seeks to enforce the judgment of **22nd November 2019**. The Applicant states that she has tried unsuccessfully to engage the Respondent with a view to securing her half share (**50%**) of the matrimonial property as well as her **50%** share in the rental income obtained from the developed properties as directed by the court. She states that the Respondent has continuously frustrated all her efforts to realize the fruits of said judgment.

32. The Respondent did not file a Replying Affidavit to counter the facts set out in the application of **6th October 2020**. However, the Respondent did file Grounds of Objection in which he stated that the application has not met the jurisdictional threshold for grant of the orders sought.

33. It is trite that in law “**jurisdiction is everything**”. Without requisite jurisdiction, the court must down its tools immediately. The Applicant filed the Originating Summons dated **24th February 2014** seeking division of properties acquired during the subsistence of her marriage to the Respondent.

34. Section 7 of the Matrimonial Property Act, 2012 provides as follows:

“7. Subject to section 6(3) Ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”

35. It is not in dispute that the marriage between the Applicant and the Respondent has been dissolved. A decree absolute was issued on **12th March 2015**. It is further common ground that the High Court rendered its judgment regarding the said division of matrimonial property on **22nd November 2019**. To date no party has appealed against said judgment nor has the same been set aside. Accordingly, I find that the judgment delivered on this matter is valid and enforceable. In the premises, I find that this court has full jurisdiction to entertain the Application of **6th October 2020**.

36. The Applicant has averred that her efforts to engage the Respondent with a view to perfecting the judgment have borne no fruit. The Respondent has not denied this allegation. Neither has the Respondent indicated to the court his willingness to comply with the orders made by the court on **22nd November 2019**.

37. It is trite that courts do not make orders in vain. A party to whom a court order is directed has an obligation to comply with said orders whether he agrees with them or not and irrespective of how unpalatable said orders may be.

38. In light of this court’s dismissal of the Respondents application dated **14th May 2021** I find that the present application is merited. In order to assess how much is due to the Applicant from the rental income, it is necessary that the Respondent render a full and accurate account of the said rental income. Therefore, I do allow the notice of motion dated **6th October 2021**.

39. Finally and in conclusion, this court makes the following orders: -

(1) The Notice of Motion dated 14th May 2021 is dismissed in its entirety.

(2) The Respondent to provide hereof full, accurate and updated accounts from the date of dissolution of the marriage to the present time.

(3) The said statement of accounts in (2) above to be served upon counsel for the Applicant and filed in this court within thirty (30) days of today's date.

(4) Thereafter the Applicant is directed to comply fully with the judgment of this court delivered on 22nd November 2021.

(5) In the event that the Respondent fails to comply as directed in (4) above the Hon Deputy Registrar of this court shall sign all relevant documents to effect the transfer of half share of the matrimonial property being-

(i) DAGORRETTI/KINOO/xxxx

(ii) KJD/KAPUTEI-NORTH/xxxxx

(iii) KJD/KAPUTEI-NORTH/xxxxx

(iv) MOTOR VEHICLE REGISTRATION NUMBER KBA xxxS-TOYOTA PRADO

(v) MOTOR VEHICLE REGISTRATION NUMBER KAQ xxxD NISSAN CARAVAN.

(6) The costs of both Applications will be met by the Respondent.

DATED IN NAIROBI THIS 5TH DAY OF NOVEMBER 2021.

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MAUREEN A. ODERO

JUDGE