REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

MATRIMONIAL CAUSE NUMBER 2 OF 2021

IN THE MATTER OF ARTICLE 45(3) OF THE CONSTITION OF KENYA

AND

IN THE MATTER OF APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

AND

IN THE MATTER OF APPLICATION FOR DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

TKR............APPLICANT

AND

JMM........RESPONDENT

R U L I N G

1. Before court is a Notice of Motion dated 8th June 2021, brought under **Articles 50(2) and 159(2) (a) and (d) of the Constitution of Kenya 2010; Sections 1A (1)(2) and 1B (1)(a) of the Civil Procedure Act; and Order 45 and order 51, Rule 1 of the Civil Procedure Rules, 2010.**

2. The Applicant seeks the following orders:-

a. Spent.

b. THAT this Honourable Court be pleased to deem as properly filed the Notice of Appointment dated 7th June, 2021 and filed on the same date on behalf of the Respondent/Applicant.

c. THAT this Honourable Court be pleased to set aside and vary its directions issued on 17th May, 2021 requiring that the Respondent/Applicant to file and serve her submissions within 21 days and mention the case on 7th June, 2021.

d. THAT this Honourable Court be pleased to grant the Applicant/Respondent leave to file his reply to the Originating Summons dated 12th February, 2021 and defend the suit.

e. THAT this Honourable Court be pleased to order that the hearing of the Originating Summons dated 12th February,2021 be by way of viva voce on a date to be scheduled by the Honorable Court.

f. THAT this Honorable Court be pleased to issue any new appropriate directions in tandem with the order that the matter will be heard by way of viva voce.

g. THAT the costs of this Application be provided for.

3. The Application is supported by the grounds on the face of it and the Supporting Affidavit of JMM, the Applicant, sworn on the 8th June 2021.

4. He deposed that sometimes in March 2021 he was served with the Originating Summons dated 12th February, 2021 and he noted that this Court issued an order dated 24th February,2021 which *inter alia* stated that this case be mentioned on 29th March,2021 for purposes of issuing directions. That this case was not mentioned on 29th March, 2021 as the High Court was on vacation and the mention of the case was rescheduled to 17th May, 2021. On the said date, the case was mentioned and directions to file and serve Submissions were issued. Subsequently, the matter was slated for mention on 7th June, 2021 for compliance and issuance of further directions on hearing and/or Ruling.

5. That due to the financial constraints he was experiencing he was unable to attend court or secure the services of an Advocate to respond to the Originating Summons. Hence he neither attended nor was represented in court on 17th May 2021 when this court directed and ordered the respondent to file and serve her Submissions within 21 days and fixed the matter for compliance on 7th June 2021.

6. He deposed that as at 7th June, 2021 he had secured the representation of an advocate who attended court and took directions for the matter to be mentioned for purposes of fixing the Ruling date on 30th June 2021. However it was his plea that the orders of 17th May 2021 be set aside so that his rights to be heard could be realized.

7. He averred that this application has been timeously filed and the respondent would suffer no prejudice as there is a caution registered against the title of L.R. No. XXXX/870 (Ruiru) (the subject property) of the cause which bars any sort of transfer or charge of the same

8. The Application was opposed by the Applicant TKR vide her Replying Affidavit sworn on 29th June, 2021. She deposed that the application in its entirety is bad in law, a sham and a total abuse of the court process and it should be dismissed with costs.

9. That the application had been brought under wrong provisions of the law and that under **Order 45 of the Civil Procedure Rules**, the Applicant has not tabled any acceptable reasons to warrant a review. She averred that the respondent was prompted to action when he saw this matter had been reserved for judgement.

10. She deposed further that on 17th April, 2021 the court apprised the Applicant through his advocate of the earlier proceedings and advised to regularize their record. That the applicant had an Advocate on 7th June 2021 and 17th June 2021 yet he has not filed any response to their Originating Summons to date and has filed this application without attaching a draft response which could determine whether issues raised therein are triable or not.

11. The respondent averred that the contention by the applicant that he could not respond to her Originating Summons in good time due to financial constraints was a total sham as he is gainfully employed as a nurse and has been working as such at Kenyatta University Hospital since early 1990s. She stated that the application has been filed too late in the day and it has not met the basic threshold to warrant setting aside of proceedings and extension of time to allow pleadings to be filed out of time.

SUBMISSIONS

12. On 30th June, 2021, the parties took directions to canvass the Application by way of Written Submissions.

APPLICANT'S SUBMISSIONS

13. The Applicant filed his submissions dated 26th July, 2021 on 29th July, 2021.

14. The Applicant submitted that the Application is premised on the correct provision of the law. That under **Order 45 of the Civil Procedure Rules** any other sufficient reason is a ground for review and if at all the application is premised on the wrong provisions then such error is curable under **Order 51, Rule 10(2), Section 1A of the Civil Procedure Act and Article 159(2) of the Constitution 2010.**

15. It was the Applicant's position that his application was filed without unreasonable delay as it was filed twenty two (22) days after the court's directions on the subject prayers of the instant application were issued.

16. It was submitted for the applicant that the applicant did not procure legal counsel in good time to respond to the Respondent's Originating Summons due to financial constraints.

17. On the issue of failure to attach a draft response to the Application, the Applicant argued that under **Article 50(1) of the Constitution** he had a right to be heard. He also relied on the case of **Visva Stone Suppliers Company Limited vs RSR Stone [2006] eKLR** which court considered an application for leave to file an appeal out of time where a draft Memorandum of Appeal had not been annexed to the said application.

18. The Applicant contended that the respondent would not suffer prejudice if the present application was allowed because there is a caution registered against the tittle of L.R No. XXXX/870 Ruiru which will bar him from transferring, charging or dealing otherwise with the subject property.

19. The applicant maintained that the respondent could be compensated by way of costs.

20. In urging this court to allow the application so that the matter can be heard on merit the applicant relied on the case of **Philip Chemwolo & Another vs Augustine Kubede [1982-88] KAR 103** which stated as follows;

> **"Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad concept of equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline"**

21. The applicant prayed that in the interests of equity and justice this application be allowed.

RESPONDENT'S SUBMISSIONS

22. The Respondent filed their submissions dated 2nd August, 2021 on 4th day of August 2021.

23. The Respondent's submissions were a reiteration of their Replying Affidavit.

24. She averred that the Applicant brought the Application on the wrong provisions of the law.

25. That basing an application on the wrong provisions of the law goes to the jurisdiction of the court and is not a mere technicality that can be cured under **Article 159 of the Constitution**. To buttress this position, the respondent relied on the case of **Samuel Mathenge Ndiritu vs Martha Wangare Wanjira & Another (2017) eKLR** which it dismissed an application for failure to attach the requisite documents.

26. The respondent asserted that this court can set aside proceedings if an application for the same is based on terms that are just as envisaged under Order 10 Rule 11. For this position she relied on the case of **County Government Of Mombasa vs Kooba Kenya Limited [2019] eKLR** where the court stated as follows;

> "some of the considerations to be borne in mind while dealing with an application for extension of time include the length of the delay involved, the reasons for the delay, the possible prejudice, if any that each party stands to suffer depending on how the court exercises its discretion; the conduct of the parties; the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has a constitutionally underpinned right of appeal; the need to protect a party's opportunity to fully agitate its disputes; against the need to ensure timely resolutions of disputes; the public interest issues implicated in the appeal; and whether, prima facie, the intended appeal has chances of success or is a mere frivolity.'

27. On the length of the delay involved, the Respondent submitted that the court ordered the Applicant herein to file their Response to the Originating Summons within 14 days of service which period has lapsed without any response on record to date.

28. On the reason(s) for the delay, the respondent argued that the contention that he lacked financial capacity to retain an advocate is negated as he had a representative in court on 17th May, 2021and 7th June, 2021.

29. On the possible prejudice, the respondent argued that she is financially ruined by unnecessary delay in this matter however the same can be cured by an order for payment of thrown away costs.

30. On the conduct of the parties, respondent averred that failure to file a response within fourteen (14) days was blatant disobedience of a court order and an affront to the administration of justice.

31. On whether the Applicant had established a prima facie case, the respondent averred that failure to attach the draft response made it difficult for the court to ascertain whether the same raised triable issues.

32. The Applicant relied on the case of **Governors vs Inspector General of National Police Service & 3 Others [2018] eKLR** in which the court relied with approval on the finding in **Nicholas Kiptoo Arap Korir Salat vs Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR** that: -

> "It is pragmatic that in an application for extension of time to file an appeal out of time**, one needs to attach a draft of the intended petition of appeal for perusal of the court to buttress the arguability** aspect(s) of the intended Appeal. This was not done in the present case**.[13]** Curiously, in his Notice of Motion Application, the Applicant seeks only one substantive prayer: extension of time to file an appeal to this court. We note however that there is no Notice of Appeal filed in this matter and there being no prayer for extension of time to file a Notice of Appeal, we see difficulties in how the matter will progress beyond the mere blanket prayer for "extension of time'' to file an appeal. Parties are bound by their pleadings and the court will not grant reliefs not sought by litigants before it. Hence with no prayer or an application, for extension of time to file a Notice of Appeal out of time, it will be in vain for this court to grant extension of time to file an appeal where no Notice of Appeal has been filed given the centrality of a Notice of Appeal as a jurisdictional prerequisite''

33. The Respondent urged the court to find the Application to be unmeritorious and dismiss the same with costs.

34. Citing **Order 50 5ule 6 of the Civil Procedure Rules** and without prejudice to the foregoing submissions, the respondent acknowledged the court's power to enlarge time and condemn the applicant to pay costs. The respondent submitted that if the court was inclined to allow

the Application the Respondent be compensated by way of thrown away costs assessed at Ksh.65,000/= as the respondent had attended court three (3) times, filed written submissions and a Replying Affidavit to the applicants application

ISSUES FOR DETERMINATION

35. The issues for determination in this matter are: -

(a) **Whether this application is premised on the wrong provisions of the law and the consequences for the same.**

(b) Whether the court should set aside the orders of 17th June 2021 and grant leave to the respondent to respond to the Originating Summons.

(c) Who should bear the costs of this Application?

ANALYSIS & DETERMINATION.

(a) Whether this Application is premised on the wrong provisions of the law and the consequences for the same

36. The instant application has been brought under **Articles 50(2) and 159(2) (a) and (d) of the Constitution of Kenya 2010; Sections 1A (1) (2) and 1B (1) (a) of the Civil Procedure Act; and Order 45 and order 51, Rule 1 of the Civil Procedure Rules, 2010.**

37. The respondent submits that **Order 45 of the Civil Procedure Rules** provides for review yet the instant application seeks to set aside ex-parte proceedings and grant leave to the applicant to file his response to the respondent's Originating Summons out of time. Does that render this application incompetent?

38. The applicant also relied on **Order 51, rule 15 of the Civil Procedure Rules which** provides that the court may set aside an order made *ex parte*.

39. The application also relied on **Article 159(2) (d)** which provides that justice shall be administered without undue regard to procedural technicalities.

40. The Supreme Court of Kenya in the case of **Zacharia Okoth Obado vs Edward Akong'o Oyugi & 2 Others** **(2014) eKLR** while commenting on the strict observance of the mandatory provisions of the **Constitution, the Election Act, and the Rules**, stated thus**:-**

> **"Article 159 (2) (d) of the Constitution simply means that a Court of law should not pay undue attention to procedural requirements at the expense of substantive justice. It was never meant to oust the obligation of litigants to comply with procedural imperatives as they seek justice from the court."**

41. Thomas Ratemo Ongeri& 2 Others vs Zachariah Isaboke Nyaata& Another **[2014] eKLR**, court stated as follows:

> "On the Defendants' argument that the application has been brought under the wrong provisions of the law, I am fully in agreement. That however is a procedural technicality that this court would overlook for the sake of substantive justice pursuant to Article 159 (2) (d) of the Constitution of Kenya."

42. In the case of **Gitau vs Muriuki [1986] KLR 211** the Court held that:

> "…as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the court will not dismiss an application solely on account of a provision of the law on which the application is grounded."

43. In the case of **Nancy Nyamira & Another vs Archer Dramond Morgan Ltd.** **[2012]eKLR** court held that:

> "Next, the Defendant argues that the Plaintiffs' application must fail because it cites the wrong provisions of law. The Enforcement Application cites Order XLIV, Rule 17. The Defendant correctly points out that there is no such rule. As many cases have now held, and notwithstanding Sir Udoma's remarks **Salume Namukasa vs Yozefu Bukya (1966) EA 433,** invoking the wrong provision of law does not necessarily spell doom to an otherwise meritorious application. This was the holding in **Gitau vs Muriuki [1986] KLR 211** which I now follow to hold that in as long as a party's invocation of the wrong provision of law is not in bad faith, meant to mislead or otherwise causes injury or prejudice to the other side, the Court will not dismiss an application solely on account of wrong invocation of a provision of the law on which the application is grounded."

44. It is has not been demonstrated that **Order 45** was cited in bad faith. In fact the applicant has cited the correct provision of the law despite the apparent error. That error in my mind does not render the application incompetent. Guided by the above authorities it is only proper that the application be considered on its merits and I proceed to do so.

(b) Whether the court should set aside the orders of 17th June 2021 and grant leave to the respondent to respond to the Originating summons.

45. From **order 51 rule 15 of the Civil Procedure Rules,** the **court has** wide and unfettered **discretion to set aside *ex-parte* orders.**

46. On 17th May, 2021 the Respondent confirmed and proved to court that she had duly served the Applicant with the Originating Summons dated 12th February 2021. No response had been filed and served upon her by the Applicant herein. The court directed the Respondent to file and serve her submissions within twenty one (21) days upon the Applicant herein and granted a mention date of 7th June 2021 to confirm compliance. On 7th June, 2021 the respondent had filed her submissions and the Applicant's counsel intimated to file the instant application but since the same was not on record the court proceeded to grant a date of 30th June, 2021 for purposes of fixing a Ruling date. On 16th June, 2021 the Applicant filed the instant application.

47. The applicant avers that the reason for not responding to the Originating Summons was that the applicant was financially constrained and he could not procure the services of an advocate to respond to the Originating Summons which he termed as an emotive matter.

48. The counsel was duly instructed as he was present in court on 17th May, 2021 and 7th June, 2021 yet he has not advanced any reason why on these dates he hadn't filed response to the Originating Summons.

49. The prayers sought are at the discretion of this court but discretion is not exercised in a vacuum. *It must be* **on just grounds noting that the court's primary/** fundamental **duty is to do justice to the parties.**

50. Section 3A of the Civil Procedure Act provides that;

> **"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."**

51. In **Shah vs Mbogo and Another [1967] EA 116** the Court of Appeal of East Africa held that:

> "This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, 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."

52. The Court of Appeal in **CMC Holdings Ltd vs James Mumo Nzioka [2004] eKLR** where it was held *inter alia*:-

> "The discretion that a court of law has, in deciding whether or not to set aside ex-parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such discretion if the court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error"

53. The court before exercising its discretion has to ascertain whether the applicant has demonstrated a sufficient cause warranting setting aside of the ex-parte decision or proceedings.

54. In The Registered Trustees of the Archdiocese of Dar es Salaam vs The Chairman Bunju Village Government & Others Civil Appeal No. 147 of 2006, the Court of Appeal of Tanzania while deliberating on what constitutes sufficient cause opined thus:

> **"It is difficult to attempt to define the meaning of the words "sufficient cause." It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of *bona fides*, is imputable to the Appellant."**

55. In **Wachira Karani vs Bildad Wachira [2016] eKLR** court held that:

> "Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. 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, the defendant must demonstrate that he was prevented from attending court by a sufficient cause..."

56. The applicant came to court and filed his application soon after the directions. The explanation he gives for the delay is not unlikely and he concedes to costs noting that he was served way back. The issue at hand is about matrimonial property. That is not an issue that ought to be dealt with *ex parte* especially where the other party in the equation shows up in good time to seek to be heard. Issues matrimony are familial and emotive issues, and the parties herein have children between them. Such matters where possible ought to be settled amicably and where that is not possible, each party ought to be heard so as to retain any necessary relationships without undue hostilities. Sometimes it is in the hearing of such matters that certain festering issues get settled.

57. Nevertheless, it goes without saying that should the application be allowed the respondent will suffer prejudice, of a delay she did not anticipate especially after her counsel had filed submissions, of other costs of restarting the matter. The latter can be dealt with as the price the respondent must pay for not dealing with the matter in the requisite period of time given to him through payment of costs.

58. In the upshot, having considered the application, rival affidavits, submissions and authorities, I do find that it is in the interests of justice that I allow the application in the following terms:

i. THAT the Notice of Appointment dated 7th June, 2021 and filed on the same date on behalf of the Respondent/Applicant be and is hereby deemed as properly filed.

ii. THAT directions issued on 17th May, 2021 requiring that the Respondent/Applicant to file and serve her submissions within twenty-one (21) days are hereby set aside.

iii. THAT the Applicant/Respondent is granted leave to file and serve his reply to the Originating Summons dated 12th February, 2021, together with any witness statements and documentary evidence within twenty one (21) days hereof. The respondent/applicant to have corresponding leave.

iv. THAT the Originating Summons dated 12th February, 2021 be heard by way of viva voce evidence.

v. THAT the costs of this Application be borne by the applicant/respondent, and to pay thrown away costs of Kshs. 25,000/= to the respondent/applicant within twenty one (21) days hereof.

vi. In default of (v) above the leave granted the applicant/respondent to reopen the matter will stand lapsed.

59. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DECEMBER, 2021

MUMBUA T. MATHEKA

JUDGE

In the presence of:-

CA Edna

Mr. Githendu for Applicant/Respondent N/A

Ms. Sabaya for Respondent/Applicant