



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MARSABIT

JUDICIAL REVIEW NO.4 OF 2019

AKE MOHAMED DAWE.....APPLICANT

VERSUS

PRINCIPAL KADHI MARSABIT.....RESPONDENT

RULING

The Notice of motion dated 5.11.2019 seeks the following orders:-

2(a) A writ of certiorari directed to the Respondent to remove to the Honourable Court the entire file of papers in Divorce case No.22 of 2019 at the Principal Kadhi's Court at Marsabit consisting of :

- (i) Summons to appear issued upon the petition therein***
- (ii) The interested party's petition therein***
- (iii) The verifying affidavit***
- (iv) List of documents filed with the petition and any other document filed therein***
- (v) Proceedings thereof and directions, rulings judgment, order, decrees and process of enforcement thereof***

And to quash the said summons to appear issued upon the interested party's claims in pleadings in the said suit and to quash the petition the verifying affidavit, and to quash all proceedings thereupon and to quash the certificate of divorce and all directions, ruling, judgments, orders and decrees and any incidental process or orders of enforcement of the decree thereof.

3. That the honourable Court be pleased to make such further or other orders within its inherent jurisdiction.

4. That the Applicant be awarded costs of the application.

The application is supported by the ex-parte applicants' affidavit and the grounds in support as stated on the application. The interested party filed a replying affidavit sworn on 24th October, 2019. The affidavit in reply was in response to the application seeking leave of the court to seek Judicial Review orders and was retained for the substantive application. Mr. F.N.Wamala appeared for the applicant while the interested party appeared in person.

Mr. Wamalwa submitted that the application relates to the proceedings before the Kadhi in Divorce case number 22 of 2019. The proceedings were conducted ex-parte. The summons issued to the applicant gave her only ten (10) days whereas the Civil Procedure rules require a period of not less than ten(10) days. The applicant lives in Nairobi and ought to have been given fifteen (15) days which is the normal minimum. The proceedings started on 17.5.2019. Service was done on 3.5.2019 and therefore the case was heard within fourteen (14) days. Pleadings had not closed by the time the case was heard. No pre-trial was done.

Counsel for the applicant further contend that no witnesses were called. Part of the evidence is whats up messages. Whatsup messages is not part of the Koran. The proceedings are a violation of due process. Each party has to be given equal chance to give his/her side of the story. The rule of law was thrown out of the window and the applicant was left with the vagaries of an improper process. The applicant lives in Nairobi and the proceedings were filed in Marsabit only to punish her. Counsel urged the Court to let parties file their cases where they

wish. The applicant is not asking for the resumption of the marriage. The applicant prefers having the matter heard in Nairobi where she resides with the two children of the marriage. The Kadhi's proceedings indicate that the divorce was given on 13.5.2019 yet the case was filed on 2.5.2019. This cannot be the case.

The interested party maintain that they are already divorced. The applicant was given ten (10). In Islam it is the man who grants the divorce. Service was done properly and the applicant failed to appear before the Honourable Kadhi. Service was done on 3.5.2019. The applicant had no intention of attending Court. The parties were married in Marsabit and lived in Marsabit. The interested party lives in Marsabit initially the interested party filed a divorce case in 2017 in Marsabit but the family intervened.

The divorce petition before the Kadhi's Court was filed on 2nd May, 2019. On the same day the Court issued summons to the applicant giving her ten(10) days to appear failing which the plaintiff could proceed with the suit in her absence and judgment entered against her. The interested party appeared before the Kadhi on 17.5.2018 and proceeded with the case. The trial Court observed that the applicant had been served with the petition on 3.5.2019 but no appearance had been made. The Kadhi heard the petitioner and granted the divorce on the same day. A divorce certificate was thereafter issued. The certificate does indicate the date of divorce as 13.5.2019. Counsel for the applicant is of the view that the suit having been filed on 2.5.2019, the divorce could not have occurred on 13.5.2019. The interested party testified before the Kadhi that he had divorced his wife on 13.5.2019. The interested party annexed a whatup message indicating that he had divorced his wife.

The record of the trial Court shows that **Alex M. Kimeu**, a Court process server served the applicant with the divorce petition on 3.5.2019 in the morning at South "C", Nairobi. The service was effected personally on the applicant as per order 5 rule (8). The Kadhi heard the case On 17th May, 2019. This gives fourteen (14) days period to the applicant to respond to the case.

Order 5 rules 1,2 and 3 states as follows:-

- 1.(1) When a suit has been filed a summons shall issue to the defendant ordering him to appear within the time specified therein.**
- (2) Every summons shall be signed by the judge or officer appointed by the judge and shall be sealed with the seal of the Court without delay, and in any event not more than thirty days from the date of filing suit.**
- (3) Every summons shall be accompanied by a copy of the plaint.**

Order 6 rule (1) of the Civil Procedure rules state

- (1) When a defendant has been served with summons to appear, he shall unless some order be made by the Court, file his appearance within the time prescribed in the summons.**

Under order 10 rule (2), where the defendant fails to appear after service has been effected, the plaintiff is required to file an affidavit of service. There is an affidavit of service on record that was filed on 14.5.2019. The summons are issued by the Court as per order 5 of the Civil Procedure rules. The summons gave the applicant ten(10) days to appear and defend the suit. The applicant had all the time to enter appearance. Since no appearance was entered, the contention by the applicant's counsel that pleadings had not closed by 17.5.2019 cannot be true. Had the applicant entered appearance, she would have pushed the closure of pleadings to a further date. The Kadhi did observe that the time for entering appearance had lapsed and since the suit did not involve a liquidated claim, proceeded to hear the matter. The case involved divorce proceedings. The Petitioner before the Kadhi informed the Court that he had divorced her. This was done on 13th May 2019. Under Islamic law its not mandatory that a Kadhi grants the divorce. The husband can divorce his wife without involving the Court. Divorce case are filed before the Kadhi but still the divorce can take effect without a case being filed. The Court process is meant to formalize the divorce process. It is therefore possible that the interested party could have divorced his wife on 13.5.2019 even before the case was heard.

Paragraph 17 of the application herein reads as follows:

17. That the summons to appear together with the petition were not served on the applicant".

That averment cannot be true. There is the process server's affidavit. There is no averment that the affidavit of service is a fabrication. Further, if indeed the applicant is interested in defending the petition before the Kadhi, she could have filed an application to set aside the divorce and tell the court her side of the story. That remedy is still available to the applicant.

It is evident that instead of defending the petition before the Kadhi, the applicant filed Divorce case number 110 of 2019 before the Kadhi's Court in Nairobi. At paragraph 4 of the verifying affidavit to that suit, the applicant states:-

4. That there is no pending suit in any other Court on the same matter and involving the same parties.

Although the applicant's suit number 110 of 2019 in Nairobi did not seek a prayer for divorce, the suit was registered as a divorce case and the applicant, having been duly served with the divorce petition, was fully aware of the Marsabit Kadhi's Court proceedings.

In Judicial Review No.3 of 2019 I observed as follows in my ruling delivered on 25th November, 2019.

It is clear to me that whereas the ex-parte applicant prefers to have any legal dispute heard and determined in Nairobi, the interested party prefers to have the cases resolved in Marsabit. The ex-parte applicant filed case number 924/2019 before

Nairobi Children's court, case number 110/2019 before the Nairobi Kadhi and miscellaneous application number 211 of 2010 before the Nairobi High Court. There is also Marsabit Judicial Review 4/2019. On his part, the interested party filed Marsabit Kadhi's case number 22 of 2019, and Marsabit Children Case No.7/2019 before the Principal Magistrate, Marsabit. There is therefore a total of six cases involving the same parties. Two judicial review matters, two cases before the respective Kadhi's and two children cases. Whenever the applicant files a suit in Nairobi, the interested party will alledge that he resides in Marsabit and the same applies to cases filed by the interested party in Marsabit where the applicant vehemently contend that the Marsabit Magistrate's Court lacks jurisdiction.

The applicant seems to be of the view that she can only get justice if her cases are heard and determined in Nairobi. Their marriage was solemnized in Marsabit. They lived in Marsabit. The interested party lives in Marsabit. The applicant is clearly out on a forum shopping exercise. Mr. Wamalwa was candid enough and submitted that they prefer having the matter heard in Nairobi. It is therefore clear that despite service having been effected, the applicant herein was not willing to subject herself to the jurisdiction of the Marsabit Kadhi's court. The same issue she is raising that she is residing in Nairobi can be raised by the interested party that he resides in Marsabit and cases against him should not be filed in Nairobi. I do find that the Marsabit Kadhi had jurisdiction to determine the divorce case.

The applicant is not seeking resumption of the marriage. The Kadhi in Marsabit simply dissolved the marriage and did not make any other orders. How would the orders of certiorari assist the applicant. The parties are divorced and there is no prospect of reconciliation. If the applicant is seeking custody of the children, she is at liberty to file another suit and seek those orders. As of now, granting the orders being sought will not serve any purpose. The High Court cannot be used to quash proceedings before a subordinate Court only for another fresh suit to be filed in a different Court. It is clear to me that the applicant has been presenting herself as an illiterate woman who was plucked out of school and married off to the interested party at the age of 13 years in 2007. Her identity card has been exhibited showing that she was not a minor by 2007 when she got married.

Judicial Review orders are intended to control administrative excesses which result into injustice. It is not the intention of Judicial Review remedies to assist a party who is not willing to subject herself to the jurisdiction of a Court. The granting of Judicial Review orders is at the discretion of the Court. The discretion has to be exercised judiciously. The orders should be granted if the Court is satisfied that the administrative process complained of has resulted into injustice. I see no injustice in this matter. The applicant simply refused to subject herself to the jurisdiction of the Marsabit Court and preferred to institute another case in Nairobi. There is no prejudice to the applicant. She does not seek to continue living with the interested party as a married couple. The orders being sought will not serve any purpose other than opening up a fresh divorce cause.

In the end, I do find that the application herein lacks merit and is hereby dismissed. Parties shall meet their own respective costs.

Dated, Signed and Delivered at Marsabit this 27th day of January, 2020

S. CHITEMBWE

JUDGE