REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL SUIT NO. 44 OF 2002 (O.S.)

TMS.....PLAINTIFF/ RESPONDENT

VERSUS

ZBS.....DEFENDANT/APPLICANT

RULING

1. The plaintiff TMS and the defendant ZBS were married at the [Particulars withheld] Church in Kakamega on 10th September 1956. In July 1999 the plaintiff filed this originating summons for declaration of her entitlement in certain properties that were registered in the defendant's name but which she claimed had been jointly acquired during their marriage. The properties were:-

(a) LR No. [particulars withheld], LR No. [particulars withheld],, LR No. [particulars withheld], and LR No. [particulars withheld], situated in Karen in Nairobi;

(b) 500 acres in Kitale comprised in LR No. [particulars withheld], in Kitale; and

(c) LR No. [particulars withheld], at Mumias.

The plaintiff sought 3 of the 4 plots at Karen, 500 acres of the Kitale land and half of the parcel at Mumias.

2. The defendant filed a replying affidavit to defend the summons which he asked that it be dismissed with costs.

3. On 1st October 2004 the defendant filed an application to have the cause transferred to the High Court at Kakamega for hearing and disposal. The application was opposed. The defendant had earlier on made a similar application which the court had dismissed on 16th September 2003. In the new application he alleged that circumstances had since changed. By letter dated 1st March 2005 the defendant's advocate Gervase B. K. Akhaabi wrote to the plaintiff's advocate M/s Guserwa inviting her to the registry to take a hearing date for the application. Instead, on 16th March 2005 the defendant's advocate received a hearing notice dated 15.3.2005 notifying him that the main suit would be heard on 21st April 2005 at 9.00 am. On receiving the notice, he rung the plaintiff's advocate informing her that the hearing date would not be convenient as he would be away in South Africa for treatment. He followed the phone with a letter dated 20th March 2005. The defendant's advocate had not been invited to take a convenient hearing date. Counsel swore that both the plaintiff and her advocate knew that he had a medical condition. The plaintiff's advocate wrote back to say that she would not accept any adjournment. Come the hearing date, the defendant's advocate had detailed Mr Abele of Chris Abele & Co. Advocates to go and apply for the adjournment of the case. Mr Abele applied for adjournment. M/s Guserwa opposed. The court did not allow the adjournment. Mr Abele informed the court that he has no further instructions in the matter. He left the court. The judge (the then Justice Koome) heard the plaintiff's evidence on that day and on two other occasions. Mr Akhaabi swore that he had notice for only 21st April 2005, and not for the two days. Judgment was delivered on 30th May 2005. Counsel stated that he was not served with the judgment date.

4. The judgment was that the defendant held each of the above properties in trust for the plaintiff who was entitled to 50% in each property. The couple had on-going divorce proceedings, and therefore petition could not be ordered. They have since divorced.

5. In the present application dated 29th September 2005, the defendant sought the setting aside of the proceedings of 21st April 2005, and subsequent dates, and the judgment entered on 30th May 2005, and subsequent decree, so that the cause could be re-opened to allow the cross-examination of the plaintiff and the calling of the defence. The defendant swore that he had not come to court on 21st April 2005 because he had been confined in bed where he was recovering from an accident.

6. The plaintiff opposed the application whose dismissal she sought on the basis that it lacked merits, and that it was meant to delay the matter. It was conceded that Mr Akhaabi had written to say that 21st April 2005 was unsuitable because he was going to be away for treatment, but her case was that the 3 weeks' notice was enough for counsel to get another advocate to defend the suit. The plaintiff acknowledged that the defendant had been involved in an accident, but she swore that the accident had been on 12th May 2001 and that the last time he had been hospitalised was between 22nd March 2004 and 28th March 2004. Therefore, she stated, the defendant had no excuse for failing to turn up on 21st April 2005. The plaintiff further deponed that the matter had been adjourned many times in the past at the insistence of the defendant.

7. The defendant's defence was that the plaintiff had not contributed to the acquisition of the property in the summons. The plaintiff's case was that she had contributed, and that her contribution had been equal to that of the defendant.

8. It should be noted that for about 10 years the court file could not be traced. Infact it was never traced in the registry. An application had to be made for reconstruction, and this explains the delay in hearing the instant application. The delay meant that the decree has not been realised. The fact that the couple had not divorced means that the properties have not been partitioned to the parties.

9. The court has a wide discretion to set aside or vary a judgment obtained without hearing the other side; there are no limits and restrictions to that discretion, except that if the judgment is varied or set aside it must be done on terms that are just **(Shanzu Investment Ltd –v- The Commissioner of Lands, Civil Appeal No. 100 of 1993**). The court will consider the particular circumstances of each case. Some of the factors to be considered while exercising the discretion are whether the defence raises triable issues; the explanation given for not filing the defence on time, or, like in this case, the explanation given by the defendant and his advocate why they did not attend the hearing to prosecute the defence; and what prejudice will be suffered by the other side if the application is granted, and whether such prejudice cannot be reasonably compensated by costs. The court should ask itself whether justice will not be served in the particular case by ordering the payment of costs, including the payment of throw-away costs **(CMC Holdings Limited –v- Nzioki [2004]1 KLR 173).**

10. A party with a *bonafide* defence should, as much as it is possible, be assisted to present it at trial. Justice is best served when a case is determined after hearing both parties, and therefore the matter determined on merits **(Pithon Waweru Maina –v- Thuku Mugiria [1982-1988] KAR 171).**

11. A defence on merits does not mean a defence that must succeed but one that raises triable issues; issues that raise a *prima-facie* defence which should go for trial **(Patel –v- EA Cargo Handling Services [1974] EA 74).**

12. The court should guard against the discretion being used to assist a person who is deliberately seeking to obstruct or delay justice. In **Philip Chemolo and Another –v- Augustine Kubende [1986]KLR 492** it was observed that –

> **"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 pay the penalty of not having his case heard on merits. The broad approach 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 parties and not imposing discipline."**

13. Applying these principles to the facts of this application, I note, and there was no dispute, that the defendant had filed a defence to the summons. The defence raised triable issues. Between the couple was substantial property. The plaintiff sought half of each in settlement of matrimonial property, saying that she had contributed to its acquisition while they were married. The defendant was saying that he had alone acquired the property. As between the plaintiff and the defendant there was a substantial dispute that the court was being asked to try and determine.

14. The defendant's advocate alleged, and it was not denied, that he was sick and this was known to the plaintiff and her advocate. A hearing date was taken without reference to him. This contravened known procedure. He was travelling to South Africa for treatment, and upon service with the hearing date, he said as much. He was asking the plaintiff's advocate to indulge him. She would not hear of it. He sent an advocate to seek adjournment. It was declined. The matter proceeded without him.

15. The defendant was absent. He stated that he was, on the hearing date, bed-ridden owing to the accident he has suffered in the past. The accident was known to the plaintiff and her advocate. They knew that the defendant had spent some time in hospital. Given these facts, the court cannot say that either the defendant or his counsel was not keen to defend the claim. I am unable to find that either of them intended to obstruct or delay the hearing of the cause.

16. It was deponed without contest, that the case proceeded, not only on 21st April 2005, but also on two other days before it was adjourned for judgment. The defendant and his advocate had no notice of the two hearings. It was not checked to know whether the defendant and his advocate were available on the two hearings.

17. I have anxiously considered the facts of this application. I determine that the absence of the defendant and his advocate on 21st April 2005 has been reasonably explained, and was excusable. The proceedings on the two subsequent days were irregular as there was no notice to the defendant and his advocate.

18. I do consider that there has been no division of the matrimonial property. The property is still intact. I also consider that the application was brought without undue delay.

19. In conclusion, therefore, I allow the application with costs to the plaintiff. The proceedings of 21st April 2005, for the two following days, and the judgment delivered on 30th May 2005 and the subsequent decree are all reviewed and set aside.

20. I direct the Deputy Registrar to give the parties the earliest date possible for the hearing of the cause.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF FEBRUARY, 2020

A.O. MUCHELULE

JUDGE