



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL CASE NO. 23'A' OF 2018 (OS)

IN THE MATTER OF SECTION 7, 12 AND 17 OF THE

MATRIMONIAL PROPERTY ACT, NO. 49 OF 2013

AND

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT, NO. 49 OF 2013

AND

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

BETWEEN

MHM.....APPLICANT

VERSUS

KNM.....RESPONDENT

RULING

1. The applicant MHM and the respondent KNM got married on 13th December 1987 under Islamic law and have three children. They were divorced by the Kadhi's court on 2nd February 2016. There is an appeal challenging the dissolution of the marriage. It is pending hearing and determination. In the course of the marriage the following properties were acquired:-

- a. Kwale/S.N. Kundutsi [....];
- b. Kwale/S.N. Kundutsi [....];
- c. Kwale/S.N. Kundutsi [....];
- d. Kwale/S.N. Kundutsi [....];
- e. Kwale/Mabokoni/ [....];
- f. Kwale/Mabokoni/ [....];
- g. LR [....] Mountain View, Nairobi;
- h. LR [....] Kitale;
- i. Ngong/Ngong/ [....];

j. Nairobi/Block [...];

k. matrimonial Home in Geneva, Switzerland; and

l. vehicles registration numbers CDGE [...], KAQ [...] and KBT [...]

According to the respondent there are other properties.

2. The applicant filed this originating summons on 20th April 2018 seeking the distribution of the matrimonial property, and proposed how he wanted that done. The applicant filed a response on 16th July 2018. She stated that the sharing of the property cannot be done until the High Court has addressed the appeal on divorce. Further, she indicated how she had contributed to the acquisition and development of the property, and proposed how the same should be distributed. On 6th December 2018 this court determined that since there was a divorce, which had not been stayed, it had power to hear and determine the dispute regarding the division of the matrimonial property.

3. The applicant is represented by Githogori & Harrison Associates Advocates, and the respondent by D. M. Musau & Co. Advocates. On 8th May 2019 Mr. Etole was holding brief for Ms Githogori. He entered into a consent that the originating summons be heard on the basis of affidavits and written submissions. The parties were to file written submissions, now that the affidavits were on record, and come on 13th June 2019 to take a judgment date. This is the order that the applicant's advocates have applied, under **Order 45** of the **Civil Procedure Rules** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act**, to review, set aside, vary or amend to allow for the originating summons to be heard by way of *viva voce* evidence, so that there can be cross-examination on the disputed matters. Ms Githogori who has conduct of the matter for the applicant swore a supporting affidavit to state that she was on this day indisposed and asked Mr. Etole to hold her brief and request that the matter be heard by *viva voce* evidence. Without instructions, however, he consented to having the matter to be heard by affidavits and written submissions. According to her, the dispute had pertinent contested matters which could only be clarified through oral hearing and cross-examination. Such hearing, she said, would not prejudice the respondent but, instead, do justice to the parties.

4. According to the respondent, the application has been made in bad faith. This is because she is resident in Geneva in Switzerland, and that she is currently no able to travel to Kenya to testify in the matter. This was the reason why she instructed her advocates to have the summons heard by affidavit evidence and written submissions. She stated that she does not have travel papers. She does not have resident permit. She has applied for the permit and she is waiting for a response. The applicant is fully aware of this position, she stated. She stated that:-

“14. I contend that if I must travel to Kenya, I would need to ask the Swiss Government to issue me with written permission to do so. This would occasion me undue hardship and it would take a long time thus impede the expeditious and timely disposal of this matter.

15. In further reply to the applicant's application I state that I am unable to meet my financial obligation of traveling to attend court in Kenya as the applicant has refused to make my payments towards my upkeep.....”

She stated that she was not gainfully employed. She lives in their matrimonial home in Geneva, and she thinks that the applicant wants her to travel to Kenya, and therefore leave the house, so that he can have the house, something he has always wanted.

5. I agree with counsel for the respondent, and this is what was observed in **Patrick Kenneth Muthuri & 2 Others –v- Richard Kirimi Nderitu [2015] eKLR**, that it is always expected that an advocate who has been asked to hold brief for another has full instructions. It is the responsibility of the principal advocate to fully brief the advocate he is sending to hold his brief. The presumption here is that Mr. Etole had full instructions in the matter, and had authority to enter into the consent now subject of this application.

6. In **Brooke Bond Liebig Ltd –v- Mallya [1975] EA 266**, it was held that

“A court cannot interfere with a consent judgment except in such circumstances as would afford ground for varying a contract between the parties.”

The consent entered into by the advocates on 8th May 2019 had a contractual obligation. It cannot be varied or discharged unless obtained by fraud or collusion, or by an agreement contrary to the policy of the court, if the consent was given without material facts or in misapprehension or in ignorance of the material facts, or in general for a reason which would enable the court to set aside an agreement (**East African Portland Cement Limited –v- Superior Homes Limited [2017] eKLR**). It is notable that Mr. Etole was not made to swear an affidavit to say that he had no instructions to consent to the matter being heard on affidavit evidence and written submissions, or that he misunderstood or misapprehended the instructions that he had got from M/s Githogori (**Re Estate of Noah Muturi Kinuthia (Deceased) 2019 eKLR**).

7. It is also true that a suit can be heard through oral evidence and cross examination, but can also be heard through affidavit evidence and written submissions (**Paul Njeru Mwathe – v- Vidya Thira Mwathe & 3 Others [2018] eKLR**). However, it is upon the parties to agree on how to conduct their case. What is important is for the court to ensure the fair hearing of the case under **Article 50(1)** of the Constitution. Under **Article 159** of the Constitution, parties have the responsibility of assisting the court in the just, proportionate and disposal of their case. This can be done through oral hearing, or through affidavit evidence. The question is whether, where a party requests to have an oral hearing so that he can have the opportunity to test the evidence of the other side through cross-examination, he can be denied that opportunity.

8. I know the circumstances that may lead to the review of an order or decree or judgment under **Order 45 rule 1(1)** of the **Civil Procedure**

Rules (Tokesi Mambili & Others –v- Simon Litsangu, Civil Appeal No. 90 of 2001), and I have outlined the circumstances under which a consent may be reviewed and/or set aside. One must, however, remember the command of the Constitution in **Article 159(2)(d)** that justice shall be administered without undue regard to procedural technicalities, and **section 1B(1)(a)** of the **Civil Procedure Act** that asks the court to ensure the just determination of proceedings.

9. I appreciate the peculiar circumstances of the respondent as outlined in the foregoing. I will exercise my discretion and review the consent order entered into on 8th May 2019, but on the following terms:-

- a. the dispute shall be heard through oral hearing and cross- examination;
- b. a date convenient to the respondent shall be taken;
- c. the applicant shall pay a return economy air ticket to enable the respondent to come for the hearing of the case;
- d. the applicant shall not evict the respondent from the matrimonial home in Geneva when she comes to Kenya to take the hearing of the case; and
- e. the applicant shall pay the costs of the application.

DATED and DELIVERED electronically, following consent of the parties, at NAIROBI this 8TH day of APRIL 2020.

A.O. MUCHELULE

JUDGE