



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

ORIGINATING SUMMONS NO. 9 OF 2018

FMS.....APPLICANT

VERSUS

MASRESPONDENT

RULING

1. By an application dated 24.4.19 (the Application), FMS, the Applicant seeks leave of the Court to adduce additional documentary evidence in support of her claim in her Originating Summons (OS) herein. The Applicant also seeks that her supplementary affidavit sworn on 24.4.19 which contains the additional evidence be admitted.
2. The background of this matter in brief is that the Applicant filed the OS dated 19.10.18 against MAS, the Respondent, seeking *inter alia* declarations that the properties listed therein are matrimonial property and that she is entitled to a 50% share of the same. When the matter came up for hearing on 31.1.19, the Applicant's counsel sought time to file a further affidavit in response to the Respondent's replying affidavit, which was granted. Directions were taken that the OS be heard by way of written submissions. The Applicant was to file the further affidavit and submissions by 14.2.19 while the Respondent was to file submissions by 28.2.19. Hearing was fixed for 25.4.19. On the hearing date however, counsel for the Applicant informed the Court that he had filed a supplementary affidavit by the Applicant and an application dated 24.4.19, seeking that the said affidavit be admitted. It is that application that is the subject of this ruling.
3. The grounds upon which the Application is premised are set out in the Application as well as in the Applicant's supporting affidavit sworn on even date. The Applicant alleges that the Respondent has raised issues in his submissions which are not contained in his replying affidavit. She further claims that some of the evidence in the supplementary affidavit had gone missing and was only traced after parties had filed their submissions. Similarly, she had not filed the cheque counterfoils as she had been chasing copies of the cheques from the bank which only informed her on 18.4.19 that the same were in the archives in Nairobi and cannot be traced. According to the Applicant, the additional evidence is crucial and will assist the Court arrive at a just and fair determination of the issues in the OS. She further stated that the Respondent will not suffer any prejudice and can be given a chance to respond to the same.
4. The Respondent opposed the Application by his replying affidavit sworn on 6.5.19. He denied that he raised any new issues in his submissions. To the Respondent, the Application goes against the principles of fair hearing and against orders 3, 7 and 11 of the Civil Procedure Rules which require parties to exchange evidence in advance. The Applicant had ample time to prepare for her case. According to the Respondent, the Applicant is using the Court to fill the gaps in her evidence. The Respondent contends that the Application is an afterthought and will occasion him great prejudice and injustice. The Application will also delay the matter. He urged the Court to dismiss the Application as the Applicant has not adduced sufficient reasons to warrant the exercise of the Court's discretion in her favour.
5. I have carefully considered the Application, the rival affidavits and the respective parties' counsel's oral submissions. It is the Applicant's contention that since the bank was unable to retrieve actual cheques, she opted to file cheque counterfoils. Further, the annexed school reports, diaries and pictures of food crops were triggered by statements in the Respondent's submissions which were not in his replying affidavit. It was further submitted that if the Application is allowed, the Respondent would be given time to respond to the affidavit thus curing any prejudice that may be suffered. On the other hand, if the Application is not allowed, the Applicant will suffer prejudice. Citing Article 159 of the constitution, and the Court's inherent jurisdiction, the Applicant urged the Court to allow the Application.
6. For the Respondent, it was argued that the additional evidence, the admission of which the Applicant seeks, was available all along. Cases proceed on timelines set by statute and the Court and the Applicant was given ample opportunity. On 31.1.19, the Applicant was granted leave to file a further affidavit which she did not file until 19.2.19. She did not bring the additional evidence. It was further contended that there is nothing in the affidavit to show that the Applicant sought any information from the bank. Having averred in her further affidavit that she was providing for the children, it was necessary for her to provide the evidence. The Court's discretion can only be exercised judiciously, by looking at parameters set out by statute and precedents. The Respondent argued that justice protects both parties. Arguing that pleadings

had closed and parties had filed submissions, the Respondent urged the Court to dismiss the Application.

7. The Application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act. Section 1A(1) of the Act sets out the overriding objective of the Act as follows:

The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

8. Section 1A(2) places an obligation upon the Court to give effect to the overriding effect of the Act in the exercise of its powers under the Act or in the interpretation of the provisions of the Act. Similarly, parties and their advocates have a duty to assist the Court to further the overriding objective. This is achieved by participating in the processes of the Court and by complying with the directions and orders of the Court.

9. The Civil Procedure Rules stipulate the period within which pleadings are to be filed at the completion of which pleadings are closed. Order 2, Rule 13 provides:

The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.

10. In the present case, the pleadings closed on 21.1.19 when the Respondent filed his replying affidavit in opposition to the OS. The matter was fixed for hearing on 31.1.19. On that date however, while the Respondent was ready to proceed, the Applicant was not and sought leave to file a further affidavit in response to the replying affidavit which was served upon her on 23.1.19. Parties agreed to dispose of the OS by way of written submissions. The Court granted the Applicant the leave sought and directed that the further affidavit and submissions be filed and served by 14.2.19. The Respondent was to serve his submissions by 28.2.19. Highlighting of submissions was fixed for 25.4.19. On that day however, counsel for the Applicant informed the Court that he had filed a supplementary affidavit sworn on 24.4.19 and the present application seeking to have the supplementary affidavit admitted.

11. The Court notes that both parties had filed their written submissions complete with authorities, as directed by the Court. What was remaining was the highlighting of the submissions and reserving a date for judgment, thus concluding the matter. However, on the date for highlighting of submissions, the matter did not proceed because the Applicant had filed the present Application.

12. The Applicant states that the additional evidence is cheque counterfoils which she filed after failing to secure the actual cheques from the Bank and the children's diaries, school reports and pictures. No evidence has been placed before me to show that this evidence was not in the possession of the Applicant. Further, from 22.10.18 when she filed the OS to 31.1.19, when directions were given, the Applicant ought to have approached the Bank which would have readily told her that old records were not available. In any event, nothing prevented her from filing the said cheque counterfoils with her further affidavit. Additionally, the children's school records and photographs were with her (she has not said she did not have them). She ought to have filed them at the time she filed the OS or with the further affidavit when she was granted leave to file the same.

13. In order to do justice between parties, this Court has been clothed with wide and unfettered discretion. Section 3A of the Act provides:

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.

14. The only limit to the powers and discretion of the Court is that the same must be exercised judicially, in order to avoid abuse of the Court process. I am of the view that to admit the Applicant's supplementary affidavit after having sight of the Respondent's submissions would greatly prejudice the Respondent. The Court must balance the interests of the parties herein.

15. The Applicant further submitted that her supplementary affidavit, the admission of which she seeks, responds to issues raised for the first time in the Respondent's submissions, which were not pleaded. It is trite law that Submissions are not pleadings and that new issues cannot be raised in submissions. In Republic vs. Chairman Public Procurement Administrative Review Board & another Ex parte Zapkass Consulting and Training Limited & another [2014] Korir, J. stated:

“The Applicant, the respondents and the interested party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.”

16. In light of the foregoing, the way to counter the alleged evidence introduced in submissions by the Respondent is not to seek to file additional evidence to rebut the same, but to ask the Court to disregard the same. This is what the Applicant ought to have done.

17. The filing of the Application has resulted in a delay of the matter herein. Indeed rather than spending judicial time in writing the judgment, the Court has spent precious time writing this ruling. This militates against the requirement in Section 1B for the Court to ensure the just determination of the proceedings herein, the efficient use of judicial resources, and the timely disposal of the proceedings herein, at a cost affordable by the parties. This application has only served to delay this matter which was more or less concluded, the parties having filed their written submissions.

18. In view of the foregoing, this Court is not persuaded to exercise its discretion in favour of the Applicant. To do so would be prejudicial to the Respondent, thwart the ends of justice and encourage and permit the abuse of the process of the Court. Accordingly, the Court finds that

the Application dated 24.4.19 lacks merit and the same is dismissed. Costs in the cause.

DATED, SIGNED and DELIVERED in MOMBASA this 5th day of May 2020

M. THANDE

JUDGE

In the presence of: -

.....for the Applicant

.....for the Respondent

.....Court Assistant