



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CONSTITUTIONAL PETITION NO. 154 of 2018

**IN THE MATTER OF: THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS
AND FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES 2013**

**IN THE MATTER OF: CONTRAVENTION OF RIGHTS AND FUNDAMENTAL
FREEDOMS UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA**

CHARLES MICHAEL ANGUS WALKER-MUNRO.....PETITIONER

VERSUS

1. PAMELA ANN WALKER-MUNRO

2. JACKLINE CHEPKWONY practicing as

CHEPKWONY & ASSOCIATES

3. J. N. WANDIA

4. THE NATIONAL POLICE SERVICE.....RESPONDENTS

RULING

1. The Petitioner Charles Michael Angus Walker-Munro filed a Petition dated 3.5.18 seeking a raft of orders against the Respondents, Pamela Ann Walker-Munro, Jackline Chepkwony, **J. N. Wandia and The National Police Service**. The Petition is brought under Articles 22 of the Constitution of Kenya and Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

2. By a Notice of Motion dated 1.12.18 the Petitioner seeks the leave of this Court to file a 2nd further affidavit and that the 2nd further affidavit be deemed to have been properly filed and served.

3. The grounds of the Application are contained therein and in the affidavit of the Petitioner sworn on 3.12.18. It is averred that new, important and very material evidence has come to light on 22.10.18. The said evidence is a replying affidavit filed in MCDC/89/2018 between Jackline Chepkurui Chepkwony and Erastus Gicharu Kimani sworn on 19.9.18 which according to the Petitioner will assist the Court to do justice to the parties. The new evidence relates directly to the administration of justice and explains the conduct of the 2nd and 3rd Respondents. It is averred in the said affidavit that the 3rd Respondent is a close friend of the 2nd Respondent and whenever she visits the 2nd Respondent, they both sleep in the same house, same bedroom and same bed.

4. The Petitioner further avers that the 3rd Respondent is the judicial officer who dealt with the Notice to Show Cause against the Petitioner in Divorce Cause No. 1 of 2010 in which the 2nd Respondent acted for the 1st Respondent. The 3rd Respondent delivered rulings in the absence of parties but the 2nd Respondent would know about them and act upon them. It is alleged that due to their closeness, the 3rd Respondent favoured the 1st and 2nd Respondents and was biased against the Petitioner. The Petitioner further states that the 3rd Respondent of ordering on 14.2.18 that he should be imprisoned for failure to pay to the 1st Respondent the sum of GBP 10,800 yet he had in fact paid the whole Amount in full. On the same date, the 3rd Respondent signed committal warrants against the Petitioner for failure to pay GBP 72,200. The Petitioner further alleges that the 3rd Respondent imposed herself on the dispute to assist and favour the 2nd Respondent.

5. The Petitioner further alleges that the 3rd Respondent had a personal issue in the matter and this clouded her judgment. On 14.12.18 she set aside her orders of 13.12.18 on the false basis that she had not heard the Petitioner's application dated 11.12.18. The Petitioner speculates that the 3rd Respondent must privately discussed his affairs with the 2nd Respondent resulting in her ruling that the Petitioner had means to pay without any evidence. He prayed that his 2nd further affidavit be deemed to have been properly filed as information relating to the 2nd and 3rd Respondents' intimate relationship was not within his knowledge when he filed the Petition.

6. Citing Articles 22(3)(b), 25(c) (159(2)(d) and 259 of the Constitution the Petitioner averred that this Court has unfettered discretion to allow the filing of additional evidence to achieve the ends of justice. The 2nd and 3rd Respondents will suffer no prejudice as they will have an opportunity to be heard and at the risk of perjury swear affidavits denying the new evidence.

7. The 2nd Respondent in her Replying Affidavit sworn on 10.12.18 opposes the Application. She avers that the Application and affidavit consist of falsehoods and misrepresentations calculated to mislead this Court into further delaying the matter herein and scuttling the issues for trial. The 2nd Respondent contends that the Petitioner failed to comply with the directions of the Court of 12.11.18 to file submissions by 19.11.18. At the time of filing this Application, failed to explain to the Court the reason for failure to comply with the said directions, a clear indication that the Petitioner is on a fishing expedition. The filing of this Application a day before the date fixed for highlighting submissions was intended to avert parties from proceedings as scheduled.

8. The 2nd Respondent claims that the additional evidence is not new as was indicated in ground 1 of the Application, the same came to the Petitioner's knowledge on 22.10.18. The Petitioner therefore had time and opportunity to seek leave to file further pleadings on 12.11.18 when the matter came up for directions. The Petitioner's advocate is not on record in her matrimonial case and is prying on her marital issues which have no bearing on the issues before this Court. The 2nd Respondent alleges that the acquisition of the affidavit in MCDC/89/2018 clearly shows a collusion between the Petitioner, his authorized agents and third parties to malign and defame her as an officer of the Court. The matrimonial cause is still pending and the Petitioner should not be allowed to use the 2nd Respondent's family issues to settle scores with her. The Petitioner cannot use the 2nd Respondent's evidence against her unless in criminal proceedings where both are parties.

9. As regards the payments that were due from the Petitioner to the 1st Respondent, the 2nd Respondent averred that the Petitioner had only made partial payment. On the allegation that she was the only one who knew of the rulings on the subject matters, the 2nd Respondent avers that notices were duly served upon the Petitioner's advocates as required by law. The 2nd Respondent denies being close to the 3rd Respondent. They met by virtue of their children attending the same school and this happened in November 2018 long after the execution proceedings were concluded. She further states that the 3rd Respondent was carrying out her duties and lacked ulterior motives. The issue of jurisdiction was never raised and raising it now is too late and an abuse of the Court process. In sum, the 2nd Respondent contends that the Petitioner has not come to Court with clean hands as the evidence he seeks to have admitted has been within his knowledge prior to the close of pleadings and directions which he failed to comply with. He is therefore not deserving of equitable remedies from the Court.

10. The Petitioner and the 2nd Respondent filed written submissions which I have duly considered.

11. The only issue for determination is whether leave should be granted to the Petitioner to file a 2nd further affidavit and that the said further affidavit be deemed to have been properly filed and served. The main objective of the said 2nd further affidavit is to introduce the further replying affidavit sworn on 19.11.18 by Erastus Gicharu Kimani in Judicial Separation Cause No. 89 of 2018 between him and the 2nd Respondent. The introduction of the said further replying affidavit is intended to show that there is an intimate relationship between the 2nd and 3rd Respondents which in the Petitioner's views clarifies a lot of things that went wrong in the post judgment applications in Malindi High Court Divorce Cause No. 1 of 20101.

12. The grant of the prayers sought by the Petitioner is discretionary. In order to determine whether the Petitioner is deserving of the orders sought, it is necessary to review the history of this matter. The Petition was filed on 4.5.18. Directions were taken on 21.5.18. The 1st 3rd and 4th Respondents were to file their responses within 7 days. Thereafter the Petitioner was to file submissions within 10 days of receipt of the last of the responses. The Respondents were to serve file their submissions within 10 days of service of the Petitioner's submissions upon them. Mention for compliance was fixed for 12.7.18. On that date however, the Petitioner had not filed submissions but sought leave to file a supplementary affidavit in response to the Respondents' submissions. Leave was granted to the Petitioner to file the supplementary affidavit within 10 days with corresponding leave to the Respondents. On 19.9.18 when the matter was mentioned, the Petitioner's advocate informed the Court that he had filed the supplementary affidavit on 13.3.18. This, the Court notes was about 23 days late. Counsel then told the Court that he was working on submissions and sought 14 days to complete. The Respondents sought 30 days. The Court gave further directions that the Petitioner file submissions by 3.10.18 while the Respondents were to serve their respective submissions by 5.11.18. Mention to confirm was fixed for 12.11.18.

13. On 12.11.18 the Petitioner's advocate did not attend Court though the date had been taken in Court and submissions were still not filed by either party. The Court yet again extended the period for filing of the Petitioner's submissions by a further 7 days till 19.11.18. The Court did direct that submissions filed after that date would not be admitted. The Respondents were directed to file their submissions by 3.12.18 whether or not the Petitioner will have filed his submissions. The matter was to be mentioned on 10.12.18 to confirm and to fix a date for ruling.

14. On 6.12.18, the Petitioner filed the present Application under certificate of urgency. The Court directed that the same be served upon the Respondents for hearing on 10.12.18. On this date, when the matter was called out, the Petitioner's advocate was not present. The Respondents informed the Court that they had not been served with the Petitioner's submissions. They had all filed their submissions and prayed for a judgment date. At that point the Petitioner's advocate walked in and asked that the application be heard at 10 am. Although parties were ready to proceed with the Application, the Court was unable to hear them as it was involved in a 3 judge bench matter. Hearing of the Application was fixed for 28.1.19. Parties were to serve their respective submissions before then.

15. On 28.1.19, the Petitioner's advocates informed the Court that they filed their submissions for the Petition late. The reason given by Counsel for the Petitioner is that "*We had a matter in Nairobi which has gone up to the Court of Appeal. We only filed and served submissions yesterday.*" The Respondents reminded the Court of its orders that any submissions filed out of time be expunged. The Court noted that the Petitioner failed to comply with the directions of the Court in spite of time being extended to the Petitioner. The Court further observed that orders are not made in vain but to be complied with. The Court further stated that it cannot exercise its discretion in favour of a party who repeatedly fails to comply with its orders. The Court then proceeded to expunge from the record the Petitioner's submissions which had been filed that morning.

16. The Petition herein has been filed under the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (the Rules). Rule 3(2) provides:

The overriding objective of these rules is to facilitate access to justice for all persons as required under Article 48 of the Constitution.

17. Access to justice is a fundamental right available to both the Petitioner and the Respondents in these proceedings which have been filed under the Rules. Further Rule 3(6)(b) places an obligation upon all parties in proceedings or their advocates to assist the Court to further the overriding objective of the Rules as follows:

A party to proceedings commenced under these Rules, or an advocate for such party is under a duty to assist the Court to further the overriding objective of these rules and in that regard to—

(a) participate in the processes of the Court; and

(b) comply with the directions and orders of the Court.

18. The parties herein are under a duty to assist the Court to further the overriding objective of the Rules which is to facilitate access to justice for all parties. In particular, the parties are required to comply with the directions and orders of the Court. Court orders and directions are not made in vain but to be complied with. As outlined in the foregoing paragraphs, the Petitioner repeatedly failed to comply with the directions of the Court at least 3 times. The orders sought in the Application are discretionary. Where an applicant seeks to have the discretion of the Court exercised in his favour, he must demonstrate that he is deserving of the exercise of the discretion of the Court in his favour. The Petitioner has by his conduct exhibited a brazen disregard for the directions of the Court and in effect has made a mockery of the directions of the Court. A party cannot repeatedly disobey express orders of the Court and then expect the same Court to exercise its discretion in his favour. The Court must not and should never exercise its discretion in favour of an applicant under such circumstances.

19. Article 48 guarantees access to justice to all. While accessing justice, every person is entitled to a fair hearing. Article 50 provides:

(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

In the instant case, the Respondents did file their submissions within the timelines set by the Court. They too are entitled to access to justice and a fair hearing. In Republic v Public Procurement Administrative Review Board & another; Mer Security & Communications System Ltd/Megason Electronics & Control 1978 (JV) & another (Interested Parties): Exparte Magal Security Systems Ltd/Firefox Kenya Limited (JV) [2019] eKLR, Mativo, J had this to say about a disobedient party:

Additionally, the ex parte applicant disobeyed an express court order. Article 48 of the Constitution cannot be used as a shield where a party flouts a court order. Above all, Access to Justice cuts both sides. The Respondents and the Interested Parties are equally entitled to access justice.

20. And in Stephen Kipkemoi Ngenoh t/a Listerc System Company Ltd v Ecobank (K) Limited & another [2018] eKLR. Odunga, J cited O'kubasu, Mbito & Mwera, JJ in Mwakalu vs. Timamy & Another Nairobi HCEP No. 18 of 1993 [2008] 1 KLR 464, where the learned judges observed:

We were requested to exercise our discretion and enlarge time within which the plaintiff could file and serve the particulars... We cannot enlarge time in such a case such as this. We are not satisfied that time should be enlarged for a party who had all the time allowed to him to do what was ordered and he did not comply.

21. The conduct of a party who appeals to the discretion of the Court is critical in making a determination as to whether discretion will be exercised in his favour. The conduct of the Petitioner in this matter falls below the expectation of a party under a duty to assist the Court as placed upon him by Rule 3(6)(b) and thereby shuts him out from the indulgence of the Court.

22. The Court notes that the 1st and 2nd Respondents filed their written submissions on 23.11.18 while the 3rd and 4th Respondents filed their written submissions on 28.11.18. The filing of the Petitioner's Application on 1.12.18 is in my view an afterthought. To allow the additional evidence after having the benefit of seeing the Respondents written submissions is in my view prejudicial to the Respondents. To my mind, the filing of the Application after submissions have been filed will give the Petitioner a surreptitious advantage over the Respondents. This will negate the constitutional principle of fairness.

23. In view of the foregoing I do find that the Petitioner is not deserving of the orders sought. The Application dated 1.12.18 is therefore dismissed with costs to the 2nd Respondent.

DATED, SIGNED and DELIVERED in MOMBASA this 8th day of March 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner

.....for the 1st Respondent

.....for the 2nd Respondent

.....for the 3rd & 4th Respondents

.....Court Assistant