



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 42 OF 2018

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTIES

ACT 2013 AND DIVISION OF MATRIMONIAL PROPERTIES

PNM.....APPLICANT

VERSUS

HMW.....RESPONDENT

RULING

BACKGROUND

This Court sitting as Family Court then on 27th September 2018 was brought by Deputy Registrar Family Division the instant Court file as the matter as per Court orders of 18th July 2018 when the matter was heard *interpartes*, the date of 27th September 2018 was issued by the Court.

On the said day the matter was not listed but the Applicant appeared in Court and sought the Court file that was retrieved and availed to the Court by the Deputy Registrar later the same day. The Applicant and Counsel appeared before this Court in Chambers.

Upon hearing the party the Court granted further orders of 27th September, 2018.

On 25th October 2018, the Respondent filed certificate of urgency application and sought that;

1. Spent

2. That there be interim stay of execution of orders issued on 27th September 2018 pending hearing and determination of the application *interpartes*;

3. That the orders made by this Court of 27th September 2018 be set aside and the Respondent be granted unconditional leave to defend the application of 16th July 2018

4. That the Court enlarges time for the Respondent to File Replying affidavit to the Application of 6th July 2018 and Replying affidavit to the Originating Summons.

The grounds for the application are that;

1. The Respondent stands to suffer great prejudice due to the orders of 27th September 2018 requiring that the Applicant and Defendant/Respondent manage and share equally rent proceeds from Roysambu Lumumba Drive Residential **Plot BHC – [particulars withheld]**). This placed the Applicant in great financial difficulty as the half amount is not enough to service the loan, manage rental property, pay utilities and rates and rents thereof, run a fledging commercial farming business and live a decent life.

2. The Respondent stands to suffer great injustice as the Applicant obtained orders of 27th September 2018 by deceit that she was left destitute since December 2015 by concealing that the Applicant receives from **57 Mpesa** outlets which average **Ksh 700,000/-**

3. The Respondent stated the Applicant deceived the Court that the Respondent frustrated the execution of a lawful Court order by withdrawing funds from the 2 family Accounts.
4. The Respondent stated the Applicant blatantly undermined and sabotaged his relationship with their sons and further the Applicant dragged them into this dispute by causing their sons to swear affidavits containing untruths in matters they lack sufficient information about.
5. The Respondent's advocate failed to attend Court because the matter was not listed and were not aware that the Applicant's advocate would place the Court file before the judge in their absence.
6. The Respondent is not to blame for not filing replies to the Originating Summons and application of 6th July 2018.

The Respondent/Applicant filed Replying Affidavit on 1st November 2018 and deposed as follows;

1. The Court order of 27th September 2018 was served to the Respondent, Caretaker and agent and to all 19 tenants in the presence of the Applicant and her advocate.
2. The Respondent and Caretaker tore the Court order and the Respondent threatened all tenants with eviction and dire consequences if they complied with the Court order.
3. The Applicant lodged Complaint at Kasarani Police Station under **OB/67/04/10/18** the Police Ob extract and copy of Torn Court order annexed to the Affidavit.
4. On 22nd October 2018 the Court order of 27th September 2018 was served to/on the Respondent by OCS Kasarani Police Station Mr. Muchemi with a Penal Notice and the Caretaker and Agent.
5. On 24th October 2018 by consent signed by the Applicant's advocate and the Respondent's agent the Applicant took possession of **19 flats in Wing B Lumumba B** with effect from 1st November 2018 and the 19 tenants signed new tenancy agreements with effect from 1st November 2018.
6. Therefore Court order of 27th September 2018 is overtaken by events. The Court order was executed, enforced and spent.
7. The prayers sought in the present/instant application cannot be granted, as the orders sought to be stayed are spent.
8. The hearing date of 27th September 2018 was given/obtained by consent. The matter was considered urgent due to the paramount interests of the children of their marriage though the parties are now divorced.
9. That on 27th September 2018, the matter was not listed and the Court file was not in Court but the Applicant and her advocate retrieved the same from the Registry through Deputy Registrar Family Division.
10. During hearing of the matter, the Applicant who was granted leave to file Replying Affidavit for the Originating Summons and Application had not filed any pleadings after 2 ½ months.
11. The Application filed on 6th July 2018 was found to be unopposed and uncontested and the orders were granted.
12. From December 2015 to date 2½ years the Applicant operated all family accounts and monopolized the family properties to the detriment of the Respondent and their Children.
13. In Criminal Case **3652/15 R vs HMW** in Makadara CM's Court; the Applicant was ordered to draw 2 bankers cheques to pay school fees arrears of **Ksh 306,770/-** to Catholic University of East Africa for their son CRW and **Ksh 447,300/-** to International School for their son GRM.
14. The Applicant and Respondent's marriage was dissolved on 8th July 2017 vide Decree Absolute in **Milimani CMCC divorce Cause No 30 of 2016 PNM vs HMW.**
15. The Applicant has come to Court with unclean hands as he undermined the Court order of 19th July 2018 and the present application is in bad faith and abuse of the Court process.

The Applicant Further Affidavit on 4th December 2018. He deposed;

1. that the Replying Affidavit should be expunged from the Court file because, their sons are not parties to the suit and their affidavits are incompetent before the Court.
2. The Court has jurisdiction to grant stay of execution and/or set aside any order if the Court considers it just to do so. The Court orders of 27th September 2018 are not spent as they were granted to the continuing process of collecting monthly rent.

3. The matter in this Court relates solely to division of matrimonial property and the question of paramount interests of the children is best -handled by the Children’s Court where the law allows for extension of parental responsibility for dependency of adult children. The question of upkeep of their children is not the subject of this suit but he alluded to it purely to demonstrate how the Applicant deceived the Court.

4. The Applicant contended that he did not siphon the Applicant’s share of rental proceeds and joint family accounts or monopolized the family properties.

DETERMINATION

ISSUE

The issue for determination is whether this Court will grant the application of 25th October 2018. The Applicant sought to stay execution of orders of 27th September 2018, set aside the said orders. The Applicant also sought leave to file Replying Affidavit to the Application of 6th July, 2018 and the same to be heard *inter partes*. The Applicant sought to file Replying Affidavit to the Originating Summons of 6th July 2018.

Order 42 Rule 6 (1) CPR 2010 provides;

“No order for stay of execution shall be made under Subrule (1) unless;

a. The Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

b. Such security as the Court orders for due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

The Court of Appeal in **Butt vs Rent Restriction Tribunal [1982] KLR 417** stated as follows;

“The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent [an appeal].”

On 19th July 2018 Mr. Gitau for the Applicant informed the Court that they tried to serve the Respondent who resides in Kirinyaga declined service of Court documents. The Applicant who lives with their children was financially constrained as all the properties listed in the Originating Summons were/are in the custody and control of the Respondent.

The Court granted the Respondent time to file Replying Affidavit to the application and to the Originating Summons. The Court granted the Applicant corresponding leave to file Further Affidavit to the Replying Affidavit.

The Court granted Prayer (c) of the application; the funds held in DTB Nation Centre Branch Account **Number [particulars withheld] & [particulars withheld]** in the name of Network Supplies Company Limited be shared equally between the Applicant and Respondent pending hearing and determination of the Application and Originating Summons.

The above outline confirms that whereas the Applicant filed the instant application without unreasonable delay; the Applicant was/is of the matrimonial properties listed in the Originating Summons and funds in the Accounts and therefore the Applicant is not suffering or undergoing substantial loss.

Secondly, the Originating summons is on division of matrimonial property between him and the Respondent following dissolution of marriage and hence it is highly likely that the matrimonial properties may be divided hence reducing ownership possession use of some of the properties as required by law. This eventuality cannot be considered substantial loss.

Thirdly, the impugned Court orders of were granted following non -compliance of Court orders of 19th July 2018 for the Applicant to file Replying Affidavits and attend Court on 27th September 2018 which he failed to comply with. Hence the application was considered unopposed in the absence of any pleadings filed the Applicant. For these reasons the Application for stay of execution is not granted as prayed for.

The Applicant sought that the Court orders be set aside because the application was heard and determined *ex parte*. The Applicant stated that the case was not listed in the Cause List on 27th September 2018 and he did not realise the Applicant and her advocate would have the Court file retrieved and placed before Court.

The Respondent through her advocate told the Court that on 25th September 2018, he was served with Notice of Change of Advocates for the Applicant. This clearly showed that the Respondent/Applicant and his advocate then did not want to appear in Court on 27th September 2018 to take responsibility for non compliance of Court orders granted by consent on 19th July 2018.

The Respondent’s Counsel stated that suspiciously, the Court File was not in the Cause List on 27th September 2018; when the matter was scheduled to proceed, on the date taken *inter partes*

So that they would not give the Court an update of what happened. Luckily the Deputy Registrar Family Division retrieved the Court file and placed the same before the Court. The application was uncontested as no Replying Affidavit was filed as ordered on 19th July 2018.

From the facts above, clearly, the Applicant was all along aware of the next hearing date as he was represented by his advocate. Infact 2 days before the scheduled date he changed advocates; the Notice of Change must have been filed in Court. For the matter not to be listed on the scheduled date and the Applicant and/or his advocate who knew the scheduled date not to attend Court at least to enquire what happened is glaringly suspicious. The non-compliance of Court orders of 19th July 2018 and non-attendance of Court on the scheduled date 27th September 2018 do not constitute proper conduct or sufficient grounds to warrant setting aside Court orders of 27th September 2018.

In *Econet Wireless Kenya Limited vs Minister for Information & Communication of Kenya & Anor [2005] eKLR* the Court referred to on compliance of Court orders;

Gulabch and Popatlal Shah vs Anor Civil Application no 39 of 1990 (unreported)

“It is essential for maintenance of the Rule of law and good order that the authority and dignity of Courts are upheld at all times. This Court will not condone deliberate disobedience of its orders and will not shy away from its responsibility to deal firmly with proved contemnors...”

In *Hadkinson vs Hadkinson (1952) 2 All ER 567* it was held;

“It is plain and unqualified obligation of every person against or in respect of; who an order is made by a court of competent jurisdiction to obey it unless and until the order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void.”

The Applicant failed to comply with Court orders of 19th July 2018 and on 27th September 2018 the Respondent explained in great detail the dire circumstances she was in with their children whom she has custody of. The Applicant explained that all matrimonial properties and funds were in control of the Applicant.

The Respondent was almost destitute as the small business/canteen/hotel she operated was demolished by County Authorities. The children had dropped out of school due to school fees arrears. Against these facts, the Applicant despite Court orders to file Replying Affidavits declined and the Application was unopposed and hence granted.

The other issue raised is that this Court lacks jurisdiction to adjudicate children matters under **the Children Act**. The Children Court has original jurisdiction on Children matters. However, the issues regarding the children of the parties was raised and brought to the attention of the Court to explain how dire the financial situation of the Respondent is ; due to lack of funds and with added responsibility of fending for their children yet there are family properties and funds solely controlled by the Applicant. These circumstances exacerbated the grant of interim orders pending the hearing and determination of the Originating Summons on division of matrimonial properties.

The Applicant did not deny marriage, divorce and paternity of their children and hence both Applicant and Respondent have/retain parental responsibility over their children.

Section 4(3) of Children Act 2001 reads;

“All judicial and administrative institutions and all persons acting in the name of these institutions....shall treat the interests of the child as first and paramount consideration...safeguard and promote the rights and welfare of the child....

The Court did not hear and determine any question regarding custody and maintenance of the children but took the fact that the parties have children and therefore continue to have and exercise parental responsibility. Whilst we await the hearing and determination of division of matrimonial properties which process shall take into account their children’s residence upkeep and support; granting collection of rent to be shared equally between both parties then the Respondent could urgently attend to their children’s needs promptly.

DISPOSITION

- 1. The Court orders of 27th September 2018 were implemented and enforced and are thus spent as they are overtaken by events.**
- 2. For the above reasons, the application filed on 25th October 2018 for stay of execution and/or setting aside of Court orders of 27th September 2018 lacks merit and is dismissed with costs.**
- 3. The Applicant is granted leave to file Replying Affidavit to the Originating Summons of 6th July 2018.**
- 4. The Respondent has corresponding leave to file Further Affidavit if the Respondent so wishes.**
- 5. The Originating Summons shall be heard and determined in any Court within Family Division.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND JULY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

MRS KURIA FOR APPLICANT

MR GITAU FOR RESPONDENT

COURT ASSISTANT – ISAIAH OTIENO