



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**MISC. CAUSE NO. 44 OF 2010**

**JGM.....APPLICANT**

**VERSUS**

**GWG.....RESPONDENT**

**RULING**

1. This matter has a long history. The applicant JGM and the respondent GWG got married on 3<sup>rd</sup> October 1981 at the P.C.E.A. [Particulars withheld] Church in Kiambu. They got 5 children who are now adults. In the Chief Magistrate's Court at Milimani in **Judicial Separation Cause No. 17 of 2008**, the respondent sued the applicant seeking judicial separation, custody of the children, maintenance for her and the children, and so on. The applicant responded by denying the allegation contained in the cause, and cross-petitioned for the dissolution of the marriage and sought the custody of the children. It is not clear whether the main dispute – whether to separate or to divorce – has been heard and determined by the subordinate court.

2. There were interim orders of support and maintenance that were made by the subordinate court in favour of the respondent and against the applicant. The execution of the orders aggrieved the applicant who filed an appeal in the **High Court Appeal No. 9 of 2009**. He had been threatened with arrest in execution of the orders. It is apparent that the appeal was not heard and determined.

3. Somewhere along the line, the applicant, claiming that the orders made for him to make payments to the respondent had violated his constitutional rights under **sections 70(c), 75(1) and 76(1)** of the old Constitution, filed a petition at the Constitution and Human Rights Division of the High Court on 23<sup>rd</sup> April 2010. The court transferred the matter to the Family Division which became **H.C. Mis. Application No. 44 of 2010**.

4. The matter went silent. On 13<sup>th</sup> June 2012 the Deputy Registrar noted the silence, and asked that a notice issue to the parties to show cause why the same should not be dismissed. A notice was issued to the parties in 2017. The notice to the applicant's advocates M/s S.W. Ndegwa & Co. Advocates was received on 21<sup>st</sup> August 2017 giving them warning that the matter would be closed within one month if no action was taken to prosecute the case. On 12<sup>th</sup> October 2017, no step having been taken by either side, the file was placed before Justice M. Muigai. Mrs. Wambugu for the respondent was present. She was apparently not opposed to the closure as she informed the court that she would be filing a bill of costs. The order that was made read as follows:-

**“Notice having been issued to the parties herein under section 73 of the Law of Succession Act and in the absence of any steps taken by the parties to further prosecute this matter, the grant issued herein on the .....is hereby revoked under section 76(a)(i) of the said Act and the matter is marked as closed.”**

5. Subsequent to this, the respondent filed a party to party costs dated 30<sup>th</sup> October 2018 seeking Kshs.1,272,918/04 from the applicant.

6. The applicant is now represented by M/s Ndegwa & Co. Advocates. On 17<sup>th</sup> January 2019 he filed the present notice of motion seeking the stay of execution and/or taxation of the bill of costs, and that the court does set aside the order dated 12<sup>th</sup> October 2017 that closed the file and reinstates the petition for hearing on merits. One reason for the application was that the order closing the file did not condemn him, or any party, to pay costs, and therefore there was no basis for the filing of the bill of costs against him. Secondly, that although his then advocates were served with the notice to take action in the matter, they took no action, did not attend court on 12<sup>th</sup> October 2017, and did not inform him. It was only when the bill of costs was served on his present advocates that that file was perused to find that the file had been closed owing to non-attendance. Thirdly, the notice issued and the closure of the file were done under the **Law of Succession Act**, and yet this has never been a succession cause. It is a constitutional petition.

7. The respondent filed a notice of preliminary objection dated 27<sup>th</sup> May 2019 in answer to the motion. Her objection was based on the ground that the application was bad in law, frivolous and an abuse of the process of the court and should be struck out with costs. There was also a replying affidavit sworn by the respondent saying that the applicant had totally failed to comply with the orders issued on 26<sup>th</sup> March 2008 by the subordinate court, and had instead engaged in various suits and applications to frustrate the order. She stated that, as a result, she is owed over Kshs.10 million in maintenance. She referred to the ruling by Justice Kimaru on 24<sup>th</sup> November 2011 on the application that had been made by the applicant to restrain the court from executing the maintenance order of the subordinate court, which application was dismissed with costs and in which the judge observed that the applicant was, by filing the application and others, seeking to avoid his legal responsibility of maintaining the respondent and their children. The respondent stated that the applicant had been indolent, and not interested in presenting the petition. She contended that the petition had no merits. This was in answer to the allegation by the applicant in the motion that the petition raised fundamental constitutional issues on which he should be heard.

8. I wish to point out that each party has avoided to deal with the dispute between them – whether they want to continue to live together as married, or not. The rest of the issues, including the determination of their rights to matrimonial property (an issue that was the subject in **Civil Application No. 254 of 2017** between them), are beside the point.

9. It is clear that the notice that was issued to the parties was under the **Law of Succession Act**. The closure of the file was also done under the **Law of Succession Act**. This was not a succession cause. It was a petition in a family dispute. A judicial separation matter. Both the Deputy Registrar and the court fell into error. An error on the face of the record that **Order 45 rule 1** of the **Civil Procedure Rules** contemplates. I consequently review and set aside the notice that was served on the applicant's advocates on 21<sup>st</sup> August 2017, and also review and set aside the order of closure by the court made on 21<sup>st</sup> October 2017.

10. The bill of taxation was premised on the closure of the file. If the bill has been taxed, the same is reviewed and set aside.

11. I direct that the petition be heard on **9<sup>th</sup> December 2019**, and each side has 30 days from today to file and serve written submissions on the same.

12. I make no order as to costs.

**DATED AND SIGNED AT NAIROBI THIS 14TH OCTOBER 2019.**

**A.O. MUCHELULE**

**JUDGE**

**DATED AND DELIVERED AT NAIROBI THIS 15TH OCTOBER 2019.**

**ALI-ARONI**

**JUDGE**