



**REPUBLIC OF KENYA**

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

**CIVIL SUIT NO 4 OF 2016 (O.S)**

**IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY**

**AND**

**IN THE MATTER OF SECTION 3(2) OF THE MARRIAGE ACT, 2014**

**AND**

**IN THE MATTER OF SECTION 6 & 7 OF THE MATRIMONIAL PROPERTY ACT NO.49 OF 2013**

**AND**

**IN THE MATTER OF ARTICLES 45(3) AND 68(C) (iii) OF THE CONSTITUTION OF KENYA (2010)**

**BETWEEN**

**J W.....PLAINTIFF/RESPONDENT**

**AND**

**C W M.....DEFENDANT/APPLICANT**

**RULING**

The Applicant/Objector filed an application under Certificate of Urgency through Notice of Motion pursuant to **Section 6 & 7 of the Matrimonial Property Act, 2013** and **Section 3(2) of the Marriage Act, 2014** on 21<sup>st</sup> July 2017 before this court, seeking the following specific orders;

- a. That this Honourable Court be pleased to certify the application herein as urgent and hence do dispense with the service thereof in the first instance.
- b. That this Honourable Court be pleased to issue an order of temporary stay of execution of the Order issued on 10<sup>th</sup> July 2017 until interpartes hearing of this application and/or until further orders of this Honourable Court
- c. That to set aside the Order issued on 10<sup>th</sup> July 2017 and all other consequential orders thereto and the suit be allowed to proceed on merits.

**d. That the costs of the application to be provided for**

The grounds for the application are stated in the supporting affidavit sworn by the Applicant on 21<sup>st</sup> July 2017. The Applicant's objection to the suit as well as the orders issued by the court is premised on the grounds that the matter was heard ex parte without the Applicant's knowledge and that he was available and willing to defend the matter in court. The Applicant further alleged that he was a victim of a myriad of orders and decrees imposed on him by the Plaintiff/Respondent's counsel without being given an opportunity to be heard in court. He contends that he has been prejudiced by the actions of the Respondent alongside her counsel.

The Parties were married in 1991 under Kikuyu Customary Law and were blessed with 4 issues from the marriage. The Respondent herein shortly after the marriage deserted the family and occasionally reappeared after a couple of years. In 2014, she reappeared after being away for two years, packed all her belongings and left together with the children without the Applicant's knowledge. She then filed for maintenance proceedings at the Thika Law Courts in Civil Case No31 of 2015.

The Respondent later alleged that during the subsistence of their marriage, they jointly acquired the suit property herein being land parcel No.LOC.16/GATURA/1249 as matrimonial property. On 5<sup>th</sup> May 2017, the matter proceeded ex-parte and the Court issued the following orders:

**a. The Respondent and/or his agents and servants is hereby restrained by way of temporary injunction pending the interpartes hearing and determination of the main suit from evicting or interfering with the Applicant's quiet enjoyment and occupation of the suit which is registered jointly under the names of both parties.**

**b. None of the parties are to sell, alienate, subdivide, dispose, lease, transfer, charge , or in any other way interfere with the suit property LOC16/GATURA/1249 pending the hearing and determination of the main suit.**

**c. The Respondent evicted the Applicant from their matrimonial home on the suit property Land Parcel LOC16/GATURA/1249 contrary to Section 12 of the Matrimonial Property Act. The Applicant and children of the marriage shall be reinstated in the matrimonial home forth and the third party evicted from the matrimonial home.**

**d. The order shall be enforced by OCS Kirwara Police Station**

**e. Costs of this Application shall be in the main Cause.**

Shortly after the ruling, the Respondent applied for a notice to show cause why the Applicant should not be arrested for the disobedience of the orders issued by the court. Being dissatisfied with the above holding and the subsequent notice to show cause of orders, the applicant filed a notice of motion challenging the Honourable Court's orders issued on 10<sup>th</sup> of July 2017 on the grounds that he was not given an opportunity to defend himself before the Court.

**HEARING**

The Applicant testified to Court that they got married in 1980 under Kikuyu Customary Law. He took dowry and her mother refused him as a son-in-law and she said her daughter was like a son and she took care of the family. The applicant lived with her parents. In 2003, she came and told him that they were to divide property and again in 2005 she came and fought the applicant's other wife J W who they have 4 children with. J filed Thika Civil Case No. 440 of 2005 and sought court orders to prevent the Applicant from evicting her from the matrimonial home. J approached FIDA Kenya and further blackmailed him. There have been Court proceedings in Thika Children's Court that have been reviewed to give the Respondent/Applicant a chance to be heard.

**DETERMINATION**

The Civil Procedure Rules under Order 10 Rule 11 provides that:

***‘Where judgment has been entered under this Order the Court may set aside or vary such judgment and any consequential decree or order upon such terms as are just.’***

In accordance to the above provision, the Court has the discretion to set aside its judgment when justifiable reasons are adduced before this Court. The Applicant alleges that he was willing to attend court and the Respondent had not served him with any of the requisite documents. Harris J in *Mbogo v Shah [1967] EA 116 at 123B* stated that:

**“The court’s discretion to set aside a judgment obtained ex parte ... is exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.”**

The Respondent was not given an opportunity to defend himself before this Court thus contravening the right to be heard which is among the rules of natural justice provided for under Article 50 of the 2010 Constitution of Kenya.

Article 159(2)(b) of the Constitution of Kenya and Section 1A and Section 1B of the Civil Procedure Act laid down the overriding objective guiding litigation in Kenya which facilitates the ‘just expeditious, proportionate and affordable’ resolution of disputes. In **Abdirahman Muhumed Abdi v Safi Petroleum Products Ltd. & 6 others, Civil Application No. 173 of 2010**, the Court held that in furtherance of the overriding objective, **“the court is mandated to consider aspects like the delay likely to be occasioned; the cost and prejudice to the parties should the court strike out the offending document. In short, the court has to weigh one thing against another for the benefit of the wider interests of justice before coming to a decision one way or the other.”**

The principle confers to this court the discretion to consider aspects such as delay, cost, time when disposing cases before it. Furthermore, the court has to be satisfied that the case has a high chance of success mainly so as to avoid any chance of injustice being occasioned, unnecessary costs or delay to any of the parties. The case before this Court deals with matrimonial property and the Applicant alleges that he was not served any documents prior to the final Court orders. The Applicant further states that the suit property was acquired solely on his own efforts and the Respondent deserted the matrimonial home immediately they got married in 1991. She would come back whenever she wished.

In this premises therefore, the Court holds that the Applicant has established to the required standard that this court should exercise its discretionary powers in the Applicant’s favor. It is evident that the Applicant was not served with the required documents as there is no affidavit of service present in the Court file. The Applicant had no information that the case was proceeding and subsequently could not defend himself before this Court.

## **DISPOSITION**

- 1. The Application is hereby allowed.**
- 2. The Judgment delivered on 5<sup>th</sup> May 2017 is therefore set aside.**
- 3. Originating Summons dated 10<sup>th</sup> February 2016 shall be heard afresh interpartes.**

**DELIVERED SIGNED DATED IN OPEN COURT IN NAIROBI ON 6<sup>Th</sup> APRIL 2018.**

**MARGARET W. MUIGAI**

**JUDGE.**

**In the presence of:**