



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**CIVIL APPEAL NUMBER 191 OF 2014**

**B M O ..... APPELLANT**

**=VERSUS=**

**V C M ..... RESPONDENT**

**RULING**

1. By her plaint dated 7th March, 2012 the Respondent (Plaintiff) filed a suit in the Chief Magistrate's Court, Nakuru being CMCC No. 259 of 2012 against the Appellant (Defendant). It was her claim that the Defendant married her under the Kalenjin Customary Law sometimes in the year 1998. The two lived together as man and wife at [particulars withheld], Keringet District before moving to Nakuru in 2007 due to the tribal clashes. Their marriage was blessed with two issues, JMM and KOM. Through their joint efforts they acquired motor vehicle registration number KAV [...] Saloon which was later traded in for motor vehicle registration number KBK [...], a lorry registration number KBC [...], properties No. LR Njoro/Ngata Block [particulars withheld] and LR Molo South/Ikumbi Block [particulars withheld] and a plot in Mutirithia Molo.

2. The Respondent averred that the Appellant had become very violent towards her. He had threatened to leave her and keep all the property they had acquired together. She averred that all her efforts to salvage the marriage were futile. For these reasons she sought orders that the customary marriage between her and the Appellant be dissolved, a permanent injunction be issued restraining the Appellant from selling or disposing the motor vehicle registration numbers KBK [...] and KBC [...], properties No. LR Njoro/Ngata Bloc [particulars withheld] and LR Molo South/Ikumbi Block [particulars withheld] and the plot in Mutirithia Molo. She further sought an order that the Defendant pays the school fees and continue maintaining the Plaintiff and the children of the marriage.

3. In response the Appellant filed the defence dated 18th March 2014. He denied the fact of marriage, the allegations of cohabitation or that he has any issues with the Respondent. It was his case that KOM is his nephew who he has been taking care of. He however averred that the Respondent must also assume parental responsibility of this child. The Defendant denied that the property listed in the plaint was matrimonial property which he and the Respondent acquired jointly.

4. The matter proceeded for hearing ex-parte. The Respondent's case was that she was a business woman who sold cereals and that she contributed to the acquisition of the matrimonial property. She led evidence to the effect that she contributed Kshs. 100,000/= towards the purchase of motor vehicle registration number KBK [...]. They obtained a loan from Equity Bank to purchase the lorry registration number KBC 577Y which they were supposed to repay in monthly installments. It was her evidence that she deposited Kshs. 100,000/= into the Appellant's account. She produced title deeds for property LR. No. and Njoro/Ngata Block [particulars withheld] and Molo South/Ikumbi Block [particulars withheld] as P. Exhibit 2 and 3. She did not have documents of title in regard to the plot in Molo.

5. The Respondent testified that she and the Appellant were not blessed with any issues. She came into the marriage with JMM who was born from an earlier union. However the Respondent accepted this child and maintained her. KOM is the Appellant's nephew who they adopted when he was six months old after the death of his mother. She produced a copy of the birth certificate. Her case was that she and the Appellant took in both children as their own.

6. The Respondent's testimony was that trouble in their marriage began in the year 2011 when the Respondent realised that the Appellant was having extramarital affairs. He then became violent and abusive towards her and refused to pay the school fees for the children or otherwise maintain them and she is now their sole provider. It was her evidence that her marriage with the Appellant was irreparably broken down and the Appellant has since remarried. In her judgment delivered on 12th September, 2012 the Court found in favour of the Respondent and granted all the prayers sought in the plaint.

7. Subsequently the Appellant moved Court vide the application dated 9th October, 2014 to set aside the ex-parte judgment. He alleged that he did not attend the hearing due to an inadvertent omission of his counsel who failed to notify him of the hearing date. He argued that he had an arguable defence which he should be allowed to present. That the Plaintiff failed to disclose material fact to wit that she had filed a matrimonial cause for division of the property in the High Court in Nakuru HCCC No. 82 of 2012 (OS) and a suit for maintenance of the

children in the children's court in Civil Suit No. 259 of 2012. He also averred that JMM is now an adult and the orders of maintenance cannot issue. This application was disallowed by the Court in its ruling delivered on 4th December, 2014.

8. The Appellant has now appealed to this Court against the ruling of the lower Court dated 4th December, 2014 on the three grounds raised in his memorandum of appeal dated 22nd December, 2014, That;

**a. the lower court erred in finding that the Appellant's application lacked merit;**

**b. the lower court erred in failing to appreciate that compliance with the decree issued on 17th July, 2014 would cause a legal confusion as to its implementation; and**

**c. the trial magistrate erred in considering extraneous issues and in wholly disregarding the Applicant's submissions and evidence.**

9. The appeal was canvassed by way of written submissions. The Appellant's submissions were filed on 14th March, 2017. It was the Appellant's submission that failure to attend court was as a result of an error as was explained by the Appellant's former counsel through the affidavit. The lower court misdirected itself in finding that the excuse was an attempt by counsel to aid the Appellant. The Appellant did change counsel under the mistaken belief that erstwhile counsel had not fixed the matter for hearing. When the new counsel took over the matter, and listed the matter for mention, it was then that they learnt of the judgment. In addition, the proceedings do not portray the Appellant to be a lethargic litigant. The date when the matter proceeded ex-parte was the first time it had come up for hearing.

10. Counsel submitted that the defence does raise triable issues. The Appellant denied the fact of marriage to the Respondent and that he is the biological father of the two children. The Court erred in its ruling when it found that the Appellant had not stated in his defence that he is not the biological father of the children. In addition, the Respondent admitted in her evidence that she and the Appellant did not have any children. One was the Appellant's nephew and the other was begotten to the Respondent out of another union. Counsel was of the view that the lower court ought to have properly interrogated how the Appellant acquired parental responsibility. The Respondent did not tender sufficient evidence to support her case. Counsel further noted that there were material inconsistencies with regard to the custom under which the alleged marriage between the Appellant and the Respondent was conducted. In her plaint the Respondent alleged that she was married to the Appellant under the Kalenjin Customary Law. She however testified that the marriage was celebrated under the Gusii Customary Law.

11. The trial Court, when determining the application to set aside the ex-parte judgment, should also have considered that there was no notice of entry of judgment that was served upon the Appellant. It also should have considered the multiple suits that have been filed by the Respondent against the Appellant. The lower court did not have jurisdiction to issue the conservatory order over matrimonial property in light of the pending matrimonial cause and to order that Appellant maintains the children when the same issue was also being considered in the Children's Court.

12. Counsel also faulted the Court for awarding the Respondent alimony despite finding that she was not a housewife because the bank statements of her account show that she was transacting regularly. Counsel argued that the decree itself is ambiguous and vague for not specifying which limb of maintenance the Appellant was supposed to shoulder.

13. It was imperative to hear the Appellant's case in light of the inconsistent evidence and the gravity of orders that had been sought against him. By refusing to set aside the ex-parte judgment, the lower court denied him his right to a fair trial.

14. The Respondent filed the submissions dated 11th April, 2017. Counsel submitted that the Appellant did not deny the fact of marriage in his defence. He merely denied that the Respondent contributed to the acquisition of the matrimonial property for which she sought the conservative orders. Counsel argued that the Appellant's real intention is to avoid maintaining the children and that is why he raised the argument against marriage belatedly when seeking to set aside the ex-parte judgment.

## **ANALYSIS AND DETERMINATION**

15. The issue for consideration is whether the lower court erred in failing to set aside the ex-parte judgment dated 12th September, 2017. Order 9A of the Civil Procedure Rules vests in courts a wide discretion to set aside an ex-parte judgment entered in default of appearance by the Defendant at the hearing of the matter. There are no limits on the court to set aside the judgment save that the same must be on terms that are just. It is a power that is vested in the Court to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error. It is however not designed to assist a person who deliberately seeks, whether by evasion or otherwise, to obstruct or delay the cause of justice. The main concern for the Court is to do justice.

16. When determining an application to set aside the judgment, the Court should consider the nature of the action, the defence if any, the reason for failing to attend court and whether the Plaintiff can reasonably be compensated by costs for any delay. Ultimately, denying a litigant a hearing should be the last resort of a court.

17. It was not disputed that neither the Appellant nor his counsel attended the hearing despite the Appellant's counsel being served. The Appellant explained that he was not informed by his advocates of this date and that is why he did not attend the hearing. He annexed an affidavit sworn by his advocate, Geoffrey Otieno, who admitted that he was served with the hearing notice but failed to diarise it or inform the Appellant and his counsel.

18. The lower court was however not convinced and instead found that there was a deliberate attempt by the Appellant's counsel to aid his client. It is my view that there was no basis for this finding. From the record, the matter was only listed for hearing once and it proceeded ex-parte. I further note that there is nothing on record to suggest that the Appellant was an indolent litigant who was keen on delaying the conclusion of the matter. I think that upon counsel swearing that affidavit to confirm that he did not inform his client of the date and

explaining that it was an inadvertent mistake, the court should have given the Appellant the benefit of doubt and set aside the judgment.

19. The Respondent did not demonstrate any prejudice she would suffer if the judgment is set aside. The Appellant on the other hand stood condemned unheard. This is aggravated when one takes into account the nature of the dispute. There were three claims, the first was a divorce cause, the second was a matrimonial cause which although there was no prayer for division of property but there were conservatory orders sought over the properties and the third was a claim for maintenance of the issues of marriage.

20. These are matters which by their very nature ought to be determined upon hearing all the parties. The Court should have considered the issues raised in the defence and in particular the questions of paternity, contributions to the matrimonial property which then would justify the conservatory orders and whether the Appellant had acquired parental responsibility over the children. It is noteworthy that a meritorious defence only needs to raise a triable issue which is not necessarily one that the defendant would succeed on. It only needs to be bonafide. **(OLYMPIC ESCORT INTERNATIONAL COMPANY LIMITED & 2 OTHERS VS. PARMANDER SINGH SANDHEN & ANOTHER [2009] eKLR).**

21. For the above reasons, the appeal must succeed. The ruling of the lower court is hereby set aside. The Exparte judgment is hereby set aside. The parties shall have the matter heard afresh. The Appellant is awarded the costs of this appeal.

**Dated and Signed at Nakuru this 10th day of May, 2018.**

**A. K. NDUNG’U**

**JUDGE**