



**REPUBLIC OF KENYA**

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

**HIGH COURT CIVIL NO. 17 OF 2014**

**ANN NJERI KANGARA.....APPLICANT**

**V E R S U S**

**HARRISON KANG'ARA KARURI.....RESPONDENT**

**RULING**

1. The applicant Anne Njeri Kang'ara filed Originating Summons on 29/10/2014 seeking an order of division of matrimonial property. The respondent entered appearance on 31/10/2014 and filed P.O which was dismissed on 24/04/2015.

2. On 27/04/2015, the applicant proceeded to request for judgment since the respondent had failed to file his statement of defence and memorandum of appearance within the stipulated period. Later, the respondent filed Replying Affidavit on 06/05/2015.

3. As per the proceedings it is indicated the interlocutory judgment was entered on 06/05/2015 by the Deputy Registrar.

4. This ruling relates to an application by the respondent Harrison Kang'ara Karuri dated 25/5/15 brought under **Order 10 rule 11 and Section 3A and 63(e) of the Civil Procedure Act**. It seeks the following orders:

***a) THAT this Honourable Court be pleased to set aside an interlocutory judgment entered on 6<sup>th</sup> May, 2015 against the Respondent/Applicant.***

***b) THAT the Replying Affidavit (defense) by the Respondent/Applicant filed on 6<sup>th</sup> May 2015 be deemed to have been properly filed.***

***c) THAT the costs of this application be in cause.***

5. The application is based on the following grounds:-

***1) The Applicant was served with the summons to enter appearance herein and forwarded the same to his Advocates, Mosi & Company Advocates for further action on 30<sup>th</sup> October 2014.***

***2) That Applicant's Advocates without unreasonable delay filed and served both memorandum of appearance and the Notice of Preliminary Objection on 31<sup>st</sup> October 2014.***

***3) That the Applicant's Advocate participated in prosecuting their notice of preliminary objection to its conclusion.***

***4) That the Respondent's Advocate has always served the applicant's advocates inviting them to participate in hearing of this matter.***

***5) That there was no way the respondent's advocate would have known the address of the Applicant's Advocates without filing and serving of the memorandum of appearance.***

***6) That the Applicant filed his defense without unreasonable delay after the preliminary objection was no allowed.***

***7) That the respondent misled the court in believing that the applicant had not filed a memorandum of appearance and the defense.***

8) *That the Deputy Registrar did not peruse the file, before deciding to enter the ex parte Judgment as the same was entered after the Applicant had filed all relevant documents.*

9) *That owing to the omission to peruse the file, the applicant may not be afforded an opportunity to be heard.*

10) *The applicant has a viable defense to the respondent's claim and it is only fair and just that the applicant's defence be put on record to enable this Honourable Court reach a just and fair finding based on merit of the matter.*

It is also supported by the affidavit of the applicant sworn on 26/5/15.

6. The Respondent filed grounds of opposition and contends that:-

- *The application is vexatious and frivolous, bad in law and abuse of court process.*
- *The orders sought in the application cannot stand.*
- *The applicant is out to frustrate due process of the law.*
- *The application is without merits and should be dismissed.*

7. At the hearing of the application, counsel for the applicant R. Muthike Makworo relied on the supporting affidavit. She urged the court to reply on the Affidavit and the ground and exercise its discretion in favour of the applicant.

I have considered the application.

#### **1. Setting aside of ex-parte judgment.**

8. As submitted the court exercises discretion to set aside inter locutory Judgment.

In **CMC Holdings Ltd v James MumoNzioki [2004] eKLR**

The Court of Appeal stated;

9. Our view is that in law, the discretion that a court of law has, in deciding whether or not to set aside ex parte order such as before us was meant to ensure that a litigant does not suffer injustice or hardship as a result of among other things an excusable mistake or error. It would in our mind not be a proper use of such a discretion if the Court turns its back to a litigant who clearly demonstrates such an excusable mistake, inadvertence, accident or error. Such an exercise of discretion would in our mind be wrong in principle.

10. The law is now well settled that in an application for setting aside ex parte judgment, the Court must consider not only reasons why the defence was not filed or for that matter why the applicant failed to turn up for hearing on the hearing date but also whether the applicant has reasonable defence which is usually referred as whether the defence if filed already or if a draft defence is annexed to the application, raises triable issues.

11. Further in **Geeta Bharat Shah & 4 Others v Omar Said Mwatayari & Another [2009] eKLR**.

The appellants sought to set aside judgment entered in default of appearance. The Court of Appeal in Mombasa allowed the appeal stating;

*The principles to be considered by the court in determining whether or not to set aside a default judgment are well settled. Where it is established that there was no proper service, the court has no option but to set aside such judgment ex debitojustitiae.....*

*However, in a case where the summons was properly served and therefore the ex-parte judgment is regular, the court, in the exercise of its discretion does not end there. It is enjoined, in a case where draft defence is annexed in the application, to consider that draft defence and if having considered it, it comes to a conclusion that the draft defence raises matters that require the court's investigation or put otherwise if the draft defence annexed to the application for setting aside raises arguable issues or triable issues, then the court is required to exercise its discretion in favour of setting aside the ex parte judgment even though it is regular.*

12. Before the ex-parte judgment can be set aside, the court needs to therefore determine whether there was proper service and whether the draft defence raises triable issues.

#### **a) Whether there was proper service**

The issue of service is not faulted in this case, since the defendants duly filed Memorandum of Appearance. The issue is failing to file a defence to the Originating Summons or even a reply.

13. The applicant at paragraph -5- of the supporting affidavit deposes that the Interlocutory Judgment was entered on 6/5/15 after he had

entered all the relevant documents and especially the Replying Affidavit on 6/5/2015 Annexure HKK-1. He faults the Deputy Registrar for failing to peruse the record before entering the interlocutory Judgment.

14. The record shows that the Replying Affidavit was filed in court on 6/5/2015. Interlocutory Judgment was entered on 6/5/2015. As such the Replying Affidavit was filed the same day the Judgment was entered. The applicant entered appearance on 31/10/2014. On **Order 37 rule 14 Civil Procedure Rules** provides that service shall be effected under **Order 5**. This matter was filed as an Originating Summons. The procedure under **Order 37 Civil Procedure Rules** is that once a party enters appearance, the Registrar was supposed to fix the matter for directions before the Judge. The Order has no provisions for entry of inter-locutory Judgment in a matter started by way of Originating Summons. The procedure laid down under **Order 37 Civil Procedure Rules** was not followed. The inter-locutory Judgment which was entered was irregular. **Order 37 rule 19 Civil Procedure Rules** provides:

*Where, on an originating summons under this Order, it appears to the court at any stage of the proceedings that the proceedings should for any reason be continued as if the cause had been begun by filing a plaint, it may order the proceedings to continue as if the cause had been so begun and may, in particular, order that any affidavits filed shall stand as pleadings, with or without liberty to any of the parties to add to, or to apply for particulars of, those affidavits.*

*(2) Where the court makes an order under subrule (1), Order 11 shall apply.*

*(3) This rule applies notwithstanding that the cause could not have been begun by filing a plaint.*

*(4) Any reference in these Rules to proceedings begun by a plaint shall, unless the context otherwise requires, be construed as including a reference to a cause proceeding under an order made under sub rule (1).*

**b. Whether the defence raises triable issues.**

15. The defendants attached the filed replying affidavit claiming that he is not married to the applicant and that the applicant abandoned him on two occasions and he was left to take care of the children. This case raises triable issues on whether or not there existed a customary marriage between the respondent and the applicant.

16. In addition, the respondent filed memorandum of appearance in time and has been following on the matter. Therefore it will be unfair to dismiss the respondent's affidavit without according them a hearing. It is a cardinal principle of natural justice that a party should not be condemned un heard.

**In Conclusion:**

17. The respondent filed an Originating summons which has no provision for entry of Judgment. The procedure followed to apply for judgment was flawed and the judgment entered was irregular. This is a matter which required the parties to appear before the Judge and directions given on how the matter would proceed. I find that the application has merits. I order as follows:-

1. The interlocutory Judgment entered on 6/5/2015 is set aside.
2. The matter shall be mentioned for directions before the Judge.
3. Costs to the applicant.

**Dated at Kerugoya this 13<sup>th</sup> day of December 2018.**

**L. W. GITARI**

**JUDGE**