



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**DIVORCE CAUSE NO. 2 OF 2012**

**I P J.....PETITIONER**

**VERSUS**

**I M J K.....RESPONDENT**

**RULING**

**Introduction**

This divorce cause was filed on 3<sup>rd</sup> July 2012 by way of a Petition dated 18<sup>th</sup> June 2012 filed by the Petitioner. Directions were sought and given that the divorce cause proceeds as an undefended cause on 10<sup>th</sup> October 2013, and a hearing was duly conducted in the absence of the Respondent on 20<sup>th</sup> May 2014, after she failed to file an Answer to the Petition. Judgment was delivered on 31<sup>st</sup> July 2014 dissolving the marriage between the Petitioner and Respondent, and a decree nisi issued on 9<sup>th</sup> March 2014.

The Respondent subsequently filed a Notice of Motion dated 14<sup>th</sup> April 2015, seeking orders that the proceedings that were done on 20<sup>th</sup> May 2014 and the subsequent judgment made on 31<sup>st</sup> July 2014 and decree issued on 9<sup>th</sup> March 2015 be set aside, and the Respondent be given an opportunity to be heard. The grounds for the application are that the Respondent fell ill after being served with the Petition, and could not remember about the Petition until when she recovered on 30/3/2015. Further, that the Respondent had the intention of opposing the Petition, as the Petitioner was the one to blame for breaking the marriage and should take care of the maintenance and custody of the children of the marriage.

The Respondent in her supporting affidavit sworn on 17<sup>th</sup> April 2015 stated that her illness affected her memory, and she began to be forgetful and recovered in early April 2015. She attached a medical report in support of her averments. According to the Respondent, she was able to remember on 1<sup>st</sup> April 2015 that she had been served with a Petition on 20<sup>th</sup> July 2012, and did not proceed to instruct her lawyer to respond to the Petition due to her sickness. Further, that when she visited her lawyer in early April 2015 she discovered that the Petition that was filed in Machakos and served upon her was heard and determined on 31<sup>st</sup> July 2014, and that her lawyer was not able to get her between July 2012 and March 2015 when he wrote to inquire about the divorce, as she had changed her postal address and telephone number.

The Petitioner in response filed a replying affidavit sworn on 15<sup>th</sup> July 2015, wherein it was stated that it is strange that the Respondent fell sick between 20<sup>th</sup> July 2012 and 30<sup>th</sup> March 2015, yet she was served personally with the Petition in this Divorce cause on 20<sup>th</sup> July 2012 which she personally signed, and he annexed an affidavit of service dated 24<sup>th</sup> July, 2012 sworn to that effect. Further, that her chronology of

events as to what happened do not add up, that the even if the case is re-opened, the Respondent is not prepared to cater for his return air-ticket together with accommodation/travel expenses to and from Kenya as he is not willing to incur the said expenses for a matter that is already settled and determined. Lastly, the Petitioner averred that he has perused the Respondent's draft answer to Petition and Cross-petition and that there is no new issue raised therein save for the untruths that he has parental responsibility over children who are not biologically his, and devoid of any proof. Further, that this was pleaded in his Petition and further stated in his evidence in court on the date of hearing on 20<sup>th</sup> May 2014.

### **The Issues and Determination**

The Court at the hearing of the application on 20<sup>th</sup> September 2016 directed that it be canvassed by way of written submissions. Manthi Masika & Company Advocates, the learned counsel for the Respondent, filed written submissions dated 21<sup>st</sup> October 2016; while Ahmednasir Abdikadir & Co Advocates filed submissions dated 24<sup>th</sup> November 2016.

I have read and carefully considered the pleadings and submissions made herein. The issue to be decided is whether the proceedings of 20<sup>th</sup> May 2014, the subsequent judgment delivered on 31<sup>st</sup> July 2014, and decree issued herein on 9<sup>th</sup> March 2015 are subject to setting aside. The Respondent in this respect submitted that her Application meets the applicable principles that warrant setting aside of the proceedings and orders of this Court, as she has shown she was ill and had changed her address and telephone numbers. Reliance was placed on the decision in **Julius Wafula Chebi vs Gibon Akifuma & Another (2014) eKLR** that the exercise of the Court's discretion should be based on terms that are just, and that the main interest of the court is to avoid injustice or hardship resulting to from accident, inadvertence or mistake or error, but not to assist a person who deliberately seeks to avoid obstruct or delay justice.

Further, that the Respondent has always been desirous to be heard, and had initially been served with Milimani Divorce Petition No . 489 of 2011 which was filed before the present petition. However, that after the Respondent filed an answer to petition and cross petition to the said petition, it was withdrawn with no orders for costs to the Respondent. The notice to withdraw suit was then served upon the Respondent's Advocates on record, but that they were not able to get in touch with the Respondent since she had changed her telephone number.

In addition, that her advocates were also not aware that a new cause had been filed in Machakos since the Respondent was served in person and she was sick. Reliance was in this regard placed on the decisions in **Richard Ncharpi Leiyagu vs Independent Electoral Boundaries Commission & 2 Others, (2013) eKLR** and **K v K, (1993) eKLR**, for the position that the Respondent should be given an opportunity to be heard, and that she had not delayed the hearing and has raised triable issues which ought to be ventilated in a hearing.

The Petitioner on the other hand submitted that it is evident from the Respondent's draft Answer to Petition as well as Cross Petition that she does not in fact challenge the fact that their marriage had irretrievably broken down and as such, a divorce would rightly suffice. Therefore, that the question before this Court is whether it is appropriate and in the interest of justice to set aside an order of the Court of competent jurisdiction, and substitute it with the same Order. Reliance was placed on Order 10 Rule 11 of the Civil Procedure Rules 2010 for the position that this Court has discretionary powers to set aside the aforesaid judgment, and that the Court in this respect ought to be guided by the principles set out by the Court of Appeal in the case of **Shanzu Investments Limited vs. Commissioner of Lands, Civil Appeal No. 100 of 1993**. These are that the test for the exercise of the Court's discretion are firstly, whether there was a defence on the merits; secondly, whether there would be any prejudice; and thirdly, whether there was an explanation for any delay.

It was submitted in this regard that the Respondent in her draft Answer to Petition denied the allegation of desertion and accused the Petitioner of the same, and that this does not establish a defence with triable issues which would warrant a trial for adjudication, as the effect of the same would still be that a divorce would be granted as a result of the irretrievability of the above marriage. Further, that the Petitioner is

resident in the United States of America whereas the Respondent is resident in the Republic of Kenya, and it would highly be prejudicial to the Petitioner who has been away from the Respondent since the year 2009 to assume into a marriage that has already irretrievably broken down, as held in the case of **SBS vs. IMN, Civil Appeal No 54 of 2007.**

On the third requirement as to whether there is any reasonable explanation for delay, it was submitted that it has not been adduced whether the Dr. Lucas Mwove who prepared the medical report produced by the Respondent, is an accredited and registered psychiatrist, to be able to deal with the ailment raised by the Respondent for which she states that she was sick between 20<sup>th</sup> July 2012 and 30<sup>th</sup> March 2015. Further, that it is not explained how the Respondent was able to receive Court documents on 20<sup>th</sup> July 2012 at 4.05 p.m. yet she was ailing and did not have her memory, and her credibility is thus in question. The rest of the Petitioner's submissions were on the merits of the Respondent's case as to payment of alimony and custody and maintenance of the children of the marriage, which are premature at this stage.

This Court in reaching a determination notes that it is not in dispute that the Respondent was served with the Petition on 20<sup>th</sup> July 2012, and that she acknowledged receipt of the same, as shown by the Affidavit of Service filed in Court on 9<sup>th</sup> August 2012 and sworn on 24<sup>th</sup> July 2012 by Onesmus Kasyoka Masua, a duly authorized court process server. It is also not in dispute that the Respondent did not enter appearance or file any Answer to the Petition, which then proceeded to be heard as an undefended cause.

In **Pithon Waweru Maina vs E.A. Cargo Handling vs Thuka Mugiria (1982-88) 1 KAR 171** it was held that an *ex parte* proceedings can arise either from non-appearance or failure to file a defence in a suit, or failure by either party to attend a hearing after appearance. In both cases, the Court has discretion to set aside a default judgment arising out of the proceedings pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules. The application of Order 10 Rule 11 in this regard has been the subject of various Court of Appeal decisions, and I am in this respect guided by the decisions of the said Court in **Mbogo vs Shah (1968) E.A 93**, **Patel vs EA Cargo Handling Services (1974) EA 75**, **Pithon Waweru Maina vs Thuku Mugiria (1982-1988) 1 KAR 171** and **Waweru v Ndiga (1983) KLR 236**.

The Court of Appeal in **Waweru v Ndiga (1983) KLR 236** reviewed and upheld its previous decisions on the application of Order 10 Rule 11 of the Civil Procedure Rules, and held that this Court has unfettered discretion to do justice between the parties. Further, it was held that it may be just on the facts of a particular case to set aside an *ex parte* judgment to avoid hardship or injustice arising from inadvertence or mistake even though negligent, but that the discretion should not be exercised to assist anyone to delay the course of justice. The Court of Appeal also stated that an application to set aside an *ex parte* judgment may be allowed if the court is satisfied that the summons to enter appearance were not duly served, or that a defendant was prevented by any sufficient cause from appearing when the suit was called for hearing.

In the present application the question to be answered is whether any sufficient cause has been shown by the Respondent for her non-appearance to defend the Petition filed herein. The Respondent has in this regard brought evidence of a medical report to show she was ill during the service of the Petition and thereafter. I have two observations to make on the report.

Firstly, the said medical report, by Dr. Lucas Mwove of Miwani Medical Clinic, is dated 27<sup>th</sup> March 2015, some three years after the filing of the Petition and service of the same on the Respondent; and secondly, the report indicates that the Respondent had been attending the clinic since July 2012 for a longstanding illness which included short memory lapses.

However, no specific dates of attendance by the Respondent in the clinic are provided, nor of the specific ailments she presented during her dates of attendance, nor of the actual treatment notes to demonstrate that the Respondent was actually attended to and incapacitated on the material dates, which were the dates between the date of service of the Petition on 20<sup>th</sup> July 2012 and the date of issue of the decree on 9<sup>th</sup> March 2014.

I find that in the circumstances the veracity and reliability of the medical report is in question. In addition, the Respondent did not present any evidence as to her changed telephone numbers or addresses to show that she was not reachable by her lawyers as alleged.

Lastly, as the Petitioner has averred that he is resident outside the country in the United States of America, which is not denied by the Respondent, reopening this cause will cause undue prejudice to the Petitioner, who duly complied with all the requirements in presenting his Petition.

It is thus my view that the Respondent has not provided sufficient reason as to why there was non-appearance, or no answer to the Petition herein, and I find that this Court's discretion should be exercised in the Petitioner's favour.

Arising from the foregoing reasons, I accordingly decline to grant the prayer sought in the Respondent's Notice of Motion dated 14th April 2015, which Notice of Motion is dismissed with no order as to costs as this is a matrimonial dispute.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 13<sup>th</sup> day of February 2017.

**P. NYAMWEYA**

**JUDGE**