REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 31 OF 2011(O.S.)

IN THE MATTER OF SECTION 17 OF THE MARRIED WOMEN'S PROPERTY ACT 1882

VERSUS

J W K-K……..……..…....……....…….APPLICANT

VERSUS

G K G.……....…….....RESPONDENT

RULING

1. The applicant's application dated 5th April 2016 is brought under section 1A, 1B, 3A Order 10 rule 11, Order 45 rule 1 and Order 22 Rule 22 of the Civil Procedure Rules, 2010.The applicant seeks the following orders;

i. That these execution proceedings be stayed pending the inter partes hearing of this application.

ii. That this Honorable court be pleased to set aside and/or discharge the ex-parte judgment of this honorable court dated and issued on 28.05.2015.

iii. That this honorable court be pleased to give any other orders as it may deem fit.

2. The application is based on grounds that the applicant forwarded the Originating Summons served to his previous advocate for action and believed that he was defending his interest s only to discover that the matter had proceeded ex-parte upon being served of a decree against him. That the applicant made false representations to court alleging that one of the properties which is subject of these proceedings has been sold which he alleges is not true. That there is real and present danger that unless the said judgment and subsequent orders are stayed or set aside in the first instance and subsequently set aside in such a manner and by the time the substantive application is heard and determined, the proceeding in question will have been wasted and rendered valueless. Adding that the applicant/respondent does not stand to suffer any prejudice is the said application is heard and it is in the interest of justice and expediency that the orders sought are granted.

3. In his affidavit in support of the said application, he avers that he had instructed the firm of Mwanyumba & Co. Advocates who were handling another suit regarding the issue of marriage at Children's court to deal with the same and in spite of his instructions was shocked to learn that no action had been taken until it was too late. After making efforts to contact the said Law firm he learnt that the firm had relocated to Voi and he could not trace any of his records. That his advocate upon perusing the said court record found that no appearance had been entered by the said advocate. He is informed that the advocate's failure should not prejudice his interests. He avers that in rendering it's judgment the court

only relied solely on the testimony of the petitioner as there was no evidence to contradict the same, that the petitioner made false representation to the court that he disposed Plot no. 25446 situated in Langata and registered in his names an allegation he denies adding that the court based on the said misrepresentation made orders touching on the said property.

4. The respondent in opposition to the said application filed her replying affidavit dated 17th May 2016. She avers that she filled the suit on 22nd June 2011 and the respondent acknowledged service but failed to defend the same despite having due notice. The suit proceeded on 28th May 2015 and judgment was delivered on 28th May 2015 and she, through her advocates on record served the respondent on 12th November 2015. That on 24th November the applicant's advocates on record wrote to them stating that they had instructions to act on behalf of the applicant. She added that from November 2015 the applicant had notice of the said judgment and decree but chose not to act until 5th April 2016 when he filed the current application. This court ordered that the said properties be valued with parties sharing cost of valuation and a valuation report be filed in court. Further, that despite the applicant being informed about the order on valuation, the respondent ignored all correspondence and even denied valuers access to the matrimonial home in Karen and has hindered the valuers from carrying out a valuation of the Karen home adding that the applicant has done all he could to frustrate the finalization of the suit which she avers is part of the applicant's scheme to delay and deny her the fruits of the judgment.

5. In essence what the applicant seeks is to set aside an exparte judgment. Setting aside of a judgment is discretionary and the court in doing so has to factor in various factors on this am guided by the Court of Appeal decision in the case of **Maina versus Mugiria (1983) KLR 78**, where it was held that,

> *"2.* ***The principles governing the exercise of judicial discretion to set aside an exparte judgment obtained in default of either party to attend the hearing are:***
>
> ***a) Firstly, there are no limits or restrictions on the judge's discretion except that it should be based on such terms as may be just because the main concern of the court is to do justice to the parties.***
>
> ***b) Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. Shah v Mbogo [1967] EA 116 at 123B, Shabir Din v Ram Parkash Anand (1955) 22 EACA 48.***
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> ***c) Thirdly, the Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some manner and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice. Mbogo v Shah [1968] EA 93.***
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> ***d) The court has no discretion where it appears there has been no proper*** **service (Kanji Naran v Velji Ramji (1954) 21 EACA 20).**
>
> ***e) A discretionary power should be exercised judicially and in a selective and discriminatory manner, not arbitrarily and idiosyncratically. (Smith v Middleton [1972] SC 30)".***

6. The applicant blames the failure to defend the matter on his initial advocate on record who failed to enter appearance and file a response to the said initial application. I find that condemning him would be unjust as the failure was not on his part. Further I find that the applicant was not given an opportunity to give his side of the story as such I find that it is only just to give an opportunity for both parties to ventilate their issues before this court can give final orders . Further I find no prejudice will be caused to the respondent should the matter proceed to inter-partes hearing

7. I therefore find that it is only just to set aside the ordered given by this Court on 28th May 2015. To

avoid further delay in this matter the respondent is ordered to file a response to the said Originating summons dated 17th June 2011 within 21 days of this Ruling and serve. The respondent/petitioner will also have an opportunity to respond in 14 days. Parties to proceed to take a date for direction on the hearing once they comply.

Dated, signed and delivered this ***23rd*** day of ***February*** 2017.

R. E. OUGO

JUDGE

In the presence of;

.....For the Applicant

.....For the Respondent

MS. Charity Court Clerk