



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 19 OF 2013 (OS)

AND

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT NO. 49 OF 2013

F W N M.....APPLICANT

VERSUS

S M M.....RESPONDENT

RULING

1. The matter for determination is the Motion dated 27th July 2016. It seeks stay of proceedings herein, and that the matter be heard *de novo*. It also seeks that the affidavits and information contained in the application be deemed as part of the record of the suit. The application is founded on the grounds set out on the face of the application, as well as the affidavit of S M M, the applicant, sworn on even date..
2. On the grounds it is alleged that the applicant had been active in the matter since its inception and in that case the matter ought not to have proceeded as undefended without cross-examination of the applicant. He states that the contents of the documents put on record in the matter were opposed to the truth. In the affidavit in support, the applicant deposes as to how he acquired the assets the subject of the suit.
3. There is a response to the application, by way of an affidavit sworn on 30th August 2016, by the respondent, F W N M. She contends that the application does not meet the threshold for the orders sought. She states that the applicant was at all times aware of the dates fixed for the hearing of the matter, instead he chose to stay away. It is argued that the applicant has given no reasons for his failure to attend court. She has then gone through the record of the proceedings conducted, showing that the applicant despite being aware chose to absent himself. She states that the applicant had been served on all those occasions when the matter came up for hearing. She further says that the documents that are now being placed on record were not presented at the time the applicant responded to the Originating Summons.
4. The applicant has come to court claiming that the main suit herein proceeded *ex parte*, and argues that it was not just to do so without a chance being given to the him to be heard in his case.
5. To determine a matter of this nature, I need to examine the record to determine whether or not the applicant was not treated fairly in the matter proceeding in his absence.
6. The Originating Summons dated 18th April 2013 was lodged at the registry on even date by the respondent to the instant application. The applicant filed a notice of appointment, dated 22nd July 2013,

and filed the same in court on even date. The applicant subsequently filed his reply to the Originating Summons on 14th May 2014 through an affidavit sworn on an even date. The matter was placed before Kimaru J. on 13th May 2013, for the hearing of a summons dated 18th April 2013. Temporary injunctive orders were made pending full hearing. Hearing was fixed for 23rd May 2013. The matter was not heard on the due date as the matter was not listed.

7. The respondent then filed a summons on 3rd June 2013 seeking certain injunctive orders against the applicant with respect to a specific alleged matrimonial property, and orders to compel him to vacate the matrimonial property. The said summons is dated 3rd June 2013. That application was placed before me on 3rd June 2013 and I granted interim orders to last till 20th June 2013, and directed the respondent to serve. When the matter came up for hearing on 5th July 2013, the respondent had apparently abandoned the application dated 3rd June 2013 and instead lodged another application dated 24th June 2013. I directed that the application date 24th June 2014 be served and heard *inter partes* on 16th July 2013. The matter was not listed on 16th July 2013, and was not back in court until 5th December 2013. I granted preservative orders pending hearing and disposal of the Originating Summons.

8. The matter was next placed before me on 20th March 2014, but I stood it over as there was no evidence that the applicant had been served. There is an affidavit of service sworn on 7th March 2014 indicating that counsel for the applicant had been served on 24th April 2014 with notice of the hearing scheduled for 8th May 2014. The counsel embossed their official stamp and affixed their signature on the notice as evidence of service. The matter came up next on 8th May 2014, counsel for both sides appeared. I gave directions on the disposal of the main suit. I also gave time to the applicant to respond to the application dated 24th June 2014. Matter was thereafter fixed for mention on 15th May 2015 for compliance. When the matter was mentioned on 15th May 2014, the applicant indicated that he had filed a reply, but as the same was not on record the matter was put off to 12th June 2014, counsel for the applicant did not attend court, and the respondent sought and obtained leave to file a further affidavit.

9. The Originating Summons was given an *ex parte* date at the registry on 19th April 2016 for hearing on 12th May 2016. There is an affidavit of service sworn on 6th May 2016, indicating that a hearing notice dated 19th April 2016 for the hearing dated 12th May 2016 was served on 21st April 2016, and his counsel had affixed their official stamp and signed the document as evidence of service. Come 12th May 2016, counsel for the respondent was in court, but the applicant's counsel was absent. The hearing did not proceed, on account of the court's heavy schedule that day, and the matter was put off to 30th June 2016.

10. Come 30th June 2016, counsel for the respondent attended court and stated that they had served the applicant and were ready to proceed with the matter. There is an affidavit of service sworn on 31st May 2016, indicating that counsel for the applicant was served on 16th May 2016 with a hearing notice dated 13th May 2016, in respect of a hearing dated 30th June 2016. The lawyers for the applicant embossed their official stamp on the document and signed against the same as acknowledgement of service. The court, upon being satisfied that there had been proper service directed that the matter be placed aside and would proceed to hearing that morning. The matter was later called out at 11.30 am. The applicant had still not come to court. The matter proceeded, the respondent testified, after which it was reserved for filing of written submissions.

11. From what I can see from the record, the applicant had been served severally with process, through counsel, attended court on some occasions and stayed away on others. For the hearing scheduled for 30th June 2016, when the matter proceeded, the applicant's counsel was properly served. Counsel did not attend court, nor sent another advocate to hold their brief to either have it adjourned, or placed aside until he was available, or with full instructions to proceed. Non-attendance at a hearing has consequences. Where an applicant fails to attend court their case risks being dismissed for non-attendance or want of prosecution, while in the case of the respondent the risk is that the matter will proceed their absence notwithstanding.

12. The law is clear that the court has discretion to dismiss a suit for non-attendance and want of prosecution. The court exercised that discretion when the defendant failed to attend court on the date that had been allocated for the hearing of the case. See Order 12 rule 2 (a) and Order 17 rule 3 of the Civil Procedure Rules. Order 12 rule 2 in particular provides: -

'If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied –

(a) that notice of hearing was duly served, it may proceed ex-parte;

(b) that notice of hearing was not duly served, it shall direct a second notice to be served; or

(c) that notice was not served in sufficient time for the defendant to attend or that for other sufficient cause the defendant was unable to attend, it shall postpone the hearing.'

13. In this case, notice was served at least six weeks to the due date. The notice given was no doubt ample. In any event if the date was not convenient to the defendant he should have received the same under protest. He could have also written to the plaintiff to express that fact, or sent someone to court on the appointed day to have the matter adjourned. He has not demonstrated that he did any of those.

14. In cases of this nature, it is expected that where a matter proceeds in the absence of a party who was duly served, that party would move the court for setting aside of the proceedings or related orders and explain why they were unable to attend court. The applicant in this case has not explained why he was not in court on 30th June 2016 when the matter came up for hearing yet he had been served with a hearing notice. No reasons are given at all to explain why the applicant and his counsel stayed away.

15. The orders sought in the application are discretionary. A party who expects the court to exercise discretion in its favour must be persuasive. He must convince the court that there was a good excuse for him to be away from court on the due date. He owes the court an explanation. Where there is no explanation, the applicant should not expect the court to look at him favourably. He was aware that the matter was coming up for hearing, he stayed away, the matter proceeded in his absence, he gives no explanation for his absence, surely he cannot expect the court to exercise discretion in his favour in the circumstances.

16. I do not find any basis at all for exercising discretion at all in favour of the applicant in the application dated 27th July 2016. Consequently, I shall proceed to dismiss the same with costs to the respondent.

DATED and SIGNED at NAIROBI this 3RD DAY OF MAY, 2017.

W. MUSYOKA

JUDGE

DELIVERED and SIGNED this 5TH DAY OF MAY, 2017.

M. MUIGAI

JUDGE