



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

HCC NO. 15 OF 2017 (OS)

IN THE MATTER OF DIVISION OF MATRIMONIAL PROPERTY

AND

IN THE MATTER OF THE MATRIMONIAL PROPERTY ACT 2013

AND

IN THE MATTER OF THE LAND REGISTRATION ACT

C W GPLAINTIFF/RESPONDENT

VERSUS

H G N DEFENDANT/APPLICANT

RULING

1. On 9th March, 2017, this court issued exparte orders in favour of the applicant/plaintiff pursuant to an application dated 7th March, 2017 filed under certificate of urgency in which the court granted prayer two and directed the applicant to serve the respondent for interpartes hearing on 23rd March, 2017. On 23rd March, 2017, the respondents did not turn up nor file any response culminating to exparte hearing and a ruling fixed for 7th April, 2017.

2. Before delivery of the ruling, the respondent brought an application dated 29th March, 2017 filed on even date seeking to arrest the ruling by setting aside the orders made and exparte proceedings held on 23rd March, 2017. Consequently, the said application was certified urgent on 30th March, 2017 and fixed for hearing interpartes on 6th April, 2017. The pending ruling was technically compromised subject to the outcome of this application.

3. In response to the said application, the plaintiff/respondent filed a replying affidavit deponed on the 5th April, 2017 by C W. Subsequently, the applicant/defendant filed a further affidavit sworn by Waithaka Advocate on 18th April, 2017 and filed the same day.

4. During the hearing, the applicant adopted averments contained in the supporting affidavit in which he claimed that on 21st March, 2017, he instructed his advocates Waithaka and company to come on record on his behalf but counsel inadvertently misdiarized the date thereby indicating the 24th March, 2017 as the date for hearing instead of 23rd March, 2017. He attached a copy of the said Advocate's diary as proof of the mistake of misdiarizing the date (HUN2).

5. He therefore pleaded with the court to allow him defend the suit as he has a good case raising reasonable triable issues. He further contended that mistakes of hisadvocate should not be visited on him. This position was corroborated by Mr. Waithaka Ngaruiya Advocate who swore a supplementary affidavit deponed on 18th April, 2017 in which he admitted that he misdiarized the hearing date. He pleaded with the court to give the defendant a chance to defend his suit so that he is not condemned unheard.

6. The respondent opposed the application through her replying affidavit sworn on the 5th April, 2017 arguing that there was no proof that the defendant's counsel had misdiarized hearing date.

7. I have considered the application herein, affidavit in support, replying affidavit, supplementary affidavit and submissions by both counsels. For starters, I wish to point out that there were no orders issued on 13th March, 2017 by this court. There is no dispute that the applicant/defendant was duly served with the application dated 7th March, 2017 and the exparte orders issued on 9th March, 2017 and that

there was no appearance during the interpartes hearing set for 23rd March, 2017. The applicant/defendant has given an explanation for his failure to turn up nor file response. His counsel has also demonstrated the mistake of misdiarizing the hearing date by producing a copy of the diary indicating that he had marked hearing date as 24th March, 2017 instead of 23rd March, 2017. Although counsel did not photocopy the same diary for the date of 23rd March, 2017 to confirm whether he had diarized the matter correctly, I will give him a benefit of doubt.

8. From his affidavit in support plus the annexures in support, he appeals to me that he has a good defence raising triable issues and he deserves a chance to be heard for the ends of justice to meet. The respondent/plaintiff will not suffer any prejudice if the orders sought are granted. Considering that an omission of this nature is not so gross, I will not visit an advocate's mistakes on the client. Accordingly, application dated 29th March, 2017 be and is hereby allowed with orders as follows:

- (a) That the respondent/defendant do file a replying affidavit and or response to the plaintiff/applicant's application dated 7th March, 2017 within 7 days from the date of delivery of this ruling.**
- (b) That the plaintiff/applicant be and is hereby granted corresponding leave to file a further affidavit should need arise.**
- (c) That proceedings of 23rd March, 2017 be and are hereby set aside.**
- (d) That the matter be fixed for hearing on priority basis.**
- (e) That the defendant/respondent be and is hereby ordered to pay costs of both applications in favour of the plaintiff/applicant.**
- (f) Interim orders in place extended.**

Order accordingly.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JULY, 2017.

J.N. ONYIEGO (JUDGE)

In the presence of

..... Counsel for the applicant/plaintiff

..... Counsel for the respondent/defendant

..... Court Assistant