



**MHS v NEN (Divorce Cause E003 of 2023) [2024] KEKC 15 (KLR) (7 May 2024) (Ruling)**

Neutral citation: [2024] KEKC 15 (KLR)

**REPUBLIC OF KENYA  
IN THE KADHIS COURT AT KERICHO  
DIVORCE CAUSE E003 OF 2023  
IN NYABOGA, SRK  
MAY 7, 2024**

**BETWEEN**

**MHS ..... PETITIONER**

**AND**

**NEN ..... RESPONDENT**

**RULING**

1. The Applicant through her Counsel approached this Court by way of Notice of Motion under Certificate of Urgency dated 15<sup>th</sup> February 2024 pursuant to Rule 1A, 1B, 3A & 63(e) of the Civil Procedure Act & Order 10 Rule 4,10, and 11, Order 22 Rule 22 & Order 51 Rule 1 of the Civil Procedure Rules and prayed for among other orders:
  - a. That the *ex-parte* judgment and consequential decree then on record against her together with all consequential and subsequent Orders, Notices and other processes issued or made in execution of the aforesaid decree be reviewed, varied, discharged or set aside.
  - b. That the Applicant be granted leave to file and serve her Answer to the Petition and Cross Petition out of time and that the draft Answer to Petition and Cross Petition attached to the Application be deemed as duly filed and served upon the Petitioner herein subject to payment of the requisite Court fee.
  - c. That there be an interim Order of stay of execution of the decree arising from the *ex-parte* judgment which is on record together with all other consequential and subsequent Orders, Notices and other processes issued or made in purported execution of all the aforesaid decree against the Applicant herein and or further proceedings herein pending inter parties hearing and determination of the Application.
2. The matter came up first on the 21<sup>st</sup> February 2024 and certified as urgent and service to Petitioner/ Respondent directions given.



3. The Petitioner/Respondent was duly served twice *vide* Affidavits of Service dated 25<sup>th</sup> March 2024 and 12<sup>th</sup> April 2024.
4. The Court through its Registry reached the Petitioner/Respondent several times before the hearing of the Application to remind him of the Application
5. The matter came up for hearing on 16<sup>th</sup> April 2024 and only the Applicant appeared virtually through her Counsel and thus the matter proceeded *ex-parte*.
6. The Applicant through her Counsel stated that she was seeking from the Court to have the ex-parte judgment dated 31<sup>st</sup> May 2023 be set aside and all the consequential orders arising there from and she be granted leave to answer to the Petition and Cross Petition be admitted out of time.
7. She further stated that it is her contention that the matter was heard ex-parte and she was not accorded an opportunity to be heard and that her answer to the Petition and Cross Petition raises weighty issues of law and fact.
8. The Applicant stated in her sworn Affidavit dated 5<sup>th</sup> February 2024 that it is her submission that the orders issued by this Court on the 31<sup>st</sup> May 2023 were not pleaded and that it was in the interest of justice that she is accorded an opportunity to be heard.

### **Determination**

9. The main issue to deal with in this Application is to find out whether the Applicant was duly served and notified of the Petition against her before this Court.
10. The wisdom behind serving and notifying a party on a case before a court of law is to accord the party an opportunity to be heard and enable the Court to understand properly the matter before it.
11. It has been narrated that Ali Ibn Abi Twalib said: “The Prophet (PBUH) appointed me to be a judge in Yemen. I said to him, You appoint me to be a judge while I’m young and have no judicial knowledge. The Prophet (PBUH) said: “Allah will guide your heart and make stable your speech, when you sit before disputing parties, don’t judge until you hear from the second party like you heard from the first one for that is worth in making the matter clear to you.” Ali said: “I remained to be a judge and never doubted after that.” Abu Dawuud, 2:270
12. The Prophet (PBUH) prohibited one from hearing and deciding a case unless he has heard from both parties which implies that deciding a case before hearing from both parties is prohibited except in rare circumstances as mentioned by Alkhatwiib Ashirbiiny like if the Respondent is brought before court but escapes before the hearing or after and before the matter is decided. Mugniy Almuhtaaj, 6:308
13. Ibn qudaamah states that: ‘There is a possibility that the party not present may be in possession of evidence to rebut against the party present, like criticizing and challenging the testimony of witnesses and the evidence of the party who is present.’ Almughniy, 10:95
14. Article 50 of the [Constitution](#) of Kenya 2010 has provided the right to a fair hearing to all persons and that includes to be informed of the charge, with sufficient detail to respond to it.
15. Section 20 of the [Civil Procedure Act](#) Cap 21 provides that: Where a suit has been duly instituted the defendant shall be served in manner prescribed to enter an appearance and answer the claim.
16. Order 5 rule 1(5) of the Civil Procedure Rules states that every summons shall be prepared by the plaintiff or his advocate and filed with the plaint to be signed in accordance with sub-rule (2) of this rule.



17. It further states in rule 15(1) that the serving officer in all cases in which summons has been served under any of the foregoing rules of this Order shall swear and annex or cause to be annexed to the original summons an affidavit of service stating the time when and the manner in which summons was served and the name and address of the person (if any) identifying the person served and witnessing the delivery or tender of summons. The affidavit of service shall be in Form No 4 of Appendix A with such variations as circumstances may require.
18. By perusing the file to find out all the relevant documents filed by the Petitioner before the ex-parte hearing and judgment, it came to my attention that several important documents required in a Petition were missing.
19. First, there was no copy of summons which has been provided by Order 5 rule 1(5) mentioned above.
20. I also found out that no copy of Affidavit of Service was filed and thus leading to a possibility that the Respondent/Applicant herein was not served with summons together with the Petition and thus was not aware of the Petition against her.
21. I further found that the Petitioner's Supporting Affidavit was not commissioned which is also a requirement prescribed in by section 5 of the *Oaths and statutory Declaration* Act Cap 15 of Laws of Kenya.
22. In re MWO (Minor) [2021] eKLR, the Honorable Court stated in paragraph 38 that: "It is a legal requirement that an Affidavit be commissioned by either a Magistrate, a Commissioner of Oaths or by a Notary Public."
23. And in *Mary Gathoni & another v Frida Ariri Otolu & another* [2020] eKLR, the Honorable Court stated in paragraph para 8 that "The affidavits on record, purportedly sworn by .....were not properly commissioned. They are not on oath. In fact, they are not affidavits at all."
24. Apart from the Applicant being unaware of the Petition as a result of not being served or notified and thus denied her constitutional right to a fair hearing, the Petition did not meet the requirements provided by law before its hearing and determination.
25. From this uncontested application, I do make the following orders
  - a. That the *ex-parte* judgment and consequential decree then on record against the Applicant herein, together with all consequential and subsequent Orders, Notices and other processes issued or made in execution of the aforesaid decree are hereby set aside.
  - b. That the Petitioner/Respondent is hereby given one (1) month from the date of this Ruling to properly file his Petition and serve the Respondent failure to that shall render the Petition null and void.
  - c. No order as to costs.

**DATED, SIGNED AND DELIVERED AT KERICHO THIS 7<sup>TH</sup> DAY OF MAY, 2024**

**IDRIS N. NYABOGA**

**SENIOR RESIDENT KADHI**

