



REPUBLIC OF KENYA

IN THE KADHIS COURT KENYA AT NAIROBI

DIVORCE CAUSE NO. 91 OF 2015

RWW.....PETITIONER/RESPONDENT

V E R S U S

SS.....RESPONDENT/APPLICANT

RULING

1. The applicant filed a notice of motion dated 11th January 2016 seeking the following orders;

- I. That Court proceedings herein be conducted in absence of members of the public and media.
- II. That the Petitioner, the media prohibited from, covering, airing, divulging and/or publishing any story and/or documents relating and/or connected to the case herein.
- III. That the honourable Court be pleased to grant any other or further order as it may deem fit.
- IV. That the costs of this application be granted.

2. The application is based on grounds *inter alia* that;

- a) On 19th January 2015 the Nairobiian on its front page posted the following headline- "**Why Rich Politician left my bed-Ex-wife**". The headline was accompanied by the caption "**Split Businesswoman demands sh. 750,000/- insists she is still tycoon's wife as SS tables old divorce certificate**".
- b) It seems that the Respondent is being tried in the media on matters pertaining to family law which is unconstitutional and an affront to the Respondent's privacy.

3. The Petitioner/Respondent raised a preliminary objection dated 24th January 2016 pointing out the following;

- a) That this Honourable Court lacks jurisdiction by virtue of Article 170(5) of the Constitution to entertain the said application and to issue any orders therein.
- b) That Applicant's application offends order 2 rule 6 of the civil procedure rules which render the application fatally defective.

APPLICANT'S SUBMISSION

4. It was the applicant's submission that the application dated 11th January 2016 meet the standard set out in **Giella vs Cassman Brown & Co.** and thus the Petitioner/Respondent should be restrained from deliberately supplying the media with private personal and confidential information . The release of such information is of no use to the general public and is only calculated to cause embarrassment to the Respondent/Applicant since he is a public figure and his family and business associates will suffer irreparable loss and damage.

5. The Applicant further submitted that he is being tried in the media on matters pertaining to family law which is unconstitutional and an affront to the his privacy.

6. On jurisdiction, the applicant submitted that the jurisdiction of the court to hear the application was vested under section 1A, 2A, 3A and 63 of Civil Procedure Act, which gives this court inherent jurisdiction to deal the application.

THE RESPONDENTS SUBMISSIONS

7. The respondent in her submission opposed the applicant's application dated 11th January 2016 through the notice of preliminary objection dated 24th January 2016. She stated that Article 170(5) of the Constitution is couched in mandatory terms and sets a limit on the area upon which the Kadhi's Court would have jurisdiction. Similary section 5 of the Kadhis Courts Act cap 11 set out the jurisdiction of the Kadhi's Court.

Article 170(5) provides

The jurisdiction of a Kadhi's Court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's Court.

Section 5 of the Kadhis' Courts Act Cap 11 provides

A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of question of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings which all parties profess the Muslim religion.....

8. The respondent further submitted that no mention is made in either the Constitution or the Kadhis' Courts Act to issue gagging orders. The exclusion of gagging orders is a clear indication that the jurisdiction of Kadhi's Court doesnt extend to such matters. No doubt the thinking was the defamation Act Cap 36 provided sufficient and exhaustive legislative cover for defamation matters in Kenya. Therefore, Kadhi's Court in Kenya lacks jurisdiction by lack of written law giving it the jurisdiction on defamation matters.

9. The respondent submitted that the applicant had not sought leave or complied with any of the requirements set out under Order 2 Rule 6 of the Civil Procedure Rules that provides for the rule against departure of pleadings:

Order 2 Rule 6.(1) "No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit."

10. The respondent cited and attached the following case; In MARY NGARU V FAMILY BANK LTD & 2 OTHERS [2014] eKLR it was held that failure to incorporate a prayer for an injunction in the plaint, clearly offends order 2 rule 6(1) and (2) of the civil procedure rules . The Court noted that lack of a prayer for an injunction in the suit render the plaintiff's application fatally defective as was expressed in JAMES ARCHIMEDES GICHANA V PYRETHRUM BOARD OF KENYA- Nakuru HCC C NO. 237 OF 2007 Where judge observed :-

" Both rules 1(a) and 1(b) of Order 40 have been judicially considered to require clear

indication or prayer in the suit seeking such injunction. Where an application for injunction fails to demonstrate that he first sought an order of temporary injunction in his suit his application is said not to sound in either rule 1(a) and 1(b) of the said order 40 and will be deemed to be incompetentThe reason for this is clear. It is found in Order 2 rule 6 of the Civil Procedure Rules 2010. That no party may in any pleadings make allegation of facts, or raised any new ground of claim, inconsistent with a previous pleading of his in the same suit...6(1) without first amending his pleadings. 6(2) No party can depart from his pleadings whether in evidence or in an interlocutory application, to do so the party must first amend his/its pleadings."

11. ISSUES FOR DETERMINATION

- i. Whether the court has the jurisdiction to hear and determine the gagging proceedings.
- ii. Whether the Applicant's application offends Order 2 Rule 6 of the Civil Procedure Rules.
- iii. Whether the Court proceeding herein be conducted in camera.

12. ISSUE NO. (i)

The applicant cited 3A of the CPA as an enabling clause which provides as follow;

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

This section was enacted purposely to preserve inherent powers of the courts where there is no specific provision of the law to cure a situation. This section saves the inherent powers of court so that such powers should not be limited in any way by any provision in a given law.

The inherent powers of the Court are used to achieve;

- a) Orders necessary for attaining the ends of justice
- b) Prevent abuse of Court process and
- c) Prevent abuse of the process of the Court caused by delay

In the case of Miller v Miller (1988) eKLR the court held that;

" The upshot of all the cases is that in Kenya the court has wide powers to impose secrecy in the matters relating to the exceptions in section 77 (11) (a) of the Constitution. Even in English domestic jurisdiction the protection of secrecy is extended to guard the interest of the parties as well as the issues of the marriage. Besides the public morality and over-riding consideration of innocent persons dictate that embarrassing details of domestic disputes ought not be aired in public. This time-honoured and deep-rooted practice based on sound public policy carries the force of law. It is as it should be an essential safeguard against social abuse of the unfortunate persons facing the odium of their personal life. Any perverse and morbid interest in the exposition of unpleasant details of other people's lives is and must be against public morality."

13. The above assertion is based upon the inherent power of the court to hear in camera any case in which justice cannot be done. Such powers is required in the interest of justice to enable the Court to maintain its own efficiency and its own dignity.

In the premise, I therefore find that this court has jurisdiction to hear and determine the application for gagging orders.

14. ISSUE NO. (ii)

Order 2 Rule 6.(1) provides;

"No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit."

Applying the foregoing provision to this case, after carefully perused the file I can confirm that the Applicant's answer to petition contains a prayer for an injunction and that the application doesn't offend order 2 rule 6 of the civil procedure.

15. ISSUE NO. (iii)

The starting point must be the importance of the principle of open justice. This has been a thread to be discerned throughout the world.

" Publicity is the very soul of justice. It is the keenest spur to exertion and the surest of all guards against improbity. It keeps the judge himself while trying under trial." (Bentham)

Under Article 10(1) of the Constitution:

The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

- (a) applies or interprets this Constitution;***
- (b) enacts, applies or interprets any law; or***
- (c) makes or implements public policy decisions.***

Clause (2) of the said Article, on the other hand provides:

The national values and principles of governance include—

- (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
 - (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
 - (c) good governance, integrity, transparency and accountability;***
- and***
- (d) sustainable development.***

It cannot be doubted that in determining a legal dispute a Court of law is necessarily applying or interpreting the law hence it is bound by the values and principles of governance one of which is transparency.

Article 50(1) of the Constitution on the other hand provides as follows:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

16. This position was reaffirmed by the Court of Appeal in M'kiara Vs. M'ikiandi [1984] KLR 170 where the Court held:

“Section 77(9) of the Constitution states that a court or other authority prescribed by law for the determination of the existence or extent of a civil right or obligation, shall be established by law and shall be independent and impartial; and where the proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing, within a reasonable time. Section 77(10) of the Constitution states that except with the agreement of all parties thereto, all proceedings of every court and proceedings for the determination of the existence or extent of any civil right or obligation before any other adjudicating authority, including the announcement of the decision of the court or other authority, shall be held in public..... The oath administrator, though still a valued respectable member of the community in some areas, is not a court or an adjudicating authority established by law to determine the existence or extent of any civil right or obligation. The respondent in this appeal instituted his proceedings in the High Court and thereafter he and the appellant, were entitled to a fair hearing (and decision) within a reasonable time and this should have taken place in public. If they wanted their dispute resolved by the oath of administrator, they should not have begun or continued it in a court established by law.”

17. However, Article 50(8) of the Constitution provides:

This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.

18. The circumstances under which a court of law may hear matters in camera was enumerated by the Court of Appeal in Miller Vs. Miller [1988] KLR 555 where the Court of Appeal expressed itself as follows:

“Subsection 11 of section 77 of the Constitution is an exception to subsection 10 which provides that except with the agreement of all the parties thereto, all proceedings of every court and proceedings for determination of any civil right or obligation before any adjudicating authority shall be in public. Subsection 11 properly construed, has several limbs, each limb independent of the other. Interlocutory proceedings are included in the subsection as an exception to hearing in public. The proceedings in the instant case were interlocutory and the only question is whether the trial judge had the jurisdiction to order for the holding of *in camera* proceedings.....Kenya, unlike England has a written Constitution with a provision for hearing *in camera* in specified circumstances and that is the law which the trial judge cited and relied on. English law, too lays down that the High Court in England may hear cases in private where a public trial would defeat the whole subject of the action, and in cases affecting lunatics and wards of the Court..... So although the broad principle in England is that English Courts must administer justice in public, the principle is subject to exceptions and those exceptions and the exceptions in subsection 11 of section 77 of the Constitution, take account at all times, of the fundamental principle that the purpose of courts of justice is to ensure that justice is done. The paramount consideration in applying the material exception must be that without *in camera* proceedings justice should not be attained, that nothing short of excluding the public and publicity would secure justice. An example is where evidence to be given is of such character that a witness would not give it in public.”

19. The general rule as to publicity must yield to the paramount duty of the Court to secure that justice is done; and it is open to party in a matrimonial suit, upon proof that justice cannot be done otherwise, to apply for a hearing in camera, and even for the prohibition of subsequent publication of the proceedings, in exceptional cases.

In cases where it is shewn that administration of justice would be rendered impracticable by the presence

of the public, as for example where a party would be reasonably deterred by publicity from seeking relief at the hands of the Court, an order for hearing a matrimonial suit in camera may be lawfully made subject to Article 50(8) of the Constitution.

20. In this case as the dispute involves a private matter, it is my view that unless the circumstances dictate otherwise, the determination of this dispute ought to be transparent as mandated under Article 10(2)(c) of the Constitution. Under Article 50(1) the parties thereto have a right to have the same decided in a fair and public hearing. However, the court has discretion to direct in appropriate circumstances that certain part of evidence be heard in Camera. That however is an exception to the general rule and ought to be exercised as and when circumstances dictate.

21. Therefore I don't agree with the Applicant that open justice in all matters pertaining to family law is unconstitutional and an affront to the parties' privacy.

While underlining the clear principle of open justice, Earl Loreburn stated ;-

"The inveterate rule is that justice shall be administered in open Court. I don't speak of the parental jurisdiction regarding lunatics or wards of Court, or of what may be done in chambers which is a distinct and by no means short subject, or of special statutory restrictions. I speak of the trial of actions including petitions for divorce or nullity....."

22. Accordingly, I direct that unless the Court directs that the media and members of the public be excluded pursuant to the provisions of Article 50(8) of the Constitution, the trial will be conducted in public.

It's so ordered.

Dated and Delivered in Nairobi this 4th April 2016.

A. I. Hussein

Kadhi