



REPUBLIC OF KENYA
IN THE KADHI'S COURT AT NAIROBI
MLIMANI COMMERCIAL COURTS
MATRIMONIAL CAUSE NO. 30 OF 2015

G RPETITIONER

VERSUS

I MRESPONDENT

R U L I N G

The Respondent has filed an application by way of Notice of Motion dated 4th November 2015 in which she is seeking the following orders:

1. That this application be certified as urgent and service thereof be dispensed with in the first instance.
2. That an Ex-parte judgment in favour of the plaintiff against the defendant be set aside and the execution of the Decree be stayed until the determination of this application.
3. That the Ex-parte hearing and judgment be reviewed and the defendant be allowed to appear before the court for a fresh hearing and defend himself. (sic)
4. That costs of this application be provided for.

The Notice of Motion is supported by an affidavit sworn by the Respondent on 4th November 2015. The Respondent's grounds for the application are as follows:

- a. That the Defendant /Applicant has never been invited to fix for a hearing date which is convenient to both parties and instead is served with a hearing notice with an inconvenient hearing date and /or served one day before the hearing also sometimes the court clerk by the name Rukiya used to call the Defendant/Applicant 15 minutes before the hearing of the case and there was a time the Defendant/Applicant received the hearing notice under protest.
- b. That the Defendant /Applicant used to come to court seeking for the hearing date so as both parties to appear for the date and hearing of the case but in vain all the times is being ignored by the said court clerk as there was one day when the defendant/applicant attended the court registry from 8:00 am to 5:00 pm without getting any assistant to my said case.
- c. That the Defendant/Applicant never deserts the matrimonial home but is the petitioner /respondent who ignored and abandoned the defendant/applicant her right.

d. That the petitioner /respondent is treating the defendant/applicant with cruelty also using rude and abusive language of which the defendant/applicant is fed up with the behavior/habit and attitude of the petitioner.

e. That the defendant/applicant is very weary with petitioner/respondent's persecution and the marriage is currently not serve any useful purpose.

f. That it is therefore due to the foregoing reasons and in the interest of justice that this Honorable court be pleased to grant the orders sought.

The Application was certified by the court as urgent on 4th November 2015 and the parties were directed to attend for inter parte hearing on 13th November 2015.

The Applicant/Respondent submitted that the judgment entered on 17th June 2015 was entered on her absence and she wishes to defend her case. She further stated that she was not given a sufficient notice of the hearing and prays the ex-parte judgment be set aside to defend her case.

The Applicant/Respondent further testified that the Respondent/Petitioner has abandoned the matrimonial home and that he doesn't provide for the issue of the marriage. She lastly stated that she is not happy with the decree since she's not ready to go back to matrimonial home.

The Respondent/Petitioner argued orally that the Applicant/Respondent notice of motion was not properly before the court since the Respondent/Applicant was duly served but failed to attend the court when required. He further stated that before this matter was brought before the court the Applicant mother was forcing him to divorce her daughter due to some misunderstanding during the subsistence of marriage and that he doesnt not objected to the Applicant/Respondent right to seek audience.

I have carefully considered the submission of both parties, as to whether there are valid grounds to set aside the judgment , the Applicant made submission in that regard. It is also averred in the affidavit in support that the Applicant has never been invited to fix a hearing date and instead she was served with the hearing notice a day before the hearing. She further stated that she used to come to court seeking for the hearing date but in vain all her attempts were ignored by the court clerk by the name Rukia.

It's imperative to note that the allegation that the hearing notice was served a day before the hearing is also made in the notice of motion but it was never alluded to in the brief submission by the applicant.

The return of service traced on the file reveals that a process server deponed a R/S on 31st March 2015 , to effect that he had duly served the Applicant /Respondent with the hearing notice, which indicated that the matter was coming up for hearing on 14th April 2015 approximately 14 days from the service, who accepted the service under the protest.

When the file was called for hearing on 14th April 2015 only the petitioner attended, notwithstanding the Applicant/Respondent absent the court went ahead and ordered the petitioner to serve Respondent with a notice of hearing who accepted the service by signing it, after duly been served by the process server.

Order 10 rule 11 of the CPR gives this court unfettered discretion to set aside or vary ex parte judgment . See ***Mbogo and Another v Shah [1968] EA 93 (CA), Nicholas Roussos v GulamHussein Habib Virani and Another SCCA No 9 of 1993, and Attorney General & Another v James Mark Kamoga & Another SCCA No. 8 of 2004.***

Harris, J. in the case of ***Kimani v. McConnell (1966) E.A. 547*** stated that in the exercise of discretion under r.10 (our rule 11) one needs to consider whether in light of all the facts and circumstances both prior and subsequent of the respective merits of the parties, it would be just and reasonable to set aside or vary the judgment if necessary upon terms to be imposed.

That principle was followed by the Court of Appeal for East Africa in **Mbogo v. Shah (Supra)**, and in **Patel v. E.A. Cargo Handling Services (1974) E.A.** where Duffus P. at page 76 said;

“I also agree with this broad statement of principle to be followed. The main concern of the court is to do justice to the parties and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.”

This court is fortified by the above principle as it exercises its discretion judicially to determine whether in light of the facts, circumstances and merits of the instant case it would be just and reasonable to set aside or vary the judgment. This application was not brought under any provisions of law. Order 10 rule 11 of the CPR gives this Court discretion to set aside or vary the judgment passed pursuant to any of the preceding rules of that order upon such terms as may be just. Order 10 rule 11 gives this Court discretion to set aside decree ex parte against the defendant upon the defendant satisfying the court that summons was not duly served or he or she was prevented by sufficient cause from appearing when the suit was called on for hearing.

As regards service of service of the hearing notice , I am inclined to agree with the respondent/petitioner that service of the court process was duly effected on the applicants twice . I have also had the benefit of looking at the affidavit of service of the process server Mr. Antony M Ngotho dated 31st March 2015 and 2nd June 2015 in which he stated that he duly served her severally at Pangani.

The second ground of this application is that the applicant/Respondent never deserted the matrimonial home but is the petitioner /Respondent who ignored and abandoned the defendant/Applicant's right. If that is the case it will be unrealistic for the application to stand.

It is my view that the Applicant/Respondent has not given sufficient reason as to why there was non-appearance for the hearing twice of the suit herein that led to the judgment delivered on 17th June 2015. She has not tendered any evidence for attendance during the hearing and /or being ignored by the said court clerk. This evidence is also corroborated by her admission of non-attendance during the hearing of the suit. There will also be no undue prejudice suffered by the applicant/respondent if the said judgment is not set aside as she has averred in her supporting affidavit that she never deserted the matrimonial home and that it's the Respondent / Petitioner who has ignored and abandoned her. There will also be no undue prejudice suffered by the Applicant/Respondent if the said judgment is not set aside as she will still have the opportunity to seek way out of her marriage , if she so desire , by presenting her case for consideration by the court instead of disobeying the lawful orders with no lawful excuse. He who comes into equity must come with clean hands.

In the circumstances, I find that the applicant has failed to satisfy this court that there are any valid grounds to set aside the default judgment and decree. In the result this application must fail and it is accordingly dismissed.

I so order.

Dated and Delivered at Nairobi this 1st day of December 2015.

Hon. A. I. Hussein

KADHI

Ruling delivered in chambers at 12.40 pm in the presence of both parties