



**IN THE COURT OF APPEAL OF KENYA
AT NYERI
CIVIL APPLICATION 74 OF 2009 (NYR. 3/2009)
SMMAPPLICANT
AND
LNG.....RESPONDENT**

(Appeal from a ruling of the High Court of Kenya at Nyeri (Makhandia, J.)

**dated 30th June 2008
in**

H.C.C.Divorce No. 1 of 2006)

RULING

The application before me is for extension of time to file and serve both the notice and record of appeal out of time and for provision for costs thereof. It is based on the grounds which are set out on the face of the application and also in the averments on the supporting affidavit deposed to by P. N. Mbugua, counsel for the applicant. The grounds set out on the face of the application are as follows:

- “(i) The applicant was not served with a letter of invitation to fix a suitable hearing date of the divorce cause to be appealed against.**
- (ii) The respondent proceeded unilaterally to be fully heard in the said divorce cause thereby trumping the principle of natural justice which says *Audi Alteram Partem* or simply that the applicant had a right to be heard.**
- (iii) The denial of the hearing of the applicant by the respondent in the divorce proceedings in the court *a quo* was unprecedented, irregular and untenable and a breach of natural justice.**
- (iv) The affidavit filed by the respondent in the impugned divorce cause in regard to alleged service on the applicant are false and tantamount to perjury.**
- (v) Despite an early application by the applicant for proceedings of the divorce cause in the court *a quo* the said proceedings were dispatched late to the applicant.”**

The supporting affidavit by the said counsel for the applicant have the following averments:

- “1. THAT I am an advocate of the High Court of Kenya hereby on record for the applicant in this application.**
- 2. THAT the applicant intends to file and lodge an appeal in the Court of Appeal against the judgment and decree issued by Mr. Justice Makhandia on 20th day of June 2008 in the High Court at Nyeri Divorce Cause No. 1 of 2006 the said judgment and decree having dissolved the heatherto**

marriage between the parties to this application and having resulted from unilateral one sided hearing of the impugned Divorce Cause that is sought to be appealed in the Court of Appeal.

3. THAT: The unilateral proceedings of the said Divorce Cause resulted from default of serving of the applicant by the respondent with an invitation to fix a suitable hearing date and a hearing notice of the Divorce Cause.

4. THAT: The respondent hence denied the applicant his entitlement to natural justice and right to be heard resulting in oppressive proceedings.

5. THAT: The intended appeal has a very high likelihood of success and hence the need for an order enabling the applicant to have extra time to file and lodge both the notice of appeal and the record of appeal in the Court of Appeal.

6. THAT: Time for the lodgment of the Notice of Appeal and Record of Appeal lapsed by affluxion of time due to the absence of service or notification of the hearing of the Divorce Cause by the respondent to the applicant.

7. THAT: It is in the interests of substantive justice for the honourable court to grant the applicant the sought for orders.

8. THAT: Annexed hereto are the copies of the Notice of Appeal and Memorandum of Appeal in the intended appeal in the Court of Appeal hereby designated as annexure PNM1 and PNM 2 respectively.

9. THAT: Annexed herewith are copies of the certified Decree absolute issued in *HCDC Number 1 of 2006 LNG versus SMM* designated as annexure PMN 3 and as well as a copy of the letter requesting for a certified copy of the above said decree absolute herein designated PNM 4 and the ruling marked PMN 5.”

As indicated in paragraphs 8 and 9 of the supporting affidavit, annexed to it are a notice of appeal filed in court on 15th January 2009, a draft memorandum of appeal, decree absolute, an application for proceedings and decree absolute of the divorce cause dated 11th November 2008 and a copy of the judgment delivered on 30th June 2008.

To this application has been filed a replying affidavit on 14th May 2009 by one Titus Timothy Muthui Kimani who describes himself as an advocate of the High Court of Kenya who had conduct of the Divorce proceedings in the superior court on behalf of the Respondent/Petitioner. He avers that:

“1.

2. THAT: I have read and understood the Notice of Motion dated 17th January 2009 and the supporting affidavit thereto.

3. THAT: the applicant duly was served with the Divorce Petition and Notice to enter appearance.

4. THAT: on 6th February 2007 the applicants’ Advocates served me with a notice of address for service for the applicant stating the advocates address as C/o P. N. MBUGUA & CO. ADOCATES RAILWAYS GODOWNS SHED 2K DOOR 15 – P.O. Box 70713 – 00400 NAIROBI (*Annexed hereto is a certified copy of the said notice marked T.M. K.1*).

5. THAT: on 29th February 2008 I traveled to Nairobi to effect service of the application before the superior court dated 14.2.2008 (*annexed herein is a copy of the City Council Parking ticket for my vehicle dated 29.2.2008*).

- 6. THAT: I proceeded to the Railway Godowns but I discovered the shed 2K door 15 given by the applicant's advocates as their address for service was non-existent.**
- 7. THAT: I therefore effected service of the said application vide registered post using the postal address given by the applicant's advocates as per the annexed affidavit of service dated 4.3.2008 annexed hereto.**
- 8. THAT: thereafter I invited the applicant's advocates to fix a hearing date of the divorce petition and on 25.3.2008 I sent them a copy of the hearing notice vide certificate of posting number 0760 dated 8.4.2008.**
- 9. THAT: the allegations of non service by the applicant's advocates are false as he is the one who gave non-existent physical address and the hearing notices by registered post are clearly addressed to the postal box given by him.**
- 10. THAT: I haven't received any return to sender of the notices I sent to the applicant's advocates by registered post.**
- 11. THAT: the applicants intended appeal has no chances of success and the same is frivolous and indeed nonstarter.**
- 12. THAT: in any event the applicant cannot force himself on an unwilling spouse when the marriage has irretrievably broken down.**
- 13. THAT: indeed the applicant went to extraordinary extents to force himself on the respondent by filing a frivolous vexatious and an abuse of the process of the court suit that is *Nyeri Chief Magistrate's Civil Suit No. 671 of 2006* falsely alleging that the respondent was mentally unstable, which the applicant failed to prosecute and the same was dismissed by the court.**
- 14. THAT: the superior court rightfully found that there was unchallenged evidence that there was desertion by the applicant of the respondent/petitioner between December 1997 and 22nd September 2006.**
- 15. THAT: in the memorandum of appeal the applicant admits the desertion.**
- 16. THAT: I annex an affidavit sworn by the respondent/petitioner on 22.2.2008 detailing how the applicant herein violently kidnapped and abducted the respondent/petitioner in a mafia gangland style on the 15.2.2008 and at a police roadblock the applicant gave false information to the police that the respondent/petitioner was mentally ill and that the applicant was taking her to Nairobi for treatment and the applicant produced a false medical report alleging that it was by Dr. GATERE.**
- 17. THAT: the applicant on the same 15.2.2008 forcibly took the respondent/petitioner to AVENUE HEALTH CARE NAIROBI where the applicant hoped to manipulate the doctors to make a further fake medical report to show that the petitioner/respondent was mentally unstable as an excuse to create a false impression that the respondent/petitioner was a person in need of special care and attention.**
- 18. THAT: the plans of the applicant were ripped in the bud and indeed thwarted by DR. M. A. MAKANYENGO a consultant psychiatrist at the said hospital whose opinion and report gave the respondent – petitioner a clean bill of health dispelling the false claim that the respondent petitioner was mentally ill.**
- 19. THAT: the respondent/applicant informs me which information I verily believe to be true that upon the doctor's discovery of the applicants' false allegations about the petitioner's medical state to suit his ulterior and evil motive the Doctor at Avenue including even Doctor Gatere reprimanded the applicant and ordered him to leave the hospital upon which the respondent/petitioner was**

discharged.

20. THAT: the respondent/petitioner further informs me which information I verily believe to be true that the said hospital staff advised her to report the kidnap and abduction at the police station which was done Vide OTHAYA POLICE STATION O.B. NUMBER 29 of 15.2.2008.

21. THAT: the applicant is indeed desperado who will go to any extent and employ any means both legal and illegal to torment, oppress and interfere with the liberty of the petitioner/respondent.

22. THAT: the application dated 20th January 2009 is fatally defective, lacks merit and the same sought to be dismissed with costs.”

The application was heard before me on 14th May 2009 when Mr. Mbugua learned counsel for the applicant urged for extension of time mainly because on the hearing of the petition whose judgment is the subject of the intended appeal he was not invited to fix a suitable hearing date nor were they served with a hearing notice. According to counsel, this went against rules of natural justice. He stated that he applied for proceedings of the divorce cause immediately he learned that the decision therein had been delivered. He further stated that the intended appeal has a likelihood of success and that there are triable issues. That being a divorce matter it is sensitive and it was important that the applicant attends the hearing.

Mr. Kimani, learned counsel for the respondent opposed the application and submitted that it was fatally defective since it was not supported by any affidavit as the affidavit supporting it was dated 20th January 2009 although the application was drawn on 17th January 2009. Counsel submitted that the applicant was not quick in filing the application in court in that while he prepared it on 17th January 2009 he did not file it in court until 29th January 2009 and that in any case he concealed the date he discovered the date of delivery of judgment in the divorce cause. That it was incumbent upon the applicant to show that by the time he discovered that judgment had been delivered, the time for lodging an appeal had already lapsed.

According to counsel when he served the applicant with the divorce cause his advocate filed an affidavit in the superior court and on the same date he served a notice of address for service to the office of counsel for the respondent. This remained the applicant's address for service and counsel for the respondent travelled to Nairobi on 29th February 2008 in order to effect service of an application upon the applicant's counsel filed in the superior court dated 14th February 2008 at Railway Godowns – the address given by the applicant's counsel - but could not trace shed 2K door 15. That inquiries from all around for such offices yielded nothing. Counsel for the respondent then went to the High Court Nyeri and swore an affidavit to this effect and was granted leave to effect service upon counsel for the applicant by substituted service using postal address given in the notice of address. This application was served by certificate of posting and it was heard. And when he wanted to fix the divorce cause for hearing he applied to the court which allowed him to serve a hearing notice to counsel for the applicant by certificate of posting which he did and the same was never returned.

Counsel submitted that if the applicant was not served the rules of procedure would require that he applies for setting the judgment aside so that the other party has an opportunity to cross-examine him otherwise an appeal presumes that parties have been heard at the lower court whose decision is the subject of a challenge to the Court of Appeal. Counsel was of the view that the intended appeal is not arguable. Counsel has not received the proceedings of the divorce cause and does not know what went on at the superior court. He had not obtained a certificate of delay to show the cause of the delay. These are the arguments for and against this application.

The application is by way of Notice of Motion under Rule 4 of this Court's Rules. Under that rule it is settled law that the court's decision whether or not to extend time is essentially discretionary. It is also settled that in general considerations which the court takes into account before making a decision to extend time are first the length of the delay, the reasons for it, possibly chances of the appeal succeeding if the application is granted and lastly the degree of prejudice to the respondent if the application is granted. Of course these considerations are not exhaustive. The judgment in the divorce cause was

delivered on 30th June 2008 and this application lodged in this court on 29th January 2009. This would put the period of delay at about 7 months. However, the applicant filed notice of appeal to the superior court on 15th November 2009 (*I guess this was 15th November 2008*) which was outside the requisite period under **rule 74** by one day. On the same day the applicant filed the notice of appeal, he applied for certified copy of the decree absolute of the court but there has been no follow up thereafter.

The applicant's counsel does not disclose to this court on what date he discovered that the judgment in the divorce cause was delivered and even if he did so on the same day he filed the notice of appeal, his reason for failing to appear in court to contest the suit is not convincing.

The record of the proceedings disclose that the divorce cause was based on the grounds of desertion when the applicant left the matrimonial home in 1997 and went to the United Kingdom without the knowledge of the respondent. He swore no affidavit in support of this application to contest the allegation of desertion, the main cause of the decision in the divorce cause. And the affidavit sworn by his counsel on 20th January 2009 cannot be said to be in support of the application dated 17th January 2009. That the applicant's counsel was not served with a hearing notice for the divorce cause does not wish away the efforts put in by counsel to serve him with such notice through certificate of posting using the address supplied by counsel for the applicant to counsel for the respondent. And given the strained relationship between the applicant and the respondent indicating that the marriage between the couple irretrievably broke down in the late 1990's, it would be futile for this court to exercise its discretion to extend the time for filing the intended notice and record of appeal as the possibility of success of that appeal appears too remote in the circumstances.

I dismiss this application but make no order for costs since the parties were once husband and wife.

Delivered and dated this 12th day of June 2009.

D. K. S. AGANYANYA

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR