



**GGN v BOO (Miscellaneous Application E002 of 2023)  
[2024] KEHC 469 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 469 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISII  
MISCELLANEOUS APPLICATION E002 OF 2023  
PN GICHOHI, J  
JANUARY 25, 2024**

**BETWEEN**

**GGN ..... APPLICANT**

**AND**

**BOO ..... RESPONDENT**

**RULING**

1. By a Miscellaneous Application dated 25/05/2023 filed through the firm of Nyangito & Associates Advocates Company, brought under Section 1A, 1B, 3 and 3A of the Civil Procedure Act, Rule 18 of the Matrimonial Property Rules 2022, Order 51 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya 2010, the Applicant seeks orders:-
  1. Spent.
  2. That this court grants leave to the Applicant to file a Matrimonial Property Cause out of time against the Respondent.
  3. Costs be in the cause.
2. The grounds are on the face of the Application supported by the Affidavit sworn by Gladys Gesare Nyaweya (the Applicant) on 25/05/2023. The Applicant depones that she was married to the Respondent under the Gusii Customary Law but they divorced and a decree nisi issued on 4/11/2019. That at the conclusion of the divorce proceedings, she fell seriously ill and Topline Marketing Limited which is a company she had worked for tirelessly and invested in, issued her with a redundancy letter dated 15/05/2019, informing her that her position as the regional manager had been scrapped off. She fell into depression and hence she was not able to file the matrimonial property cause on time.



3. The Applicant stated that her mental health has now improved and she is able to file the matrimonial suit. She further depones that the Application is made in good faith and not intended to prejudice the Respondent. She annexed documents in support of her Application.
4. The Respondent opposed that Application through a Replying Affidavit sworn by Bernard Onderi Onkware on 3/06/2023 and filed on 3/7/2023 through the firm of Farah Munoko & Company Advocates. The Respondent depones that he met the Applicant in the year 2000 and was subsequently introduced to the Applicant's parents in the year 2001.
5. They were blessed with three issues but since their marriage was characterized with constant quarrels, they lived separately and eventually, the Respondent filed for divorce vide Divorce Cause No. 424 of 2019. The marriage was dissolved on 19/09/2019 and a Certificate of Decree nisi issued. It was made absolute on 19/10/2019.
6. The Respondent further contended that he filed for custody , care and full parental control of the children in Children's Case No. 649 of 2019 and he was granted their custody on 23/1/2020.
7. While accusing the Applicant of misleading the court, the Respondent depones that as a family, he and his children could not recall any member of his family suffering from depression in the year 2017. He further states that the letter from the Kisii Teaching & Referral Hospital on the Applicant's state of health is about a one-off examination requested by the Applicant, and though it indicates that the Applicant was treated at St. Luke's Hospital and Mediheal both in Eldoret , the said reports have not been presented to court to support her claim on the length of time she suffered the illness. That likewise, the letter from one Zipporah Nyariki , who is alleged to be a psychologist, was not produced in Court.
8. He further depones that the Applicant participated in both the divorce and children disputes and the alleged mental illness cannot suffice since she was able to issue instructions to her Counsel. He states that the alleged mental issues were birthed in the year 2021 when the Applicant resorted to malign the Respondent's name in social media platforms prompting him to file a defamation suit seeking injunctive orders against the applicant, which suit was responded to by the Applicant herein through Ondieki Ayuka & C. Advocates.
9. The Respondent contended that there is a reason why courts develop legal procedures, set rules on timelines which must be adhered to and therefore, the reasons advanced by the Applicant do not warrant the exercise of this Court's discretion to enlarge time. He therefore asks the Court to dismiss the Application with costs.
10. Pursuant to leave granted by this Court on 22/6/2023, the Applicant filed a further Supporting Affidavit on 5/07/2023. She denies participating in the divorce and children's cases which the Respondent filed in different courts. The Applicant stated that the Respondent herein is intent on denying her, her rightful share of their matrimonial properties.
11. She depones that she had been suffering from mental disorders due to the mistreatment by the Respondent. She states that the medical report from the Kisii Teaching and Referral Hospital which is in support of this Application was not contested. She also listed matrimonial properties she allegedly acquired with the Respondent during the subsistence of their marriage some of which she alleges to have been disposed of by the Respondent.
12. Directions on the application were taken and the same was canvassed by way of written submissions. Both parties complied.
13. The Applicant filed her submissions dated 6/07/2023. She submits that from the pleadings filed in the Children's court, the Respondent demonstrated why he was to be granted custody of the children.



- That in his pleadings, the Respondent stated that the Applicant attempted to harm the children physically and this is evidence of mental health since a parent cannot wish to harm her children.
14. She submits that Respondent did not challenge the letter issued by Dr. Mary Njuguna on 5<sup>th</sup> January 2023 indicating that the Applicant started suffering from mental illness six years back. She submits that as at the period when the Decree Absolute was issued, the records show that she was still mentally unwell and suffering depression and therefore, there was no way she could have commenced matrimonial proceedings.
  15. The Applicant further submits that even if the Respondent had disposed of some of the properties, there is nothing she could have done before leave was granted to her to file the matrimonial suit out of time. Relying on the case of *JWN v Julius Kamande* [2018]eKLR, the Applicant urges this Court to allow the application as prayed.
  16. On his part, the Respondent filed his submissions on 14/07/2023. He submits that Rule 5 (2) of the *Matrimonial Property Rules* provides that claims on matrimonial cases should be filed within 12 months from the date of the decree nisi. He therefore submits that in this case, the matrimonial cause should have been filed on or before 18/10/2020.
  17. He submits that the reasons advanced by the Applicant as to why she could not comply with Rule 5 (2) are an afterthought since she actively participated in other suits against her. He therefore submits that the Applicant's failure to institute the proceedings was intentional and precipitated by the doctrine of laches.
  18. While further relying on Section 22 of the *Limitation of Actions Act*, he submits that where actions to be brought in court are hindered by disability, such actions may be brought before the end of six (6) years from the date when the person ceases to be under the disability. The Respondent contends that in this case, the Applicant has not with particularity explained when the alleged mental illness commenced. He argues that this would have effect on all previous proceedings before other courts where she was a party.
  19. The Respondent urges the Court to strike out paragraphs in the Applicant's Further Affidavit where the Applicant introduced new and fundamental facts and allegations to which the Respondent had no opportunity to respond to. Ultimately, he urges the Court to dismiss the Application with costs.

## Determination

This Court has considered the Application, supporting and further affidavit, the Replying Affidavit and the submissions by both parties. The undisputed fact is that the marriage between the parties herein was dissolved, a Decree Nisi issued and ultimately made Absolute on 19/10/2019. Therefore, the Applicant is qualified to apply to the Court for determination of her claim over the matrimonial property under Rule 5 (1) (a) of the *Matrimonial Property Rules* 2022 which provides that:-

- 1) A spouse or former spouse may apply to a court for the determination or declaration of any right or claim over matrimonial property in accordance with rule 7—
  - (a) at any time after the dissolution of the marriage by a decree of a court given in final determination of proceedings under the *Marriage Act*, 2014.”



20. There are timelines within which to file such an application and no doubt time lapsed before the Applicant could file the same as Rule 5 (1) (a) above for Rule of the Rules 5 (2) provides that:-

“An application under paragraph (1) (a) shall be filed within twelve months from the date on which the decree absolute is given.”

21. As a consequence of that lapse, Rule 18 of the Rules provides that: -

“No party may file any pleadings or other process out of time except with leave of the court on application for extension of time for that purpose, and on such terms as the court may think just.”

22. From the above provisions and the material before this Court, the main issue for determination is whether time should be extended to allow the Applicant file the Matrimonial Properties proceedings. To allow such an application or not is within the discretion of this Court and that discretion has to be exercised with certain parameters and principles as outlined by the Supreme Court of Kenya in Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others (2014) eKLR where the Court held :-

“This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
6. Whether the application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.

23. In this case, the Applicant ought to have filed matrimonial property claim around October 2020 and therefore there is a delay of three (3) years. The Applicant has explained that the delay was caused by illness. She was having bouts of mental illness. To support this, she produced a letter from Dr. Mary Njuguna, a consultant psychiatrist at Kisii Teaching and Referral Hospital. The letter indicates that the Applicant had major depressive disorders and she was on medication but she is recovered.

24. In his Replying Affidavit to this Application, the Respondent annexed a letter dated 4/10/2021 from Zipporah Nyariki a psychologist who took the Applicant through a situational crisis trauma suicidal tendencies depression counselling and psychotherapy sessions. The letter which the Respondent says



was sent to his Counsel on 3/1/2023 states that the Applicant underwent Eighteen (18) sessions and progressed well and therefore no longer on anti - depressants.

25. The Respondent has however questioned the authenticity of this letter for reasons that it was not referred to in the Application yet it was produced two days before the letter from Kisii Teaching & Referral Hospital and further, that the Applicant participated in the divorce cause and children case proceedings.
26. These reports were however not rebutted by the Respondent by way of different medical reports to support the claim that they were not authentic. Further, the Respondent has not demonstrated the level of participation by the Application to show she had no mental illness. Besides, it is this Court's view that the level of her healing or otherwise could only be confirmed through medical documents.
27. From the foregoing, this Court is satisfied that the delay in filing the matrimonial proceedings is not inordinate and the reason for that delay is adequately explained. That delay was not intentional. It was caused by mental illness. This Court is persuaded by the decision in JWN (*supra*) where despite a lapse of 12 years was due to mental illness, L.Gacheru, J allowed the Applicant to file a suit out of time.
28. In conclusion, it must be pointed out that any averments in the Affidavits or submissions herein, containing allegations of cruelty or otherwise on either party herein are irrelevant to this Application. Further, the spirited effort by the Applicant herein to list and justify acquisition and ownership of matrimonial property is irrelevant at this juncture. The Application for leave is not about merits or otherwise of the intended claim for matrimonial property.
29. The jurisdiction to determine such a claim lies with the Court dealing with the suit once filed. This Court is guided by the Court of Appeal decision in *Mary Wambui Kabugu v Kenya Bus Service Limited* [1997] eKLR that:-

“It must be remembered that even when the Judge grants leave, there is nothing final about it. It is merely provisional. The Defendant will have every opportunity of challenging facts and the law afterwards at the trial. The Judge who tries this case is the one who must rule finally whether the Plaintiff has satisfied the conditions of overcoming the time bar. He is not in the least bound by the provisional view expressed by the Judge in Chambers who gave leave”.
30. What is clear is that to deny the Applicant herein the leave sought is tantamount to denying the Applicant a chance to pursue her constitutional right to present her claim to a share of matrimonial property whether such claim will succeed or not. Curtailing that right at this stage would be highly prejudicial to the Applicant. On the contrary, this Court finds that no prejudice would be caused to the Respondent at all if leave is granted. The Respondent will have a chance to state his case once the proceedings are filed before the appropriate Court.
31. Lastly, even though the Respondent has submitted on the procedure used to move this Court which is by way of a Miscellaneous Application instead of Originating Summons as provided for under Rule 7 (2) of the *Matrimonial Property Rules*, this Court is satisfied that denying the Applicant the relief sought based on that irregularity in procedure would be highly prejudicial in the circumstance of this case. This Court's discretion is in favor of the core merit in the Application and not the procedure.
32. In the upshot, this Court finds the Application dated 25/5/2023 merited and therefore the following orders are hereby issued: -
  - a. The Applicant is hereby granted leave to file a Matrimonial Property Cause out of time.
  - b. The intended Matrimonial Property Cause be filed within 30 days from the date of this ruling.



- c. Due to the circumstances of this matter, each party is directed to bear his own costs of this Application.

**DATED, SIGNED AND DELIVERED (VIRTUALLY) AT KISII THIS 25<sup>TH</sup> DAY OF JANUARY, 2024.**

**PATRICIA GICHOHI**

**JUDGE**

In the presence of

N/A for the Applicant

N/A for the Respondent

Laureen Njiru/ Aphline, Court Assistant

