GWK v ANW (Civil Appeal 59 of 2019) [2024] KEHC 10192 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 10192 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 59 OF 2019

TW OUYA, J

JULY 26, 2024

BETWEEN

GWK ..... APPELLANT

AND

ANW ..... RESPONDENT

(Being an appeal from the Ruling and order of the Senior Resident Magistrate, Hon. G. Onsarigo delivered on 29th September 2019 in Kikuyu SPMCC No. 31 of 2018; George Wairuiru Kariuki Versus Alice Nungari Waruiru)

JUDGMENT

1. This Appeal arises from the Ruling and order of the Resident Magistrate Hon. G. Onsarigo delivered on 29th September 2019 in Kikuyu.

2. The Lower Court in Kikuyu SPMCC No. 31 of 2018 *GWK v ANW*, allowed the Respondents application dated 15th November, 2018 on 29th September, 2019. The upshot of the orders was that the Appellant pays the Respondent kshs.80,000 in monthly maintenance. The Appellant seeks quashing and/or overturning the Lower Court decision on the grounds raised in the memorandum of appeal dated 18.4.2019 on grounds are as stated here below:

    i. That the Honourable Magistrate erred in in law and fact by failing to have due regard, take into account and appreciate the substantive issues of law and facts raised by the Appellant during the hearing and in the submissions, authorities and other documents on record.

    ii. That the Honourable Magistrate erred in law and in fact by finding that the Appellant's reply to the Respondent's application forming the substratum of this appeal lacked merit.

    iii. That the Honourable Magistrate erred in law and fact by finding that the Appellant's reply to the Respondent's application had not met the threshold of the balance of probability standard despite there being sufficient evidence on record to hold otherwise.

iv. That the Honourable Magistrate erred in law and fact by failing to consider the earning capability and/or financial status of the Appellant when making the ruling and order being appealed.

v. That the Honourable Magistrate erred in law and fact by failing to consider the financial responsibilities of the Appellant who when making the ruling and order being appealed.

vi. That the Honourable Magistrate erred in law and fact y failing to factor in the Respondent's earning capabilities and/or financial status of the Respondent when making the ruling and order being appealed.

vii. That the Honourable Magistrate erred in law and fact in failing to consider that the Honourable Court lacked jurisdiction to hear and determine the Respondent's application from which this appeal stems because the subject matter had been determined in Nairobi High Court Judicial Separation Cause No 45 of 1999; *ANW v GWK and CWN* filed by the Respondent herein seeking maintenance and/or alimony and which prayer was dismissed.

viii. That the Honourable Magistrate erred in law and fact in failing to take into account the erroneously when entertaining an appeal of the Respondent's similar Application in Nairobi was erroneously entertaining an appeal of the Respondent's similar application in Nairobi High Court Judicial Separation Cause No. 45 of 1999; *ANW v GWK and CWN*.

ix. That in all circumstances of the case, the Honourable Magistrate entered in dismissing the Appellant's reply to Respondent's Application.

3. The Appellant contends that the issue of maintenance is res judicata as it was already determined in Nairobi High Court Separation Cause Number 45 of 1999 where the respondent application for maintenance was dismissed. The Appellant submits that it was dismissed on merit after consideration of the facts that were presented to the court and that allowing the Lower court Ruling dated 29th September 2019 will in effect quash or review the high Court Ruling in *HC Separation cause 45 of 1999* to stand will result in an irreparable illegality.

4. The Appellant relies on Section 7 of the *Civil Procedure Act* provision that:

> " No court shall try any suit or issue in which the matter directly and substantially and in issue has been directly and substantially in issue in a former suit between the same parties under whom they or any of them claim litigating under the same title, in a court of competent jurisdiction to try such suit or subsequent suit or the suit in which such issue has been subsequently raised and has been heard and finally decided by such court"

5. The Appellant also submits that the Lower Court unilaterally relied on the Respondents unsupported account of both parties' financial status and totally ignored the Appellants evidence on the same. The Appellant gave a detailed account of his income and expenses seen on paragraphs 15-27 of the record as opposed to the Respondent who was equivocal in her evidence. He argues that he was able to tender proof that the Respondent undertakes fish, poultry and crop farming on a commercial scale on the most prime matrimonial lands at Kabete 699 (CHURA) measuring 2 Acres together with the matrimonial home at Lower KabeteXX4 Kibichiku measuring 1 acre where the Respondent resides. That on the other hand the respondent exaggerated Appellant's income and failed to give a full account of her income.

6. The Appellant cites on the authority of *M E K v G L M* (2018) eKLR where the court held inter alia that in the absence of full disclosure by the parties of their means there was no sufficient evidence on which an order of maintenance could have been judicially assessed and an order made.

7. The Respondent on the other hand argues that this court should uphold the decision of trial court because in awarding her monthly maintenance kshs.80,000, the court considered her contribution to the family businesses, bank statements, business registration certificates among others. She states that the Appellant did not dispute that she/Respondent worked in the family businesses and contributed to their success.

8. The Respondent states that she is a retired teacher with no source of livelihood and seeks support from her children and well-wishers. That the Appellant is financially stable and currently in control of all the properties some of which earn a lot of income. That she previously collected rent amounting to kshs.38,000 from stalls (matrimonial property) in Wangige but the Appellant denied her access.

9. That the Appellant has never complied with the Lower Court order since it was issued on 29th September 2019, denying the Respondent the fruits of her judgement.

10. That the Appellant's allegation that the matter of maintenance had been considered by another court of competent jurisdiction has not been supported by any evidence or an order from the said court reflecting the same.

Issues For Determination

11. I have read and considered the submissions by both parties and identified the following issues for determination:

    I. Whether the Appeals Court should uphold the decision of the trial Court

    II. Whether the High Court in Judicial Separation Cause Number 45 of 1999 pronounced itself on the issue of spousal maintenance?

    III. Who should bear the costs of this Appeal

Analysis and Determination

12. A brief history of the parties is that they got married in church in 1978 under the *African Christian Marriage and Divorce Act*. They got four issues out of the marriage and have lived separately since 1998. The Appellant now a retired public servant, has since moved on and started another family with whom he lives and undertakes business at Mai Mahiu. The Respondent now a retired teacher has continued to reside at the matrimonial home also engaged in business. The union was fraught with difficulties and upon their separation the parties have engaged in matrimonial court matters: The Appellant a Petition for Divorce in the *Chief Magistrates Court at Kikuyu No. 31 of 2018* dated 4th December 2018.

13. Respondent filed a cross petition dated..... in which she made an application for maintenance leading to the orders which are subject of this Appeal. The Appellant in her Supporting Affidavit states and avails documents to demonstrate that the Appellant is engaged in businesses and makes good income. She also states that she made immense contribution to the family investments during their union and on that basis, she is entitled to part of the income. She describes herself as a retired teacher with no means of income.

14. The Appellant, having obtained interim orders of stay of execution on 20th May, 2019, has Appealed against the Lower court order and states that the Respondent engages in commercial farming amongst other businesses and is therefore capable of taking care of herself. He also attaches documentary evidence of the Respondent's capability alongside his own and states that the Respondent exaggerated his income in the application while concealing her own.

15. The issues of the marriage are now grown-ups and live separately. The Appellant states that he is sickly and requires medical treatment for kidney transplant and convalescence for which he has attached supporting documents. Above that, he has to provide for his children who are now attending school and college.

16. The Appellant has alluded to Nairobi High Court Separation Cause Number 45 of 1999 where the Respondent application for maintenance and submits that it was dismissed on merit after consideration of the facts that were presented to the court. The alleged order has not been included in the record of appeal and a search at the registry has not yielded much.

17. It is clear that in this Appeal, the Appellant only challenges the award. The legal principles for spousal maintenance were well espoused in the case of *MN v JMK* HCCA No.163 OF (2015) eKLR. Judge Odunga in pronouncing himself on this matter cited the case of *W.M.M. v B.M.L.* [2012] eKLR, G B M Kariuki, J (as he then was) held that:

> "In considering a claim for maintenance, regard must be heard to the provisions of Article 45(3) of the *Constitution* of Kenya which recognize that "parties to a marriage are entitled to equal rights at the time of the marriage, during marriage, and at the dissolution of the marriage." The rights enshrined in this Article connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms. The equality in this Article does not create nor is it intended to create equal spousal ownership of property acquired during marriage regardless of which spouse has acquired and paid for it or regardless of how it has been acquired and paid for. Rather, and contrary to the assumption that it makes property acquired during marriage the property of both spouses in equal shares, it relates to and recognizes personal rights of each spouse to enjoy equal rights to property and personal freedoms and to receive equal treatment without discrimination on the basis of gender and without being shackled by repugnant cultural practices or social prejudices. Article 45(3) is in harmony with Article 21(3) of the *Constitution* which enshrines equality of men and women and specifically states that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." In the light of Article 45(3), the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance. In short, in cases where, as here, spouses have no children, a wife does not enjoy advantage over a husband or the vice versa and the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore. Under the Constitution, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the Respondent to support herself. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse

enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce. The financial capacity of the spouses has to be examined before the court makes a finding as to whether a spouse should pay maintenance and if so how much. It seems clear that an adjustment to sections 25 and 26 of the *Matrimonial Causes Act* (and to a host of other provisions) to align the same with the Constitution is called for...The quantum of maintenance must make sense. It must be such as the party paying can afford i.e. within the ability of the spouse paying it. It must not enrich the spouse to whom it is paid nor oppress the spouse paying it. Where the spouse seeking maintenance is capable of engaging in gainful employment but refuses to work, such conduct may be oppressive to the other spouse and the court is entitled to have regard to it when considering the quantum of maintenance. Equality of spouses under Article 45(3) of the *Constitution* connotes equal treatment under the law." (The emphasis mine)

20. Judge Odunga appreciated the reasoning in *Mbogo and Another v Shah* [1968] EA 93 that:-

> " This court will not interfere with the exercise of discretion by an inferior court unless it is satisfied that its decision is clearly wrong, the court has misdirected itself or because it has acted on matters on which it should not have acted or because it failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."

In the spirit of the above reasoning the Judge (Odunga) quoted the case of: *Leo Sila Mutiso v Rose Hellen Wangari Mwangi* Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231, it was held that:

> " ...an appellate court is justified in interfering with the exercise of discretion where it is satisfied that it is clearly wrong, because it has misdirected himself, or acted on matters which it should have not acted or failed to take into consideration matters which it should have considered and in so doing arrived at a wrong conclusion or where the discretion is exercised arbitrarily or capriciously or should it be exercised on the basis of sentiment or sympathy rather than judicially. Where the figure awarded is not based on the evidence, the exercise of discretion may well be arbitrary"

21. Quoted herein also was the decision of Chitembwe, J in *K A S v M M K* [2016] eKLR where he noted that:

> " The petitioner came to court seeking to be divorced and subsequently set free from her engagement with the respondent. That is the main reason why she came to court. Since there are no children out of the marriage and in view of the parties' view on each other, it would be unfair to grant the prayers for maintenance. The parties have been living separately since the petition was filed. No order of interim maintenance was made. It is fair if each party is set free and allowed to cater for herself/himself. Consequently, the prayer for maintenance is not granted."

22. In determining whether the order for maintenance by the Lower Court should be upheld, I have considered whether the application leading to the decision met the principles laid down above. i. that the Appellant against whom the order was made is capable of affording the maintenance as ordered by court, ii. That the party in favor of whom the order is made has no means of livelihood. I have analyzed the parties' history above and noted that both of them are engaged in business and income generating activities. In particular, the Respondent engages in commercial farming including poultry, fish farming among others. She is also a retired teacher and receiving pension. There is no indication

that she is desperate or needy. The issues of the marriage are grown up and independent requiring no parental support.

23. The Appellant on the other hand is also engaged in business including a private school and a driving school. But he is sickly and requires medication and medical care. He also has college going children from his other marriage. From his Affidavit, his current income is barely sufficient for his kidney transplant, treatment and convalescent costs and the maintenance of his school going children and niece.

24. In line with the principle of equality of parties in a marriage each party should be best left to fend for themselves.

25. This Court also notes that the parties have lived apart for 26 years and that there is a pending divorce cause in court ie Kikuyu CMCC No. 31 of 2018. The Respondent's Application was heavily pegged on her contribution to the matrimonial property/ wealth and her perception that the Appellant is doing well financially. Such matters can be well addressed through the divorce cause.

    In line with the holding in the case of *Leo Sila Mutiso v Rose Hellen Wangari Mwangi Civil Application No. Nai. 255 of 1997 [1999] 2 EA 231*, this court finds that there is a basis to interfere with the Lower court discretion and Ruling on the that it failed to take into consideration matters which it should have considered and in so doing arrived at a wrong conclusion that the Appellant ought to pay monthly maintenance to the respondent.

26. In the premises, I find that the award of maintenance was not justified based on the evidence on record and cannot be sustained.

27. Consequently, this appeal succeeds and the judgement of the trial court awarding maintenance to the Respondent is hereby set aside. Taking into account the relationship between the parties, while I have no reason to interfere with the decision on costs of the trial court, there will be no order as to costs the costs of the appeal.

28. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 26TH DAY OF JULY, 2024.

HON. T. W. OUYA

JUDGE

ROA 14 days.

In the Presence of:

Appellant: Ms Yvonne Omondi

Respondent: Mr. Prince Kingori

Court Assistant: Mr. Martin Korir