



SNN v ANN (Civil Appeal E003 of 2024) [2024] KEHC 9927 (KLR) (26 July 2024) (Judgment)

Neutral citation: [2024] KEHC 9927 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
CIVIL APPEAL E003 OF 2024**

**AC BETT, J
JULY 26, 2024**

BETWEEN

SNN APPELLANT

AND

ANN RESPONDENT

*(Being an appeal from the ruling and order delivered on 27th April 2022 by
Hon. H. Nganga in Gatundu SPM Misc. Civil Application No. E026 of 2021)*

JUDGMENT

1. On 27th April 2022, the trial court delivered a ruling in which he made the following orders: -
 - a. A restraining/protection order is hereby issued against the respondent preventing him from physically abusing the applicant and her children, and harassing the applicant, whether by stalking them or picketing outside their matrimonial home being L.R NO. RUIRU/KIU BLOCK x/xxx.
 - b. That the officer commanding Ruiru Police Station does ensure compliance with the orders.
 - c. That any party be at liberty to apply for enforcement and review of the orders.

The trial court did not award costs.

2. The order referred to in paragraph 1 above resulted from an application made by the respondent on 2nd September 2021 and supported by an affidavit sworn by the respondent. It was the respondent’s deposition that she was married to the appellant under Kikuyu customary law, and they were blessed with five issues. She averred that since 2018, the respondent became extremely violent and abusive towards her, the hostility largely exacerbated by her discovery of the appellant’s dalliance in an extra marital affair with one EM. According to the respondent, when she registered her disapproval to the affair, she was met with beatings that resulted in grievous harm to herself and pain, anxiety and suffering to the children.



3. The respondent annexed medical reports from various medical facilities as well as an extract of an occurrence book from Kahawa Sukari Police Station to her affidavit. She implored the court to grant her relief as the appellant had dehumanized her severally, threatened to kill her, severally beaten her seriously, publicly shamed her, publicly denounced her as a wife, coerced her into giving consent to disposal of matrimonial property and violently chased her from the matrimonial home. The respondent said that she was forced to stay in hiding in order to safeguard her life and that she feared for her life and that of her children. The respondent consequently filed Divorce Petition No. E019 of 2021 at Ruiru Law Courts.
4. The appellant opposed the application. He filed an affidavit dated 13th October 2021 in which he deponed that the respondent was his first wife who had filed a divorce petition against him. He denied planning to sell the matrimonial property and vehemently denied assaulting the respondent and threatening to kill her. He averred that a criminal case, Ruiru Criminal Case No. 132 of 2020 in which he had been charged with assaulting the respondent was dismissed.
5. He also accused the respondent of making false averments and stated that she had deserted him, and he was therefore the one living with his children, on the parcel of land known as RUIRU KIU BLOCK x/xxx. He stated that the Assistant Chief, Kiuu sub-location had no jurisdiction over the said property which falls under Mwihoko sub-location. He stated that the respondent was intent on obtaining orders to evict him from the subject property technically. The appellant objected to the jurisdiction of the court saying that the application should have been filed before a competent court in Ruiru. He urged the court to dismiss the application. The appellant annexed copies of the divorce petitions, copies of the application for a conservatory order in respect to the matrimonial property, answer to the divorce petition and cross-petition, and proceedings in respect of Ruiru Criminal Case No. 132 of 2020.
6. The application was disposed of by way of viva voce evidence. The respondent testified by adopting her affidavit and further affidavit together with all the documents annexed thereto. On cross-examination, she said that the appellant used to assault her and that she lived with her eldest child in the matrimonial home. It was her assertion that the appellant does not live in the matrimonial home. She insisted that the case was for protection against domestic violence.
7. According to the appellant, he never assaulted the respondent. He denied living in Lang'ata and maintained that he lives in the matrimonial home in plot No. 190, Mwihoko. He said that the respondent got injured when she slid over a banana after throwing water at him. He further said that it is the applicant who deserted the matrimonial home. He stated on re-examination that he lives in Mwihoko plot no. 190 with his last born PKJ, his first-born daughter and his grandchildren. He said he was not convicted of assault in the criminal case.
8. The appellant's witness was the assistant chief, Kiu, Mwihoko sub-location who said that he was the acting chief, Githurai when he signed the letter dated 24th October 2020 produced by the respondent. He said that he understood from the respondent's complaint that the appellant had sold some matrimonial property. He took action to have the matrimonial property safeguarded by way of caveat.
9. DW 3, the Senior Chief, Githurai Location, also testified in support of the appellant. He discredited the letter written by DW 1 the assistant chief Kiu and said that as far as he knew, the appellant was the one living on the subject property although sometimes he would stay with the second wife. Much of DW's 3 evidence was hearsay as he appeared to be relying on reports from the assistant chiefs to know what was happening in the couple's lives. He said that he had never heard of a case of violence between the parties.



10. At the close of the case, the parties filed submissions whereupon the court made its ruling against the appellant after which the appellant secured leave to file the present appeal.
11. In his appeal, the appellant faults the trial magistrate for hearing and determining the matter when the court was devoid of jurisdiction. He further faulted the trial magistrate for ruling that he moves out of the home he occupies with his children and on land registered in his name, and in effect, evicting him from the land in question. He challenged the trial magistrate's finding that there was a prima facie case that he had assaulted the respondent when there was no evidence to support the finding. The appellant also challenged the trial magistrate's finding that he had another home. The aforesaid is a summary of the appellant's appeal of seven grounds.
12. Upon directions of the court that the appeal be canvassed through written submissions, the parties filed their written submissions.
13. At the trial, the appellant submitted that the trial court did not have the territorial jurisdiction to hear and determine the matter and raised the issue of jurisdiction in the first instance. He urged the court to transfer the matter to Ruiru Law Courts on the grounds that Mwhoko falls under Ruiru Law Courts. The court did not make a finding on the objection but asked the parties to agree and in the alternative, directed the appellant to "move the court formally." The appellant did not act on the court's directions and the matter later proceeded to hearing at the Senior Principal Magistrate's court at Gatundu.
14. It is the appellant's submissions that since Ruiru had an operational court at the time the respondent filed the suit, then the Gatundu Law Courts was not seized with territorial jurisdiction to hear and determine the matter. He pointed out that the two previous cases filed by the respondent against him were filed at Ruiru. These are, Ruiru Criminal Case Number 132 of 2020, and Ruiru SPM Divorce Cause NO. E019 of 2021. The respondent relies on the case of REPUBLIC -VS- MAGISTRATES COURT MOMBASA; ABSIN ENERGY LIMITED (Interested Party) JUDICIAL REVIEW OF E033 OF 2021 [2022] KEHC 10 (KLR) 24th January 2022 where the court stated: -
 - "20. Consistent with the above jurisprudence in determining the lower court's jurisdiction, the pleadings filed in the lower court are useful. It's not for cosmetic purposes that every plaint must contain an averment that the cause of action arose within the jurisdiction of the court. A trial court is required to have its antennae hoisted high any time it reads an averment pleading the court has jurisdiction. This is because if a court exercises jurisdiction which it does not possess, the proceedings will be a nullity.
 21. The term jurisdiction has been demarcated into three categories, namely
 - (a) Subject matter jurisdiction, i.e., whether that particular court has jurisdiction to deal with the subject matter in question;
 - (b) territorial jurisdiction, i.e., whether the court can decide upon matters within the territory or area where the cause of action arose; and
 - (c) pecuniary jurisdiction, i.e., whether the court can hear the suit of the value of the suit in question. These three categories of jurisdiction are prerequisite to the assumption of a court's jurisdiction sine non qua non. The absence of any of these three



is sufficient to extinguish a courts jurisdiction or invalidate the proceedings.”

15. Citing the Supreme Court in Supreme Court of Kenya Petition No. 3 (E004) of 2022, DHANJAL INVESTMENTS LIMITED VS. SHABANA INVESTMENTS LIMITED, the appellant urges the court to find that jurisdiction is everything and without it, the court has no power to make one more step. Reliance is also placed on the case of SAMUEL KAMAU MACHARIA -VS- KENYA COMMERCIAL BANK AND 2 OTHERS, SC APPLICATION NO. 2 OF 2011 [2012] eKLR where it was emphasized that a court’s jurisdiction flows from either *the constitution* or legislation or both and “cannot be expanded through judicial craft or innovation.”
16. On the second limb of his appeal, it is the appellant’s submissions that the respondent schemed to dispossess him of his home and his source of income as she willfully misled the court that she was in possession of the property, that is the residence on the land known as RUIRU KIU BLOCK x/xx. The appellant submits that there was no evidence led by the respondent to prove that she was in possession of the property. Conversely, the appellant submits that he had sufficient evidence that he is in possession of the land. The appellant submits that the respondent did not deserve the orders sought because “he who comes to equity must come with clean hands” and relies on the case of ESTHER NUGARI GACHOMO -VS- EQUITY BANK LIMITED [2015] eKLR and CALIPH PROPERTIES LIMITED -VS- BARBEL SHARMA AND ANOTHER [2015] eKLR.
17. It is the appellant’s further submissions on the finding of a prima facie case on the allegations of violence on his part, the Criminal Case in which he had been charged at Ruiru was dismissed for want of prosecution and that he was denied a fair hearing as guaranteed by Article 50(1) of *the Constitution* since the makers of the documents relied on by the respondent in opposing his application were not called to give evidence. He submits that he offered a plausible explanation as to how the respondent may have sustained the injuries.
18. Further, the appellant submits that the respondent made a bland statement that the appellant has another home yet he submitted sufficient evidence that he lives on the property that is the subject of the appeal. He avers that the respondent is intent on taking control of his properties and that is what motivated the claim of violence and the divorce cause. He urges this court to allow the appeal with costs.
19. On her part, the respondent, through her advocate opposes the appeal, she submits that there are only two issues for determination. On the first issue of jurisdiction, she submits that the trial court’s jurisdiction was rightly invoked in accordance with Section 24 of the *Protection Against Domestic Violence Act* and Section 3A of The *Civil Procedure Act* which vests the court with inherent power to make such orders as are necessary for the ends of justice. She submits that since the appellant participated in the trial, then he is estopped from challenging the trial court’s jurisdiction on appeal as his right to a fair trial was not prejudiced in any way. She terms the ground of appeal on jurisdiction as an afterthought that is meant to frustrate her in her quest for justice.
20. The respondent further submits that Sections 8 and 19 of the *Protection Against Domestic Violence Act* are instructive. Section 8 stipulates: -
 - “(1) A person who is in a domestic relationship with another person may apply to the court for a protection order in respect of that other person.”



21. She further submits that Section 19 contains extensive provisions on the scope of the protection order that a court may give and Section 19 (2) and (3) state as follows:

“(2) Without limiting the provisions of subsection (1) but subject to section 20, it shall be a condition of every protection order that at any time other than when the protected person and the respondent are, with the express consent of the protected person, living in the same dwelling house, the respondent shall not do any or more of the following: -

- a. Watch, loiter near or prevent or hinder access to or from, the protected person’s place of residence, business, employment, educational institution, or other place that the protected person visits often.
- b. Stalk the protected person or stop or accost the protected person in any place;
- c. Without the protected person’s express consent, enter remain on any land or building occupied by the protected person.
- d.
- e.

(3) Without prejudice to the provisions of this section, the court may in an order under this section: -

- a. Subject to subsection (6), grant to any protected person the right of exclusive occupation of the shared residence or a specified part thereof by excluding the respondent from the shared residence or the specified part thereof, regardless of whether the shared residence is wholly owned or leased by the respondent or jointly owned or leased by the parties;
- b. Require the respondent to permit any protected person to enter the shared residence, or to enter the residence of the respondent accompanied by any enforcement officer for the purpose of collecting the personal belongings of the protected person.
- c. Require the respondent to permit any protected person to have the continued use of the necessities which had previously been ordinarily used by the protected person or persons; or
- d. Give such other directions as may be necessary and incidental for the proper carrying into effect of any order made under paragraph (a), (b) or (c)”

22. In making a protection order, the court is required under Section 19(4) to take into account the need to ensure that the protected person is kept safe from violence, the accommodation needs of the protected person are catered for and the welfare of any child affected by the order.

23. The respondent also submits that she proved that her marriage was happy until 2018 when the appellant became violent and even inflicted bodily harm on her. Her submissions are that she lodged



a report of assault and was issued with a P-3 form. She submits that she laid sufficient basis for the protection orders and the court was right in granting them.

24. None of the submissions by either party was helpful to the court on the issue of jurisdiction.

25. Section 5 of The [Civil Procedure Act](#) states that: -

“Any court shall subject to the provisions herein contained have jurisdiction to try all suits of a civil nature excepting suits which its cognizance is either expressly or impliedly barred.”

26. Section 16 of the same Act stipulates:

“No objection as to the place of jurisdiction shall be allowed on appeal unless such objection was taken in the court of first instance and there has been a consequent failure of justice.”

27. From the proceedings, this court has deduced that Mwihoko sub-location where the parties are is within Kiambu County. Gatundu Law Courts, which is where this appeal emanates from, is also located within Kiambu County. The appellant did not place any material before the trial court to suggest that Gatundu Court lacks jurisdiction to hear and determine a matter emanating from Mwihoko sub-location. It may be that the Ruiru Law Courts is nearer and more convenient to the parties than Gatundu Law courts. I find that the Gatundu Law Courts have territorial jurisdiction herein under sections 11 (ii), 12, 14 and 15 of The [Civil Procedure Act](#). See the case of CHARLES NDUNGU KAHANDO -VS- CLEMENTINE NYAWIRA KURIA AND ANOTHER [2021] eKLR.

28. This court further finds that the appellant did not pursue his preliminary objection on jurisdiction during the proceedings in the trial court as directed by the court. The appellant, upon being directed to file a formal application to the court on the issue of jurisdiction on 15th October 2021, did not file such application. Subsequently, the matter came up for hearing on 1st November 2021 when the appellant, through his advocate prayed for directions that the matter does proceed through viva voce evidence. In the circumstances, the appellant clearly acquiesced to the proceedings before the trial court. He is therefore precluded from raising the issue on appeal. I find that the issue of territorial jurisdiction is succinctly covered by Section 14 of The [Civil Procedure Act](#) and this ground of appeal must fail.

29. The second limb of the appeal dwells on the averments that the case in the lower court was a well calculated scheme to deprive the appellant of his property. On the contention that the trial court erred in finding that there was prima facie evidence that the appellant assaulted the respondent, I have analyzed the evidence. The respondent produced a P3 form that confirmed that she had sustained injuries. She had a tender anterior cheek, wound to the right palm, and bilateral oedema to the knees. She had reported the assault and criminal proceedings were instituted. I have looked at the record of the criminal proceedings. The appellant was indeed charged with assaulting the respondent. When the case first came up for hearing the appellant informed the court that they were attempting reconciliation. The attempted reconciliation failed, and the prosecution later withdrew the case under section 87 (a) of the Criminal Procedure Code because after only one earlier adjournment due to absence of the police file, the court declined a further adjournment. The withdrawal of suit was not the respondent's fault and does not suggest in any way, that she had not been injured.

30. The trial court made a finding of fact in respect to the respondent's allegation of injury upon hearing and seeing her give evidence, and upon examining the evidence, including photos, that she had tendered. The appellant in his evidence claimed that the respondent sustained the injuries after a fall. I find this to be an afterthought as it was not in his pleadings. It is trite law that parties are bound by



their pleadings. For the aforesaid reasons, I agree with the trial magistrate's finding that the appellant assaulted the respondent. The burden of proof was on a balance of probabilities. There was no need for the appellant to be convicted to prove the assault.

31. Turning now to the finding that the appellant had another home, I find that on a balance of probabilities, the same was also proven. The appellant admitted that he was polygamous. The appellant attached a copy of the pleadings relating to the respondent's divorce petition to his replying affidavit. In the said divorce cause, the respondent made a deposition by way of an affidavit sworn on 3rd February 2021 in which she stated: -

“ 14. That sometime in 2019, the respondent bought another plot and built a house within Mwiwoko estate in which he moved with his new lover together with the children that she had with her late husband.”

32. In response, the appellant stated that the purported lover was a second wife that he married under Kikuyu customary law. Nowhere in his depositions did the appellant deny that he lives with his second wife in another house away from the house sitting on RUIRU KIU Block 7/190. Even his own witness, the Senior chief, testified that the appellant at times goes to his second wife's house. The trial magistrate was therefore correct in finding that the appellant lives with his second wife about 500 meters away from his matrimonial home with the respondent who is his first wife.
33. Finally, the appellant faults the trial magistrate's finding that the respondent was residing in their matrimonial property and insists that he is living in their home with their children.
34. The evidence before the court was that the respondent used to live in the matrimonial home until she was forced to flee for her life after the assault and threats to her life by the appellant. The respondent was therefore seeking protection so that she could go back to her matrimonial home.
35. The court's finding was that the appellant had another matrimonial home and since it was proven that he was violent to the respondent, then he should be restrained from entering the matrimonial home occupied by the respondent. The orders granted by the court were based on the trial court's appreciation of the facts and consideration of the law.
36. It is an established principle of the law that an appellate court should not interfere with the trial court's findings on facts especially where there was a conflict in the primary evidence unless there are compelling reasons. In the case of ERASTUS ONYANGO -VS- MANOA MALENYA [2015] eKLR, the court stated as follows: -

“An appellate court will hardly interfere with the conclusion made by a trial court after weighing the credibility of witnesses in cases where there is a conflict in primary facts between witnesses is crucial.”

37. The aforesaid case is relevant in this appeal. The trial court heard both parties and the appellant's witnesses. The parties' evidence was conflicting. The trial magistrate had the benefit of seeing and hearing the witnesses as they testified. He found in favor of the respondent in a detailed ruling in which he exhaustively analyzed the evidence and the applicable law. I find no grounds to reverse the finding.
38. The upshot is that the appeal lacks merit and is hereby dismissed, and the ruling of the lower court affirmed.

There shall be no order as to costs.



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

A. C. BETT

JUDGE

In The Presence Of:

Olembo for appellant

Ms Matu holding brief for Ms Wangui Kuria for respondent

Court Assistant: Polycap Mukabwa

