N v K (Civil Appeal E036 of 2021) [2022] KEHC 336 (KLR) (28 April 2022) (Judgment)

Neutral citation: [2022] KEHC 336 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E036 OF 2021

LM NJUGUNA, J

APRIL 28, 2022

BETWEEN

RGN ..... APPELLANT

AND

AIK ..... RESPONDENT

JUDGMENT

1. The appellant herein was the petitioner in Divorce Cause No. 13A of 2020 in the Chief Magistrate's Court at Embu, in which she sued the respondent and prayed for dissolution of their marriage and division of matrimonial property.

2. In her petition, she averred that, on the 1st day of June, 1996 she and the respondent entered into Kiembu Customary law marriage where all the rites and duties of Kiembu customary law rites were performed. Further that after the celebration of the said customary marriage both of them entered into an agreement in which they accepted to be a husband and wife, in the year 2010. That they lived as such from 1996 – 2018 during which period, they were blessed with three issues of their marriage and also acquired matrimonial property together.

3. It was her case that around the year 2013 they started having misunderstandings and in the year 2018, the appellant was chased away from the matrimonial home and despite attempts aimed at reconciliation, the marriage irretrievably broke down. She accused the respondent of cruelty, violence and adultery.

4. In his reply to the petition, the respondent denied the allegations and in particular, the allegation that he was married to the appellant and urged the court to dismiss the petition.

5. After hearing the matter, the learned magistrate dismissed the petition after finding that it had no merits as the appellant did not prove there existed a customary marriage between herself and the respondent.

6. Following the judgment, the appellant filed the notice of motion dated the 16th September 2021 in which she sought to review and/or vary and set aside the judgment; further that her case be heard de novo. She based her application on the grounds that she acted in person and being a layman, she did not appreciate the kind of evidence that was material to her case and as such, she should not be disadvantaged simply because she is not legally empowered with legal knowledge and was not represented by a counsel.

7. It was her case that, though ignorance of the law is no defence, allowing the re-opening of her case to adduce new evidence will not prejudice the respondent since the evidence sought to be adduced is well within the knowledge of the respondent. That the new evidence is only meant to remove any vagueness or doubt over the relationship between the appellant and the respondent. She averred that she will suffer great loss for the 25 years that she had been married to the respondent and she will be deprived of all her financial contributions amounting to more than Kshs. 4,000,000/= and other non-monetary contribution. She contended that there is an error apparent on the face of the record in that, the record shows that she did not have other witnesses on that day of the hearing but if she had been accorded a chance she would have brought other witnesses. Further that both parties did not file their witness statements during the pretrial before the matter was set down for hearing thus amounting to trial by ambush. That the application had been made diligently and without unreasonable delay in light of the circumstances of the case.

8. When the application was placed before the learned magistrate, he proceeded to dismiss the same after finding that it did not have merit.

9. The appellant has now moved this court by way of memorandum of appeal dated the 29th September, 2021 in which she has raised thirteen grounds of appeal which in her submissions, she has compressed into the following three issues;

    a. Whether the court erred in making final orders on the application dated the 16th September, 2021.

    b. Whether the lower court had jurisdiction to review/set aside the judgment.

    c. Whether the judgment delivered on the 4th August, 2021 should be set aside and the matter be heard afresh.

10. When the appeal came up for hearing, the court gave directions on filing of submissions to which only the appellant complied.

11. The court has considered the appeal and the submissions filed by the appellant. I have also perused the record of the trial court and the application dated the 16th September, 2021 which is subject of this appeal.

12. In considering the merits of the appeal, this court will be answering the three issues raised herein.

13. On whether the court erred in making final orders on the application dated 16th September, 2021, the record shows that the said application was filed on the 16th September, 2021 and on the same day; it was placed before the learned magistrate in chambers for directions.

14. The application was not filed under certificate of urgency but the file was taken to the learned magistrate for the usual directions which in my view should entail giving timelines on the service of the same, filing of a response, if any, and giving either a mention or a hearing date for the same. Instead of such directions and surprising, the court substantially dealt with the application and gave final orders

after the learned magistrate found the same had no merits. He proceeded to dismiss the same without giving the parties a hearing and in their absence.

15. As was submitted by the appellant, she was greatly prejudiced because she was in essence condemned unheard. The application had not even been served upon the respondent so that he could answer to it by filing a response. In the case of *Tetra Pak Limited Vs Macheo limited* [2018] eKLR the court held;

> " When the matter is scheduled for mention, it is procedurally and legally wrong to turn a mention date to a hearing date and issue final orders as the party who had expected the matter to be mentioned and appropriate orders issued is not only prejudiced by issuance of such final orders in the matter but is denied fair hearing".

16. Similarly, in *R Vs Anti-Counterfeit Agency & 2 Others Exparte Surgipharm Limited* [2014 eKLR, the court held;

> " First and foremost, it is clear that the matter was coming up for mention for directions rather than for hearing. It is trite that on a day when a matter is fixed for mention the same ought not to be heard unless the parties consent to the hearing....what emerges from the foregoing jurisprudence is that the court, without the consent of the parties could not lawfully dismiss the application".

17. In the case herein, the matter was not even coming up for mention but it was just placed before the trial magistrate for directions. By dismissing the application without hearing the parties, the learned magistrate denied the appellant her right to be heard on the application.

18. On whether the trial court had jurisdiction to review/set aside its judgment, the application was seeking orders of review and/or setting aside of the judgment delivered on the 4th August, 2021. Review is provided for under Order 45 of the *Civil Procedure Rules* and Section 80 of the *Civil Procedure Act.*

19. Order 45 1(1) provides;

1

(1) Any person considering himself aggrieved –

a. By a decree or order from which an appeal is allowed but from which no appeal has been preferred, or

b. By a decree or order from which no appeal is hereby allowed; and whom from the discovery of a new and important matter or evidence, after which the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

2.

(1) An application for review of a decree or order of a court, upon some ground other than discovering of such new and important matter or evidence as is referred to in Rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of

the decree, shall be made only to the judge who passed the decree or made the order sought to be reviewed.

20. From the above, it is clear that the learned magistrate has(d) jurisdiction to entertain the application but as to whether the same has merit or not, that was a different thing altogether. It was therefore a misdirection and misapprehension of the law on his part, to find that the orders would amount to sitting on an appeal of his own decision for the reason that the suit had been heard and finalized.

21. Under Order 45(1) of the Rules, there is no iota of doubt that the learned magistrate has jurisdiction to entertain an application to review not only an order but also a decree.

22. Another important thing to note is that before the hearing of the main petition, there were fundamental legal and procedural flaws leading to the main hearing which had the potential of prejudicing the parties herein. First and foremost, under Order 3 Rule (2) of the *Civil Procedure Rules*, all suits filed under Rule 1(1) including suits against the government shall be accompanied by;

    (a) .....

    (b) .....

    (c) Written statements signed by witnesses excluding expert witness; and

    (d) Copies of the documents to be relied on at the trial including demand letter before action. Provided that statement under sub rule (3) may with leave of the court be furnished at least fifteen days prior to the trial conference under order 11.

23. The court has keenly perused through the record and I note that this provision was not complied with. Though the matter proceeded to full hearing, there were no witnesses' statements that were filed as required under order 3 Rule (2).

24. Similarly, there was no list of documents and that of witnesses that was filed by either parties. Despite this noncompliance, the respondent produced several documents and it is not clear whether the appellant had been served with the same beforehand.

25. Order 11 of the *Civil Procedure Rules* is generally on pretrial directions and conferences. The court takes cognizance of the fact that since the rules were amended in 2010, mechanisms have not been put in place to allow for a proper pretrial directions and conference to be carried out as provided for under Order 11.

26. However, some basic directions with a view of furthering expeditious disposal of cases and case management should be done. In this case, the trial court ought to have complied with Order 11 Rule 3 (1)(a) which enjoins the court to consider compliance with Order 3 Rule 2 among others. In failing to comply with this legal and procedural requirement and more so, in allowing the respondent to produce documents at the trial, the right of the appellant to a fair hearing was denied as she did not have an opportunity to adequately prepare for the case. It was at best, trial by ambush.

27. In view of the foregoing, I find that the appeal has merits and hereby allow the same. Ordinarily, I ought to send back the case to the lower court for the hearing of the application dated 16th September, 2021 but considering all the flaws that this court has identified hereinabove, in the interest of justice, I hereby make the following orders;

    1. The appeal is allowed.

    2. Both the ruling delivered on the 17th September, 2021 and the judgment delivered on the 4th August, 2021 are hereby set aside.

3. The matter is remitted back to the trial court to be heard afresh by a different magistrate.

4. Each party to bear its own costs of the appeal.

28. It is so ordered.

DELIVERED, DATED AND **SIGNED** AT **EMBU** THIS **28 TH** DAY OF **APRIL, 2022.**

L. NJUGUNA

JUDGE

.....fort the Applicant

.....for the Respondent