DMG v JWM (Civil Appeal 179 of 2019)
[2022] KEHC 14302 (KLR) (27 October 2022) (Judgment)

Neutral citation: [2022] KEHC 14302 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KIAMBU

CIVIL APPEAL 179 OF 2019

DAS MAJANJA, J

OCTOBER 27, 2022

BETWEEN

DMG ..... APPELLANT

AND

JWM ..... RESPONDENT

(Being an appeal from the Ruling and Order of Hon. D.N. Musyoka, SPM dated 31st October 2019 at the Magistrates Court, Kikuyu in Misc. Civil Application No. 44 of 2018)

JUDGMENT

Introduction and Background

1. On August 8, 2019, the appellant filed an application before the subordinate court made *inter alia* under order 37 rule 1, 2 and 8 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* seeking to remove a restriction lodged on a parcel of land Title No Muguga/Muguga/x xxx registered in the name of the appellant ("the suit property"). On August 28, 2018, the appellant's application was granted due to non-appearance and lack of opposition by the respondent.

2. Two days later, the respondent filed a notice of motion seeking to stay the orders of the court issued on August 28, 2018 arguing that the appellant's application was never served upon her. Further that she and the appellant were married under statute and that the suit property constituted matrimonial property within the meaning of section 6 of the *Matrimonial Properties Act, 2013*. The subordinate court issued interim orders of stay which were extended from time to time pending hearing and determination of the application.

3. The parties reported to the court that they were engaged in negotiations in a bid to settle the matter. The negotiations culminated in the consent dated October 29, 2018 that was adopted as an order of the court on October 30, 2018 ("the consent order") on the following terms:

1. That the applicant shall cause a subdivision of all that piece of land known as LR No Muguga/muguga/x xxx into 2 (two) equal portions

2. That the portion of the said LR No Muguga/muguga/x xxx on which the matrimonial house stands shall be transferred to the 1st respondent free from all encumbrances to hold in trust for herself and that of her children

3. That the other portion of LR No Muguga/muguga/x xxx shall be transferred to the 1st respondent absolutely free from all encumberances

4. That the applicant shall continue to provide for the schooling and housing of the children. The 1st respondent to provide upkeep and subsistence for the children

5. That the costs in relation to the subdivision and transfer of LR No Muguga/muguga/x xxx shall be borne by the 1st respondent

6. That the 1st respondent shall have no further claim over the applicant's assets

7. That subject to (1)-(6) above all cautions, restrictions and encumbrances registered on LR No Muguga/muguga/x xxx and LR No Muguga/muguga/x xxx shall stand removed and/or cancelled.

8. That each party shall bear their own legal costs

9. That subject to compliance with terms of this consent, this suit be compromised accordingly with each party bearing its own costs.

4. On May 23, 2019, the respondent filed a notice of motion dated May 22, 2019 accusing the appellant of being in contempt of the consent order and urged the court to cite and sentence the appellant to serve imprisonment of at least six months. On August 27, 2019, the appellant filed an application to discharge, vacate and set aside the consent order. The subordinate court ruled on the two applications through its ruling dated October 31, 2019 ("the ruling") where it dismissed the appellant's application and in effect declined to set aside the consent order and also allowed the respondent's application to cite the appellant for contempt of the consent order.

5. The appellant is aggrieved with this decision and has now filed an appeal through his memorandum of appeal dated November 15, 2019. He asks this court to set aside the ruling and allow his application dated August 27, 2019 setting aside the consent order and dismiss the respondent's application dated May 22, 2019 for contempt. The appeal was canvassed by way of written submissions which are on record and which I have considered and will make relevant references to.

Analysis and Determination

6. Since this is the first appeal, this court is enjoined by the provisions of section 78 of the *Civil Procedure Act* to evaluate and examine the subordinate court record and the evidence presented before it in order to arrive at its own conclusion. This principle of law was elucidated in *Selle v Associated Motor Boat Co Ltd* (1968) EA 123 as follows:

> [An appellate court] is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear

in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...

7. Even though the appellant's memorandum of appeal contains 18 grounds, his submissions have condensed the issues for determination to three main grounds. First, whether the subordinate court had jurisdiction to adopt and issue the consent order. Second, whether consent order was contrary to the provisions of sections 7 and 17 of the *Matrimonial Property Act 2013*, and section 73 of the *Children's Act, 2001*, among other statutes and last, whether the consent order was contrary to the policy of the court and against the rule of law and statute laws.

8. On the issue of jurisdiction, the appellant submits that the subordinate court did not have jurisdiction to adopt the consent order which related to division of matrimonial property with finality, a preserve of this court. On her part, the respondent contends that indeed the subordinate court has jurisdiction to adopt the consent order as the jurisdiction over matrimonial property disputes is not a preserve of the High Court alone.

9. The issue of jurisdiction is fundamental to any court process and the appellant rightly cites *Owners of the Motor Vessel Lilian SS v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where Nyarangi JA, famously held that:

> Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....

10. I am in agreement with the respondent's submissions that the High Court does not have exclusive jurisdiction to determine disputes over matrimonial property as the *Matrimonial Property Act, 2013* does not define any particular court therein as having exclusive jurisdiction to determine disputes of matrimonial property (see *B W M v J M C* MRNGA ELCC No 379 of 2017 [2018] eKLR and *EMW v RMK* Thika ELCC No E035 of 2021[2022] eKLR).I therefore find and hold that the subordinate court had the requisite jurisdiction to determine the matrimonial dispute between the parties and adopt the consent order.

11. As to whether the consent order is contrary to sections 7 and 17 of the *Matrimonial Property Act, 2013*, the appellant submits that court should not have adopted the consent order while the marriage between the parties still subsists. The said provisions state as follows:

> 7. Ownership of matrimonial property
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> Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
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> 17. Action for declaration of rights to property
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> (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
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> (2) An application under subsection (1)—
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> a. shall be made in accordance with such procedure as may be prescribed;
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> b. may be made as part of a petition in a matrimonial cause; and

c. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.

12. The appellant relied on the Court of Appeal decision in *AKK v PKW* Nrb CA Civil Appeal No 61 of 2019 [2020] eKLR where it was held as follows:

> (34) A plain reading of section 17 enables a spouse, subsistence of a marriage notwithstanding, to make an application for declaratory orders. It further states that that application may be made as part of a petition in a matrimonial cause and notwithstanding that a petition has not been filed under any law relating to matrimonial causes. It is our opinion that the divorce cause does not prevent a party from bringing an action for declaration of rights to property in the High Court under section 17 of the Act. In PNN v ZWN [2017] eKLR, Waki, JA stated that:
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> An inquiry may thus made under section 17 and declarations may be issued, the subsistence of a marriage notwithstanding. As stated by Lord Morris of Borthy-Guest in Petit v Petit [1970] AC 777:
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> "One of the main purposes of the act of 1886 was to make it fully possible for the property rights of the parties to a marriage to be kept separate. There was no suggestion that the status of marriage was to result in any common ownership or co-ownership of property. All this in my view negates any idea that section 17 was designed for the purpose of enabling the court to pass property rights from one spouse to another. In a question as to title to property the question for the court waswhose is this? And not to whom shall it be given?"
>
> (35) The above case demonstrates that a declaration under section 17 of the Act is not necessarily pegged on the subsistence of a marriage. The effect of this section is that the court can make a declaration with regard to the suit property even though the parties are still married or pending divorce. It is our considered view that the High Court has jurisdiction to declare the rights of parties in relation to any matrimonial property which is contested. However, by virtue of section 7, the High Court cannot divide matrimonial property between spouses until their divorce or their marriage is otherwise dissolved. We find that the trial court was clothed with the requisite jurisdiction to entertain those aspects of the appellant's prayers that did not involve the division of matrimonial property and the superior court was in error to limit its jurisdiction on the basis of the provisions of section 7 of the Act.

13. From the terms of the consent order which I reproduced in the introductory part, it is clear that the parties agreed on how to divide the suit property. It is also common ground that this agreement of division was done during the subsistence of the parties' marriage. While I am in agreement with appellant the court cannot sub-divide the matrimonial property under section 7 of the *Matrimonial Property Act, 2013* while the marriage subsists, I do not agree that the court cannot adopt a consent of the parties. Nothing in the statute prohibits the parties to a matrimonial property dispute from concluding the matter on their own terms.

14. I reject the appellant's argument that the consent order was contrary to the policy of the court and against the rule of law and statute law, for the same reason I have already held that it does not violate section 7 of the *Matrimonial Property Act, 2013*. The appellant also submits that the consent order dealt with issues of children which ought to have been addressed in the Children's Court through a children's matter properly filed. The respondent indeed conceded that the substratum of the issue before the subordinate court was neither concerned with matrimonial property nor children matters but that the parties agreed to settle the dispute before the court including incidental matters.

15. In *William Karani and 47 Others v Wamalwa Kijana and 2 Others* NKR CA Civil Appeals Nos 43 and 153 of 1986(consolidated) [1987] eKLR, Gachuhi JA, expressed the following review regarding settlement by the parties:

> There is no limit or fore under which a consent can take so as to finalise the whole dispute. The doors of negotiations are very wide. One can bring in matters which were not in this pleading or leave out any matter or claim pleaded so long as the intention of the parties is to bring the whole dispute into finality.

I agree with the above sentiments and with the respondent's submissions that there was nothing wrong with the parties consenting to matters outside those pleaded as long as the intention of the parties was to settle their disputes as a whole. It is in fact that policy of the law that parties should as much as possible settle their dispute outside and the court would be abandoning its duty to promote reconciliation, particularly in family matters, if it rejected an agreement on flimsy grounds. The duty of our courts to promote reconciliation and other forms of alternative dispute resolution is now anchored in article 159(2)(c) of the *Constitution*. In family disputes, the issue of the marriage, matrimonial property and children of the marriage are usually so intertwined such that when parties agree on a settlement, it is usually all encompassing.

16. The consent order is merely an adoption of an agreement freely entered into between the parties. The issue of the children's court would only come into play if there is a need to enforce those aspects that relate specifically to children. As I have already held the fact that consent order deals with a myriad of issues, does not in any affect its validity.

Conclusion and Disposition

17. I have considered the record and it is clear that the consent order was the result of negotiations and an agreement between the parties. It is trite law that a compromise agreement which results in a consent order can only be set aside on the same grounds under which a contract may be avoided; fraud, misrepresentation, mistake, public policy and like grounds (see *Hirani v Kassan* [1952] EACA 131, *Flora Wasike v Destimo Wamboko* [1988] 1 KAR 625). No such grounds have been established.

18. For the reasons I have set out in this judgment, I find that the appeal lacks merit. It is dismissed with costs to the respondent. The costs are assessed at Kshs 40,000.00.

SIGNED AT NAIROBI

D. S. MAJANJA

JUDGE

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF OCTOBER 2022.

M. KASANGO

JUDGE

.....instructed by Wamiti Njagi and Associates Advocates for the Appellant.

.....instructed by Mbugua Ng'ang'a and Company Advocates for the Respondent.