



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 20 OF 2020

HGE.....APPELLANT

VERSUS

SM.....RESPONDENT

(Being an appeal against the judgment of Hon. DS Ratori, Principal Kadhi,

delivered on the 16th day of April, 2020 in Vihiga Principal Kadhi's Court

Matrimonial Cause No. 2 of 2019)

JUDGMENT

1. The appellant herein has proffered this appeal against the judgment delivered by Hon. DS Ratori, Principal Kadhi, on the 16th day of April, 2020, in Vihiga Principal Kadhi's Court Matrimonial Cause No. 2 of 2019. The suit at the trial court had been brought by the respondent against the appellant, where she claimed that he had distributed his estate, in particular a parcel of land described as Plot Number [...], situate at Jebrok, in a manner that left her out. She further alleged that she lived in the said parcel of land, and she has been thrown out, despite being a legal wife of the appellant. She sought, among other prayers, that the appellant give a portion of his property to her. The appellant filed a defence and counterclaim, disputing the purported marriage to the respondent. After hearing both sides, the trial court upheld the marriage between the two parties, ordered the appellant to allow the respondent back to the matrimonial house at Jebrok Plot [...] with immediate effect, ordered the appellant to allocate and transfer a half share of Jebrok Plot [...] to the respondent within twenty-one days to safeguard her interests, ordered the appellant to bear the charges for the transfer of the property to the respondent, ordered the appellant to pay to the respondent her unpaid dowry of Kshs. 1, 000.00 within thirty days, ordered the appellant to maintain the respondent, and directed the parties and their relatives/agents to maintain peace.

2. It is from the above orders that the appellant lodged the instant appeal, arguing that the trial court was wrong in finding that there was a valid marriage between the parties, and directing him to pay dowry to and to maintain the respondent; his right to freedom of association was violated by the order that directed the two parties to reside together; and the trial court was wrong to compel the appellant to allocate and transfer property to the respondent, as that was contrary to Islamic law and the provisions of the statute governing division of matrimonial property, all of which envisaged such division upon divorce.

3. The duty of a first appellate court was summarized in *Gabriel Kamau Njoroge vs. Republic* (1987) eKLR, where the court stated that:

“... it is the duty of the first appellate court to remember that the parties to the court are entitled, as well on the questions of fact as on questions of law, to demand a decision of the court of first appeal, and that court cannot excuse itself from the task of weighing conflicting evidence and drawing its own inferences and conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and to make due allowance in this respect.”

4. The jurisdiction of the trial court, from which this appeal arises, is contained in Article 170 (5) of the Constitution of Kenya, which provides:

“The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.”

5. From the proceedings recorded by the trial court, I have noted that both parties indicated that they professed the Muslim faith, and that meant that Islamic law applied to the dispute before the court.

6. Was there a valid marriage between the parties to this suit? The law on Islamic marriages, that is relating to its officiation and and

registration, is outlined in sections 49 and 57 of the Marriage Act, which provide as follows:

“49(1) A marriage under this Part shall be officiated by a kadhi, sheikh or imam as may be authorised by the Registrar and celebrated in accordance with Islamic law. (2) A person authorised to officiate at a marriage under this Part shall record the details of a marriage under this part in the prescribed form and shall deliver the record to the Registrar for the registration of such a marriage.

(3) Any provision of this Act which is inconsistent with Islamic law and practices shall not apply to persons who profess the Islamic faith.”

“57(1) Where a Kadhi, sheikh, Mukhi or imam authorised by the Registrar celebrates a marriage under Part VII of this Act, the Kadhi, sheikh, Mukhi or imam shall—

(a) record the details of the marriage;

(b) issue the parties to the marriage with a certificate of marriage; and (c) deliver the record and certificate to the Registrar.

(2) Where the Registrar receives a record and certificate of a marriage celebrated under Part VII and the Registrar is satisfied that the provisions of this Act have been complied with, the Registrar shall register the marriage.”

7. The primary law on Islamic marriages is stated in the Quran. The Quran imposes conditions for a marriage, being dowry and the permission of guardians. Quran 4:24, 25 provide:

“24. And all married women, except those you rightfully possess. This is Allah’s decree, binding upon you. Permitted for you are those that lie outside these limits, provided you seek them in legal marriage, with gifts from your property, seeking wedlock, not prostitution. If you wish to enjoy them, then give them their dowry—a legal obligation.

“25. If any of you lack the means to marry free believing women, he may marry one of the believing maids under your control. Allah is well aware of your faith. You are from one another. Marry them with the permission of their guardians, and give them their recompense fairly - to be protected - neither committing adultery, nor taking secret lovers. When they are married, if they commit adultery, their punishment shall be half that of free women. That is for those among you who fear falling into decadence. But to practice self-restraint is better for you.”

8. It is the case by the respondent that she is yet to receive her dowry. A reading of the Quran seems not to dictate the time for payment of the dowry, and that would mean, therefore, that dowry can be given at any time, be it before or after marriage, and if divorce is to occur, then on divorce or *talaq*. In *NAH vs. SBK* [2016] eKLR, the court directed payment of dowry at the point of divorce.

9. With respect to determining whether there was evidence to determine the existence of marriage between parties, the court in *NNS vs. SAM* [2002] eKLR, held that a marriage certificate is enough proof of the existence of a marriage under statute. In the instant case, the appellant has disputed the validity of the certificate of marriage relied on by the respondent, and claims that the same is a forgery.

10. The law on proof is clear. He who alleges must prove. Proof of facts is governed by the Evidence Act, Cap, 80, Laws of Kenya, which states, at section 107, that:

“(1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.”

11. The burden of proof lay with the person disputing the validity of the certificate of marriage. Going by the above provision, it follows that the appellant ought to have subjected the certificate of marriage to forensic examination to determine the authenticity of the signatures on it, and to place a report of the examination as his evidence of the alleged forgery. That was not done. The trial court could not dismiss the genuineness of the certificate of marriage without a report from a forensic expert. Alternatively, he could have called the Kadhi or Sheik or mukhi or other Muslim official who had allegedly presided over the alleged ceremony.

12. I am satisfied that the respondent had proved the existence of a marriage between herself and the appellant, and the burden had shifted to the appellant to establish that the document being relied on was forged. The trial court cannot, therefore, be faulted for coming to the conclusion that it did on that score.

13. Did the trial court do the right thing in directing that the respondent reside with the appellant? Having established that there was a valid marriage between the parties, the next consideration would be duties of the parties during marriage, to determine whether there was a duty for them to reside together. The Quran, at chapter 4:34, makes it the duty of the man to maintain the woman, according to his means. Its states:

“Men are the protectors and maintainers of women, as Allah has given some of them an advantage over others, and because they spend out of their wealth. The good women are obedient, guarding what Allah would have them guard. As for those from whom you

fear disloyalty, admonish them, and abandon them in their beds, then strike them. But if they obey you, seek no way against them. Allah is Sublime, Great.”

14. The Quran advocates for peaceful co-existence. The importance of peace in a house is echoed in Quran 27:130, which states, “*Peace be upon the House of Elijah.*” From the proceedings and the pleadings filed at the trial court, the appellant is adamant that he cannot stay with the respondent. Being cognizant of his right of association as espoused under Article 36(2) of the Constitution, the court cannot, therefore, coerce the two to live together. It would appear that the right thing should be that the respondent ought to move to a residence other than one also occupied by the appellant, and the appellant ought to provide such a residence, either by buying or renting one for her.

15. Should part of Jebrok Plot [...] be partly transferred to the respondent? I have noted that the respondent has regarded this property as her matrimonial home. It is proper to note that division of matrimonial property occurs through a matrimonial cause after the dissolution of a marriage. In doing so, the court is given the opportunity to assess the contribution of each party to the development of the property, and thereafter give proper orders on the division of property. However, there would be nothing wrong with the court declaring the rights of the parties without dividing the property, for division should only be ordered at dissolution of the marriage. Such declarations can only be made where there is evidence as to the contributions of either party to the acquisition of the property.

16. From the proceedings of the trial court, the court did not assess whether or not there was such contribution, for the court found that the parties were still legally married. Consequently, it was improper and premature for the trial court to direct that part of Plot [...] Jebrok be transferred to the respondent at that juncture. Consequently, it is my finding that all the orders of the trial court relating to that property were not proper.

17. This court has discretion to interfere with the decision of the trial court where it finds that the decision of the trial court to be wrong or improper. It was stated, in *Mbogo & Another vs. Shah* [1968] EA 93, that:

“An appellate court will interfere if the exercise of the discretion is clearly wrong because the Judge has misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

18. In the end, the appeal herein is allowed, to the limited extent of setting aside the orders of the trial court, that directed the respondent to go back to residing at Plot [...] Jebrok, allocating her a portion of the said plot and directing its transfer to her. The same shall be substituted with orders that the appellant shall provide the respondent, forthwith, with a residence, commensurate with her status as a spouse, whether by buying or renting one for her. The other orders in the impugned judgement shall remain intact. Each party shall bear their own costs of this appeal.

DELIVERED AT KAKAMEGA, ELECTRONICALLY, DUE TO COVID-19 PANDEMIC, ON THIS 19TH DAY OF APRIL, 2021

W MUSYOKA

JUDGE