



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 55 OF 2015

LGK.....APPELLANT

-VERSUS-

RN.....RESPONDENT

(Being an appeal from the ruling and order of honorable J. Wanyanga resident magistrate made on 2nd April 2015 in Molo SPMCC No. 92 of 2013)

JUDGMENT

1. The appeal arises from the ruling and order of the **Senior Principle Magistrate at Molo, Hon J.H.S. Wanyanga** issued on the **2nd day of April 2015** in **Molo SPMCC No.92 of 2013**. The plaintiff and defendant are described as husband and wife respectively having lived together as husband and wife from the year 2005 until the year 2011 when the plaintiff is alleged to have been evicted from the home by the defendant.

2. The plaintiff through plaint dated 30th April 2013 sought the following orders from the defendant:-

a. That the defendant be compelled and/or ordered to return the original titles and/or documents to the plaintiff in respect to properties LR No. Mau Summit/Molo Blockx/xxxx(T) and Nyandarua/Olkalou South/xxx.

b. That the defendants her agents, servants, workers and/or those claiming under her from collecting rent, selling any assets and/or constructing any structures in the parcels mentioned in (a) above.

c. The defendant be ordered to refund and/or pay rent amounting to kshs 30,000 per month collected from parties described in (a) above.

d. A declaration that there was no marriage between plaintiff as she is still married to one JM.

e. Costs and interest.

3. In response the defendant filed defence dated 21st May 2015 denying the averments in the plaint and stated that she got married to the plaintiff under the Kikuyu customary law and before her marriage, she disclosed that she had a son named **K** and the plaintiff agreed to adopt him as his son. She denied being violent nor evicting the plaintiff from the matrimonial home.

4. In support of the suit, the plaintiff called 2 witnesses himself and **JM** who produced a marriage certificate to the effect that he was married to the defendant herein and their union is still subsisting as there has been no divorce.

5. The defendant in opposition to the suit called one witness. **RN** stated that she was married to the plaintiff in the year 2005 and together they begot 3 children, she stated that she never stole the title deeds from the plaintiff but the plaintiff handed them to her for safekeeping. She only collects rent from [Particulars Withheld] plot which is Kshs. 30,000/= which she utilizes in feeding for the children as well as paying school fees. And thus she isn't in a position to refund the monies collected as rent.

6. After hearing the trial court determined that there was no valid marriage between the plaintiff and the defendant as at the time of the marriage as the defendant was still married to one **JM** as evident by the marriage certificate produced by the PW2. The court also ordered the defendant to return the title documents of the suit property to the plaintiff as there was no valid reason for the respondent to continue holding the titles. On the issue of matrimonial property, the court opined that it lacked jurisdiction to entertain issues of division of matrimonial property.

7. Record show that after delivery of judgment, the trial magistrate instructed the parties to file their affidavit of means to determine how the children will be provided for by the parties; and on the 2nd day of April 2015 the trial court made the following orders:-

- a. The defendant and the plaintiff to share parental responsibility of the 3 children; the defendant to automatically take shelter, food, and fees,
- b. The plaintiff to cater for medical needs and books.
- c. The defendant to continue collecting rent from the Tayari premises in order to ensure that the children are well taken care of and
- d. Caution be registered in the **Mau Summit/Molo block x/xxxx(T)** to prevent the transfer of the same to 3rd parties until the minors attain the age of 18 years.

8. The appellant being aggrieved by the decision of the magistrate filed the current appeal on the following grounds namely that the trial – magistrate erred in law and in fact:

- i. *By encumbering the appellant's property in favor of the respondent for 18 years yet the court had rightfully found that the property belonged to the appellant.*
- ii. *By failing to acknowledge that the appellant had offered to maintain the minors from his income but the court proceeded to attach the property without any default on the part of the appellant.*
- iii. *By treating rental income from the property as the respondent's earning and contribution yet it belonged to the appellant.*
- iv. *By usurping the powers of the High Court in determining the issue of sharing of the property which the court erroneously took to be matrimonial property.*
- v. *By issuing contradicting decisions in the same judgment by apportioning the income from the property yet there was no marriage between the appellant and the respondent.*

SUBMISSIONS BY APPELLANT

9. The appellant submitted that in the judgment delivered on 5th of March 2015, the trial court found that in the year 2005 when the plaintiff and the defendant got married, the defendant was still legally married to **JM** and the marriage contracted between plaintiff and defendant was therefore a nullity and proceeded to declare it null and void.

10. And in respect to the two titles, the appellant submitted that the defendant stated that he has been keeping the two title deed after being given by the plaintiff for safe keeping and has continued to keep them for fear that the appellant may sell the property rendering their children destitute.

11. The appellant submitted that when the trial magistrate issued the judgment in March 2015 it becomes *functus officio*. The appellant submitted that if the court was minded to consider maintenance issue, it would have heard the parties on it before delivering its judgment; that after delivering judgment on 5th March 2015, the court become *functus officio* and had no jurisdiction to make further orders and cited the case of **Telkom Kenya Limited V John Ochanda(Suing on his own behalf and on behalf of 996 Former Employees of Telkom Kenya Limited [2014] eKLR** where the court of appeal state das follows:-

“The determination of this court hinges on the single issue of whether or not by ordering adduction of further evidence through the filing of affidavits after the suits as consolidated had been heard and concluded, the learned judge overstepped his mandate and erred in law.

It is apparent that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered, the learned judge had the noblest and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought. The court’s only recourse would have been to review the judgment and having effused to do so, it was rendered *functus officio*.”

12. The appellant submitted that *functus officio* is an enduring principle of law that prevents the reopening of a matter before a court that rendered the decision thereon; that it is a doctrine which has been recognized in common law tradition from as long as the latter part of 19th century.

13. The appellant submitted that the rule apply only after a formal judgment has been drawn up, issued and entered and was only subject to two exceptions:-

- a. Where there has been a slip in drawing it up
- b. Where there was an error in expressing the manifest intention of the court

14. The Appellant cited the case Raila **Odinga v IEBC** where the court of appeal elaborated on the issue of **functus officio** as follows:-

...” the functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality according to the doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule exercise those powers only once in relation to the same matter ...the principle is that once such a decision has been given, It is (subject to any right to the superior body or functionary) final and conclusive such as decision cannot be reviewed or varied by the decision-maker.”

15. The appellant further submitted that during trial, both parties were represented by counsels and no counsel sought the orders issued on 2nd April 2015 and submitted that the orders did not flow from the pleadings as the respondent did not raise the issue of maintenance in her defence and cited the case of **Kenya Airport Authority v Mitu Bell Welfare Society & 2 others (20160) eKLR** where the court opined that **parties are bound by their own pleadings**.

16. Counsel for the appellant further submitted that issues of the maintenance of the minors were not before the trial court and there was no application by the parties before the court in terms of **Section 91 of the Children Act** which provide as follows:-

“any parent, guardian, or custodian of the child may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person makes such periodical or lump sum payment for the maintenance of a child.”

17. On grounds 4 and 5 counsel for the appellant submitted that the trial court found that the marriage between the appellant and the respondent was a nullity thus amounting to nothingness and the properties in question do not therefore amount to matrimonial property as claimed by the trial court and thus the respondent should not have any vesting rights over property Mau summit /Molo x/xxxx(T) and the trial court therefore lacked the legal basis to apportion the rent from the premises.

RESPONDENT’S SUBMISSIONS

18. On the first issue, the respondent submitted that the trial magistrate considered all facts in encumbering the T plot; that the trial court factored in the interest of the children as per **Section 2 of the Children Act**. As the children were sired between the appellant and the respondent during the years of cohabitation and both properties were also acquired during the period of cohabitation and construction done.

19. The respondent further submitted that the trial court exercised judicial authority as envisaged in the **constitution** in **article 159 (2) (d)** which provided as follows:-

“in exercising judicial authority the courts and tribunal shall be guided by the following principles: -

... justice shall be administered without undue regard to procedural technicalities.”

20. The respondent further submitted that the court pronounced itself in the prayers sought in the plaint by dissolving the union and went ahead to provide for the children of the union as it has inherent jurisdiction to make orders to protect the ends of justice.

ANALYSIS AND DETERMINATION

21. This being the first appellate court, I am obligated to reevaluate evidence adduced before the trial court and arrive at an independent determination. This I do with the knowledge that unlike the trial court, I never got the benefit to observe the demeanor of witnesses and for this I give due allowance. The principles guiding first appellate court were stated in the case of **Selle & Another Vs Associated Motor Boat Co. Ltd & Others (1968) EA 123** as follows: -

“...An appeal to this court from the trial court is by way of retrial and the principles upon which the 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 thought it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

22. In view of the above I have perused the record of appeal, grounds of appeal and submissions filed herein and consider the following as issues for determination: -

a. Whether the trial magistrate was **functus officio** at the time directions to adduce additional evidence and of issuing orders of 2nd April 2015.

b. Whether orders issued on 2nd April 2015 should be set aside

(i) Whether the trial magistrate was **functus officio at the time directions to adduce additional evidence and of issuing orders of 2nd April 2015.**

23. The court after hearing the parties proceeded to pronounce its judgment as per the requirement of Order 21 of the civil procedure rules on 3rd march 2015. Thereafter the trial court proceeded to make an order that the parties to file an affidavit of means in order to factor in the

provision of the minors. The real contention made as to the Court's jurisdiction is hinged on the supposition that because the suit at the trial court has been heard and determined, the trial Court has become *functus officio*, and so had no further authority to hear or determine any matter arising from the suit.

24. *Functus officio* is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. It is a doctrine that has been recognized in the common law tradition from as long ago as the latter part of the 19th Century.

25. In regards to the orders issued on 2nd April 2015, there was no doubt that the matter had been finalized, and the Judgment was issued on 5th March 2015. The fact that the trial court ordered the parties to file affidavits after the judgment was issued it is clear that the court tried to open the trial with the intention of amending the judgment/reviewing its judgment.

26. Suit should not be opened in the name of article 159 (d) and the inherent powers, the view of re-opening the suit through an affidavit has the effect of defeating the law and the interest of justice, thus the said article of the constitution could not be invoked to justify a departure from the normal procedure of effecting judgments.

(ii) Whether orders issued 2nd April 2015 should be set aside

27. On perusal of plaint, I note that the plaintiff sought declaration that there was no marriage between plaintiff and defendant, return of the two title deeds, refund of rent in respect of the two properties and for the defendant to be restrained from collecting rent, selling or constructing on the two propertie. There is no prayer in respect to maintenance of the children.

28. The defence dated 21st May 2013 has no counterclaim. It is therefore clear that the defendant never filed counterclaim for maintenance of the children neither did she make any claim in respect of the properties herein. At page 5 of the judgment, the trial court declared marriage between the plaintiff and defendant a nullity on ground that a marriage between the defendant and one **JM** subsisted at the time of solemnisation of the marriage between plaintiff and defendant in the year 2005.

29. There is no doubt that children were born out of the union but the issue of their upkeep was not an issue before the suit filed before the trial court.

30. In my view, the trial court should have made determination on issues pleaded by parties and let the defendant file a separate suite for maintenance of the children.

31. I also note that the trial magistrate found that the plaintiffs evidence of ownership of the two properties was not controverted by the defendant but instead said she was holding the two titles for safe keeping. In my view the defendant having failed to prove any contribution to acquisition of the property, it should have gone further to release the title deed to the plaintiff and leave the issue of maintenance of the children be dealt with by the children's court or in the suit for maintenance. From the foregoing, I find that the appeal merited.

32. FINAL ORDERS

- 1) Appeal is allowed.**
- 2) Orders issued on 2nd April 2015 are hereby set aside.**
- 3) The defendant to follow the right procedure to seek maintenance of the children.**
- 4) Titles in respect to properties L.R. No. Mau Summit/Molo Block x/xxxx(T)and Nyandarua/Olkalou South/xxx be released by Respondent/Defendant to the Appellant/Plaintiff.**
- 5) Costs of the appeal to be borne by the Respondent.**

JUDGMENT DATED, SIGNED AND DELIVERED VIA ZOOM AT NAKURU THIS 29TH DAY OF JULY, 2021

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RACHEL NGETICH

JUDGE

In the presence of:

Schola/Jeniffer - Court Assistant

Mr. Omae for Appellant

Mamwacha for Respondent absent