



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL APPEAL NO. E009 OF 2020

FATUMA SAID SULEIMAN.....APPELLANT

VERSUS

HAMISI KUPURA CHIGAMBA.....RESPONDENT

(Being an appeal from the Ruling of Hon.Mwambele M.Suleiman, Kadhi

delivered on 14th October, 2020 in Kadhi's Court No. 7 of 2017)

Coram: Hon. Justice R. Nyakundi

Omagwa Angima & Company Advocates for the Appellant

Hamisi Kupura Chigamba - Respondent

J U D G E M E N T

This is an appeal which the appellant asks this Court to allow this appeal from the Ruling of the Kadhis Court at Kilifi delivered on **14th October, 2020**. The appellant is aggrieved as demonstrated by the following grounds of appeal namely; -

- 1) The learned Kadhi erred in both law and fact and misdirected himself on the law applicable for Notice to Show Cause and execution proceedings.***
- 2) The learned Kadhi erred in both law and fact in failing to note that judgement had been delivered a year before and the respondent had not appealed against it, neither had he applied for review.***
- 3) The learned Kadhi erred both in law and fact in failing to consider that the respondent had not filed an application for stay of execution and that he had been presented after being arrested for failing to satisfy the decree;***
- 4) The learned Kadhi failed to consider that the show cause proceedings had become necessary as a result of the respondent's failure to satisfy the judgement.***
- 5) The learned Kadhi had no jurisdiction to suspend or stay execution in the absence of a substantive application by the respondent.***
- 6) The learned Kadhi erred in both law and fact in failing to note the respondent remedy if any, lay in seeking stay of the judgement or appeal yet what was before the court was a Notice to Show Cause pursuant to a decree which he had failed to satisfy.***
- 7) The learned Kadhi erred in both law and fact in failing to appreciate that the 1/8 share of the matrimonial house was available and only issues of valuations were required therefore, there was no justification for the 2-year period grant.***
- 8) The learned Kadhi erred in fact and in law by failing to appreciate that payment of dowry was to be effected within the shortest time after delivery of judgement.***

First of all, I must call a summary of facts as I can form the record and set them out in chronological order or else there will be no

background to the determination of the appeal. Initially, the appellant Fatuma Said Suleiman filed a matrimonial cause on 1.8.2017 against the respondent **Hamisi Kupura Chigamba** seeking the following orders; -

- a) Dissolution of the marriage.*
- b) Physical distribution of the matrimonial house or its monetary value in equal shares.*
- c) Payment of past maintenance since September 2016 at monthly rate of Kshs.20,000/=.*
- d) Compensation in monetary form for the plaintiff's five (5) coconut trees, mango tree and banana trees.*
- e) Custody of the parties' children and their maintenance be granted to the Plaintiff.*
- f) Costs of this suit.*
- g) Any other relief the Honorable Court deems fit to grant.*

Fatuma as the pleadings indicate was married to the respondent. Hamisi Kupura a marriage celebrated in accordance to Muslim Law on 9.1.1997. During the subsistence of the marriage, the couple were blessed with four issues namely Khadija Hamisi, Said Hamisi, Swabra Hamisi and H.Z.H. it was stated in the plaint that upon solemnization of the marriage, they lived in rental home located at Mombasa, until an initiative to build their own matrimonial home came into fraction at Kisumu Ndogo – **Plot No. 536/537**. Sometimes, in the course of the marriage instances of cruelty set in necessitating the filing of divorce so that each party can move on without being held hostage by the other partner.

In a trial, interpartes before the Kadhi's Court both parties adduced evidence in support of their respective positions to the issue raised in the plaint on the dissolution of the marriage. Turning to the outcome of the claim it is clear from the judgement that the session Kadhi ruled as follows; -

- 1. The matrimonial house is without land belongs to the respondent's family.*
- 2. What can only be distributed is the value of the disputed parties matrimonial house.*
- 3. Therefore fractional award of value of 1/8 to the parties matrimonial house without land be given for the benefit of the appellant.*
- 4. The children stated to be below 18 years namely S.H.K and H.Z.H be provided for by the Respondent entailing their basic needs, food, clothing, education, shelter and medical care.*
- 5. The respondent to pay dowry of 5x6 bed, wardrobe and dressing table.*
- 6. Each party to bear their own costs.*

From the above judgement and subsequent decree sometimes on 12.8.2020 Fatuma Said moved the Court by way of a notice of motion seeking execution and enforcement of the judgement against the respondent Hamisi Kupura Chigamba. The motion was for the Respondent Hamisi Kupura to show cause why he has not paid the decretal sum of Kshs.24,850/= to the appellant. Her application was to have the respondent committed to civil jail in absence of settling the decretal sum. The Kadhi on those issues raised in the motion ordered as follows; -

- a) That the respondent be permitted to pay the decretal properties in phases.*
- b) The 5x6 bed to be paid on or before 31.3.2021.*
- c) The dressing table to be paid on or before 31.7.2021.*
- d) The wardrobe to be paid on or before 31.12.2021.*
- e) The 1/8 share of the matrimonial property be paid on or before 30.6.2022.*
- f) In default of any one installment execution to issue.*

So, by this appeal as expressed in the Memorandum of Appeal Fatuma, the appellant asked for leave of the court directed at that ruling to set aside the orders.

Determination

The Court's jurisdiction on appeal is a nature of power and duty to re-hear and evaluate the evidence afresh of the proceedings which led to

the impugned decision. The case of *Okeno V R (1972) EA 33* outlines in detail the various circumstances where appeals court judicially records the evidence of the trial court and the subsequent decision of an inferior Court or tribunal. The test as to whether the impugned judgement or ruling on examination and scrutiny is capable of being set aside. On any of the guiding principles in *Mbogo V Shah [1968] EA 93* in that Court it was held by *De Lestaing V P* stated as follows; -

“I think, it is well settled that this Court will not interfere with the exercise of its discretion by an unfair Court unless it is satisfied that its decision is clearly wrong, because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

In the instant appeal it follows that all what the appellant is unhappy about is the exercise of discretion by the Kadhi to subject the main decree of the court in the judgement delivered on 22.8.2019 to a settlement of terms by way of installments. It is apparent that the Kadhi adjudicated over the matter within the notice of motion filed on 12.8.2020 for a show cause issued against the respondent why he should not be committed to civil jail. The requirement of that motion was concerned with default on the part of the respondent indolence in settling the terms of the decree as directed by the trial court. Basically, the accepted position in law is that Civil Procedure Rules and Civil Procedure Act do apply even in the proceedings before the Kadhi's Court. There is no debate that a judgment debtor with leave of the court can be allowed to settle the decree by way of installments in the circumstances that are fair and just this may be particularly necessary if the judgement debtor is experiencing financial difficulties to settle the claim in a lump sum.

For this Court to take action by interfering with the decision of the trial Court, there must be clear and cogent evidence to prove that the trial court misdirected itself on the facts and the law. As a consequence, it arrived at an erroneous decision. What is sought to be quashed on appeal is the variation of the relief applied for by the appellant to commit the respondent to civil jail and instead have him settle the decree with certain decreed installments.

Applying the provisions of the Qur'anic teaching chapter 65 verse 7 and chapter 2 verse 280 a debtor can be granted leave to settle the debt with easy installments to clear the debt notwithstanding the set timelines. This is also in consonant with order 21 Rule 12 of the Civil Procedure Rules where its expressly provided that; - ***“in so far as a decree is for the payment of money, the Court may for any sufficient reason at the time of passing the decree order the payment of the amount decreed to be made by installments”***

Although in the impugned order, the directions on installments involves substantially movable properties it pre supposes that to acquire them for onward conveyance to the appellant availability of real cash for the respondent to purchase them is a condition precedent since the respondent demonstrated to the trial Court that he was impecunious to settle the decretal once, he was entitled to the order of installments.

The power to grant such a relief is discretionary considering the compelling evidence that implies the respondent can only settle the debt by way of installments in this aspect of the appeal, I am not persuaded that the learned Kadhi was wrong or had in any way misdirected himself or acted on matters on which he should not have acted upon or that the failed to take into consideration material which was not applicable to the facts of the case (*see Mbogo V Shah(supra)*). That discretion cannot therefore be interfered with by this Court. Accordingly, and for the reasons above the appeal fails and is dismissed with no orders as to costs.

DATED, SIGNED ON 30TH DAY OF JULY 2021 and DISPATCHED via email ON 4TH DAY OF AUGUST 2021

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R. NYAKUNDI

JUDGE