



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY APPEAL NO.33 OF 2017

HJO alias BJOAPPELLANT

VERSUS

IMS alias EMS.....RESPONDENT

(Being an appeal from the judgement of the honourable Khamis Ramadhani Senior Resident Kadhi –in KADHI'S CIVIL CAUSE NO.257 OF 2016 –MSA delivered on 17th October, 2017)

BETWEEN

IMS ALIAS EMS.....PLAINTIFF

VERSUS

HJO ALIAS BJO.....DEFENDANT

JUDGEMENT

1. The respondent a Tanzanian national celebrated his marriage at Mombasa under Islamic law with the appellant herein a Kenyan national on the 9th June 2015. However, their marriage hit a rock due to the couple's irreconcilable differences leading to the respondent petitioning for divorce before the Kadhi's court Mombasa Vide civil suit no xxx of 2016. Through his plaint dated 15th December, 2016, the respondent (plaintiff) sought orders against the defendant as follows: she be summoned and admonished by the court and be directed to desist from all her bad and immoral behaviour at the matrimonial home; she be directed to respect and recognize the plaintiff as her legal husband; she be directed to stick to her marriage and to immediately resume all her marital obligations and duties towards her husband the plaintiff unconditionally;

2. In the alternative, the respondent (plaintiff) sought the following orders; the parties' marriage be dissolved by the court; the defendant be ordered to compensate the respondent for divorce; the defendant be ordered to vacate from the respondent's house at Likoni; the appellant to pay costs of the suit and any other relief the court may deem fit.

3. According to the plaint, the appellant was arrogant and disrespectful to the respondent; entertained men lovers in their matrimonial home; engaged in open communication with secret lovers in his presence; she failed to observe Swalah; had hatched a plan to kick him out of their matrimonial home which he bought in her name simply because he was a Tanzanian national;

4. In her defence dated 12th January 2017, the appellant (defendant) denied allegations of infidelity and instead demanded for dissolution of their marriage; She alleged that; they were only married for a period of four months; the respondent was an immoral person who was once caught with a neighbour's wife in their matrimonial bed while she was away on a business trip thus attracting criminal charges being filed at Likoni police station; the defendant was an animal who demanded forcefully to have anal sex with her; he was irresponsible as he never supported her financially and a dishonest person who never disclosed that he had another wife in Tanzania.

5. During the hearing, the respondent told the court that he was a Tanzanian citizen who came to Kenya the year 2007 as a businessman engaged in buying shoes from Tanzania and selling the same in Mombasa. That he started cohabiting with the appellant the year 2009. That he took her to Tanzania the year 2010 and had their union solemnized in accordance with the Maasai culture and customs. That on 5th December kshs 2010, they were able to buy a plot at Likoni at a sum of kshs 45,000. He stated that they paid kshs 20,000 upfront and a balance of kshs 25,000 on 26th January 2011.

6. According to him, the property could not be registered in his name because he had not obtained necessary documentation hence the reason why his name did not appear in the ownership documents. He claimed that they jointly constructed a house to which they moved in the year 2014. That the year 2014 he converted to Islamic religion and the appellant followed suit the year 2015. Consequently, they solemnized their Islamic marriage on 9th June 2015 before the Kadhi. Subsequently, allegations and counter allegations of infidelity took centre stage in their marriage thus necessitating this suit.
7. From the record (proceedings) which appears to be mixed up with no proper order or flow of taking evidence, the respondent called a witness referred to as Abdul Razak Abubakar (pw1) whose evidence basically centred on his intervention in resolving domestic differences between the couple and eventual disintegration of their marriage.
8. On her part, the defendant reiterated the content of her defence. She denied ever engaging in any Maasai traditional marriage ceremony with the respondent. She further denied having been introduced to any of the respondent's relatives. She however admitted celebrating Islamic marriage the year 2015. She stated that when she bought and developed the subject plot she was single and that they had not started cohabiting.
9. The appellant also called a witness by the name of Ndegwa Kombo Mzungu referred to as Dw1, a land broker who introduced her to a seller of a plot in Likoni measuring 34 feet by 48 feet with eight rooms thereon. Ndegwa stated that he was the one who got a plot for the appellant to buy and it was around 5th December 2010 that the appellant paid a first instalment of Kshs 20,000 and the balance of Kshs 25,000 end of December the same year. He denied seeing the respondent during the transaction.
10. The next witness was one Fredrick Odhiambo Okeyo (pw2) a neighbour and a friend to the appellant who stated that on 5th December 2010 he witnessed the appellant purchase a plot from one Hassan Masoud Mahero at Kshs 45,000. That present as witnesses were himself, Judith and madam Senje. That he only came to learn that the appellant had a man friend the year 2013 and that they married 2015 under Islamic law. He stated that it was the appellant who bought and developed the plot alone.
11. FL (Dw3) a sister to the appellant with whom she jointly operates mitumba business at Marikiti corroborated the testimony of the appellant. She claimed that she was the one who got Ndegwa a land broker and requested him to find a plot for the appellant to buy. She alleged to have witnessed the appellant pay the first instalment.
12. Having considered the evidence at hand, the hon. Kadhi delivered his judgement on the 17th October 2017 rendering himself as follows;
- “...I find that the objectives of marriage cannot be achieved under such an acrimonious environment. I therefore officially dissolve the marriage between IMS and BJO ‘H’ on FASKH principles with effect from this 17th of October 2017 corresponding with the 27th of MUHARRAM 1439H. The defendant having renounced Islam, she is not entitled to observe any Edda and there are no orders as to Edda maintenance. The divorce certificate to issue accordingly. On the issue of ownership of the house on plot number: MOMBASA/LIKONI/xxxx, the parties herein to own the house on 50-50 basis. Any of the parties willing to buy off the other from the property have the leave of this Hon.Court to do so.”**
13. Aggrieved by the said Judgment, the appellant moved to this court vide a Memorandum of Appeal dated 8th November, 2017 citing the following grounds of appeal;
- a. The learned Kadhi erred in law and in fact in finding that the house standing on plot known as Mombasa /Likoni /xxxx is matrimonial property contrary to the evidence presented in court.**
 - b. The learned Kadhi erred in law and fact when he completely ignored the glaring evidence before him that the appellant is and has at all material times been the rightful and registered owner of the plot and the house with 100% indefeasible title.**
 - c. The learned Kadhi erred wholly in disregarding the appellant's submissions and proceeded to rely on his own views not backed by law.**
 - d. The learned Kadhi erred in law in failing to analyse and synthesis the evidence before him and arrived at a completely erroneous finding.**
 - e. The learned Kadhi failed to apply the known principle in civil litigation that proof required is on a balance of probability and not beyond reasonable doubt.**
 - f. The learned Kadhi erred in law and fact and issued a contradictory and ambiguous judgement as having found that the respondent had not produced any evidence for contribution to the house and land thereon still proceeded to award a share of the house to the respondent, thus the judgement entered for the respondent had no basis and thereby bad in law.**
 - g. The learned Kadhi erred in law and misdirected himself in making a finding of payment allegedly paid without any evidence having been tendered as proof contrary to the Evidence Act Chapter 80 of the laws of Kenya.**
 - h. The learned Kadhi erred in failing to analyse and synthesis evidence presented by the defendants and arrived at a judgement in favour of the respondent against the appellant which is patently erroneous.**
 - i. The appellant urged the court to allow the appeal with costs and set aside the judgement of the Principal Kadhi against the appellant”**

14. When the matter came up for hearing, parties agreed to dispose the appeal by way of written submissions. Despite being given sufficient time to file the same, the appellant's counsel did not file any.

Respondent's submissions

15. The respondent through his advocates Munyi and co. advocates filed a page of submissions dated 30th October 2019 contending that; the respondent had proved his case on a balance of probability at the Kadhi's Court and that no documents or tangible proof was placed before either the lower court or this court to change the finding that the suit premises lawfully belong to the appellant. Counsel further submitted that the appeal is fatally defective as it was not premised on any legal basis hence should be dismissed with costs.

Analysis and determination

16. I have considered the Record of Appeal and submissions thereof by the respondent. This being a first appeal, this court is duty bound to independently re-evaluate, re-examine and re-assess the evidence tendered before the trial court and make an independent finding and or determination bearing in mind that the trial court had the benefit of listening and observing witnesses' demeanour. See **C W M v J P M [2017] eKLR** where the Court of Appeal stated that;

“This is a first appeal and that being so, we are mandated to reconsider the entire evidence before the trial court and give it fresh analysis but with the usual caveat that we never saw or heard the witnesses testify. (See the case of Selle vs. Associated Motor Boat Company (1968) E.A. 123 at page 126, where the Court of Appeal held:-

“..... this Court must reconsider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witness and should make due allowance in that respect...” See Jivanji vs. Sanyo Electrical Company Ltd. (2003) KLR 425”.

17. Before the Kadhi were several prayers inter alia; the court to issue a warning against the appellant to respect the respondent as a husband and to stop her immoral behaviour in default; dissolution of marriage; an order to compensate the respondent for divorce and, the appellant to vacate from their Likoni home.

18. The court having dissolved the marriage as per the parties' wishes, there is no contestation on the same. Although not specifically pleaded and played for, the hotly contested issue before the court is division of what is alleged to be matrimonial property (Mombasa /Likoni/xxxx)

19. According to the respondent, the property in question was bought through their joint efforts during the subsistence of their marriage. To the contrary, the appellant claimed that the same was bought before their marriage. From the cited grounds of appeal, I am able to discern two issues for determination; Firstly, whether the property in question was acquired during coverture; Secondly, if the answer is in the affirmative, what was their respective contribution.

20. The hon. Kadhi relied on Matrimonial Property Act to distribute the property on equal basis. I must however caution that the manner in which evidence was taken by the court is not consistent and structured for proper and clear understanding. Nevertheless, I was able to connect the same although with a lot difficulties.

21. At the centre of this dispute is the period the parties herein started cohabiting as husband and wife. Section 9 of matrimonial Property Act provides that property acquired before marriage does not form part of matrimonial property. However, if such property is acquired during coverture and the other spouse contributes towards its acquisition or development either directly or indirectly, then each spouse shall have a beneficial interest on the said property to the extent of his or her contribution.

22. It was incumbent upon the respondent to prove that although the property in question is registered in the appellant's name, he contributed towards its acquisition and that she is holding the same in trust. Section 7 of the Matrimonial Property Act provides as follows;

“Ownership of matrimonial property 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”.

23. According to the respondent, he made monetary contribution towards the acquisition of the disputed property. Under Section 2 of the Matrimonial Property Act 2013, contribution is defined as;

“monetary and non-monetary contribution includes-

-Domestic work and management of the matrimonial home;

-Child care

-Companionship

-Management of family business or property; and

-Farm work

24. In the case of **Agnes Nanjala William vs Jacob Patrius Nicholas Vander C.A NO.127of 2 011**, the court recognized both monetary and non-monetary contribution in the acquisition of matrimonial property.

25. It therefore follows that spouses' rights at the time of Marriage, during and after the marriage are underpinned under Article 45 of the Constitution and that no spouse shall be denied his or her right/s after dissolution of the marriage on account of nationality, religion, sex or racism. See **P A W-M v C M A W M (2018) e KLR** where the Court of Appeal stated that;

“That said, the Constitution and the statute law, herein before referred to as the Matrimonial Properties Act of 2013, protects family property and underpins the principles of fairness and non-discrimination of a spouse who has made contribution in the manner provided in the Act. Article 45 (1) (3) of the Constitution makes provisions regarding the rights of parties during marriage and upon dissolution and anchors the principle of “equal rights” as thus:-

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage...”

26. In the instant case, there is a dispute as to whether the property in question was acquired during the subsistence of the marriage or not. Both parties are in agreement from their respective testimonies that the property in question was bought on 5th December 2010 from one masoud hassan. Although Massoud did not testify, the sale of that property on 5th December 2010 as corroborated by the appellant and her witnesses is not in dispute. The question is, was the appellant married to the respondent at the material time? The respondent claimed he got married to the appellant in accordance with Maasai cultural practices the year 2010 and that he introduced her to family members. The appellant denied there was such traditional Marriage conducted between the two.

27. Unfortunately, there was no evidence adduced by the respondent to prove that the requisite Maasai rites and or cultural practices were performed. I take judicial notice of the fact that, in any African traditional marriage ceremony, there are certain common denominators which cut a cross inter alia; the ceremony is conducted in public in the presence of elders who blesses the marriage; exchange of gifts and payment of dowry.

28. It is trite that 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 (See Section 107 of the evidence Act). The respondent did not call any witness who witnessed the Maasai ceremony. His evidence regarding Maasai marriage is simply not corroborated.

29. The hon. Kadhi did not address the issue whether there was a traditional marriage between the two prior to the celebration of the Islamic marriage 2015 which is not disputed. It was upon the respondent to adduce evidence to prove existence of marriage traditionally or presumption of marriage. A mere allegation that they got married 2010 without proof is not sustainable. The appellant and all her witnesses corroborated her evidence that she bought and developed the subject property when she was single.

30. From the evidence on record, the only evidence available is that the appellant got married to the respondent the year 2015 way beyond the time the disputed property was acquired. Accordingly, it is my finding that the subject property was acquired before coverture and therefore not the subject of matrimonial property for division.

31. Having held as above, I do not find any evidence on improvement of the subject property during coverture. To that extent, the issue of contribution does not arise whether directly or indirectly. In a nut shell, it is my finding that the hon. Kadhi erred in law and indeed did misdirect himself by holding that the property was acquired during coverture.

32. The upshot of it all is that, the appeal herein is upheld and the Judgment delivered on 17th October 2017 set aside in so far it relates to division of matrimonial property in respect of plot no Mombasa /Likoni/xxxx and a declaration thereof made herein that the said property was solely acquired by the appellant before marriage to the respondent and therefore her property 100%. As to costs, this is a family issue hence each party shall bear his or her own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 17TH DAY OF DECEMBER, 2021

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J. N. ONYIEGO

JUDGE