



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

CIVIL APPEAL NO.8 OF 2018

ERK.....APPELLANT

VERSUS

JCC.....RESPONDENT

(From the judgment in Kericho CMCC No.120 of 2011– E. M. Karani RM)

JUDGMENT

1. In a judgment delivered on 7th March 2018 the learned magistrate concluded as follows –

“accordingly, I enter judgment for the plaintiff in the following -

- a. That a declaration that the subsisting marriage by presumption between the plaintiff and the defendant herein is hereby dissolved.
- b. A declaration that the plaintiff is entitled to (1/2) share of the value of the following jointly acquired properties
 - i. LR NO. Kericho/Kapsuser/XXXX valued at Kshs.600,000.
 - ii. K W E with a net capital of Kshs.1.5 million.
 - iii. Motor vehicle registration number KBD XXXD Toyota Raum valued at Kshs.670,000/=.
 - iv. A permanent residential house constructed on LR No.Kericho/Kapsuser/XXXX.
- c. Each party shall bear its own costs.
- d. On any other or further relief as prayed by both parties herein and in the interests of fairness to the parties, this court directs that –
 - i. The parties herein do appoint and nominate a joint valuer or each of the parties to get a valuer of their choice so that the value of the properties in (b) above can be ascertained within 30 days of this judgment.
 - ii. Having ascertained the value of the properties in (b) above, the parties should agree on whether to sell or set off among themselves the value of the said properties in (b) above within the next 14 days after compliance with (i) above.
 - iii. In case the parties fail to agree within 14 days stipulated in (ii) above, the properties identified in (b) above be sold by way of public auction and proceeds therefrom be divided equally in compliance with the judgment order in (b) above.

2. Dissatisfied with the decision of the trial court, the appellant who was the defendant in the original suit, has come to this court on appeal on the following grounds –

1. The learned magistrate erred in law and in fact in arriving at a decision that is void ab initio as it is purely based on what was neither pleaded nor prayed for by the respondent.
2. The learned magistrate erred in law and in fact in basing her decision on extraneous issues.

3. The learned magistrate erred in law and fact by making two decisions in one matter that belong to two separate regimes of the law.
4. The learned magistrate erred in law and in fact by proceeding to make a finding of a marriage by presumption and yet the respondent clearly stated her case in paragraph (3) of her plaint/amended plaint.
5. The learned magistrate erred in law and in fact by making a decision on a matter that she never presided upon without first asking parties to take directions.

3. By consent the appeal proceeded by way of filing written submissions. The appellant's counsel M/s Siele Sigira filed their submissions on 26th June 2019 while the respondent's counsel M/s E. M. Orina and Company filed written submissions on 13th July 2019. I have perused and considered the submissions filed, as counsel elected not to highlight the same in court.

4. This being a first appellate court, I am required to re-consider the evidence on record and come to my own conclusions and inferences – see **Selle – vs – Associated Motor Boat Company Ltd [1968] EA 123**.

5. I have perused the evidence on record on both sides. Each side tendered oral evidence in court through witnesses. The appellant has come to this court on several grounds of appeal, which I will now consider.

6. It has to be borne in mind that the pleadings relied upon at the trial were the amended plaint of 15th July 2015 and amended defence 5th November 2015.

7. The first ground of appeal is that the magistrate's decision was void ab initio as it was based on what was neither pleaded nor prayed for by the respondent. The argument of the appellant on this was that there was no plea for presumption of marriage and division of property. I note that under paragraph 3 of the amended plaint the respondent pleaded that they lived with the appellant as wife and husband from 5/12/2005 and that they were married under Kipsigis Customary Law in November 2005. Under paragraph 10A the respondent asked for (1/2) share of the listed investments and in the concluding prayer asked for a declaration of dissolution of marriage, and costs.

8. From the orders of the trial court which I have highlighted above in this judgment, it cannot be said that the trial court made orders that were not pleaded or requested. The mention of presumption of marriage related to proof rather than on pleaded issue. I dismiss that ground.

9. The 2nd ground of appeal is that the magistrate wrongly based her decision on extraneous issues. In the submissions the counsel for the appellant has not pointed at any extraneous issue that the magistrate brought into the judgment which was not part of the pleadings and submissions. I dismiss this ground as it is baseless.

10. The third ground of appeal is that the magistrate erred in making a decision that incorporated together two separate regimes of the law. In this regard counsel for the appellant has argued that it was not proper for the respondent to file a suit whose claim belonged to two regimes of law, that is the Marriage Act and the Matrimonial Property Act. Counsel further argued that the respondent did not lodge a petition on the marriage and they later file a separate suit to claim matrimonial property. Counsel claimed that the Marriage Act was a 2014 legislation while the Matrimonial Property Act was a 2013 Act, both in existence before the respondent filed a defective amended plaint in 2015 and should be applicable.

11. In my view, any objection to the form of the plaint should have been raised in the trial court as the prayers in the plaint asked for dissolution of marriage and division of property. Both parties were represented in court by counsel. In my view, it is too late in the day for such contest to be raised on appeal. I dismiss this ground.

12. The 4th ground is that the magistrate erred in making a finding on presumption of marriage and yet the respondent clearly stated her case in paragraph (3) of her plaint. Indeed in the plaint the respondent did not plead presumption of marriage. It was her pleading and position that she was customarily married to the appellant under Kipsigis Customary Law. The appellant however disputed this contention of a valid customary marriage, and stated merely that they were friends with the respondent. That being the position, in my view, it cannot be said that the magistrate erred in applying the principle of presumption of marriage by conduct of the parties as an alternative to a formal customary marriage by relying on the case **Hottensia Wanjiku Yawe – vs – Public Trustee – Civil Appeal No.13 of 1976** which was based on long cohabitation. I dismiss that ground.

13. The 5th and last ground of appeal is that the magistrate erred in making a decision in a matter she did not preside over. In this regard Order 18 Rule 8 (1) of the Civil Procedure Rules provides –

8 (1) where a judge (magistrate) is prevented by death, transfer, or other cause from concluding the trial of a suit or the hearing of any application, his successor may deal with any evidence taken down under the foregoing rules as if such evidence had been taken down by him or under his direction under the said rules and may proceed with the suit or application from the stage at which his predecessor left it"

14. In the present case the E. M. Karani RM delivered judgment in this matter where all the evidence was taken by C. K. Mungania SRM. In my view the succeeding magistrate was fully entitled in law to deliver the judgment. In any event, if the appellant had a different view, he should have raised the issue at directions stage before the trial court, which he did not do though he was represented by able counsel. I dismiss this ground as well.

15. Lastly, whether or not there was presumption of marriage, Article 45 of the Constitution recognizes equality of spouses or other persons to acquire and own property, not equality of sharing. Having re-evaluated all the evidence on record, I find that the only asset that the two could be said to have contributed to equally was the joint business of K W E worth KShs.1.5 Million. With regard to the house the respondent

contributed Kshs.30,000/= which is a percentage of the cost of construction. She did not contribute to the purchase of the plot. She also did not contribute to the purchase of the motor – vehicle KBD XXXD Toyota Raum. I will thus set aside the final orders of the trial court with regard to the equal sharing of the properties and order as follows –

1. The respondent is entitled to half share of the business in K W E with nett capital of Kshs.1.5 Million. If that business is not in existence today, the appellant will pay the respondent the equivalent of half of the investment that is Kshs.750,000/=

2. The appellant will pay the respondent 30% of the current market value of the permanent residential house constructed on plot LR No. Kericho/Kapsuser/XXXX. In this regard the parties may appoint a joint valuer or each will get a valuer of their choice to value the property within 30 days from the date of this judgment.

3. The respondent is entitled to interest on the amounts above until payment in full.

16. Thus the appeal herein is allowed in part. As this is primarily a family related suit, I order that each party will bear the costs of the appeal.

Dated this 28th of April 2020.

GEORGE DULU

JUDGE

Delivered through video conferencing in the presence of Mr. Langat court assistant, Mr. Musyoka ICT officer, Mr. Siele for the appellant and Mr. Orina for the respondent.