



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

CIVIL APPEAL NO. 12 OF 2017

(DIVORCE CAUSE 215 OF 2014)

GSD.....APPLICANT

-VERSUS-

RSK.....RESPONDENT

JUDGMENT

APPEAL

By a **Memorandum of Appeal** filed on 24th February 2017 by the **Appellant** aggrieved by the Principal Magistrate's Court Ruling of 30th April 2015, relied on the following grounds;

- a. **The trial magistrate committed a gross injustice and grave error in law and in fact by failing to enter judgment against the Respondent for maintenance of the Appellant despite the overwhelming and uncontroverted evidence in support of the prayer for maintenance.**
- b. **Learned trial magistrate erred in law and in fact by selectively reading the Appellants pleadings in the Respondent's favor and completely ignoring the Appellant's pleadings for maintenance.**
- c. **Learned Trial Magistrate erred in law and in fact and ruled unfairly by giving undue regard to procedural technicalities contrary to the constitutional expectations of administering substantive justice.**
- d. **The learned trial magistrate erred in law and in fact, and made a finding that defied all the evidence and logic on the question of maintenance of the Appellant by the Respondent.**
- e. **That the Learned Trial Magistrate erred in law and in fact in failing to find in view of the evidence adduced, and hold that the Appellant was still entitled to alimony.**

The Appellant sought;

- a. **That the appeal be allowed.**
- b. **The Judgment and decree issued in Nairobi Milimani Chief Magistrate Divorce cause No. 215 of 2014 on maintenance be reversed and or set aside and be substituted therewith an order for alimony and or maintenance in favor of the Appellant against the Respondent.**
- c. **The costs of the suit be granted to the Appellant.**

BACKGROUND

1. **The parties herein were married on 28th November 2006; the Appellant herein was then a divorcee while the respondent**

was a bachelor. That on 5th June 2014, the Respondent petitioned the Chief Magistrate Court at Nairobi seeking orders for: dissolution of the marriage on the grounds that the marriage had irretrievably broken down on basis of cruelty by the appellant.

2. On the 1st August 2014, the Appellant filed her answer to petition, denying all the contents of the petition and stating that, the Respondent had kicked her out of the matrimonial home, and had treated her with extreme cruelty causing her to undergo mental treatment for depression, she proceeded to pray for the dissolution of the marriage, maintenance of the respondent or a lump sum settlement and the cost of the petition.

EVIDENCE FROM TRIAL COURT RECORD

PW1, the Respondent herein testified on 5th December 2014, he testified that during the subsistence of the marriage the Appellant was disrespectful, violent and had no interest in marriage and kept threatening that she would leave, she never agreed to have children and denied the Respondent conjugal rights, it was further his testimony that the Appellant had her own account and car which she had bought for herself and that she did not in any way contribute to the house. Upon cross examination, he stated that he was responsible for her upkeep. However, he stated that he could no longer maintain her as she had taken him through anguish and depression and that she was also working and earning her own money.

DW1, the Appellant herein testified on 4th February 2015, stating that she worked as sales representative at Associated Steel Company; that the Respondent and his mother were cruel to her and they chased her out of her matrimonial home on basis that she could not conceive. She testified that the Respondent took care of all her needs; that she is/was earning Kshs. 75,000/= and her monthly expense were more than that amount. On cross examination she stated that they did not have a joint account that she had her own account however the respondent had other sources of income.

Judgment was delivered on 30th April 2015 where the Trial Court allowed the petition. The Respondent's prayer for maintenance was denied on the ground that the court would not seek to determine issues that have not been pleaded.

PROCEEDINGS /SUBMISSIONS

The matter came up for directions on 17th May 2018, where parties agreed to dispose the Appeal by way of written submissions. The Appellant filed her submissions on 26th July 2018, it was her submissions that the trial court declined to consider the Appellant's prayer for maintenance upon dissolution of her marriage with the Respondent because according to the Trial court, the Appellant did not file a Counter Claim or Cross Petition.

That the Trial court did not take into account **Article 159(2) (d) of the Constitution of Kenya** which gives the Court judicial authority to administer justice without undue regard to procedural technicalities.

It was further her submissions that the pleadings before the Trial Court were sufficiently clear that the Appellant was seeking maintenance and the said position was confirmed by the Respondent and as such the court had some evidence before it to determine the question of alimony.

In conclusion, she submitted that she is within the law to seek maintenance from the Respondent, that she is unemployed and in the circumstances sought that the Trial Court's judgment on the question of maintenance be set aside and that the Appellant be granted a monthly maintenance of Kshs. 300,000/= or a lump sum settlement of Kshs. 15,000,000/=.

The Respondent on the other hand filed his submissions on 17th September 2018, it was his case that the Appellate court is at liberty to re-examine the evidence adduced at the trial and arrive at its independent decision. It was further his submission that the Trial Magistrate rightly came to its decision after considering the evidence adduced by both the Appellant and the Respondent during the divorce proceedings and from the pleadings filed therein.

He proceeded to submit that the Appellant's Appeal should fail as she had failed to lay foundation for her claim for alimony as she did not file any counterclaim or counter-petition (cross-petition) for her prayer for alimony but simply asked for maintenance as a prayer in her answer to petition which clearly is irregular and wrong in law. That by filing her answer to petition, the Appellant simply denies the Petitioner's grounds of divorce but failed to file a counter –claim or counter petition to serve her own Petition for divorce and more importantly to ask for her own relief from court and as such her failure to plead her relief is fatally defective.

It was his case that the Trial Magistrate was right in not awarding her maintenance or alimony as the court cannot grant the Appellant a relief she has not pleaded by way of counter claim or counter petition, as it is only a counter claim or cross petition that would give her a platform to seek relief against the Petitioner. The Court cannot determine issues not pleaded.

It was further his case that **Provisions of the Constitution 2010, Article 159(2) (d)** cannot be successfully applied in this case to give the Appellant a relief she never asked for in the first place. That the Appellant's lack of counter claim or cross petition is tantamount to substantive irregularity in law and an incurable omission on the Appellant's part and not a mere procedural technicality.

He relied on the Oxygen Principle as stipulated in the case of; **COMMISSION OF INCOME TAX VS WESTMONT POWER (K) LIMITED (2020) eKLR**, where the court used the said principle to cast away old rules and engaged in balancing interests and hardships of the parties with the emphasis on placing the parties on an equal footing. However in this case, it was his submissions that the Appellant cannot seek the court's discretion to apply the Oxygen Principle to cure a defective pleading or an omission on the part of the Appellant as it is a matter of substance and not a procedural technicality to seek ruling for maintenance in a divorce proceeding by way of cross petition and

or counter claim and not by as answer to petition.

He submitted that the Appellant is a young able bodied and fit person, with no children borne out of marriage with the Respondent, she has not provided an affidavit of her means to show her financial capacity which is crucial for the court to enable the Court examine her capacity to access financial resources and/or support and also determine whether or not she is deserving to be paid maintenance. On the other hand the Respondent is now a married man with two very young children and added responsibility of looking after his aged mother, whilst his net income is KShs. 200,000/= which is fully utilized by his family.

It was submitted that the spouse who is seeking to be maintained should not seek the court's intervention to be granted maintenance without providing evidence that he/she has made an effort or is making an effort to secure a livelihood for herself or himself as stated in the case of; **S.M.R vs P.H.S (2013) eKLR.**

In conclusion he submitted that the exercise of court's discretionary power to award maintenance must be informed by an examination of all the circumstances of the case including the present and future assets, income, earning potential of the parties taking into account their ages and professional qualifications, financial needs and obligations of parties, duration of marriage and duration of time in which parties have lived separately, the welfare of the family, the conduct, where relevant each part in relation to the breakdown of marriage. He sought that the Appeal be dismissed with cost to the Respondent.

The grant of relief and the determination of the quantum of maintenance involve the exercise of discretion by the Court. It is a discretion that must however be exercised judiciously and this Court can, as an appellate court, interfere with the exercise of such discretion in certain limited circumstances.

DETERMINATION

The issue is as follows;

Whether the appellant has made out a case for us to interfere with the decision of the lower court?

I have considered the grounds of Appeal and the submissions of counsel. This being a first Appeal, the role of this Court as the appellate Court of first instance is well settled. This Court is duty bound to revisit the evidence on record, evaluate it and reach its own conclusion in the matter.

This court nevertheless appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial Court unless they were based on no evidence at all, or on a misapprehension of it or the Court is shown demonstrably to have acted on wrong principles in reaching the findings as was held in; **MWANASOKONI – VERSUS- KENYA BUS SERVICE LTD. (1982-88) 1 KAR 278 & KIRUGA – VERSUS- KIRUGA & ANOTHER (1988) KLR 348.**

Further in **MBOGO AND ANOTHER VS. SHAH [1968] EA 93** the Court stated:

“...That this Court will not interfere with the exercise of...discretion by an inferior 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 failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion.”

In **WMM v BML, HCDC No. 179 of 2009**, it was stated maintenance as follows;

“In the light of Article 45(3), the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance. In short, in cases where, as here, spouses have no children, a wife does not enjoy advantage over a husband or the vice versa and the age-old tradition in which men were deemed to be the sole bread winners and to carry the burden of maintaining their spouses does not hold true anymore. Under the Constitution, the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the Respondent to support herself. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden...”

The appeal herein is based on the maintenance of the appellant by the Respondent. It is her case that the Trial court failed to grant the same in his judgment on the ground that she hadn't sought for the same through a cross-petition or counter claim despite there being enough evidence to that effect.

Whereas **Article 159(2) (d)** of the Constitution and the Oxygen Principle in the Civil Procedure Act are relevant in the conduct of civil proceedings in the instant case; they are not helpful in the instant case because; apart from the Trial Court's correct holding that the Appellant did not specifically plead alimony in form of counterclaim and/or cross petition. This position is reinforced by the of **W.W.W vs. P.M.M (2015) EKLR**, where Justice Musyoka held;

“The pleading filed by the Respondent is an answer to petition. An answer to petition is just that, a pleading responding to the allegations made in a divorce petition. A respondent, who wishes to counter the petition by the petitioner, by asking the court to dissolve the marriage on his terms, should file his own petition for the dissolution of marriage founded on grounds to be set out in the counter petition. Although the respondent has prayed for the dissolution of the marriage in his answer to the petition, it is

my view that the said is without foundation so long as there is no counter-claim or counter-petition. The upshot of the above is that the orders sought in the answer to the petition are not available for reasons given above”

However, even if that was complied with, that the Appellant ought to file cross petition and/or counterclaim; the Appellant ought to have presented evidence of her financial sources, requirements, obligations to the Court in form of affidavit of means and the Respondent would be obliged to similarly present such evidence in and to the Court. The evidence on financial sources, assets, liabilities, responsibilities and obligations would enable/facilitate the Court an opportunity to make/grant informed decision on whether from evidence on record and applicable law, the Appellant is entitled to alimony/maintenance or not and if so how much?

In ***R P M v P K M [2015] eKLR*** and in ***S M R v P H S [2013] eKLR*** it was observed that:

“The financial capacity of the parties has to be examined before the court makes a ruling as to whether a spouse should pay maintenance and if so how much.

Therefore in the absence of parties availing such crucial evidence on their financial responsibilities, obligations sources and activities for consideration by the Court in the Trial Court or requesting to do so on appeal by virtue of **Section 78 Civil Procedure Act 2010**, the ground of appeal for maintenance/alimony fails.

I have considered the pleadings and submissions by parties and find that the Appellant did not establish her claim for alimony and/or maintenance in terms of **Section 77 of Marriage Act 2014**, due to lack of specific pleading for alimony in a cross petition and/or counterclaim and presenting crucial evidence for the Court to consider and determine.

In her testimony she also did not prove the claim of her inability to support herself, nor has she proved that she was unable to meet her expenses from her personal income and/or assets. From the proceedings at the Trial Court, I note she stated that she was a Sales Representative earning Kshs. 75,000/= which was also confirmed by the Respondent and in the absence of such evidence it would be grave injustice to burden the Respondent, who has other responsibilities with the responsibility of maintaining the Appellant.

DISPOSITION

- 1. The appeal filed on 3rd November 2017 by Appellant is dismissed.**
- 2. The Trial Court judgment of 30th April 2015 is upheld.**
- 3. Each party to bear own costs**
- 4. Each party may exercise right of appeal to the Court of Appeal.**

DELIVERED DATED & SIGNED IN OPEN COURT ON 24TH JANUARY 2019

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF;

BONIFACE MASINDE ADVOCATES FOR APPELLANT

MOHAMMED & SAMNAKAY ADVOCATES FOR RESPONDENT

MS JASMINE COURT CLERK