REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 4 OF 2017

HMN.....APPELLANT

VERSUS

JAN.....RESPONDENT

JUDGMENT

(An Appeal from the Judgment of Hon. Kimanga, Resident Magistrate

delivered on 18.1.17 in Divorce Cause No. 43 of 2014)

1. The appeal herein arises from the judgment of Hon. Kimanga, Resident Magistrate delivered on 18.1.17 in Divorce Cause No. 43 of 2014 between **HMN** the Appellant and **JAN** the Respondent. The undisputed facts herein are that the Appellant and the Respondent got married on 8.8.81 at [particulars withheld] Church Rabai and were blessed with 4 children who are now all adults. They lived in Buxton Mombasa. The Respondent used to work at the then Provincial Commissioners office but retired in 2004. As at 2015 when the matter was heard in the lower Court, the Appellant was an administrator at [particulars withheld]. The marriage experienced strain and the Appellant initially filed Divorce Cause No. 1 of 2009 against the Respondent which was dismissed. Being aggrieved, she appealed against the decision in HCDA No. 118 of 2010 which appeal was also dismissed.

2. Thereafter, the Appellant filed Divorce Cause No. 43 of 2014 seeking the dissolution of her marriage to the Respondent. Her grounds were desertion and cruelty on the part of the Respondent and depravity on the part of both the Appellant and the Respondent as well as irretrievable breakdown of the marriage. The Appellant alleged that the Respondent without reasonable and justifiable cause left the matrimonial home in 2004 thereby deserting the Petitioner. Since then, the parties have not resumed cohabitation. On cruelty, the Appellant accused the Respondent of neglecting his duties of caring for and providing shelter, mentorship, leadership and life necessities to the Appellant and the children of the marriage. She also accused him of being violent, hostile and abusive as a result of which the Appellant and the children suffered trauma and mental anguish. Both parties have caused exceptional depravity to each other in that they have not lived together since 2004 and have had no communication or conjugal relations for that period. To the Appellant the marriage had irretrievably broken down and she prayed that the same be dissolved.

3. The Respondent in his answer to Petition denied the allegations of cruelty and desertion and further states that the dispute between the parties had been resolved in the previous divorce proceedings and does not understand why the Appellant has filed another petition.

4. In his judgment the Hon. Magistrate found that the grounds of cruelty and desertion had not been proved and dismissed the petition. He further directed the parties to seek reconciliation through the help of community elders and the Church.

5. Being aggrieved by the said judgment, the Appellant preferred the Appeal herein. The summarized grounds of appeal are that the Honourable Magistrate erred in fact and in law in that he:

a) erroneously assessed of the evidence before him and thereby reached an erroneous conclusion against the weight of evidence.

b) failed to reach a conclusion that the marriage between the appellant and the Respondent had irretrievably broken down.

c) failed to adhere to the Constitution by dismissing the appellant's petition and issued the orders which were un-constitutional.

d) Ordered reconciliation without considering the wishes and the circumstances of the two parties and the basic principles of

mediation.

e) dealt with issues that had been determined at the interlocutory stage thus sitting as an appellate court.

f) failed to consider and apply the law appropriately.

6. The Appellant prayed that the said judgment of the Hon. Magistrate be set aside/annulled and the Appellant's petition be allowed with costs and a *decree nisi* do issue accordingly.

7. I have given due consideration to the record of appeal and I must say that the typed proceedings appear not to have been properly edited and are somewhat difficult to follow. I have also considered the grounds of appeal as well as the submissions by the parties' respective counsel. This being a first appeal, the Court is under a duty to reconsider and reevaluate the evidence and draw its own conclusion. However the Court must make due allowance with respect to the fact that it has neither seen nor heard the witnesses. These principles were set out in Selle and another –vs- Associated Motor Boat Company Ltd.& Others (1968) EA 123 by Sir Clement De Lestang, V. P. as follows:

An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this 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 though it should always bear in mind that it has neither seen nor heard the witnesses and should made due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally (Abdul Hameed Saif –v- Ali Mohamed Sholan (1955), 22 E.A.C.A. 270).

8. The issues for determination are:

i) Whether the matter is *res judicata.*

ii) Whether the grounds for dissolution of the marriage were proved.

Whether the matter is *res judicata*

9. The Respondent submitted that this matter had been dealt with in Divorce Cause No. 1 of 2009 in Mariakani and in Mombasa Civil Appeal No. 118 of 2010 and the Appellant's petition was dismissed. For the Appellant, it was submitted that the issue of res judicata was raised during directions and a ruling delivered on 21.7.15 allowing the petition to proceed. The Marriage Act has introduced irretrievable breakdown of the marriage and exceptional depravity by either party as additional grounds for dissolution of the marriage which never existed at the time the previous decision was made.

10. I have looked at the record and note that the learned Magistrate addressed the issue of *res judicata* in his judgment and had this to say:

I must point out that there was a preliminary issue on res-judicata of petition here in which objection was dismissed by my sister Hon Kitagwa in her considered ruling. The ruling has not been set aside, overturned of (sic) appealed against I will therefore uphold that finding as far as res-judicata is concerned herein and proceed to make findings on the merits of the petition herein.

11. As far as the record shows, the said decision on the issue of *res judicata* remains undisturbed either by way of setting aside or inversion by an appellate Court. However, given that submissions were made in this regard, I will address the same. In Mariakani Divorce Cause No. 1 of 2009, the Appellant sought dissolution of the marriage on the ground of cruelty. The particulars of the cruelty set out therein are very similar to the particulars of cruelty set out in Mombasa Divorce Cause No. 43 of 2014. The Court however notes that there was the additional ground of desertion, exceptional depravity and irretrievable breakdown of the marriage. The Civil Procedure Act prohibits all Courts from trying a suit the subject of which was in dispute between the same parties that has been determined by a Court of competent jurisdiction. Section 7 provides:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

12. The subsequent Divorce Cause No. 43 of 2014 though between the same parties raises additional grounds which were not in issue in the previous Divorce Cause No. 1 of 2009 in Mariakani. I therefore find that the matter is not *res judicata*. In this regard, I am in agreement with Odero, J who considered a similar matter in G.M.K v C.K.K [2010] eKLR and had this to say:

I have carefully considered this application as well as the submissions made by both counsel. I do agree with Mr. Hamza for the Petitioner that unlike other matters or issues raised in law marriage is not static. A marriage is a living and continual relationship which is either renewed or dies daily as the case may be. The fact that a certain position prevailed in a marriage in 1995 does not mean that the same position will prevail ten (10) years later in 2010. Like all other human relationships marriages evolve daily. There are shifts and changes that cannot be denied or overlooked. If the Petitioner's petition was dismissed in 1995 and the cruelty either continues or escalates after such dismissal does that mean she has no other legal remedy – I think not. As pointed out by Mr. Hamza any events which the Petitioner claims occurred between 1995 – 2010 obviously could not have been considered and determined in the petition decided in 1994. These are therefore new or fresh issues and can be properly ventilated before a court of law. The doctrine of Res Judicata is not applicable in the present circumstances.

13. Whether the grounds for dissolution of the marriage were proved.

The Appellant faulted the learned Magistrate in failing to find that the marriage between the parties had irretrievably broken down and to order the dissolution of the same. This, it was submitted, was against the weight of evidence. In his decision, the learned Magistrate found that on the ground of desertion, the absence of the Respondent from the matrimonial home was justifiable and was caused by the actions of the Appellant. He then stated that *"there was no desertion as contemplated in the marriage laws as a ground for divorce"*. On the ground of cruelty, the learned Magistrate cited what he referred to as the of *"Meme vs Meme case (1975) KLR pg…"* and found that the elements of cruelty as enumerated therein had not been proved. In the end the learned Magistrate held that the grounds for divorce were not proved and proceeded to dismiss the petition.

14. The marriage herein being solemnized at the [particulars withheld] Church Rabai is a Christian marriage. The grounds upon which a Christian marriage may be dissolved are stipulated in Section 65 of the Marriage Act, 2014 and they include:

> ***(a) one or more acts of adultery committed by the other party;***
>
> ***(b) cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage;***
>
> ***(c) desertion by either party for at least three years immediately preceding the date of presentation of the petition;***
>
> ***(d) exceptional depravity by either party;***
>
> ***(e) the irretrievable breakdown of the marriage"***

15. I have considered the testimony of the parties in the Court below. The Appellant stated in part:

> **JAN** ***is retired we were together till 2004*** **JAN** ***left the house since then I saw him when I had case in Mariakani. I saw him today in Court… I do not know where he stays now I pray for divorce… He left for I do not know why he left. I never saw him again. The marriage has fully degenerated fully & for 11 years we have not talked. It has irretrievably broken down… Children visits (sic) you but I have never come to visit you…***

The Respondent stated:

> ***We have not stayed together since 2004… my last born was in primary school I did not pay her fees I could not be able to pay because the mother was cruel & violent and could not allow me…I went to take care of my sick father … I did not come back to the home since I went to matrimonial home at Rabai since 2004 we never slept together we have not talked and she has not come to the elders…I still object to the divorce I belief (sic) in death as end of marriage.***

16. It is not disputed that the parties have lived apart since 2004. The Appellant stated that the Respondent left the matrimonial home and deserted her. The Respondent denies deserting the Appellant. He stated that upon retirement he went to stay in their matrimonial home in Rabai to take care of his ailing father. His attempts to return to the matrimonial home at Buxton were blocked by the Appellant who now despises him because he is retired, poor and old. He has sent emissaries to her but to no avail. Having considered these allegations and counter allegations, the learned Magistrate who had the benefit of seeing and hearing the witnesses believed the Respondent but found that the ground of desertion was not proved. The fact remains however that the parties have been apart since 2004 and have not resumed cohabitation. Desertion as a ground for dissolution of the marriage was in my view established and the learned Magistrate erred in finding otherwise.

17. The Respondent stated that he believes that only death should separate parties to a marriage. This is no doubt informed by the vows he made to the Appellant before God and man on 8.8.81 at [particulars withheld] Church Rabai when he married her, that only death will do them part. The Appellant on the other hand appears not to be of a similar persuasion and has made it clear that she is fed up with the marriage. This is evident from the fact that she has filed 2 petitions for dissolution of the marriage. It would therefore appear to me that the marriage herein died many years ago. For 15 years the parties have not spoken to each other and only see each other in Court. They have not had conjugal relations the entire time. To my mind this is a marriage that exists on paper only. Since 2004 when the Respondent left the matrimonial home, the Appellant has not sought him out nor has she submitted herself to reconciliation by the elders. She is categorical that she wants out. Even if physical death has not occurred to part the Appellant and the Respondent, the inescapable truth is that the death of this marriage parted them way back in 2004. Given the circumstances, can an unwilling marital partner be constrained in a marriage she has no interest in?

18. It is trite law that marriage is a union between consenting adults. This principle is underpinned by Article 45(2) of the Constitution of Kenya, 2010 which provides:

> ***Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.***

19. A party cannot by a Court order be compelled to remain in a marriage which has become intolerable and in which the party has no interest whatsoever. In N v. N [2008] 1 KLR [G & F] 16, Madan, J (as he then was) observed:

> ***If two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences."***

20. The reality that marriage can become unbearable for reasons observers may not understand is perhaps what informed Parliament to introduce the irretrievable break down of marriage as a ground for divorce in the Marriage Act 2014. With the enactment of the Marriage Act 2014, the landscape of matrimonial disputes has changed considerably. It is enough for a party to demonstrate that a marriage has irretrievably broken down for a Court to grant an order of dissolution of marriage. This was well articulated by Odero, J. in C.W.L v H.N [2014] eKLR:

> ***Prior to the Marriage Act 2014, the court would have required either the petitioner or the respondent to adduce evidence sufficient to prove the commission of a matrimonial offence by one spouse against the other. However in the Marriage Act 2014 the situation is vastly different. All the court requires is proof that the marriage has irretrievably broken down.***

21. Having reconsidered and reevaluated the evidence herein, I draw the conclusion that the learned Magistrate erred in not applying the law as contained in the Marriage Act 2014 appropriately. I further find that the learned Magistrate misdirected himself by failing to find that the ground of desertion was established and that the marriage between the parties herein had irretrievably broken down. Accordingly I allow the Appeal and make the following orders:

i) The decision of the learned Magistrate delivered on 18.1.17 is hereby set aside.

ii) In substitution therefor, I pronounce a decree of divorce and order that the marriage solemnised between the Appellant and the Respondent on 8.8.81 at [particulars withheld] Church Rabai be and is hereby dissolved. Decree *nisi* to issue and the same to be made absolute within 1 month.

iii) To avoid antagonizing the parties any further, I direct that each shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 15th day of March 2019

M. THANDE

JUDGE

In the presence of: -

.....for the Appellant

.....for the Respondent

.....Court Assistant