



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MALINDI

CIVIL APPEAL NO. 3 OF 2017

DR RMM.....APPELLANT

VERSUS

M a.k.a. JKM.....RESPONDENT

[Being an Appeal from the Judgement and Decree of Hon. Mshali H. Mshali, Kadhi dated 19th December, 2016 in Lamu Kadhi's Court Divorce Cause No. 24 of 2016]

JUDGEMENT

1. The Appellant, Dr RMM, pursued a claim at the Kadhi's Court seeking an official registration of divorce against the Respondent, M a.k.a. JKM, execution of the incidentals and consequences of the said divorce and any other relief that the Court would deem fit and just to grant.
2. At the conclusion of the trial, the Kadhi's Court at Lamu made a finding that the Appellant had not pronounced a divorce upon the Respondent, that desertion did not grant an automatic divorce in Islamic law and that the marriage between the parties still subsisted. A further finding was that the Appellant owes the Respondent a dowry balance of Kshs. 122,000.
3. The Kadhi's Court also found that it lacked jurisdiction to deal with the matrimonial property. Finally, the Court ordered each party to meet own costs of the proceedings.
4. The Appellant being aggrieved by the judgment filed this appeal on the grounds that the trial Court erred in fact and in law for failing to register the divorce notwithstanding the Respondent's adultery and desertion since the year 2000; finding that dowry was owing to the Respondent though theirs was a Kamba customary marriage making the issue of the dowry dissimilar with that of an Islamic marriage; failing to find that under Kamba customary marriage law under which the marriage was solemnized the Appellant had established grounds for dissolution of the same; considering irrelevant factors and leaving out the relevant ones in finding that the marriage still subsisted thereby violating the parties' freedom of association, human dignity and right to family as provided by the Constitution; and finding that it lacked jurisdiction to deal with matrimonial property.
5. The Appellant now seeks the setting aside of the trial Court's judgment; an order of dissolution of the marriage; the issuance of a decree or certificate of divorce; a declaration that the dowry of Kshs. 122,000 is not payable to the Respondent as the Kadhi had no jurisdiction over the issue; an order that the Respondent has no matrimonial property rights over plot No. 183 Mpeketoni; and an order directing the Respondent to meet the costs of the appeal.
6. The appeal proceeded by way of written submissions which were highlighted at the hearing. The Appellant urged that as per Articles 2(4), 36 and 45(4) of the Constitution, any customary law that is inconsistent with the Constitution is null and void to the extent of that inconsistency and having a right of association he has the right to form a family of his preference and not to be compelled to put up with the Respondent as the trial Court did. He cited Section 3(2) of the Judicature Act and sections 6(1)(2) and 43(1) of the Marriage Act as being relevant.
7. The Appellant urged that the parties having converted to the Islamic faith did not convert their marriage under Kamba customary law into an Islamic marriage. It is the Appellant's position that it does not follow that once one converts to a different religion their marriage is also automatically converted.
8. The Appellant further urged that under the Kamba customary law the concept of dowry is bride price which different from Islamic law. He asserts that the dowry was hence payable to the Respondent's parents and not the Respondent personally as was held in **Anna Munini Kituu/Beatrice Musangi John Kunga v Margaret Nzambi, Civil Case No. 751 of 1977** as reported at pages 85-94 of Eugene Catran's Casebook on Kenya Customary Law published in 1987. In light of this, the Appellant contends that the Kadhi lacked jurisdiction to deal with the issue.
9. The Appellant also urged that as the Respondent voluntarily left the matrimonial home in the year 2000, it amounted to desertion, and as

she sired children out of wedlock it amounted to adultery giving sufficient grounds to warrant a divorce. He relies on a case of **Joseph Makonji v Sebenzia Isichi D/o Atandola, Divorce Case No. 6 of 1967** as quoted in Eugene Cotran's already cited treatise as stating the grounds for divorce in a marriage conducted under Kamba customary law.

10. The Appellant's case is that the marriage having irretrievably broken down, the same ought to have been terminated as per Section 69(1) of the Marriage Act hence the trial Court erred in finding that there was no "talaka" and therefore the marriage subsisted.

11. On the question of the matrimonial property, the Appellant urged that under Section 3 of the Matrimonial Property Act, 2013 the Kadhi had power to make a pronouncement on the issue. He also pointed out that the Respondent made no contribution, whether monetary or otherwise, in the acquisition of the property and the dispute in respect of matrimonial property and not a dispute over land as was held by the trial Court. Further, that under Section 11 of the Matrimonial Property Act, the applicable law was customary law.

12. The Respondent on the other hand submitted that the marriage and the conversion were not in dispute and the only place for a Muslim to go in respect of such a dispute is the Kadhi's Court. The Respondent pointed out that the Appellant approached the said Court seeking dissolution of the marriage and the Court found that the proper procedure had not been adhered to and the Kadhi could not pronounce divorce under Kamba customary law.

13. On the issue of the matrimonial property, the Respondent submitted that the property was jointly acquired and there being no divorce the Kadhi could not deal with the matter.

14. The Respondent stressed that the Appellant had admitted owing dowry hence the directive by the trial Court that he pays the same to the Respondent in accordance with Islamic law.

15. It is well established that the role of the first appellate court is to re-evaluate, re-assess and re-analyze the evidence tendered at the trial in order to reach its own independent conclusion. One of the cases which conveys this principle is that of **Abok James Odera t/a A.J. Odera and Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR** where the Court of Appeal held that:-

"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-

"On a first appeal from the High Court, the Court of Appeal should 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 make due allowance in that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

16. The same principle was enunciated by the Court of Appeal in the case of **Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR** where it was held that:-

"It is trite law, and we accept Mr. Kiragu's submission that this Court is not bound necessarily to accept the findings of fact by the court below and that 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 make due allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123."

17. The Appellant pleaded that the parties were married and got two or more children before the Respondent deserted him for another man in 2000. In 2004, the Appellant married another wife under Islamic law. It was further pleaded that the Respondent's biological children were willing to resettle her elsewhere other than on the Appellant's property. It was also pleaded that the Respondent's continued stay on the property is likely to cause a breach of peace with his new wife.

18. The Respondent in her reply admitted that they were married in December, 1986 and were blessed with five issues. The parties after the marriage stayed at the Appellant's parents' home for five years though the Appellant had not paid dowry.

19. The Respondent's averment was that in 1990 they bought land upon which they established their matrimonial home. They started clearing the bush and tilling the land in 1991. The Respondent denied deserting the matrimonial home stating that she was chased away by the Appellant in 2000 after her parents demanded the dowry he had promised them. The Respondent's case was that in 2001 the Appellant went to her parents' home and apologized. He even made a down payment of the dowry leaving a balance of Kshs. 122,000. The Appellant then persuaded her to return home where she has since been living and that the Appellant often visits though he married another wife and moved to Mombasa.

20. The Respondent further pleaded that in 2016, the Appellant without reason forcefully evicted her from the matrimonial home and locked the house before the police intervened and reinstated her. The Respondent pleaded that their marriage still subsists and that she still legally resides in the only matrimonial home she knows hence the purported eviction contravened sections 9 and 12(2) of the Matrimonial Property Act, 2013 and Articles 40 and 45(3) of the Constitution.

21. Through a counterclaim, the Respondent prayed for a permanent injunction restraining the Appellant, his agents, representatives, assigns or any other person claiming under him from forcefully or in any other manner evicting her from the matrimonial property and/or house

standing on land parcel number 183 situated at Umoja area in Mpeketoni. She also prayed for a share of the matrimonial property, payment of the balance of dowry of Kshs. 122,000, costs of the suit, interest on the costs of the suit and any other relief the court may deem fit and just to grant.

22. In defence to the counterclaim the Appellant reiterated that the parties divorced under Islamic law in 2002 and that he was willing to settle the dowry balance. He denied joint ownership of the property in issue and urged the Kadhi's Court not to grant the injunction on the grounds that the Respondent had no right to the property.

23. During the trial, the evidence of the Appellant was that he married the Respondent in 1986 and in 1990 he purchased the matrimonial property being Plot No. 183 at Mpeketoni. Thereafter they both converted to Islam in 1994 and divorced in 2000 having been blessed with only four issues.

24. According to the Appellant he did not chase the Respondent away rather that the Respondent left for her parents' home on her own volition. His testimony was that the Respondent returned to the property in issue in 2013 after their son, PW2 J R M requested the Appellant to allow the Respondent back in order to oversee the "Shamba" as PW2 had cultivated it. The Appellant testified that he had by then remarried and tried in vain to have the divorce registered hence necessitating the filing of the suit.

25. PW2's evidence was that in 2000 the Respondent who is his mother left with his grandmother. She returned in 2002 before leaving again until 2013 when he (PW2) requested the Appellant to permit her to return for purposes of the farm work. PW2 stated that the Respondent failed to leave the farm after the harvest. According to him, the "Shamba" belonged to his father, the Appellant, though he did not know how the "Shamba" was acquired. PW2's testimony was that the Appellant told him they had divorced but he did not know the reasons behind it.

26. The evidence by the Respondent was in tandem with that of the Appellant on the year of their marriage, their first home, the year they converted to the Islamic faith, the year the property in question was acquired and the Appellant's marriage to another woman. However, according to the Respondent, the matrimonial property was jointly purchased and they then built their own house and had five children. She testified that the dowry was not fully paid and that she was never informed of a divorce.

27. Her evidence was that she remained at her parents' home until 2013 when her son convinced the Appellant to allow her to cultivate the "Shamba" and return home. She admitted that she never lived with the Appellant from 2000. Further, that she had lived on the said property since 2013 and when the Appellant attempted to evict her she sought the intervention of the police.

28. The emerging issues are whether or not there was a marriage recognized by Islamic law; whether there were sufficient grounds for divorce; whether or not the Respondent was entitled to a share in Plot No. [particulars withheld] Mpeketoni; and whether or not the Appellant owes dowry to the Respondent.

29. There is no doubt that a legally recognized marriage existed between the parties. It was a Kamba customary law marriage. The marriage took place in 1986 and when a dowry dispute arose the Respondent was whisked off home by her parents. Thereafter the Appellant paid part of the dowry and the Respondent came back to the matrimonial home. That Kshs. 122,000 is the unpaid dowry is also not disputed.

30. The preliminary germane issue is the applicable law in the circumstances as this would determine jurisdiction. I note that the parties, both at the trial Court and before this court did not address this issue with the seriousness it deserves. It is trite that jurisdiction is everything without which the court cannot act.

31. In **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1** it was held by the Court of Appeal that:-

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

32. The Court went ahead and cited a passage from page 113 of Volume 3:1 of Words and Phrases Legally Defined where it is stated that:-

"If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given."

33. Said Chitembwe, J in **M.S.R. v N.A.B. [2017] eKLR**, a matter also pertaining to divorce and property, held that:-

"Given the fact that the petitioner converted to Islam and submitted herself to a marriage under Islamic Law, I do find that it would be prudent if the issue of the dissolution of the marriage is handled by the Kadhi Court. Issues relating to the dissolution of a marriage celebrated under Islamic Law shall be governed by Islamic Law as stated under section 71 of the Marriage Act. The fact that the petitioner no longer professes Islamic faith does not change the situation. The respondent can equally contend that he is a Muslim and does not wish to have his marriage dissolved under any other form of law other than the law it was solemnised."

34. Section 71 of the Marriage Act, 2014 provides that:-

“The dissolution of marriage celebrated under Part VII shall be governed by Islamic law.”

35. Part VII deals with marriage under Islamic law and provides at Section 48 that:-

“This Part shall only apply to persons who profess Islamic faith.”

36. Section 49(1) of the Marriage Act 2014 provides that:-

“A marriage under this Part shall be officiated by a kadhi, sheikh or imam as may be authorised by the Registrar and celebrated in accordance with Islamic law”.

37. The parties herein converted to the Islamic faith in 1994 eight years after entering into a marriage under Kamba customary law. There was no evidence adduced of conversion of the marriage into an Islamic law marriage as there was no ceremony performed as required by Section 49(1) of the Marriage Act, 2014.

38. In fact, when the parents of the Respondent demanded payment of dowry the Appellant settled part thereof. The payment was paid to her parents as per Kamba customary law.

39. If there is doubt of the existence of a valid marriage under Kamba customary law, that doubt is put to rest by Section 43(2) of the Marriage Act, 2014 which provides that:

“Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage.”

40. The question would then be whether the Kadhi's Court had jurisdiction over a marriage not celebrated under Part VII of the Marriage Act, 2014. In submitting to the jurisdiction of the Kadhi's Court the Appellant identified his personal law as the Islamic law. The Kadhis' Court Act, Cap. 11 at Section 5 provides the jurisdiction of a Kadhi's Court as follows:-

“5. Jurisdiction of Kadhis' Courts

A Kadhi's court shall have and exercise the following jurisdiction, namely the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion; but nothing in this section shall limit the jurisdiction of the High Court or of any subordinate court in any proceeding which comes before it.”

41. Section 5 of the Kadhis' Court Act is the law applicable to persons professing the Islamic faith and both parties did indeed profess the Muslim religion at the time of the trial, save that the marriage they had entered into was not one celebrated in accordance with Islamic law as envisaged under Section 49(1) of the Marriage Act, 2014.

42. It is trite that parties cannot confer jurisdiction upon a court and that a court is only clothed with jurisdiction given to it under the Constitution and the statute. In **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] eKLR** the Supreme Court held that:

“A court's jurisdiction flows from either the Constitution or legislation or both.”

43. The Kadhi therefore lacked jurisdiction to determine questions relating to the marriage and matrimonial property of the parties that were before him. The Kadhi rightly indicated that a divorce in Muslim marriage by a husband has to be witnessed by two persons. This was not the case here, and even if it was, the marriage contracted fell squarely under Kamba customary law and the Kadhi therefore lacked jurisdiction to pronounce a divorce. The marriage not having been re-celebrated under the couple's new-found faith remained a customary one subject to the laws governing marriages contracted under customary law.

44. In order for a marriage conducted under whichever to be valid, it should meet the legal requirements provided by the Marriage Act, 2014. Change of religion does not of itself convert a marriage to the new religion. The parties must take steps to ensure the law is complied with. Converting a marriage from one type to another is a legal process. It cannot be equated to change of religion where a word of mouth is sufficient evidence of conversion.

45. I agree with Said Chitembwe, J's statement in **M.S R.** (supra) that:-

“In the end, I do find that although this court has jurisdiction to determine the divorce petition, the dispute relating to the dissolution of the marriage should first be handled by the Kadhi's Court. Doing so would not be subjecting the petitioner to Islamic Law. Her marriage is yet to be dissolved and the same was contracted under Islamic faith. The petitioner should exit from the marriage through the same door she entered into the marriage. The presumption was that the marriage was going to last forever. Now the petitioner wants to exit, she should exit through the Kadhi's Court so that the Kadhi can issue the divorce and sign the divorce certificate.”

46. The Appellant can only exit the marriage on the grounds found in Section 69 of the Marriage Act, 2014 and through the court vested with

the authority to dissolve a marriage conducted under customary law. The Kadhi's Court is not such a court. A valid marriage is a legally binding contract and like any other contract, when it is time to terminate the same, the dissolution must be conducted in accordance with the law enacted for that purpose. The grounds of divorce are provided for marriages conducted under the various regimes found in the Marriage Act, 2014 hence the need to establish the regime under which the marriage was solemnized.

47. Indeed the Appellant, through his written submissions exhibited a conflicted state of mind as to whether his was a marriage governed by Islamic law or Kamba customary law. For example, he wanted the dowry aspect of the marriage to be dealt with under Kamba customary law but nevertheless went ahead and insisted that the Kadhi had jurisdiction to pronounce divorce in respect of the same marriage.

48. Having found that the Kadhi had no jurisdiction to handle the case in the first instance, I must also find that this court has no jurisdiction to determine issues that arose from illegal proceedings. As stated in the **MV Lillian S** (supra), the proceedings and judgment before the Kadhi's Court amounted to nothing.

49. The parties should seek redress before the proper forum. This appeal is allowed and the proceedings and judgment before the Kadhi's Court are quashed.

50. Although A. S. Hussein, the Chief Kadhi sat with me as an assessor as required by Section 65(1)(c) of the Civil Procedure Act, Cap. 21 and actually gave me a written opinion dated 21st December, 2018, I have not alluded to his opinion in my judgment because this appeal has been determined on a matter of law namely the lack of jurisdiction by the Kadhi to entertain the dispute. In the circumstances, I find it appropriate to thank the Chief Kadhi for his industry and patience during the hearing of the appeal.

51. In light of the fact that this appeal arose from a matrimonial dispute, the appropriate order on costs is to direct each party to meet own costs for the proceedings. It is so ordered.

Dated and Signed at Nairobi this 16th day of April 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 23rd day of May, 2019

R. Nyakundi,

Judge of the High Court