



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**CIVIL APPEAL NO. 125 OF 2018**

**SM.....APPELLANT**

**VERSUS**

**HGE.....RESPONDENT**

*(An appeal arising from the judgment and decree of the Hon. Ally W. Bakari, Kadhi, in Hamisi Kadhi's Court Civil Case No. 4 of 2018 of 19<sup>th</sup> October 2017)*

**JUDGMENT**

1. Before I get to the substance of the appeal before me, I feel that I must address matters that I found quite curious and strange about the record of the trial court. It would appear that the suit at the trial court was initiated by way of a plaint dated 8<sup>th</sup> February 2018, which was lodged simultaneously with a statement by the plaintiff and a list and copies of documents of even date. There is also an affidavit of service sworn on 23<sup>rd</sup> February 2018, which is duly commissioned by a Commissioner of Oaths. What is curious about these filings is that they do not bear a court stamp, to indicate that they were duly received at the relevant registry on a particular date.
2. There is a handwritten defence statement, dated 23<sup>rd</sup> February 2018. What is strange about it is that, like the filings by the appellant, it does not bear a receipt and date stamp of the court. Unlike the filings by the plaintiff, there is no official receipt issued by the court as evidence that it was ever paid for. What is more is that that it is tucked in somewhere between the handwritten notes of the Kadhi and the Kadhi's final ruling of 26<sup>th</sup> February 2018. There is no affidavit of service to indicate whether or not a copy of the alleged statement of defence was ever served on the appellant, and, therefore, the whether the appellant had the benefit of knowing the defence case in advance. It would also raise questions as to whether the same was filed at all before the hearing commenced.
3. Be that as it may, the suit at the primary court was initiated by the appellant herein against the respondent, seeking to be allocated portions, to be specified, of the respondent's parcels, presumably of land. She claimed that the respondent was her husband having contracted an Islamic marriage with him on 10<sup>th</sup> August 2010. In her witness statement she averred that although she was married to the respondent under Islamic law, when he distributed his property he did not allocate to her anything, which had left her destitute.
4. In the alleged defence the respondent denied the marriage. He asserted that he had been married only once, to a MH, and when she died he did not contract any other marriage. He conceded that he had distributed his assets amongst his children.
5. The trial court took evidence from both sides, and eventually resolved the matter in favour of the respondent. It was held that although the parties had gone through a ceremony of marriage before a Kadhi at Kisumu, the said ceremony did not meet the conditions precedent for a valid Muslim marriage. The marriage certificate issued by the Kisumu Kadhi was nullified and the appellant was ordered to vacate the respondent's property.
6. The appellant was aggrieved by the determination made by the trial court, and lodged this appeal. In her memorandum of appeal, she seeks the setting aside of the decision of the Kadhi, and to be allocated her due thereof the respondent's property as a spouse under Muslim law. She listed twenty-five grounds of appeal, which may be summarized as follows:
  - (a) That the trial court failed to find that the appellant had not been served with a defence, list and statement of witnesses and copies of documents, and proceeded to conduct proceedings as if a defence had been filed, which was contrary to the Order 7 of the Civil Procedure Rules;
  - (b) That the trial court erred in revoking the certificate of marriage on the finding that the conditions precedent for a valid Muslim marriage had not been met and the appellant had been renounced by the respondent, yet all the prerequisites for a valid marriage had been met, confirmed and a marriage certificate issued by the Kadhi for Kisumu;
  - (c) That the trial court erred in failing to note that the renunciation, or denunciation, of the appellant by the respondent came eight

years after the said marriage was contracted and that it did not consider that it could have been done to avoid his responsibilities under Islamic law;

(d) That the trial court erred in finding that the appellant had been married to a KA, without sufficient proof thereof;

(e) That the trial court erred in concluding that the appellant was a tenant of the respondent, without sufficient proof thereof;

(f) That the trial court erred in ordering the appellant to vacate the property she was residing in and in failing to find that she was entitled to occupy the same by dint of her marriage to the respondent;

(g) That the trial court erred in stating that the appellant had engaged in criminal conduct, without sufficient proof thereof;

(h) That the trial court erred in concluding that the respondent had been sick at the time of the certified marriage and based on that erroneous conclusion held that the condition precedent for contracting a Muslim marriage had not been met; and

(i) The trial court erred in failing to find that the appellant was the lawful wife of the respondent entitled to matrimonial property in accordance with Islamic law.

7. In the opening paragraphs of this judgment, I have alluded to some of the very glaring gaps and shortcomings in the manner the proceedings herein were conducted. The argument by the appellant that she was subjected to a trial by ambush, where the respondent was allowed to testify and present witnesses without having filed a defence, a list of witnesses, statements of the proposed witnesses and lists and copies of the documentary evidence the respondent was to rely on. I understand the appellant to be arguing that there was no pretrial disclosure by the respondent before the hearing commenced.

8. The Constitution, at Article 50(1), provides for fair hearing with regard to any dispute that has to be resolved in accordance with the law. It states as follows:

*“50. (1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.”*

9. The remainder of Article 50 of the Constitution, especially Sub-Article (2), is devoted to what are generally referred to as fair trial principles. The constitutional provisions on fair trial appear to be limited to criminal trials, but the spirit cuts across the board, especially with respect to pretrial disclosure of evidence. The days of trial by ambush are behind us. It is to be expected in all trials, be they civil or criminal, that there would be a fair amount of disclosure of the opponent’s case, through the pleadings, the documents proposed to be relied upon, the witnesses proposed to be presented, among others. In civil trials the spirit of pretrial disclosure is captured in Order 7 of the Civil Procedure Rules.

10. The court, in *Pinnacle Projects Limited vs. Presbyterian Church of East Africa, Ngong Parish & another* [2018] eKLR, had the following to say on Article 50 with respect to fair trial principles in civil cases:

*“While the wording of Article 50 of the Constitution on the right to a fair hearing prima facie seems to focus on criminal trials it’s not lost that fair trial in civil cases includes: the right of access to a court, the right to be heard by a competent independent and impartial tribunal, the right to equality of arms, the right to adduce and challenge evidence, the right to legal representation, the right to be informed of the claim in advance before the suit is filed, the right to a public hearing, and the right to be heard within a reasonable time.”*

11. The court went on to say:

*“... it is important that in any judicial process adjudication parties involved be given opportunity to present their case and have a fair hearing before the decision against them is made by the respective judge or magistrate. It is not lost that procedural fairness is deeply ingrained in our administration of justice system.*

*Although in particular circumstances errors, omissions, missteps and blunders are made by parties or their counsels during pretrial or in the course of trial to find appropriate balance fundamental requisite of due process of law should be accorded a purposeful meaning to protect right to a fair hearing. The Civil Procedure Act and Rules provides for time-frame rules and commitments for parties to comply with discovery; dates for closure of pleadings, filing of witness statements, production of expert material where applicable, scheduling of cases and disposition dates. Needless to say that all these commitments are aimed at each litigant to have adequate notice and fair understanding of the litigation road ahead of time disposition ...”*

12. Can it be said that the respondent complied with the rules as to pretrial disclosure? I do not think so. In the first place, his handwritten defence statement does not appear to have been properly placed on record. There is no evidence that it was paid for. Secondly, there is nothing to suggest that it was properly received at the registry for it bears no court stamp. Thirdly, there is no affidavit of service to suggest that it was ever served on the appellant. Neither is there any minute in the notes of the trial Kadhi to suggest that the same was ever served on the appellant in open court in his presence. All indications are that the appellant walked into the trial without having the benefit of knowing what the respondent’s defence was going to be, for she had not had advance access to his defence pleading. Coupled with that is the issue of lists and copies of the documents that the respondent was to rely on, and the lists of the witnesses that he proposed to call and their statements. Such material assists a party to be able, in advance, to know the nature and type of case the other party proposes to mount, and, therefore, be in a position to prepare adequately to meet that case. That is what giving the other party an opportunity to prepare its case is all

about.

13. The appellant did pay for filing a plaint, verifying affidavit, list of documents, copies of documents and her witness statement. There is a receipt on record showing that she paid for the said documents on 8<sup>th</sup> February 2018. For some unknown reason, despite the payment for the filing of these documents and the same having been receipted, the said documents were not stamped with the official receipt and date stamp of the court.

14. The other concern is that whereas the trial court did allow the appellant and the respondent to cross-examine each other, it would appear that when the respondent's thirteen witnesses testified, the appellant was not afforded an opportunity to cross-examine them. The record does not indicate whether the appellant was given the chance to cross-examine and chose not to. It would appear to me that she was not given that chance at all.

15. The system of justice in Kenya is adversarial. One critical tenet of it is cross-examination, which affords a party an opportunity to confront his adversary by challenging their testimonies by way of questioning. The chance to test the adversary's evidence through cross-examination is at the heart of the fair trial principle. Failure to afford a party that opportunity to cross-examine the witnesses availed by the other side on their testimonies strikes a fatal blow to the validity and integrity of the process.

16. From the above it is quite clear that the entire proceedings were deficient. Firstly, because the court papers were not properly received at the court registry and properly processed. It is critical that court papers be embossed with the official stamp of the court. This serves several purposes. The stamp would indicate that the document was properly on record, and was received procedurally. Secondly, it gives an indication as to the time and date when it was received. This is important as court filings are subject to certain timelines. Thirdly, and more importantly, it authenticates the process. It gives the stamp of validity and genuineness to the document thus filed. A document in a court file, especially a critical one, such as a pleading, which is not stamped is clearly not authentic and should not be treated as genuine, or properly on record. It should, therefore, not be something to be overlooked. These are control and accounting issues. It is about the integrity of the whole process. Court staff have a duty to ensure that the documents they receive at the registry at the time of filing by the parties are properly paid for, and are properly stamped or embossed with the official stamp of the court. It is equally the duty of the judicial officer hearing the matter to ensure that the documents that form the base of the cause are proper, in terms of being properly stamped, signed by the parties, paid for, dated, among other requirements. The second deficiency is that the actual trial was conducted in a manner that denied the appellant her right to a fair trial.

17. Where a trial process is wholly deficient or unsatisfactory, the appellate court should declare a mistrial, and order a retrial. An appellate court can order a retrial where the hearing by and the judgment of the trial court were so unsatisfactory as to amount to a complete mistrial. One other factor would be the unsatisfactory state of the trial court record (See *Chandaria vs. Njeri* [1982] eKLR). The appellate court can also declare a mistrial where the proceedings were conducted by the trial court in an irregular manner (See *MMO vs. FAH* [2017] eKLR). It would also be the case where the trial court failed to allow a party a chance to be heard on their defence as that would amount to a miscarriage of justice and a mistrial, and such would be a proper case to remand the matter to the trial court for the party to be properly heard (See *Jane Murugi Karanu vs. Gabriel Gikonyo Ndirangu* [2008] eKLR). Where a trial court or tribunal determined a matter without giving an opportunity to either party to be heard (See *Duncan Kamau Kiriro vs. Japheth P. Kimotho* [2013] eKLR.)

18. In view of everything that I have said above, I hereby allow the appeal, and declare the trial process of the appellant's case in Hamisi Kadhi's Court Civil Case No. 4 of 2018 amounted to a mistrial. I, accordingly, set aside the ruling, which should have been a judgment, that was delivered on 26<sup>th</sup> February 2018. I hereby remand the matter to the Hamisi Kadhi's Court, and in the event that there presently is no Kadhi's Court at Hamisi, to the nearest Kadhi's Court, for the retrial of the matter, by a Kadhi other than Hon. Ally W. Bakari. The Kadhi shall ensure that all the records in the court file are authenticated before the actual trial begins, and that the trial itself meets all the standards of a fair trial. Each party shall bear their own costs. It is so ordered.

**DELIVERED DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 26<sup>th</sup> DAY OF September, 2019**

**W. MUSYOKA**

**JUDGE**