



NO.774

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
CIVIL APPEAL NO.109 OF 2011

BETWEEN

M O N APPELLANT/APPLICANT

AND

F A O RESPONDENT

(Being an appeal from the judgment and decree of Hon. Omwanza, Resident Magistrate, dated and delivered on the 31st May, 2011, in the original Ndhiwa RMCC Divorce Cause No.3 of 2010)

JUDGMENT

Introduction and Pleadings

1. The appellant herein, M O N was the plaintiff while the respondent F A O was the defendant in Divorce Cause No.3 of 2010 filed at the Resident Magistrate's Court Ndhiwa. By the plaint dated 2nd March 2010, the appellant prayed for judgment against the respondent in the following terms:-
 - a. *The marriage between the plaintiff and the defendant be dissolved.*
 - b. *Costs of this cause be borne by the defendant.*
2. The appellant averred that he and the respondent were married under Luo customs and practices in or about 1960 upon payment of 15 heads of cattle by the appellant as dowry. It is admitted by both parties that the appellant and respondent were blessed with 5 issues namely:-
 1. R A O
 2. P A (Deceased)
 3. G O
 4. J O
 5. M A (Deceased)
3. The appellant averred that in or about the year 1970, the respondent deserted the matrimonial home and stayed away for a total of 12 years during which time she bore three (3) children out of wedlock, namely:-
 - i. W O

- ii. *MA and*
- iii. *JO*

4. The appellant claimed that during the 12 years, the respondent committed adultery with other men who sired the three children born to the respondent during that period. He also averred that the respondent was guilty of cruelty and desertion. The appellant set out the following particulars of alleged adultery:-

- i. *Engaging and/or having extra marital sexual liaison with persons other than the plaintiff;*
- ii. *Maintaining an extra marital affair (s) with other men other the plaintiff; (sic)*
- iii. *Failing to uphold marital fidelity and morality;*
- iv. *Cohabiting with other men during the subsistence of the marriage between the plaintiff and the defendant.*
- v. *Entering into and maintaining other marital relationships without lawful cause.*

5. On allegations of desertion the appellant accused the respondent of:-

- i. *Abandoning the matrimonial home ever since May 2009, without reasonable and/or sufficient cause;*
- ii. *Failing, neglecting and/or refusing to return to the matrimonial home;*
- iii. *Disregarding reconciliation endeavours.*

6. The appellant also gave the following particulars of cruelty against the respondent:-

- i. *Refusing to cook for the plaintiff*
- ii. *Engaging the plaintiff in endless and/or incessant quarrels without lawful cause;*
- iii. *Abusing the plaintiff in public, with the sole aim of embarrassing and/or disparaging the plaintiff;*
- iv. *Denying or refusing to accord the plaintiff his conjugal rights;*
- v. *Refusing to laundry for the plaintiff;(sic)*
- vi. *Ganging up with her (defendant's) sons borne out of wedlock to assault the plaintiff;*
- vii. *Being extremely hostile and quarrelsome with the plaintiff.*

7. In her written statement of defence filed on 8th April 2010, the respondent confirmed that she was a wife to the appellant but clarified that they got married in 1962 in accordance with Luo Customary Law. She however denied that she deserted the appellant. She stated that she was chased away by the appellant in 1973 on allegations that she was only giving birth to female children. The respondent admitted to getting other children during her separation with the appellant; but stated that an arbitration was done by clan elders during which the appellant pleaded with his brother to help him in bringing the respondent back to her matrimonial home despite children born out of wedlock including boys. She however denied that their marriage had irretrievably broken down. She denied allegations that she mistreated or threatened the appellant or that she failed in her responsibilities as a wife.

8. She counterclaimed for compensation for interferences caused to her by the appellant for evicting her from her homestead after a quarrel. The respondent prayed that the suit be:-

- a. *Dismissed and the defendant be reinstated in her matrimonial home because at her age she cannot be married elsewhere and give cost of the suit.*
- b. *The defendant to be entitled by the honourable court to get a piece of land from the plaintiff where she can reside and where she can cultivate in order to get some proceeds that can assist her in upkeep of herself, children and seven grandchildren.*
- c. *The plaintiff to be ordered not to interfere with the mature sugarcane plantation that she had really worked hard on in order to get proceed to assist her in maintaining her family because the plaintiff had taken her as a person non grata within his family and not as a wife.*

9. During the hearing of the case in the court below, appellant told the court that the respondent was his wife whom he married under Luo Customary Law in the year 1960; he paid 15 heads of cattle as dowry and they got 5 issues with her namely: R A, P A (deceased), G O, J O and M O (deceased).
10. That they lived together upto 1970 when the respondent left her matrimonial home to an unknown destination and efforts to trace her proved futile. However in 1982 she came back home with three more children namely: W O O, M A and J O.
11. The appellant also stated that for the period the respondent was away, he married two more wives; he never tried to reconcile with her and his relationship with his children was not cordial as the respondent had told them that he did not sire them.
12. The appellant denied that he chased away the respondent because she was only giving birth to baby girls; he also denied that he had asked village elders to call her back to his home. He said they could not reconcile since the respondent had been sending her children to assault him. Regarding the crop of sugar cane, the appellant told the court that it was him who planted the crop and that he could not give it to her nor was he ready to give her any portion of his land to settle the children who had been assaulting him.
13. In concluding his evidence the appellant asked the court to grant him a divorce so he could do away with the children. He also asked the court to reject the respondent's counterclaim on grounds that she was the one who left the matrimonial home in the first place.
14. On cross examination, the appellant maintained that he sired 5 children with the respondent; he denied that he ever went to the respondent's parents' home to demand her return. He also denied that he stayed with the respondent after he constructed a home for her. He however admitted that he built a house for his second wife in front of the respondent's house because the respondent's children were fighting him and that his 5 daughters were married but dowry was never paid to him as her sons snatched the two heads of cattle which were paid as dowry.
15. On re-examination the appellant maintained that he only sired 5 children with the respondent; that he did not chase her away from her matrimonial home between 1970-1982; that he did not now want her to stay with him because he did not want to stay with "**death**" in the house. The appellant did not call any witnesses.
16. The respondent testified as DW1 and confirmed to the court that the petitioner was her husband, whom she married in 1960 when she was only 13 years old. She also confirmed that from the said marriage they were blessed with 8 children 2 of whom had since died. She however denied the allegation that she was not cooking for the appellant, washing his clothes, or sleeping with him. She wondered how she could have got the eight (8) children if she was not sleeping with the appellant. She told the court that the petitioner had for the last two years prior to the filing of the instant case, chased her away but she now wanted to go back to the matrimonial home. She also told the court that her daughters were now married and in fact the petitioner used the dowry from these daughters to educate the children of his two (2) other wives. The respondent also denied that her children had been assaulting the appellant. She stated that one of her children who was alleged to have assaulted the appellant was charged but was not found guilty.
17. In concluding her evidence, the respondent pleaded with the court to assist her get a parcel of land to enable her get settled as she was 62 years old and the prospects of her getting remarried were nil. In addition, she prayed that she be re-united with her husband who will at the end of the road bury her.
18. On cross-examination, the respondent averred that she was married at the age of 13 years to the petitioner, the petitioner chased her away from their matrimonial home because she had given birth only to baby girls and that later when they reconciled the petitioner sired the rest of the other children. She denied having extra-marital affairs while she was estranged from the petitioner; that she used to cook for him, give him his conjugal rights and wondered how she was able to give birth if she was not sleeping with the petitioner. She however stated that the petitioner's 2nd wife left and in turn he married a third wife who has 4 children (2 boys and 2 girls), that they have a sugarcane plantation in their plot and she wants to go back to her matrimonial home as the petitioner married her and used her to her old age and now he wants to chase her away.
19. In conclusion she prayed that if the petitioner did not want to stay with her he still had to give her

- a piece of land where she could live on her own.
20. DW2 was P M N, the appellant's younger brother and the respondent's brother-in-law. He corroborated the respondent's testimony that she stayed at his home after the appellant and the respondent disagreed and that his efforts to reconcile them were rejected by the appellant who told him that he did not want a woman with two sons. He confirmed that he took the appellant and respondent to the chief for reconciliation where it was decided that the respondent should go back to her matrimonial home. The appellant again chased her away and together with 5 other villagers and himself he took them to the chief who informed them to go to the D.O.'s office at Pala. That they wanted to subdivide the land to DW1 but problems arose between PW1 and his children.
21. In conclusion, DW2 prayed that the respondent be given a portion of the appellant's land as she has a structure built on it to enable her carry on with her life. He also confirmed that the appellant's 3rd wife had two sons and two girls and emphasized that they were all entitled to share the parcel of land between them.
22. On cross examination DW2 maintained that the respondent did not have a piece of land and was therefore staying with him. He also stated that he assisted the appellant who was his younger brother in paying dowry for the respondent. He further told the court that since he was living in Mombasa in 1970 and 1982, he could not tell whether the respondent had deserted her matrimonial home. He however told the court that any time he visited his rural home he found the appellant and the respondent staying together. DW2 could however not say whether or not the respondent had given birth out of wedlock.
23. It was also DW2's testimony that while the appellant and respondent were staying together, the respondent used to wash the appellant's clothes, and that he had never heard of quarrels between the two as he was also a village elder. He held the view that and it was not right for appellant to divorce the respondent when the respondent is old with adult children and a house built for her by the appellant.
24. DW3 was H O O an uncle to the appellant. He stated that appellant and respondent were married when he was 14 years old and they had been staying together as husband and wife. That he had never handled any case regarding disrespect of the respondent towards the appellant. He therefore prayed that the respondent be allowed to return to her matrimonial home and carry on with her life.
25. On cross examination, DW3 stated that he could not tell whether the respondent was or was not washing clothes for the appellant who also got married to other women. He however confirmed that efforts to reconcile the two had failed because the appellant did not want to see the respondent.
26. DW4 was D O N, a cousin to the appellant. He told the court that the respondent was a polite lady and could not understand why the appellant should divorce her. On cross examination he confirmed that efforts to reconcile the appellant and the respondent failed because the appellant was a very fierce man. He also said that under Luo custom, it was very difficult to know who the father of the children was.
27. DW5 was J A O, a cousin to the appellant. He also told the court that as a clan member he did not wish for a divorce because the respondent was now old and he did not see where she would go at her age if she is divorced. On cross examination, he confirmed that the appellant had called them one day to solve some domestic issue concerning a land dispute in which it was alleged that the appellant was not ready to subdivide the land to the respondent. DW5 stated that DW2 chaired the meeting at which he deputized. His recommendation was that the respondent should be given her own piece of land so that she carries on with her own life.
27. Findings by the trial court
28. After carefully considering the evidence that was placed before him, the learned trial magistrate in his judgment held that the issue of cruelty had not been proved to the standard of proof set out in **Wangari Maathai –vs- Mwangi Mathai** where the court held:-

“That the charge must be clearly proved to the satisfaction of the court

which has been given the connotation to mean satisfied beyond reasonable doubt or satisfied so as to feel sure.”

29. On the issue of adultery the learned trial magistrate also found that the appellant had not proved this issue to the required standard and proceeded to dismiss the suit with no orders as to costs. The learned trial magistrate went further to:-

“Direct that the plaintiff to do what is required of him by subdividing

his land, accommodate his wife- DW1 and infact with a choice of either visiting her or not at her matrimonial house which he had erected for the defendant.”

The Appeal

The appellant being aggrieved by the above judgment filed this appeal. In his Memorandum of Appeal dated 10th June 2011, he has set out the following 12 grounds of appeal:-

1. *The learned trial magistrate erred in law in finding and holding that the appellant had failed to prove the allegations (claims) for Divorce before the honourable court, notwithstanding the clear, credible and uncontroverted evidence tendered and/or led by the Appellant.*
2. *The learned trial magistrate erred in law in finding and holding that the appellant had not proved his claim founded and/or based on Adultery, notwithstanding the clear and unequivocal admission by the respondent in terms of paragraph 5 of the Statement of Defence, to that effect.*
3. *The learned trial magistrate erred in law in failing to decipher and appreciate the evidence pertaining to cruelty, mounted by and/or with the support of the respondent, against the appellant and thereby arrived at an erroneous conclusion.*
4. *The learned trial magistrate misapprehended and misconceived the nature of Matrimonial causes and the standard of proof, required in respect of such causes. Consequently, the learned trial magistrate set and addressed his mind to an illegal and unlawful standard and thereby occasioned a miscarriage of justice.*
5. *In failing and/or declining to grant the divorce sought, the learned trial magistrate violated and/or contravened the appellant’s constitutional rights and/or liberties and thereby forced the appellant into a union and/or cohabitation contrary to the appellant’s wish.*
6. *The learned trial magistrate erred in law in ordering and/or directing the appellant to sub-divide (sic) his parcel of land and accommodate the respondent, contrary to the appellant’s wish and/or intent. Consequently, the learned trial magistrate breached and/or abrogated the appellant’s rights under the provisions of sections 27 & 28 of the Registered Land Act, Chapter 300, Laws of Kenya.*
7. *The learned trial magistrate erred in law in granting and/or awarding prayers which were neither sought for and/or pleaded before the honourable court. Consequently, the learned magistrate went on a frolic of his own and thereby departed from the pleadings.*
8. *The learned trial magistrate was harsh and passionate, in finding and holding that the appellant was disowning own children, when it was apparent and clear that the children in question, were never sired by the appellant and thus incapable of being (sic) disowned.*
9. *The learned trial magistrate misconceived and/or misapprehended the appellant’s claim against the respondent and thereby failed to address and determine the salient and pertinent issues raised by the appellant. Consequently, the judgment of the trial magistrate has occasioned a miscarriage of justice.*
10. *The learned trial magistrate erred in fact and in law in failing to properly or at all, analyze, evaluate and consider, the totality of evidence, adduced by the Appellant and witnesses. Consequently, the trial court arrived at a passionate and biased conclusion contrary to the evidence on record.*
11. *The learned trial magistrate erred in fact and in law in failing to subject the evidence of respondent and witnesses, to thorough and exhaustive scrutiny and/or evaluation. Consequently, the trial magistrate failed to appreciate and/or discern the material contradictions and discrepancies apparent in the respondent’s case vis-à-vis the pleadings.*

12. *The judgment of the learned trial magistrate is devoid of legal basis and contrary to the provisions of Order 21 Rule 4 of the Civil Procedure Rules, 2010.*

31. The appellant asked the court for orders that:-

- a. *The appeal herein be allowed and the judgment and decree of the trial magistrate dated 31st May 2011, vide Ndhiwa RMCC Divorce Cause No.3 of 2010 be set aside, revised, varied and/or quashed.*
- b. *The Honourable Court be pleased to substitute therefore an order allowing the appellant's suit vide Ndhiwa RMCC Divorce Cause No.3 of 2010.*
- c. *Costs of this appeal and costs incurred in the subordinate court be borne by the Respondent.*
- d. *Such further and/or other relief be granted as the court may deem expedient.*

Parties' submissions

32. When the matter came before Justice Korir on 16th November 2011 the parties consented to canvass the appeal by way of written submissions. Upon transfer of Hon. Korir to Nairobi, the matter was eventually listed before me on 13th February 2013. Counsel for the respondent Mr. Minda submitted that the reason why he had not filed his submissions was because he wanted to concede the appeal but before he could do so, he needed to speak to his client.

33. Mr. Minda eventually filed his submissions on 19th February 2013 conceding the appeal to the extent that the trial magistrate made an order that had not been sought for; whereby he directed the appellant to subdivide his land and accommodate the respondent. Mr. Minda's concern was that the respondent ought not to be condemned with the costs of this appeal.

Findings and Conclusions

34. I have now read the submissions by the respective counsel. As a first appellate court my duty and obligation is to reconsider and evaluate the evidence afresh before coming to an own independent decision. See **David Kajogi M. Mugaa -vs- Francis Muthomi [2012] e KLR.**

35. Since the respondents have conceded the appeal to the extent that the trial magistrate misdirected himself by ordering the appellant to subdivide the land, and share it with the respondent, the only issues for determination by this court are:-

1. *Whether the petitioner adduced evidence sufficient to be granted a divorce.*
2. *Who gets costs?*

36. It is an undisputed fact that the appellant and the respondent were married in or about the year 1960. However, their marriage encountered problems, a fact that both of them admitted. It was also not in dispute that at some point during the marriage, the respondent left the matrimonial home, only the reason for such departure is disputed. The appellant in his evidence in chief accused the respondent of adultery and this fact was admitted by the respondent at paragraph 5 of her defence where she stated that:-

“4. In response to paragraphs 7 and 8 of the plaint, the defendant states that she was never married or eloped with any man at the period of desertion but she managed to get children being that she could not resist her own body hormones since the same were active and she was also a normal person and that it was the

default of the plaintiff to send her away and the same plaintiff is the one who subjected her to extra marital affairs.”

37. The fact that the respondent had liaisons with men other than the appellant was also supported by the respondent's own testimony in cross examination when she stated at page 5 that:-

“J O. I did give birth while I had been chased away”,

although the respondent purported to contradict this admission in her evidence in chief.

38. However, it is the evidence of both the appellant and the respondent that the respondent indeed came back to the matrimonial home after she had borne her three (3) children. It is therefore not correct, as stated by the appellant that the respondent deserted the matrimonial home continuously between 1970 and 1982 when the respondent went back to the matrimonial home. There is evidence on record to show that the respondent went back to the matrimonial home and remained there until about 2 (two) years before the filing of the suit when the appellant chased her away. It is also evident from the consent order recorded in court on 26th October 2011 that the respondent is indeed resident on a portion of the land upon which the appellant also lives.
39. I have carefully read the submissions by counsel for the appellant touching on the twin issues of adultery and cruelty. With regard to the allegations of cruelty, I am not satisfied that the appellant laid sufficient evidence before the trial court to demonstrate that the respondent had unleashed her sons upon the appellant to attack him. Apart from his own word, the appellant did not produce any documentary evidence of such vicious attacks, nor did he call any other person to come to court to confirm that indeed his allegations were true. I am of course aware of the fact that a fact can be proved by the evidence of a single witness, but in this case, the appellant's allegations of cruelty were not proved. The evidence adduced by the respondent was sufficient to displace the appellant's allegations of cruelty.
40. Further, the appellant did not prove that the respondent had refused to cook for him or to wash his clothes during the subsistence of the marriage. It appears to me and as stated by DW5 that the appellant himself is a very vicious man, and has made up his mind not to live with the respondent whom he refers to as “**death**”. There is also clear evidence that the respondent provided conjugal rights to the appellant while the marriage lasted as evidenced by the number of children born while the two lived together. According to Eugene Cotran's “**Restatement of African Law Kenya – Vol.1, the Law of Marriage and Divorce (Sweet and Maxwell, 1968)**”, at p. 177, the duties of a wife among the Luo included cultivation of the fields assigned to her, preparation of food, maintenance of the household and bearing and caring for children. The marriage of the parties in the instant case took place at a time when what Cotran states were the prime duties of any wife. The respondent and her witnesses proved that she accomplished those duties. The appellant failed to show that she did not.
41. There is still the issue of adultery and whether what the appellant did by chasing the respondent away for allegedly siring children with other men was sufficient ground for divorce. In my humble view, it was not. The reason for coming to this conclusion is that the appellant accepted the respondent back to the matrimonial home in or about 1982 and allowed her to stay on until just two years before he filed for divorce, that is around 2008.
42. Based on the fact that the appellant did not divorce the respondent during the period they were estranged, there arises a rebuttable presumption that children born during the subsistence of a marriage belong to the appellant. In addition, when the respondent went back to her matrimonial home, the appellant more or less accepted the children she came back with and did not send them away. The appellant even put up a house for the respondent where she lives today. Therefore, the appellant cannot be heard to accuse the respondent of acts of adultery which in any case he seemed to have forgiven her of.
43. In reaching these conclusions, I am also guided by what Lord Mangham stated in **Joseph Constantine –vs- Imperial Smelting Corporation [1941] 2 All ER 165, 179**, “**that the burden of proof in any particular case depends on the circumstances in which the claim arises. In general, the rule which applies is that the burden of proof lies upon him who affirms and not upon him who denies. It is an ancient rule founded on consideration of good sense and which should not be departed from in the absence of any strong reasons**” I entirely agree with these words of wisdom, and see no reason to depart from the same.

44. In contrast to the appellant's allegations it was the respondent's witnesses who were infact relatives of the appellant who stated that the respondent was a good wife as she took care of the appellant and the only issue with her which led to the appellant chasing the respondent away again was touching on subdivision of land. The issue had been discussed by the appellant's clan elders to no avail. I have no reason to doubt what these witnesses called by the respondent told the court.
45. I therefore agree with the trial magistrate's decision at this point for not granting the divorce as the appellant did not prove any of the grounds for divorce to the required standard.
46. Secondly, as to the issue of costs and in appreciating the fact that this is a family dispute, in line with the principle of equity and as correctly advanced by counsel for the respondent that parties are of an advanced age, each party shall bear its own costs.
47. In conclusion, I dismiss the appeal dated 29th September 2011 for lack of merit, except for ground 6 which has been conceded.
48. Orders accordingly.

Dated and delivered at Kisii this 11th day of July, 2013

RUTH NEKOYE SITATI

JUDGE

In the presence of:

Mr. Moracha for Oguttu-Mboya for Appellant

M/s Minda & Co. (absent) for Respondent

Mr. Bibu - Court Clerk

HCCA (KISII) NO.109 OF 2011 (JUDGMENT)