

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

Civil Appeal No. 108 Of 2003

(Appeal Against The Decision Of [R.A. Oganyo, R.M.]

Dated 29.7.2003& 30.7.2003 In The Resident Magistrate's

Court At Butali In Divorce Cause No. 2 Of 2003)

S L M Appellant

V E R S U S

J S M Respondent

J U D G M E N T

This is an appeal from the decision of the Resident Magistrate's Court in Butali in Divorce Cause No. 2 of 2003. The grounds of appeal are that the court granted orders that were not sought or prayed for, that the court did not consider matters that were pertinent to the case, the decision is not in conformity to the Luhya customs to which both parties belong and that the court erred in law by proceeding with the case ex-parte.

Parties agreed to argue the appeal by way of written submissions. From the appellant's submissions the main issue being raised is that the court was wrong by apportioning family property at the ration of $\frac{3}{4}$ to $\frac{1}{4}$ in favour of the respondent yet that had not been prayed for and that the evidence on record did not prove the allegations of cruelty as alleged. It is also submitted that the age of the children was not given by the respondent to warrant the order of custody in favour of the respondent. On the other hand, counsel for the respondent maintains that the apportionment of the family property took into account the fact that the respondent was to have custody of the children. On the issue of the divorce counsel submits that it is now over 10 years from the time the decree for divorce was granted and the respondent has since re-married.

The record of the trial court shows that the two parties were lawfully married and blessed with 6 children. The respondent filed her petition for divorce and custody of the children and sought the following prayers:-

- a. *The marriage between the petitioner and the respondent be dissolved.*
- b. *The petitioner be given the custody of the children*
- c. *The respondent be restrained not to interfere at the place or business of the petitioner until the determination of this suit.*
- d. *The respondent to pay petitioner costs of this suit.*

The respondent filed an answer to the petition and a cross-petition for divorce. In paragraph 9 of the cross-petition the appellant maintains that the respondent is a woman of ungoverned fit of rage who in 1987 set the matrimonial house on fire and in 2000 stabbed a neighbor in Kisumu leading her to be charged in court. The appellant also accuses the respondent of acts of adultery. The case proceeded ex-parte although the appellant had responded to the petition. The appellant also prayed that the divorce be granted but he wanted custody of the children. Since both parties accused each other of some acts which are good grounds for divorce and the divorce was granted, I do find that the order of the trial court granting the divorce cannot be set aside by this court. That is what the parties wanted.

With regard to the issue of matrimonial property, the record of the trial court does not show what that property was and how it was acquired. The respondent only told the court to be given a bigger share of the property as she was going to live with the children. Since there were no particulars of the family property there was no prayer for distribution of the property, I do find that the order of the trial court purporting to distribute the family property was misplaced. In the end the appeal on the issue of divorce is dismissed. The order of the court distributing the family property is hereby set aside. Each party shall meet his/her own costs.

Delivered, dated and signed at Kakamega this 23rd day of October 2013

SAID J. CHITEMBWE

J U D G E