REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUNGOMA

Civil Appeal 6 of 2005

LT O ....APPELLANT

~VRS~

FOO.............................RESPONDENT

JUDGMENT

The Appellant LTOappeals against the ruling of the Senior Resident Magistrate Bungoma delivered on 25/01/2005 which dismissed the Appellant's application dated 12/10/2004. The grounds of the appeal are as follows:

1) There is an error apparent on the face of the record.
2) The Judgment purports to dissolve the marriage between the Respondent/Applicant and the Petitioner/respondent yet there was no marriage or at all between the parties.
3) There was no marriage known in law proved by the Petitioner/Respondent.
4) The Judgment dissolved the *"marriage"* between the parties in a purported judicial separation cause.
5) All the children named in the petition are love children.
6) The Applicant is entitled to the exclusive custody of all the children.
7) The Petitioner/Respondent's petition is frivolous, bad in law and incompetent.
8) The petition discloses no cause of action against the Applicant.
9) The Respondent and his wife are not capable of taking care of the children.

The grounds basically fault the magistrate for misinterpreting the law under which the application was brought and failing to notice fatal defects in the proceedings and judgment

In the lower court proceedings, the Respondent successfully petitioned for divorce on grounds of cruelty and constructive desertion on part of the Appellant. The proceedings in the magistrate's court were undefended. The court entered judgment in favour of the Appellant and granted him custody of the five children of the marriage. The Appellant in his application sought the following orders:

a) review and setting aside the judgment,

b) upon review and setting aside the judgment, the court to strike out of the petition,

c) that custody of the children to be granted to the Applicant.

The grounds supporting the application were that the Petitioner did not prove any customary marriage for the court to dissolve.

Secondly, that the parties were not married and that the five children were as a result of cohabitation. Thirdly, that the prayers by the applicant were for judicial separation and not for dissolution of the marriage. Yet the court proceeded to dissolve the marriage. Finally, that the Petitioner (Respondent) and his wife were not capable of taking care of the children.

Both parties were heard in the application which application was dismissed. The relevant part of the ruling reads:

> "*The application for review is being brought over two (2) years after the said judgment was delivered. The provision to Order 44 rule 1 (b) makes it mandatory that an application for review of judgment on decree must be made timeously and without unreasonable delay. The Applicant in this application has not shown the court why it took more than 2 years to bring this application. I have looked at the judgment which is sought to be reviewed and I am convinced beyond doubt that this application is an after thought and as there is no sufficient ground upon which this court's discretion can be exercised to review the judgment dated 17th September, 2002. I accordingly proceed to dismiss this application under Order 44 Rule 3 (1) with costs to the Petition/Respondent.*"

The magistrate invoked the provisions of Order XLIV rule 1 in dismissing the application and found that the same was brought with undue delay. Mr. Kraido for the appellant submitted that the magistrate missed the law when she invoked Order XLIV. The application was brought under section 63 (e) and section 3 of the Civil Procedure Act. He also argued that there was no marriage between the parties. Assuming there was a customary marriage, the suit ought not to have been brought by way of petition.

Mr. Ikapel for the Respondent opposed the application on grounds that the application in the lower court was for review and that the conditions applicable under Order XLIV rule 1 had to be satisfied. The Appellant failed to meet the said requirements thus resulting in the dismissal of the application. If there was any error apparent on the record in the judgment and proceedings of the lower court, the Appellant ought to have pointed them out in good time.

At a glance, the main prayer in the Appellant's application dated 12/10/2004 is for review and setting aside judgment. The other two prayers depended on the success of the first prayer. If the application was successful, it would be expected that the court would only have granted the first prayer. Other prayers ought to have come in subsequent applications. It was not proper to lump up the three prayers together. Judgment had to be set aside first before any other prayers could be entertained.

The main prayer for setting aside and reviewing judgment could only be brought under the provisions of Order XLIV rule 1 which provides for review of orders. Section 2 and section 63 (e) of the Civil Procedure Act under which the application was brought are general

provisions incapable of solely supporting any prayers. The magistrate invoked Order XLIV rule 1 in her ruling because she was dealing with an application to review orders of the court. Although the relevant law was not provided or mentioned in the application, the court was very clear in its mind that it was dealing with a review of judgment application. The magistrate was therefore correct in invoking the said law and in analyzing the requirements of the law. The application was brought two years after the judgment which was not without undue delay. The Appellant explains that the proceedings took place exparte. This is not an excuse since the Appellant was served with the summons to enter appearance and chose not to defend the case. She did not at any one time claim that she was not served.

On the issue of the proceedings having an error apparent on record, this is an issue which ought to have been raised before or during the hearing of the same case. The same case applies to the mode of instituting the suit, whether by plaint or petition. The said issues were raised in the application for review but the application was defeated for lack of merit.

The Appellant claims that there was no marriage between her and the Respondent and that the two cohabited for about 17 years and got five children. This too is a strange turn of events but I believe it would have been resolved by the court during the hearing of the case.

It is my finding that the Applicant has failed to satisfy the court on any of the three grounds of appeal. The appeal lacks merit and it is hereby dismissed. Each party to meet their own costs of this appeal.

F. N. MUCHEMI

JUDGE

Dated, Delivered and Signed at Bungoma this 9th day of February, 2010.
In the presence of Mr. Ikapel for the Respondent.