



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(Coram: Ojwang, J.)

CIVIL APPEAL NO. 244 OF 2009
- BETWEEN -

GRACE MOUKO.....APPELLANT

- AND -

ORINA ONDARI.....RESPONDENT

(Being an appeal from the ruling of Children’s Court Magistrate, Ms. Makungu delivered on 9th March, 2009 in Children’s Case No. 244 of 2007 at Tononoka Children’s Court)

JUDGMENT

The appellant herein, **Grace Mouko**, who had separated from her husband (respondent) of 20 years in 2005, filed suit (dated **4th October, 2007**) in the Children’s Court on **4th October, 2007** seeking maintenance for the six children of the marriage. The appellant wanted orders for monthly and annual payments to her, respectively, in the sums of Kshs. 20,125/= and Kshs. 241,500/=; and she also asked for “adequate contribution towards additional educational and medical expenses incurred in respect of the said children, as and when the same may arise.”

Time and again, in-between the date of filing suit (**4th October, 2007**) and the date of the ruling appealed from (**9th March, 2009**), there were applications, which the Children’s Court heard and disposed of. One of these applications was the appellant’s Chamber Summons of **14th October, 2008** and it carried the following prayers:

- (i) **that the Court do grant leave to the plaintiff to re-amend the plaint;**
- (ii) **that an annexed draft re-amended plaint be adopted.**

The main ground for seeking leave to amend the plaint was that “the plaintiff needs to include a prayer for accommodation”; but the second ground stated was not so specific: “that it is imperative that the plaintiff be granted leave to amend [the plaint] so that the issues in contention herein can be properly canvassed”.

The relevant part of the learned Magistrate’s ruling of **9th March, 2009** may be set out here:

“The plaintiff filed Chamber Summons.....seeking.....orders that there be an amendment to her plaint.....The defendant opposed the application on grounds that the matter had already been finalized and this was an attempt to reopen the matter through the back door. I have gone through the records and established that there are two developments on the file. On 6th May, 2008 when the matter came up for hearing, the defendant conceded that he was ready to cater for school fees for all the children, [as well as] uniforms and books [and] medical care..... _ such that the only outstanding issues.....were issues of custody and food. The plaintiff proceeded with her case when the matter came up for hearing; the parties had [reached the] consent to [settle] the issue of food and custody, effectively bringing the matter to an end. She brought up a review [matter], to include rent, and the same was dismissed. She has now brought this application to amend a plaint in a matter long decided. The issue of accommodation was dealt with in the review application, and her attempts to resuscitate the case appear to me to be misplaced. I do not find this application [to be one of] merit. I proceed to dismiss it with costs.”

The appellant contends, in the Memorandum of Appeal dated and filed on **15th December, 2009** that –

- (i) **the learned Magistrate erred in law and in fact by ignoring a “fundamental**

piece of evidence”;

(ii) the trial Court erred in law and fact by failing to consider that the defendant has since sold the matrimonial home; and so the Court ought to have considered the issue as to the children’s accommodation;

(iii) the trial Court erred in law and in fact by failing to record material evidence from the appellant.

The appellant asked that the ruling of the trial Magistrate be set aside.

Learned counsel **Mr. Nyabena**, for the respondent, submitted that the appellant had sought periodic payments from him, and that appropriate orders had been made by the Court in respect of school fees; transport to school and medical expenses; periodic maintenance: and since then “the respondent had been struggling to make all the payments.” After the last of the orders aforesaid had been made on **18th June, 2008** the appellant returned to the Children’s Court with a Notice of Motion dated **24th June, 2008**, seeking a review of the same, to provide for a monthly payment of Kshs. 18,000/=, for accommodation. But this application was dismissed on **25th August, 2008**: the reason being given as the joint parental responsibility in respect of the children. On the following day (**26th August, 2008**) the appellant amended the concluded Notice of Motion (now “Amended Notice of Motion” of **26th August, 2008**), stating that the defendant had “removed the plaintiff and the children from the matrimonial home”, and so he should be ordered to pay to her Kshs. 18,000/= per month for rent. When this application was dismissed, the appellant now filed the application of **14th October, 2008** seeking to embody the refused prayer in a re-amended plaint. Counsel submitted that the attempt to re-amend the plaint was a back-door procedure of regaining that which the Children’s Court had refused; the Court accepted this submission and refused the prayer for leave to amend the original claim.

Learned counsel submitted that the element of “accommodation” which the appellant was seeking to introduce in the plaint, had long been concluded by the Court, and thus the learned Magistrate’s ruling should be upheld. Counsel submitted that the appellant herein had not appealed against a previous ruling of the Court which declined to review its earlier orders or to provide for the “accommodation” element which was being sought.

Mr. Nyabena submitted that the appeal had no merits, more particularly as it was concerned with the interests of a mix of children and adults – the issue of the marriage; and also because the appellant had made no complaint that the respondent had failed to perform any of the obligations imposed on him by earlier Court orders.

The appellant, who appeared in person, said that the suit has been running when she and all the children were living in the matrimonial home; but that the respondent then sold the house. She stated that she and the children had been in the house up to 2008, though the sale had taken place in 2003.

Of the said sale of the house, learned counsel drew the Court’s attention to a past Court decision in the appellant’s documents: **Ali Amin Mzee v. Orina Ondari Mireri and Grace Mouko**, Mombasa HCCC No. 112 of 2006. In that case, on **7th September, 2007** **Mr. Justice Sergon** thus ordered:

“In the end, I enter judgment in favour of the plaintiff and against the defendants.....I direct the defendants to vacate the suit premises within a period of thirty days and in default, the plaintiff to use lawful force to evict the defendants.....”

Counsel urged that the appellant had been well aware that neither she nor the respondent had any rights to the house, in light of the above-cited High Court judgment; and that judgment was given on **7th September, 2007**, whereas the appellant’s suit was filed on **4th October, 2007**; so, in the words of counsel, “she should not say the respondent is still the owner of the property”.

Hearing of the suit took place on **13th May, 2008** when the appellant herein gave testimony and was cross-examined. Subsequently, on **16th June, 2008** learned counsel, **Mr. Nyabena** thus addressed the Court:

“[This matter] is for further hearing; [but] certain matters have been sorted out. The only remaining issue is custody and food. [The] defendant has agreed to provide food at Kshs. 6,000/= per month and the plaintiff can have custody”.

The appellant’s response was as follows:

“I don’t have any objection; the other problem I have is rent”.

The Court then made orders in the following terms:

“Since the issues have been sorted out as per plaint, by consent, the defendant to continue paying for

food at Kshs. 6,000/= per month payable by the 5th [day] of every month at the Children's Department. By further consent the custody of the children to be vested in the plaintiff. The defendant has agreed to pay school fees and medical expenses".

But on **19th June, 2009** the appellant in person took out a hearing notice for the same suit – the hearing to take place on **29th June, 2009**. On that day, the appellant thus stated before the learned Magistrate, **Ms. R. Makungu**:

"I was given today's date and I wanted the Honourable [Magistrate] Ondieki to proceed with the matter. It's for full hearing."

(The record shows that on the earlier occasion of hearing (**13th May, 2008**) the presiding Magistrate was **Ms. R. Makungu**). Learned counsel **Mr. Nyabena** briefly addressed the Court, as follows:

"There's already Judgment on record. There is no application pending. This is a vexatious plaintiff. We are being unnecessarily asked to come to Court. We pray for costs, and that an order be made for the Registry not to fix this matter for hearing."

The record shows that, by a series of applications from the time the suit was filed (**4th October, 2007**), the appellant herein had won a number of orders, mostly by consent, and these culminated in the decision and orders of **16th June, 2008** which concluded the main suit, in the terms of the prayers in the plaint.

There was no basis, therefore, for the appellant's Chamber Summons of **14th October, 2008** by which she sought leave to re-amend the plaint; and the learned Magistrate, **Ms. R. Makungu** was right in rejecting that application, on **9th March, 2009**.

Quite apart from such considerations of formal propriety, it is evident that the appellant has used unusual strategies to introduce into her claim a charge for accommodation; but it was wrong for her to fail to disclose that she knew the house which she referred to as the matrimonial home, had long ago been passed on to other occupants, on orders of the High Court.

Clearly, therefore, the appellant's case is ill-founded, and lacks merit. The appeal is dismissed, with costs to the respondent.

For the avoidance of doubt, it is hereby clarified that the appellant's Civil Case No. 244 of 2007 at the Children's Court at Tononoka was concluded with the learned Magistrate's orders of **16th June, 2008**.

DATED and DELIVERED at MOMBASA this 29th day of October, 2010.

J. B. OJWANG
JUDGE