



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT MACHAKOS**  
**Civil Appeal 125 of 2001**

**PATRICK KIMILU MUSAU.....APPELLANT**

**AND**

**PAUL NTHIWA NGULU.....RESPONDENT**

**(Being an appeal from the judgment and/or orders of the District Magistrate I , Makueni in Civil suit No. 2 of 2001 dated 26/09/2001)**

**JUDGMENT OF THE COURT**

1. The appellant in this appeal was the defendant in the Makueni Resident Magistrate's Court Civil Case Number 2 of 2001 while the respondent was the plaintiff. For purposes of this judgment I shall refer to the parties as plaintiff (respondent) and defendant (appellant) respectively.
2. By his plaint dated 16/02/2001, the plaintiff brought a claim against the defendant for alleged adultery with the plaintiff's wife, one Priscilla Mbaluka Nthiwa. The plaintiff alleged that in the year 1990, he was married to Priscilla Mbaluka Nthiwa under Kamba customary law and that out of that union between them, they got four children who by the time of filing suit on 19/02/2001, were aged between 12 years and 3 years. The plaintiff further alleged that in or about August 1999, the defendant enticed the plaintiff's said wife to desert the plaintiff and the matrimonial home and to move and stay with the defendant at the defendant's home where the two continued to commit acts of adultery. The plaintiff also claimed that on or about 7/01/2001, the defendant and the plaintiff's wife took away from the plaintiff's home three of the plaintiff's children and took them to stay with the defendant and the plaintiff's wife at the defendant's home at Mukuyuni village, and that later, the defendant misled the plaintiff's wife into filing Divorce Cause No. 2 of 2000, a matter that had not been heard and determined by the time of filing of the plaintiff's suit.
3. At paragraph 8 of the plaint, the plaintiff averred that as a result of the defendants unlawful acts, the plaintiff suffered psychological torture and mental anguish. The plaintiff prayed for judgment against the defendant for:-
  - a. Damages for adultery
  - b. A permanent injunction to restrain the defendant from committing adultery with the plaintiff's wife or in any other manner interfering with the plaintiff's family.
  - c. Costs of this suit

d. Interest on (a) and (c) above at court rates.

e. Any other and/or further relief this Honourable court deems fair and just to grant.

4. The defendant filed a brief defence in which he denied the plaintiff's allegations against him. He in particular denied that he committed any acts of adultery with the plaintiff's wife or that he took away the plaintiff's children as alleged or at all. The defendant also denied allegations of collusion between himself and the plaintiff's wife in bringing Divorce Cause No. 2 of 2000. The defendant prayed that the plaintiff's suit be dismissed with costs.

5. After a full hearing, the learned trial Magistrate, J.K. Kiia, DMI, found for the plaintiff and awarded Kshs 10,000/= in general damages. The defendant felt aggrieved by the judgment and appealed. The Grounds of Appeal as per the Memorandum of Appeal filed in court on 21/10/2001 are as follows:-

a. The learned Magistrate erred in law and fact by holding that the respondent had proved his case against the appellant when he had not done so.

b. The learned Magistrate erred in law and fact by not finding that the claim was bad in law and proceeding on the wrong premise that it was a competent claim.

c. The learned Magistrate erred in law and fact by making orders which would be unenforceable in effect.

d. The learned Magistrate erred in law and fact by arriving at a decision based on customary law which was/is otherwise inapplicable as being inconsistent with written law and/or repugnant to justice and morality.

e. The learned Magistrate erred in law and fact by finding that there existed a valid customary marriage between the Respondent and his wife when he had himself (the learned Magistrate) pronounced divorce between the two by his judgment in Divorce Cause No. 2 of 2000 **Priscilla Mbaluka Nthiwa vs Paul Nthiwa Ngulu** dated 5<sup>th</sup> April, 2001.

f. The learned Magistrate erred in law and fact by making findings/or conclusions not backed by law or evidence.

6. At the hearing of the appeal Mr. Muithya who appeared for the defendant contended that the evidence on record did not support the plaintiff's claim that Priscilla Mbaluka was his wife and that that being the case, the defendant could not have been guilty of adultery; that even if Mbaluka had been married to the plaintiff there was no evidence at the time of Mbaluka's marriage to the defendant that a marriage subsisted between the plaintiff and the said Mbaluka. Mr. Muithya also submitted further that even if there had been a marriage between the plaintiff and Mbaluka, the plaintiff had himself dissolved the marriage by chasing away Mbaluka some two years before Mbaluka got married to the defendant and that by the time proceedings in the lower court ended, the alleged marriage between the plaintiff and Mbaluka had been dissolved vide Divorce Cause No.2 of 2000, and that the learned trial Magistrate's order of injunction, made on 26/09/2001 was an order made in vain since the plaintiff's marriage with Mbaluka had been dissolved on 5/04/2001.

7. Mr. Muithya also contended on behalf of the defendant that it was wrong for the trial court to injunct Mbaluka from marrying whosoever she willed and that to have ordered Mbaluka to return to the plaintiff as wife was an infringement of Mbaluka constitutional right to freedom of association. From the record, Mbaluka is not part of these proceedings and as such, Mr. Muithya's arguments on her behalf are neither here nor there. However, Mr. Muithya, relied on the case of **Republic vs Kadhi Kisumu Exparte Nasreen HCCC No. 353 of 1970** in which the court held, inter alia, that there is no obligation on a wife to remain with her husband and that it was therefore wrong in that case for the court to have made an order requiring the wife to remain with her husband and thus depriving the wife of her constitutional right to liberty and subjecting the wife to servitude.

8. Mr. Muithya combined grounds 3 and 4 of the appeal and contended that the lower court record clearly shows that when Mbaluka testified as a defence witness, she gave evidence to show that the plaintiff physically assaulted her and that he also failed to provide for her. On this point, it is to be noted that Mbaluka did not produce any medical or other evidence in proof of the alleged assaults on her by the plaintiff.

9. The appeal was opposed on the ground that the evidence adduced in the lower court overwhelmingly supported the plaintiff's case. Regarding ground 5 of the appeal, Mr Ndungi for the defendant submitted that there was no proof that the marriage between the plaintiff and Mbaluka had been dissolved and further that no evidence of divorce was in fact adduced by the defendant. Mr. Ndungi also submitted that Kamba customary law which was applied in the lower court was sound law; that it was not repugnant to natural justice or the Constitution.

10. Regarding the authority cited by counsel for the defendant, Mr.Ndungi submitted that the authority was not only not binding on this court but that the facts of that case were distinguishable from the present case in that Mbaluka was not a party to the case in the lower court that gave rise to this appeal, nor is she a party to this appeal.

11. The facts of the case before the lower court emerge from the evidence adduced therein. The plaintiff gave evidence and also called three witnesses. The plaintiff stated that the defendant enticed his (plaintiff's) wife Mbaluka and took her away together with the plaintiff's four children namely Muindi Nthiwa, Ngulu Nthiwa, Mbeta Nthiwa and Muthini Nthiwa to the defendant's home. The plaintiff also stated that he had married Mbaluka in 1990 under Kamba customary law after paying two goats for "Ntheo" and that the defendant took Mbaluka in the year 1999. According to the plaintiff's further evidence, both the clan (of which both parties are members) and the Provincial Administration arbitrated in the matter, leading to the eventual return of Mbaluka and the children to the plaintiff, but that no sooner had this happened then the defendant again took away Mbaluka and the children. He stated further that this second time round, the defendant enticed Mbaluka to change her identity card to read "PRISCILLA MBALUKA PATRICK". It was the plaintiff's case that he did not wish to have the bride price returned to him, but to have his wife and children back.

12. PW1 was **Nzomo Kithokoi** who testified that on 20/09/2000, he and other clan elders were summoned by the plaintiff for the purpose of discussing the plaintiff's complaint against the defendant who(defendant) had allegedly taken the plaintiff's wife and children. He stated further that after the Aombe clan meeting the defendant returned the plaintiff's wife and children. During the cross-examination that followed, PW1 denied a suggestion by the defendant that he (PW1) had in fact forced Mbaluka and the children to go back to the plaintiff.

13. PW2 was **Richard Matilo Malei**. He testified that the defendant took away the plaintiff's wife for whom the plaintiff had already paid the bride price. PW3 was **Wayua Ngulu**, the mother to the plaintiff. She testified that the plaintiff and Mbaluka were lawfully married under Kamba customary law and that the plaintiff paid some goats for "Ntheo". She also said that the plaintiff and Mbaluka had been married for over ten years with four children but when the defendant interfered with the plaintiff's family by enticing Mbaluka away from the plaintiff. She also stated that the defendant assisted the plaintiff to take the bride price (goats) to Mbaluka's parents.

14. PW3 also testified that the plaintiff and the defendant are cousins, sharing a common paternal great grandfather. She also said that the dispute between the plaintiff and the defendant over Mbaluka was taken to the clansmen who decided that Mbaluka was the plaintiff's wife and her four children were the plaintiff's children.

15. The defendant gave evidence and told the court that he went to the home of Mbaluka's parents where he found Mbaluka and engaged her in the year 2000. That he was given Mbaluka by her parents upon Mbaluka's consent to marry him. In his further evidence during cross-examination, the defendant stated that he did not know that Mbaluka was the plaintiff's wife because he found her at her parents' home; that he was informed that the four children belonged to Mbaluka. The defendant testified further

that he knew that the plaintiff had at one time married Mbaluka and that bride price had been paid; that the defendant was in the group that took the bride – price (goats) to Mbaluka’s parents. The defendant also testified that he had not paid any bride price for Mbaluka.

16. DW1 was **Priscilla Mbaluka** (Mbaluka) who told the court that she knew both parties in the dispute. She stated that she was married by the plaintiff in the year 1990 under Kamba customary law and that thereafter they got three children with the plaintiff. Mbaluka also stated that by the time of her marriage to the plaintiff in 1990, she had one child of her own.

17. It was also Mbaluka’s testimony that during the course of the marriage the plaintiff became irresponsible when he refused to pay school fees for the children, and failed to take them for treatment whenever they fell sick. She also said that the plaintiff neglected her and did not provide food for the family. She also testified that the plaintiff became cruel to her when he started beating her and that he even threatened to kill her. That finally the plaintiff and his mother (PW3) sent her back to her parents’ home where she stayed for two years before she got married to the defendant. She said she gave back one goat to confirm her divorce from the plaintiff, but that the plaintiff returned the goat.

18. Mbaluka told the court that after she got married to the defendant, the plaintiff took the case to the clan elders who decided that she should return to the plaintiff and that if she did not go back to the plaintiff then she would have to return to her parents’ home. That in obedience to the clan elders’ verdict, she returned to her parents while the plaintiff took the children. That later the plaintiff was summoned by Mbaluka’s parents’, but that he refused to go and that thereafter, Mbaluka went and took the children from the plaintiff and returned to the defendant. Mbaluka swore that she would never return to the plaintiff.

19. In her further testimony, Mbaluka stated that she decided to leave the plaintiff after he (plaintiff) started beating her, though she admitted that she never reported the matter to the police for P3 forms.

20. In his judgment dated 26/09/2001, the learned trial Magistrate entered judgment for the plaintiff as prayed. In reaching his conclusions, the learned trial Magistrate framed the following issues for determination:-

- a. Whether the plaintiff Paul Nthiwa Ngulu was the lawful husband of the woman Priscilla Mbaluka.
- b. Whether the defendant Patrick Kimilu Musau interfered with the family (wife and children) of the plaintiff; and
- c. Whether the plaintiff had established his case for the court to enter judgment as prayed.

21. The learned trial Magistrate answered all the three questions in the affirmative and said that the plaintiff and his witnesses had established that the plaintiff and Mbaluka were married under Kamba custom whereby dowry was paid and that the couple had four children between them. The learned trial Magistrate also found that the defendant had in fact, by his own evidence, admitted that he took Mbaluka in the year 2000 and that he never paid any dowry for her. That upon discussion of the issue by the clan elders, the defendant was found at fault.

22. With regard to the third issue, the learned trial court found that by taking Mbaluka as his wife, when the defendant knew that Mbaluka was the plaintiff’s wife the defendant committed acts of adultery with Mbaluka and that the defendant was liable to pay damages to the plaintiff. The trial court awarded general damages in the sum of Kshs. 10,000/=; in addition the court granted the prayer for a permanent injunction against the defendant as prayed. The defendant was also ordered to pay costs of the suit.

23. It is now my duty as the first appellate court to reconsider the evidence on record and evaluate it afresh with the view of reaching my own conclusions in the matter. From the evidence on record, the following are in my view, the issues for determination:-

- a. Was the plaintiff lawfully married to Mbaluka under Kamba customary law?
- b. Was Mbaluka subsequently married to the defendant?
- c. Did the plaintiff satisfy the court as to the conditions for the granting of an injunction?
- d. Did the plaintiff prove his case on a balance of probability?

24. In the first place, there is no doubt in my mind that the plaintiff and Mbaluka got married under Kamba customary law in or about the year 1990, though by the time of the said marriage, Mbaluka had one child of her own. Even the defendant admitted that the said marriage took place, and that he (defendant) assisted the plaintiff in taking the dowry to Mbaluka's parents. Mbaluka herself also testified to the fact of the said marriage.

25. From the evidence by both the plaintiff and his witnesses, and also from the defendant's own testimony and even the testimony of Mbaluka, the defendant took away Mbaluka in the year 2000 and went and lived with her. According to the plaintiff and his witnesses, and in particular, the plaintiff's mother, PW3, the defendant took away Mbaluka from the plaintiff's home. Both the defendant and Mbaluka say that the defendant found her at her parents' home. Whichever way one looks at it, two facts are evident; that the defendant never paid any dowry for Mbaluka and secondly, that Mbaluka never got divorced under Kamba customary law. Mbaluka herself said in part of her evidence:-

**“ I returned to my parents where I stayed for two years. After two years, I got another husband. I gave them a goat for divorce but the mother of the plaintiff returned it.**

**After two years, I was married to the defendant Patrick Kimilu Musau. After I was married the plaintiff Paul Nthiwa accused [me] to the clansmen. The clansmen found me at fault for marrying another man. They decided that I do return to the plaintiff, Paul Nthiwa, but I told them that I will never return to the plaintiff”.**

26. In my view, the relationship between the defendant and Mbaluka from the year 2000 was not that of man and wife, but it was an adulterous relationship since Mbaluka was still the plaintiff's wife by the year 2000. For this reason, I am satisfied that the plaintiff was entitled to the prayer for damages for adultery. I am however not satisfied that the plaintiff was entitled to the prayer for injunction since by the date of the judgment, Mbaluka had already obtained a divorce from the plaintiff. It would thus be an exercise in futility to grant the injunction.

27. It has been contended on behalf of the defendant that by the time of the orders of the trial court, no marriage subsisted between the plaintiff and Mbaluka, because of the judgment in Divorce Cause No. 2 of 2000 – **Priscilla Mbaluka -vs- Paul Nthiwa Ngulu**, dated 5<sup>th</sup> April, 2001. Though it is true that judgment had been given in the divorce cause, my finding is that the acts of adultery complained of by the plaintiff were committed during the subsistence of the marriage between the plaintiff and Mbaluka. It is for this reason that I reject the appellant's contention that damages for adultery are not payable.

28. In the result, I find that the appellant's appeal on the first prayer lacks merit. Accordingly, that part of the appeal fails. The appeal succeeds on the second prayer, namely that the order for injunction was not merited in the first place. As to costs, I order that each party bears its own costs both for this appeal and for the suit before the trial court.

29. Orders accordingly.

Dated and delivered at Machakos this 28<sup>th</sup> day of November, 2007

**R.N. SITATI**

**JUDGE**