REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA
AT NAIROBI
CIVIL CASE NO. 513 OF 1999

PETER WAMBUGU KARIUKI ---------- APPELLANT

VERSUS

1. JUSTUS WERU NGARUCHI)

2. MARION WANJIRU WERU) ---------- RESPONDENT

3. EMILY WANGUI WERU)

J U D G M E N T

A man says he had nearly married a woman. In the process, he says, he made payments to the parents of the woman as dowry, and kept meeting certain conditions set by the parents of the woman. But later, he says, he "realized the entire relationship had already been commercialized." (see para. 13 of the plaint). He saw collusion between the parents and their daughter to frustrate the marriage "maliciously, dishonestly, in conspiracy, in bad faith and through fraudulent misrepresentations," (ibid). The particulars of these things are very many – they are 25 in number, including, among many others, "welcoming the Plaintiff as their son in law and prospective husband of the 3rd Defendant while at the back of their mind they knew they were to dishonor that."; "intimating to the Plaintiff to treat the 3rd Defendant as his future wife"; concealing to the rest of their extended family that the Plaintiff had cleared most of the dowry even before formal negotiations of the same by paying fees for the education of the 3rd Defendant and the son of the 1st and 2nd Defendants"; "acting in bad faith by not honouring their part of the bargain in the agreement"; "flouting with contempt the practice as it is known of having welcomed the Plaintiff and his family in their home severally"; assuming and/or not considering that the Plaintiff and his family were using money to finance the visits and buying the goods to be taken to the Defendants"; "conducting themselves without moral regard and/or warfare of the Plaintiff" (he must be meaning his "welfare" and not "warfare" because the rest of the pleading does not bring out there having existed any "warfare"); "coming up with other conditions before marriage after the Plaintiff fulfilled each of the previous ones set"; "assuming the Plaintiff had money and the same had to be used before the wedding for the well being of the 1st and 2nd Defendants"; frustrating the marriage by the Defendants insisting that the Plaintiff had to build the 1st and 2nd Defendants a house, buy five cows or its equivalent at the cost of shs. 30,000 each and even stock the 1st Defendant tailoring business with clothing materials"; accepting payment of dowry and not wanting to let the 3rd Defendant and the 3rd Defendant colluding not to go contrary to the spirit of leave and cleave despite being confessed christians" (of course it is not clear what "the spirit of leave and cleave" is); "imagining a wedding occasion is one to fetch a future and/or do business"; "treating and the 3rd Defendant accepting to be treated as bargainable property/challels and/or goods for sale. Something strange to any known marriage norms"; returning only a small portion of the dowry and insisting on retaining the rest"; "machinating to retain the dowry so as to make a fortune out of another man"; "having no regard to what constitutes a Christian Marriage while purporting to confess the faith"; "failing to appreciate the changes in society and rules relating to marriage in respect of the social

set-up, economy, education, urbanization, Christianity, interaction"; "the 1st and 2nd Defendants over-extending their role like they were the ones whose marriage was at stake"; "the 1st and 2nd Defendants wanting to monopolize the source of blessings"; "the Defendants abdicating their roles by accepting every decision in the steps towards the marriage of the 3rd Defendant to be influenced and/or made by grandparents, aunts and uncles"; forgetting that there is no money and/or property that can be equated with love."

The intended marriage did not materialize. Feeling the way I have stated above, and incensed by the thought that his "feelings, pride and dignity were injured as a result of the Defendants' arbitrariness, spite, ill-will, deliberate and relentless zeal to ruin" him, the man bundled the father, mother and daughter and hurled all of them into the Senior Principal Magistrate's Court at Milimani, Nairobi.

There he accused them of all sorts of sins and manner of wrongdoing to him resulting into his intended marriage not coming to maturation and fulfilment. He made a claim against the Defendants of Shs. 44,652, saying that the sum consisted of expenses incurred "with inter4est at commercial rates." He asked the Magistrate to pass judgment against the defendants for general damages, including damages "for wounded pride, loss of marriage," in the form of aggravated and exemplary damages. These were the main reliefs he sought.

A swift and detailed written statement of defence for the Defendant trio was filed, in which the whole scene was re-enacted, and the story of the aborted intended marriage was retold, from the Defendants" perspective. The long and short of it is that the Defendants denied any wrong doing on their part. In the case of the daughter she denied the Plaintiff's alleged payments, and added that if any payments were made to a third party during courtship these were gratuitously made as unsolicited favours just as she, too, "used to extend favours to him during their friendship and such money or favour is therefore not recoverable."

On their part, the father and mother called the allegation that they assured the man that the alleged payment would be advance dowry, "absolutely false". The Defendants denied the alleged pleaded particulars of malice, conspiracy, dishonesty, bad faith and fraudulent misrepresentations by them, and all other material allegations in the plaint. They sought to turn tables on the Plaintiff, accusing him of having brought about the failure of the intended marriage by his 'arrogance and ignorance of the procedure" to enter into a Kikuyu customary law marriage, and his deliberate refusal to observe the same. They said they do not owe him any dowry to refund . In short, there is nothing material in the plaint they did not join issue on, including questioning-the jurisdiction of the Court over the case.

Upon receiving the Defendants' joint defence, the Plaintiff filed a reply to it, paragraph 2 of which is not quite clear; paragraph 3 of which stated that the Plaintiff paid Shs. 10,840 as examination fees for the girl after she requested him, as part of dowry, and that the girl in her turn has not at any one time extended to him any favour as she alleged in the joint defence. He further replied that contrary to what the Defendants denied, the payments he allegedly made were towards advance dowry for the third Defendant. He added that it was not him who was responsible for the failure of the intended marriage, but that the marriage was frustrated after the defendants demanded unimaginable demands (see paras 7, 8, 9 and 10 of his reply to the joint defence of the Defendants). He repeated that there was a binding contract to marry which was broken (see para 13); and re-iterated that the Court had jurisdiction over the case by reason of the matters he set out in paragraph 15, contrary to what the Defendants had averred in their defence.

By an application dated 4th May 1999 made under Order 6 rule 13 (1) (b), (c) and (d), and other procedural and enabling provisions cited in the chamber summons, the Plaintiff returned to the Court and asked for an order that the joint defence of the three Defendants be struck out and judgment be entered for him as prayed in his plaint and the matter be listed for formal proof and assessment of damages. He said that this should be done because this defence is:

(a) a mere sham that raises no triable issue;

(b)composed of express admissions of all material particulars;

(c) confusing and self-contradicting-and makes no specific traverse;

(d)no defence in the light of annextures;

(e) simply scandalous, vexatious, frivolous and other wise an abuse

(f) of the Court process; and

(g)simply aimed at delaying the expeditious disposal of the matter, whether you consider it in the light of customary law, the

Constitution equity, proprietary estoppel, unjust enrichment or restitution. Then, there follows an affidavit sworn by the Plaintiff himself, to set out the details of what he means. He tells it all in five pages of seventy paragraphs. At the end of it all, he says in that affidavit, that the Defendants have no case to defend, and that their joint defence is what I have set out above. All this was opposed by the Defendants.

That application was heard by a Senior Principal Magistrate, Mr. C.O. Kanyangi. It was heard for three days. Each of the parties spoke at length in support or in opposition of the application. At the end of it, the learned Magistrate reserved his ruling to consider all the respective standpoints of the parties.

The learned Magistrate wrote and delivered his ruling. He considered the application and the opposition to it. He observed that the Court was expected to determine the issue as to who was responsible for the breakdown of the failed planned marriage, when the suit came up for hearing and decision on the claims of the Plaintiff.

He set out the claims of the Plaintiff, and observed that the Court had to hear full evidence before this case cold be fairly decided, he being of the view that the nature of the case was such that the ends of justice would not be served if the Plaintiff's application was granted. He said that having perused the evidence presented during the hearing of the application, it appeared to him that the defence of the three Defendants raised triable issues, and the Defendants must be heard and the Court decide the case after hearing the evidence adduced by all the parties who wished to be heard. So, he dismissed the application with costs.

The Plaintiff, now turned Appellant in the instant appeal, came to this Court after the dismissal of his application, accusing the learned Senior Principal Magistrate of having committed tenenumerated errors, which he asks this Court to remedy. Of these ten perceived sins, the Court considers only grounds Nos. 4, 6, 9 and 10, worthy serious consideration of this court in Appeal. The rest of the grievances are mere raviting rambles of an unrestrained rambler.

The Magistrate did not go into the question of "the breakdown of the marriage", and that was not before him at that stage; and that is why the first ground of appeal is misplaced; nor did he consider the marital status of the Appellant, for the Appellant to raise ground two of his appeal. It is the Appellant in his plaint and affidavits who dug up the nature and background of his claim, which formed the basis of his claim; and it would be unfair of him not to expect the Magistrate to look at it when considering the application and grounds of opposition thereto. That is why his ground 3 is spurious. To accuse the Magistrate in ground 5 that he sanctioned a full trial "simply on the basis of the nature of the prayers sought … in the main suit", is to be bring to the whole picture drawn by the Magistrate in his ruling, setting out the case for the Plaintiff, the Defendants, and the issues he considered would require to be resolved at the trial on evidence. Of course, the nature of the prayers sought by the plaintiff were pertinent considerations in the light of the defence filed. Ground 7 cannot be borne out by the record of the proceedings before the Magistrate, and at the hearing of this appeal rather a fishing expedition, nor objections thereto, nor a misled Magistrate, was ever pin-pointed and brought out to the Court. The eighth ground is a blare only too often heard on appeals without substance: Which authority did the Magistrate not consider? What difference would it have made if he specifically said that he had considered authority X and he dismissed the appeal? In what way could it have mattered? It was not pointed to this Court that the Magistrate foiled to consider any authority, that the authorities were decisive, that the failure to consider them led him to

reach a wrong decision in a material way. As for submissions, the ruling of the Magistrate speaks for itself: he considered them all, and he did not have to say that he had done so.

In ground 4, the Appellant says that the Senior Principal Magistrate erred by holding that the defence raised triable issues without disclosing any, thereby declining without substance to strike out the defence and give him judgment for what he prayed. But the senior principal Magistrate did not have to enumerate the issues which he saw. He named at least one important issue, namely the issue of where fault lay for the failure of the marriage. The Plaintiff (Appellant) sought general damages and damages for wounded pride, loss of marriage, aggravated and exemplary damages. For one to be condemned to pay any of these damages for any of these things, these things must be proved; the person who was responsible for their occurrence must be identified; his actions must be shown to have been wrongful by him against the Plaintiff: fault must be proved, because it was denied by the three defendants and shifted to the Plaintiff. If he does not succeed in the proof of these things, then his claim may as well fail.

One important matter which the Plaintiff-appellant is not being alive to, is that there are certain conditions of liability in law. Under our system of law, there are certain forms of harm of which the law takes no account; and there are some acts or omissions which, though harmful, are not wrongful in the eyes of the law and are not justifiable, and give no right of action to him who suffers their effects. Damage arising out of such acts or omissions is what is known as **damnum sine injuria**. Now in Kenya, when a person wishes to bring a suit arising out of a breach of a promise to marry he must be properly advised of two distinctions which must be made between the old English common law position and the position in African customary law.

At common law, an action for breach of a promise to marry was recognized. This action related to a monogamous marriage; but it has since been abolished in England. It is arguable that relief for breach of a promise to marry forms part of the received common law of England in Kenya, and if the intended marriage is a monogamous one, then an action for breach of promise to enter into such a marriage may lie. Despite dicta to that effect, this point has not been decided in our Courts, and no last word has been said on it yet.

In African customary law, however, the position is plainly settled on authority, that a breach of promise o marry cannot found an action where the marriage contemplated to be entered into between the parties is a customary law marriage, such an action does not lie in our Courts where the intended marriage may be polygamous : It is a form of action unknown among the Kikuyu, Meru, Akamba, Luhya etc.

Given that the English common law applies in this country to a Statutorily permissible extent as specified by the Judicature Act, and that African customary law forms a part of our jurisprudence, a person who desires to seek legal redress for a breach of a promise to marry, must satisfy the Court by congent evidence, s to what type of marriage was contemplated by the parties at the time when the promise to marry was made. If it was a monogamous English-style marriage which had been intended, he must show that despite the abolition of such a cause of action in England, breach of promise to marry is still part of the subsisting applied English common law in this country.

I know of not less than two past decisions of this Court, which are very emphatic on these legal positions. I am referring, in particular, to the decision of Waiyaki, J, in **Karimi** v. **Murugu**, HCCC No. 745 of 1973, at Nairobi; and the decision of Cotran, J, in the case of **Muinde** v. **Muindi**, HCCC No. 1969 of 1979, at Nairobi, approving the general principles stated by Waiyaki, J, in the Karimi case.

Now, given that this suit was founded on a breach of promise to marry, and given the legal position as expounded in the case-law of this country, and the Defendants having denied liability, clearly an issue of great and decisive importance appears on the pleadings, as to whether this is a justiciable claim. Questions of what marriage was contemplated will be crucial, and the defendants cannot be shut out and prevented from raising them on their filed written statement of defence. The learned senior Principal Magistrate must have had issues such as this in mind, and he did not have to spell them out in writing in his ruling. He was not at the trial of the suit whereat he would have been expected to frame the issues.

There are many other fundamental issues on the pleadings, as well as in the affidavits filed on the application. For example, the copies of the receipts, which receipts themselves are not yet authenticated, were put in question. The Plaintiff will have to show that they are admissible, relevant and material. The voluminous affidavit matter to which the Appellant resorted in an attempt to establish his claim, and the resistance put up by the defendants, only go to show that these parties should be accorded a plenary trial at which they may have a fair opportunity to clarify what is obviously obscure at the moment.

Regarding ground No. 5, complaining of the learned Magistrate having considered the Plaintiff's prayers in the suit, the Appellant is mistaken. A consideration of those prayers was central to the application, and it would have been wrong for the learned Magistrate to ignore them in his ruling. The application had to be considered in the light of the relieves sought by the Plaintiff in the suit itself. The learned Magistrate considered the nature of the prayers in the suit, along side other matters which were material and arising from the evidential matter and pleadings before him.

Ground 6 of the appeal is vague; but if I understand the Appellant correctly, then I am satisfied that he was attempting to turn the application for striking out the defence into (a) an occasion to frame issues, and (b) a trial evidence, without the benefit of cross-examination.

There were may important questions which require to be looked into at a trial. We shall need to know whether a father, mother and daughter, are the right parties to be sued, and if so, to what extent. The Court will have to consider the plaintiff's discourse on the legal consequences of his family and himself being, "welcomed and accepted in the Defendants" home." His pleaded law of Contract Act, the doctrines of restitution, unjust enrichment, proprietary estoppel, and unconscionable conduct, will require decision. Particulars of specials of Shs. 44, 652, not pleaded and particularized, and merely appearing in paragraph 19 as a by-the-way, and in the prayer for reliefs, have their own angle to them. Unless the plaintiff comes up and establishes that this is a case of **injuria sine damno**, he has plenty of things to establish.

On this appeal, the Plaintiff complained of many trifling matters of no material consequence in law. A proper appellate Judge who knows his appellate role does not concern himself with niggling, stippling, decimal details.

This appeal fails. It is dismissed with costs. It is so ordered.

Signed and dated by me at Nairobi, this 31 st day of May, 2001.

R. KULOBA

JUDGE

31.5.2001