



REPUBLIC OF KENYA



KENYA LAW
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**SON v VAO (Family Appeal E004 of 2023)
[2025] KEHC 205 (KLR) (17 January 2025) (Judgment)**

Neutral citation: [2025] KEHC 205 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
FAMILY APPEAL E004 OF 2023**

DK KEMEL, J

JANUARY 17, 2025

BETWEEN

SON APPELLANT

AND

VAO RESPONDENT

*(Being an appeal from the judgment and order of Hon. J. P Nandi
(S.P.M) in Bondo Senior Principal Magistrate's Court in Divorce
Cause No. E003 of 2023 delivered on 27th April, 2023)*

JUDGMENT

1. The Appeal arises from the judgment and order of Hon. J. P Nandi (S.P.M) in Bondo Senior Principal Magistrate's Court Divorce Cause No. E003 of 2023 delivered on 27th April, 2023. The learned trial Magistrate found that the Appellant's Petition dated 7/8/2023 seeking to divorce the Respondent did not disclose a cause of action. According to the learned trial Magistrate, the Appellant failed to plead particulars of cruelty and irreconcilable differences. The learned trial Magistrate struck out the Petition with no orders as to costs.
2. The Appellant and the Respondent got married in the year 2018 under the *Marriage Act* and were issued with a marriage certificate on 9th January, 2018. Their union was blessed with three issues. According to the Appellant, they had been married for five years but their marital relationship had irretrievably broken down due to irreconcilable differences. The Appellant asserts that he has not in any way colluded, connived or condoned the Respondent's cruelty. According to the Appellant, he does not desire to continue his marriage with the Respondent. The Appellant stated that the Respondent had on several occasions been violent and had threatened to commit suicide and had even severally stripped naked before the Appellant's parents and Children. According to the Appellant, he had tried to resolve their differences and reconcile but all was in vain as their differences were irreconcilable.



- The Appellant adopted his witness statement dated 7/2/2023 and produced their marriage certificate, certificate of birth and OB extract.
3. The Respondent failed to enter appearance and file a response to the Petition.
 4. Aggrieved, the Appellant lodged his memorandum of appeal dated 23rd May, 2023 contending that:
 - i. That the learned trial magistrate erred in law and in fact in dismissing the Appellant's Petition.
 - ii. That the learned trial magistrate erred in law in the assessment of the evidence before him and thereby reached an erroneous conclusion.
 - iii. That the learned trial magistrate misapprehended the evidence before him and thereby erred in failing to reach a conclusion that the marriage between the Appellant and the Respondent had broken down irretrievably.
 - iv. That the learned trial magistrate erred in law and fact in failing to appreciate that the Petition was uncontested and that there was no evidence at all to negate or controvert the Appellant's evidence.
 - v. That the learned magistrate erred in law and fact in reaching a decision that was against the weight of evidence.
 5. The Appellant prayed that the court allow his appeal and award the costs of this appeal to him.
 6. On 19th June, 2024, the Appellant, acting in person vide the Notice dated 23rd October, 2023 informed the court that he had filed written submission. The court cannot find a copy of the Appellant's written submissions.
 7. On the part of the Respondent, her written submissions are dated and filed on 10th June, 2024. She submitted that she got married to the Appellant in July, 2013 but later did a civil wedding in January, 2018. Further, they renewed their vows in a colorful ceremony in December, 2021. She submitted that their three issues Michael, Francisca and Samwel have been under her custody until February, 2023 when Michael was kidnapped and after a week Francisca went missing. According to the Respondent, it was the Appellant who kidnapped them. Further, she submits that in August, 2023, Samwel was also kidnapped by a known motorist who transported him all the way to Nairobi and after two days, he was returned back to her under the order of the police and Children's Office Bondo. She submitted that they jointly bought a parcel of land where they live and motor vehicle KCT 358X, properties which were registered in the name of the Appellant. She submitted that on 3/6/2023 the Appellant asked her to leave their home expressing how her presence was irritating him and how he would use force should she leave with the children. She submitted that the kidnapped children stay with the co-wife. She submitted that she is disturbed by the well-being of the children as she is not sure whether the children and the Appellant are being taken care of by the co-wife. She submitted that her children are growing like orphans.
 8. This being a first appeal, the role of this court is to re-evaluate and subject the evidence to a fresh analysis so as to reach an independent conclusion as to whether or not to uphold the decision of the trial court. The court also takes note of the fact that it did not have the benefit of seeing or hearing the witnesses testify and therefore has to make an allowance for the same.



9. In *Abok James Odera t/a A.J Odera & Associates V John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR, with regard to the duty of the first appellate court;

“This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way”

10. The learned trial Magistrate struck out the Appellant’s Petition for lack of particulars of cruelty and irreconcilable differences. According to the learned trial Magistrate, the Petition did not disclose a cause of action.

11. In *Lestang Vs Cooper* [1964] 2 All ER 929 at 934, Lord Diplock defined cause of action as follows: -

“A cause of action is simply a factual situation the existence of which entitles one person to obtain from the court a remedy against another person.”

12. Order 2 Rule 15 (1) (a) of Civil Procedure Rules, 2010 provides as follows:-

“...At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—

(a) it discloses no reasonable cause of action or defence in law; or...”

13. In *DT Dobie & Co (K) Ltd Vs Muchina*, [1982] KLR, the Court of Appeal when interpreting Order VI Rule 13 (1) of the repealed Civil Procedure Rules which is the equivalent of the current Order 2 Rule 15 defined the term “reasonable cause of action” to mean “an action with some chance of success when allegations in the plaint only are considered. A cause of action will not be considered reasonable if it does not state such facts as to support the claim prayed for. ...” .

14. The Court of Appeal in *Crescent Construction Co. Ltd Vs Delphis Bank Ltd* (2007) eKLR stated thus: -

“However, one thing remains clear, and that is that the power to strike out a pleading is a discretionary one. It is to be exercised with the greatest care and caution. This comes from the realization that the rules of natural justice require that the court must not drive away any litigant however weak his case may be from the seat of justice. This is a time-honored legal principle. At the same time, it is unfair to drag a person to the seat of justice when the case purportedly brought against him is a non-starter.”

15. The court is enjoined to sparingly exercise the decision to strike out pleadings to avoid driving away a litigant from the seat of justice.

16. The Supreme Court in *Parliamentary Service Commission Vs. Martin Nyaga Wambora & 2 Others* [2018] eKLR cited with approval the holding in *Mbogo Vs Shah* [1968] EA 93 and 96 on the question whether a court on appeal ought to interfere with the exercise of discretion by the trial court. In that case the Court of Appeal stated;

“We come to the second matter which arises in this appeal, and that is the circumstances in which the court should upset the exercise of discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways enunciating the principles



which have been followed in this court, although I think they more or less arrive at the same ultimate result. For myself I like to put it in the words that a Court of appeal should not interfere with the exercise of discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge had been clearly wrong in the exercise of his discretion and that as a result there has been mis-justice...”

17. Section 65 of the *Marriage Act* provides–

A party to a marriage celebrated under Christian system of marriage may petition the court for a decree for the dissolution of the marriage on the ground of: -

- a). one or more acts of adultery committed by the other party;
- b). cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or
- c). desertion by either party for at least three years immediately preceding the date of presentation of the petition;
- d). exceptional depravity by either party;

SUBPARA e).

the irretrievable breakdown of the marriage.

18. In the Petition, the Appellant, without particularizing, only pleaded that the Respondent had on several occasions been violent and had threatened to commit suicide and had even severally stripped naked before the Appellant’s parents and Children. According to the Appellant, their differences are irreconcilable.

19. Cruelty has been defined under the Black’s Law Dictionary to be:

“The intentional and malicious infliction of mental and physical suffering on a living creature”.

20. In Civil Appeal No. 5 of 2015 J.S.M vs. E.N.B MAKHANDIA, OUKO & M’INOTI, JJ.A., in defining what cruelty and on a marriage that has irretrievably broken down held as follows;

“There is consistent case law on what constitutes cruelty as a matrimonial offence. In MEME V. MEME [1976-80] KLR 17, it was held that to establish cruelty, the petitioner must show to the satisfaction of the court:

- i. Misconduct of a grave and weighty nature;
- ii. Real injury to the complainant’s health or reasonable apprehension of such injury;
- iii. That the injury was caused by misconduct on the part of the respondent; and
- iv. That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.



21. In *Meme vs. Meme* (supra) cited *Mulhouse vs. Mulhouse* (1966) P. 39 with approval, where Sir Jocelyn Simon P. had said:-

‘Cruelty is a serious charge to make and the law requires that it should be proved beyond reasonable doubt: *Bater vs. Bater* (1951) P. 51. That involves that each of the ingredients of the offence must be proved beyond reasonable doubt. First, misconduct must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point which threatens the health of the other spouse, the law will not hesitate to give relief. secondly, it must be proved that there is a real injury to the health of the complainant or a reasonable apprehension of such injury, of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury or health; but the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health, or a reasonable apprehension of it. Thirdly, it must be proved that it is the misconduct of the respondent which has caused injury to (the) health of the complainant. As a final test, reviewing the whole of the evidence, taking into account on the one hand the repercussions of the conduct complained of on the health of the complainant and on the other hand the extent to which the complainant may have brought trouble on himself or herself, the court must be satisfied that such conduct can properly be described as cruelty in the ordinary sense of the word.’

22. Order 2 Rule 10 of the Civil Procedure Rules (1) provides inter alia that “every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing –

- (a) Particulars of any misrepresentation, fraud, breach of trust, willful default or undue influence on which the party pleading relies; and
- (b) Where a party pleading alleges any condition of mind of any person, whether any disorder or disability of mind or any malice, fraudulent intention or other condition of mind except knowledge, particulars of the facts on which the party relies.

23. The above Order 2 Rule 10(1) is couched in mandatory terms that particulars of any claim, defence or any other matter should be pleaded.

24. In *Vijay Morjaria & Nansingh Darbar & Anor* (2000) eKLR it was stated that;

“It is well established that fraud must be specifically pleaded and that particulars of the fraud alleged must be stated on the face of the pleadings. The acts alleged to be fraudulent must of course be set out and then it should be stated that these acts were done fraudulently. It is also settled law that fraudulent conduct must be distinctly alleged and distinctly proved and it is not allowable to leave fraud to be inferred from the facts.”

25. The Appellant failed to particularize the cruelty and irreconcilable differences, thus the learned trial Magistrate rightly due to the lack of particulars proceeded to strike out the Petition. Cruelty being a serious charge, it was mandatory for the Appellant to particularize. The court finds the learned trial Magistrate exercised his discretion within the confines of the law. The fact that the Petition was not defended against by the Respondent, does not give the Appellant a carte blanche obligation not to prove his case. The Appellant’s allegations do not meet the threshold to find the ground of cruelty was



established to warrant granting the divorce between the Appellant and Respondent. Consequently, the finding by the learned trial magistrate was quite sound and must be upheld.

26. On costs, the learned trial Magistrate struck out the Petition with no orders as to costs. It is trite that awarding of costs is discretionary. Section 27(1) of the *Civil Procedure Act* gives this court discretionary powers to order payment of costs where it deems fit to do so. Mativo J.(as he then was) stated in Cecilia Karuru Ngayu Vs Barclays Bank of Kenya & Another [2016] eKLR that this discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice. The Appellant not being a successful party in this appeal is not entitled to the costs as costs follow the event. On the part of the Respondent, the Court notes that she seems not to respond to the Appellant's allegations but raises allegations that she ought to have raised before the trial Court for determination.
27. In view of the foregoing observations, it is my finding that the appeal lacks merit. The same is dismissed with no orders as to costs.

It so ordered.

DATED, SIGNED AND DELIVERED AT SIAYA THIS 17TH DAY OF JANUARY 2025.

D. KEMEI

JUDGE

In the presence of:

Stephen Omondi Nyambok..... Appellant

N/A Valentine Atieno..... Respondent

Mboya..... Court Assistant

