



REPUBLIC OF KENYA



RMM v VNM (Civil Appeal E010 of 2023) [2025] KEHC 4917 (KLR) (25 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4917 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI**

CIVIL APPEAL E010 OF 2023

MA ODERO, J

APRIL 25, 2025

BETWEEN

RMM APPELLANT

AND

VNM RESPONDENT

JUDGMENT

1. Before this court for determination is the Memorandum of Appeal dated 22nd June 2023 filed by the Appellant RMM seeking the following orders;-

- “ 1. That the appeal be allowed.
2. That the court do direct on how LR No. Nyeri/Ndathi/xxxx ought to be shared if at all.

2. The Respondent VNM opposed the appeal.

The matter was canvassed by way of written submissions. The Appellant filed the written submissions dated 7th January 2025 whilst the Respondent relied on her written submissions dated 8th January 2025.

Background

3. The Appellant RMM filed in the Nyeri Chief Magistrates Court a Petition dated 28th August 2018 seeking the following orders;-

- “ (a) That the marriage between the Petitioner, RMM and the Respondent VNM be dissolved.
- (b) Costs of this cause.”

4. The Respondent VNM filed an Answer to Petition dated 25th October 2018.



5. The Petition for divorce was heard in the lower court. Vide a judgment delivered on 13th September 2019, Hon. W. Kagendo, Chief Magistrate (as she then was) made the following orders:-

- “(a) The marriage between the Petitioner and the Respondent be and is hereby dissolved and a decree nisi to issue.
- (b) Land parcel No. Nyeri/Ndathi/xxxx measuring approximately 0.60Ha or thereabout be held by the Respondent in trust for the issues of the marriage.
- (c) No orders as to costs.”

6. Following delivery of that judgment the Appellant filed a Notice of Motion dated 17th February 2020 seeking orders:-

“That the Court do review the orders granted by this court on the 13th September 2019 specifically order that LR Nyeri/Ndathi/xxxx be held by the Respondent in trust for the issues of the marriage.”

7. This application for review was never heard by the trial court hence the present appeal. The Appellant filed the Memorandum of Appeal, which is premised upon the following grounds:-

- “(1) The learned magistrate erred in law by failing to address the issue of the matrimonial property in the application for review in spite of material placed before the court.
- (2) The learned magistrate erred by directing that the issue of matrimonial property i.e Nyeri/Ndathi/xxxx could only be addressed in an appeal.
- (3) The learned magistrate erred by failing to appreciate that by declining to address the issue of matrimonial property i.e LR No. Nyeri/Ndathi/xxxx amounted to disposing of the Appellant’s only asset land that he owns.”

Analysis and Determination

8. I have carefully considered this memorandum of appeal as well as the record of Appeal filed on 9th October 2023.

9. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -Vs- Sunday Post Limited [1958] E.A 424]

10. In *Selle and Another -vs- Associated Motor Boat Company Ltd & Others* [1968] 1 E.A 123 it was stated as follows:-

“.....this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge’s findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence.”



11. Likewise in *Gitobu Imanyara & 2 Others -vs- Attorney General* [2016] eKLR, the court of Appeal stated thus:-

“An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.”
12. The Appellant does not take issue with the portion of the judgment which allowed his Petition for divorce and dissolved the marriage between the couple. Indeed I do note that the Respondent in her Answer to Petition also prayed that the marriage between the couple be dissolved.
13. From the evidence on record it is quite clear that in the minds of both parties their marriage had irretrievably broken down. They both made prayers to have the marriage dissolved. This was a couple who no longer wished to remain in a marital union with each other. Thus the trial court was quite correct to allow the petition for divorce.
14. The Appellant takes issue with the decision of the trial magistrate to award/allocate the parcel of land known as LR No. Nyeri/Ndathi xxx to the Respondent to hold in trust for the children of the marriage.
15. It must be remembered that the petition before the lower court was a ‘Petition for divorce’. The Petitioner in his petition dated 28th August 2018 sought to have the marriage between himself and the Respondent dissolved. The Petitioner made no prayer for division of Matrimonial property indeed the Appellant did not mention the suit property at all in his petition.
16. The Respondent in her Answer to petition dated 25th October 2018 prayed to have the marriage dissolved. In said Answer the Respondent also prayed to be put in possession of the suit land.
17. It was not in order for the Respondent to make substantive prayers in her answer to petition. If the Respondent wanted to have the suit property allocated to her she ought to have filed a substantive suit for division of matrimonial property to which the Appellant would have been granted an opportunity to respond.
18. For the Respondent to include in her answer to Petition a prayer for possession of the suit land amounts to litigation by ambush which the lower court ought not to have countenanced. The Appellant had no opportunity to respond to this prayer, therefore he was not heard on the issue of the division of the said property.
19. It is my view that the learned trial magistrate erred in determining a matter for division of matrimonial property under cover of a petition for divorce. As stated earlier these are two separate and distinctive issues. The Magistrate ought to have rendered herself only on the question of dissolution of the marriage and advised the Respondent to file a separate suit to claim possession of the suit property.
20. For the above reasons I find merit in this appeal. I allow the same and make the following orders:-
 - i. Prayer (a) of the judgement delivered on 13th September 2019 is confirmed and upheld.
 - ii. Prayer (b) of the judgment delivered by Hon. W. Kagendo (as she then was) is hereby set aside.
 - iii. The Respondent is at liberty to file a substantive suit for division of matrimonial property.
 - (iv) Each side will meet their own costs for this appeal.



DATED IN NYERI THIS 25TH DAY OF APRIL 2025.

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MAUREEN A. ODERO

JUDGE

