



KKK v FK (Civil Suit 1 of 2023) [2024] KEHC 2011 (KLR) (16 February 2024) (Judgment)

Neutral citation: [2024] KEHC 2011 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 1 OF 2023
M THANDE, J
FEBRUARY 16, 2024**

BETWEEN

KKK PLAINTIFF

AND

FK DEFENDANT

JUDGMENT

1. By his Originating Summons dated 8.3.23, the Plaintiff seeks the following orders:
 1. An Order that his Honourable Court do find that the Plaintiff/Applicant and the Defendant/Respondent were lawfully married under married to the Respondent (sic) under the provision (sic) of the African Christian Marriage and Divorce act Chapter 151.
 2. A declaration that all that unregistered parcel of land Plot measuring $\frac{1}{2}$ an acre located at [Particulars Withheld] area, in Mtwapa, Kilifi County and all developments erected therein comprising of a one bedroomed house and a shop keeping business is matrimonial property and the Plaintiff is entitled to a share equal to his substantial contribution.
 3. An Order that the Plaintiff/Applicant owns the largest portion of the unregistered Plot measuring $\frac{1}{2}$ an acre located at Maweni B area, in Mtwapa, Kilifi County and all developments erected therein having lawfully purchased the same.
 4. An Order do issue vesting the subject matter of this suit, that is, Plot measuring $\frac{1}{2}$ an acre located at Maweni B area, in Mtwapa, Kilifi County and all developments erected therein, being four (4) shops and the poultry business.
 5. An order for costs of this suit to be borne by the Defendant/Respondent.
2. In his affidavit sworn on even date, the Plaintiff averred that he and the Defendant got married sometime in 1989 under the African Christian Marriage and Divorce Act Chapter 151. Following their marriage, they cohabited in their matrimonial home in Maweni. They were however not blessed with



any children. Sometime in 2013, they purchased the suit property from 2 vendors. The Defendant purchased from one Mukali while he purchased from one Mutinda. Thereafter, due to differences between them and the cruelty of the Defendant to the him, they separated. The Plaintiff accused the Defendant of maliciously destroying his fence every time he attempted to fence his plot. He further states that he filed a petition for judicial separation dated 12.10.2020 in which a certificate of decree nisi absolute (sic) was granted on 6.6.18, dissolving the marriage. The Plaintiff is apprehensive that unless restrained by the Court, the Defendant intends to dispose or deal with the property in a manner likely to prejudice his interests and he will suffer irreparably. He further claimed that he solely invested in the property by taking loans.

3. He urged the Court to determine the parties' shares of the property and order the Defendant to vacate the property to enable him meet the loan expenses and expenses for his children's upkeep and school fees. He further sought judgment against the Defendant for mesne profits, special and general damages and costs of the suit.
4. The Defendant though served did not enter appearance or file a response. The matter thus proceeded as undefended.
5. At the hearing, the Plaintiff reiterated the contents of his affidavit. He claimed that he and the Defendant separated in 2018. They had a business of a shop and a house. When the relationship failed, he left the business to the Defendant. He stated that the vacant portion was to be left for their children but that the defendant took the entire plot. He sought that the Court orders that she stays in her portion and that he stays in his portion.
6. I have considered the Originating Summons and the supporting affidavit as well as the Plaintiff's testimony and submissions. To begin with I must state that the Plaintiff's counsel appears not to be aware of the promulgation of the Matrimonial Property Rules, 2022 on 29.7.22. The Rules have made provision for the prescribed form for an originating summons under the [Matrimonial Property Act](#) and the information that should be contained therein.
7. The Application before me is fraught with many challenges. The Applicant seeks an order that the Court finds that the parties were married under the African Christian Marriage and Divorce Act. Yet in his affidavit, he stated that a decree absolute was issued. Even that has a problem because he stated that he filed a petition for judicial separation dated 12.10.2020 yet that a decree nisi absolute (sic) was granted on 6.6.18. He is unable to make up his mind whether it was a decree nisi or absolute. Further how can a decree for dissolution of a marriage be issued years before the petition for judicial separation is filed. In any event, if indeed the parties were married under the African Christian Marriage and Divorce Act, the definite date would be known. Such date would be indicated in the marriage certificate issued upon solemnization of a marriage under that Act. As such, a declaration by the Court as sought, would not be required. Additionally, the Plaintiff stated that the marriage was not blessed with any children, then again, he sought orders for vacant possession of the property to enable him meet expenses including upkeep and school fees for his children. It is quite clear to the Court the Plaintiff does not seem to know exactly what he seeks and has made conflicting averments to support his case.
8. The Plaintiff further sought a declaration in respect of a share of the property he describes as Plot measuring $\frac{1}{2}$ an acre located at Maweni B area, in Mtwapa, Kilifi County. He claimed that one portion of the property was purchased by the Defendant while the other portion was purchased by himself. However not a single document was availed to Court to prove his claim. He ought to have provided evidence by way of a sale agreement indicating the actual description of the properties, the full names of the alleged vendors, the purchase price paid by each of them. He was additionally required to



demonstrate that actual payment was made by providing evidence of the same as well as evidence of the alleged loans taken and from which institution.

9. It is trite law that he who asserts must prove. Section 107 of the *Evidence Act* stipulates:
 1. Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
 2. When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.
10. The Plaintiff was obligated to place before this Court, cogent evidence to support his claim that first he was married to the Defendant. Second that he and the Defendant purchased the alleged property. Third, that the alleged property had a house and a shop and the nature of the shop and that they were carrying on the business of a shop.
11. The affidavit in support of the Originating Summons filed by the Plaintiff does not contain a single annexure to support his case. His testimony was brief and rather vague. Without producing any documentary evidence and further making conflicting and contradictory averments, the Court is unable to make anything of the Originating Summons before it. In light of this, it is unnecessary to go into whether the property in question, which is not identifiable, is matrimonial property within the meaning of Section 6 of the *Matrimonial Property Act*. It is also unnecessary to delve into the issue whether there was contribution to the acquisition of the alleged property through loans or at all as there is no evidence to go by. Similarly, given the lack of evidence of the description or indeed the existence of the alleged property the issue of the Plaintiff's entitlement thereto cannot be gone into.
12. As I conclude, I must state that the pleadings filed by the Plaintiff are very poorly drawn. They do not coherently set out the case for the plaintiff.
13. The function of pleadings in civil proceedings is to define the case in such a manner that the other party is able to understand what confronts them and offer a suitable defence. Additionally, pleadings are required to define with precision the issues for determination by the Court seized of the matter. In the case of *Peter Kariuki Manthi v Attorney General & another* [2018] eKLR, Mativo, J. (as he then was) considered the essence of properly drawn pleadings and stated:
 3. Perhaps I should recall the function of pleadings, an issue I have addressed in several of my previous decisions. The core issue here is to understand the function of and purpose of good pleadings. In this regard, I recall the words of the Australian Court[2] where Vickery J said this of the principles of good pleading:-

"In a mathematical proof, elegance is the minimum number of steps to achieve the solution with greatest clarity. In dance or the martial arts, elegance is minimum motion with maximum effect. In filmmaking, elegance is a simple message with complex meaning. The most challenging games have the fewest rules, as do the most dynamic societies and organizations. An elegant solution is quite often a single tiny idea that changes everything.

... Elegance is the simplicity found on the far side of complexity.

While elegance in a pleading is not a precondition to its legitimacy, it is an aspiration which, if achieved, can only but advance the interests of justice. A poorly drawn pleading, on the other hand, which does not tell a coherent story in a well ordered structure, will fail to achieve the central purpose of the exercise, namely communication of the essence of case which is sought to be advanced.



Pleading should not be dismissed as a lost art. It has an important part to play in civil litigation conducted within the adversarial system. Crafting a good pleading calls for precision in drafting, diligence in the identification of the material facts marshalled in support of each allegation, an understanding of the legal principles which are necessary to formulate complete causes of action and the judgment and courage to shed what is unnecessary.

Although a primary function of a pleading is to tell the defending party what claim it has to meet, an equally important function is to inform the court or tribunal of fact precisely what issues are before it for determination.[3] (Emphasis supplied)

14. The pleadings as drawn do not meet the primary function of pleadings. They do not appear to have been drawn by a qualified advocate As such, they cannot sustain the claim sought by the Plaintiff.
15. In the end and for the reasons stated, I find and hold that the Originating Summons herein lacks merit and the same is hereby dismissed.

DATED, SIGNED AND DELIVERED IN MALINDI THIS 16TH DAY OF FEBRUARY, 2024

M. THANDE

JUDGE

