JJC v RJ (Civil Appeal 84 of 2022) [2024] KEHC 5491 (KLR) (8 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5491 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MALINDI

CIVIL APPEAL 84 OF 2022

SM GITHINJI, J

MAY 8, 2024

BETWEEN

JJC ..... APPELLANT

AND

RJ ..... RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate Court of Kenya at Malindi by Honourable Onalo J.K.Olga – Senior Resident Magistrate dated 26th August, 2022 in the Divorce Cause No.E15 of 2021)

RULING

1. This appeal arises from the judgment and orders of the learned Hon. Onalo J.K Olga in Divorce Cause No. E15 of 2021 delivered on 26th August 2022. Aggrieved by the said judgment, the Appellant instituted the appeal on the following grounds;

    1. That the learned magistrate erred in law and fact in applying the wrong principles thus failed to pronounce the divorce given the circumstances and grounds of the petition.

    2. That the learned magistrate erred in law and fact by completely failing to take into consideration the issue and/or grounds of cruelty and desertion pleaded by the appellant and seconded by the respondent.

    3. That the learned magistrate erred in law and fact by failing to appreciate the fact that the parties have not resumed cohabitation since the time the respondent deserted the matrimonial home in the year 2015.

    4. That the learned magistrate erred in law and fact in failing to reach a conclusion that the marriage between the appellant and the respondent had irretrievably broken down.

5. That the learned magistrate erred in law and fact in failing to recognize that failure to pronounce a divorce given the circumstances and grounds of the petition amounts to violation and infringement of the Appellant's constitutional rights.

6. That the learned magistrate erred in law and fact in not finding that parties were no longer interested in marriage as the aggregate period of seven years constitutes the criterion for desertion and failure to provide conjugal rights. Their demeanor of not living together was an outright proof that the marriage had broken down irretrievably without any hope of reconciliation (sic).

7. That the learned trial magistrate erred in fact and law in making an assumption that the petitioner's action of going to the Respondent out rightly meant that the Petitioner had initially given the respondent consent to go back to her parent's home or that the marriage was okay.

8. That the learned trial magistrate erred in law and fact in failing to appreciate the fact that once a marriage is broken, the hatred does not extend to family members, thus visiting the respondent's house didn't mean they were in a conclusive marriage.

2. The Respondent did not file a response to the Appeal. The court directed that the Appeal be disposed of by way of written submissions. The Appellant filed his written submissions which I have taken into consideration. What is for determination is whether the trial court erred by failing to determine that the marriage had irretrievably broken down.

3. The appellant herein filed a divorce cause in the trial court seeking that the marriage between him and the respondent be dissolved on account of cruelty and desertion. That the respondent had moved out of their matrimonial home without any valid reason or excuse since the year 2015. In response, the Respondent filed an answer to petition in which she wished the court dissolves their marriage.

4. During the hearing, Pw1 Joseph Joto Chaka the petitioner adopted his witness statement dated 14/2/2022 as his evidence in chief and produced as PEX 1 a copy of the marriage certificate. On cross examination, he stated that he was married to the respondent for a period of two years until they decided that they were no longer compatible.

5. DW1 Nancy Jefwa Rehema the respondent adopted the answer to petition and the cross petition as her evidence. She added that they have been separated for long and that there is no marriage.

6. Upon the close of both the petitioner's and respondent's cases, the trial court delivered its judgement. I have perused the impugned judgment. In paragraph 9 of the said judgment, the trial court stated that:-

> "... Efforts at reconciling have not been vividly explained or out rightly stated and the same remains to be done before the court can determine if the marriage between the two parties has irretrievably broken down. Thus I refer the parties herein to mediation...the parties or their advocates shall file before this court the outcome of the same which agreement if any shall be taken as an order of the court."

7. The Court's mandate on a first appeal is set out in Rule 29(1) of the Court's Rules namely to re-appraise the evidence and to draw inferences of fact. Where the exercise of judicial discretion is involved, the exercise of which is called to the Court's interrogation, the Court should remain guided by the principles enunciated in *Selle v Associated Motor Boat Company Ltd*. [1968] EA 123 and *Pill Kenya Ltd v Oppong* [2009] KLR 442; that it will not interfere unless it is satisfied that the judge misdirected self in some matter and as a result arrived at a wrong decision, or that it be manifest from the case as

a whole that the judge was clearly wrong in the exercise of discretion and occasioned injustice by such wrong exercise.

8. Though the Appellant raises eight grounds in the memorandum of appeal, they all narrow down to one issue which is whether the trial court determined the question of whether the marriage had irretrievably broken down. As a matter of duty, good order and procedure, the trial court ought to have conclusively determined this issue. In its place, the court in its judgment directed that the parties attempt mediation whose outcome shall be taken as an order of the court. I find this position erroneous to the extent that if any mediation was intended or necessary, the same should have been opted before delivery of the judgment. By ordering mediation at judgment stage, a stage which brings a matter to an end, the trial court was reopening the matter with no way to anticipate the outcome of the mediation. Further, the process would have placed the court at befuddlement in the event the mediation failed, having fully heard the matter and led a judgment. Thus, the question the parties sought before the trial court was not settled at the determination of the matter.

9. One of the options I am faced with is as set out in the matter of *Cosmas Maweliwe Wepukhulu v Sameer Africa Limited* (Previously Known as Firestone East Africa (1969) Limited [2018] eKLR where the Court of appeal rendered itself as follows; The upshot of the above is that it would be proper to refer this case back to the superior court for re-trial. Rule 31 of this Court's rules gives us power to do so. It provides;

> " On any appeal the court shall have power, so far as its jurisdiction permits, to confirm, reverse or vary the decision of the superior court, or to remit the proceedings to the superior court with such direction as may be appropriate, or to order a new trial and to make any necessary incidental or consequential orders, including orders as to costs."

10. However, that notwithstanding, nothing bars the option of determining the issue that the trial court did not, given that I have the record of the trial court, of which principle is set out in *Abok James Odera t/a A.J. Odera and Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] eKLR where the Court of Appeal held that: -

> > " This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse 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. See the case of *Kenya Ports Authority v Kuston (Kenya) Limited* [2009] 2EA 212 wherein the Court of Appeal held inter alia that: -
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> > "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"

11. Thus, I shall determine whether the marriage between the parties herein has irretrievably broken down and whether the same ought to be dissolved. From the evidence on record, it is clear that there is no love lost between the parties herein and both of them are no longer interested in the marriage. I do not see why the trial court had difficulties in finding that the marriage had irretrievably broken down when the parties had so established, and had lived separately for a period of over seven years. In this

regard, I associate myself with the finding in *SKC v FKK* [2021] eKLR where my brother Hon. Justice Nyakundi stated as follows;

> " For the court to find that the Petition had no legal foundation whatsoever and to continue to decree existence of a marriage which had since collapsed to me was misapprehension of the facts and the evidence by the learned trial magistrate. I must confess I find myself in considerable difficulty to understand why the learned trial magistrate took the view that the aforesaid marriage had not broken down irretrievably. It was clear that the parties were no longer interested in the marriage and that onus was mutually inclusive.
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> The purpose of the proceedings was not to put the parties together but to divide them so that they can lead their separate lives, which is a human rights reality in a marriage set up. If a marriage has broken irretrievably let the Courts set it asunder and leave the rest of the residual judgement to God, the Alpha and Omega of a marriage institution. Putting asunder what God hath joined would not have attracted the wrath of God over the learned trial magistrate. For the Appellant and the Respondent had torn apart their institution of marriage as a whole."

12. Consequently, I find that the appeal is meritorious and the same is hereby allowed with no orders as to costs. Having so found the consequential orders are: -

    1. The marriage solemnized herein between the Appellant and the Respondent under the *African Christian Marriage and Divorce Act* (now repealed) on 21st February 2013 be and is hereby ordered to be dissolved.

    2. A Decree Nisi shall issue forthwith and the same to be made absolute in 90 days from today's judgement.

       It rests well with the Judge when orders stands celebration by both parties.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 8TH DAY OF MAY, 2024.

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S.M. GITHINJI

JUDGE

In the absence of; -

1. Ms Minyazi for the Appellant

2. Mr Mwandilo for the Respondent.

They be notified.

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S.M. GITHINJI

JUDGE

8/5/2024