



AAAS v RRE (Civil Appeal E103 of 2021) [2023] KEHC 20607 (KLR) (14 July 2023) (Judgment)

Neutral citation: [2023] KEHC 20607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL APPEAL E103 OF 2021

MA ODERO, J

JULY 14, 2023

BETWEEN

AAAS APPELLANT

AND

RRE RESPONDENT

*(Being an Appeal from the entire Judgement and Decree of the Honourable
le T.W. Karanja Senior Resident Kadhi entered on 27th July 2021
in Nairobi Upperhill Kadhi Court Divorce Cause No. 80 of 2020)*

JUDGMENT

1. Before this Court for determination is the Memorandum of Appeal dated September 16, 2021 by which the Appellant AAAS sought the following orders:-
 1. That the entire proceedings, judgement and Decree of the Honourable TW Karanja Senior Resident Kadhi entered in Nairobi Upperhill Kadhi Court Divorce Cause No 80 of 2020 be annulled and set aside in their entirety.
 2. That the Nairobi Upperhill Kadhi Court Divorce Cause No 80 of 2020 be remitted for de novo hearing before a bench different from Hon TW Karanja Senior Resident Kadhi.
 3. That in the alternative to but without prejudice to (2) above, this Honourable High Court be pleased to give appropriate orders for rehearing of the questions of;
 - a) The dissolution of marriage and issuance of divorce certificate;
 - b) The payment of mahar and mataa to the Respondent; and
 - c) Terms of the minor child's custody, access and maintenance.
 4. That the costs of this Appeal be provided for.



5. That such further orders be issued as befit the interests of justice.”

Background

2. The Respondent RRE, had filed Divorce Cause Number 80 of 2020 in the Nairobi Kadhi Court vide a plaint dated June 25, 2020.
3. The matter was fully heard in the Kadhi Court and on July 27, 2021 the Senior Resident Kadhi Hon TW Karanja delivered a judgement in which he made the following orders:-
 - a) The marriage celebrated between the plaintiff and the defendant on August 24, 2019 is hereby dissolved by judicial decree.
 - b) Following from (a) above a divorce certificate does issue.
 - c) Defendant is to pay the outstanding mahar of Kshs.24,000 due to the Plaintiff.
 - d) Defendant to pay to the Plaintiff a mataa of Kshs.25,000.
 - e) The Defendant is to reimburse the Plaintiff monies she spent for antenatal, delivery services and postnatal expenses in receipts totaling Kshs.252,826.
 - f) Physical custody, care and control of the minor is granted to the Plaintiff.
 - g) Defendant to provide monthly maintenance towards the minor’s care at the scale of Kshs.15,000 as well as provide medical insurance cover and cater of his education when he comes of age.
 - h) The Plaintiff and the Defendant are ordered to appear before the National County Children’s Officer or his designate to work out a reasonable mode of access for the Defendant to the minor as he grows, modalities of which both parents are to work out, through mediation, failure by either to do so will result in adverse orders being made against the intransigent party.
 - i) That both parties will be at liberty to apply further orders to better effectuate the access ordered herein.”
4. Being aggrieved by the decision of the Hon. Kadhi the Appellant filed this Memorandum of Appeal dated September 16, 2021 which appeal was premised upon the following grounds:-
 1. That the Honourable Kadhi erred in law by completely denying the Appellant any audience at the hearing of the main suit held on July 4, 2021, thereby violating his absolute constitutional right to fair hearing under Article 50 of the *Constitution*, causing great miscarriage of justice.
 2. That the Honourable Kadhi erred in law and conducted a patently unfairly trial on July 5, 2021 violative of all tenets of natural justice by;
 - a) Opting for the higher injustice of conducting the hearing *ex parte* and thereafter condemning the Appellant unheard ostensibly because warrants of arrest were pending against him; yet the court had the option of lesser injustice by using its broad coercive powers including to arrest and incarcerate the Appellant Without taking away his rights to be heard even as an incarcerated prisoner if the circumstances so called for.
 - b) Barring the Appellants duly appointed advocate and denying any right to cross examine the Respondent on her testimony and to interrogate evidence on all the disputed issues in the case, resulting in a patently unfair trial.



- c) Failing to consider the Appellant’s pleadings and evidence filed within the court record yet the Appellant was at all times ready to continue the hearing of the suit.
3. That that the honourable Kadhi erred in law and fact by holding that the appellant did not demonstrate any will to purge contempt as pretext for visiting an injustice against him by denying him audience while making substantial adverse judicial findings against him.
4. That the Honourable Kadhi erred in law and fact by ordering the Appellant to pay mahar and mataa to the Respondent, absent just cause.
5. That the Honourable Kadhi erred in law and fact by failing to consider the Appellant’s evidence that he had valid medical Insurance Cover extending to the Respondent, and thereafter making the erroneous order of refund of maternity expenses of Kshs.252,826/= to the Respondent yet the same was validly covered by Insurance.
6. That the Honourable Kadhi erred in law and fact leading to an erroneous conclusion of law in awarding maintenance sums contrary to the facts of the case and the evidence on record.”
5. Before the hearing of the main suit the parties had entered into a consent by which the Appellant was to pay the Respondent an amount of Kshs.6,000 monthly as interim maintenance pending hearing and determination of the main suit.
6. The Appellant failed to make the maintenance payments as required. As a result the Respondent approached the Kadhi Court on two (2) occasions seeking to have warrants of Arrest issued against the Appellant due to his failure to honour the consent on maintenance.
7. After the first set of warrants were issued the Appellant complied with the consent and paid what was due as maintenance. However, the Appellant defaulted a second time and warrants of Arrest were again issued against him.
8. By the time the suit came up for hearing before the Hon. Kadhi the Appellant had not yet purged the contempt. The Advocate who was on record for the Appellant informed the court that she had first been instructed and stated that she had no knowledge of the contempt orders against her client.
9. The Hon. Kadhi then decided to deny the Appellant audience due to the contempt which remained unpurged. The trial court proceeded to hear the Plaintiff case only (the Respondent herein) and thereafter rendered its judgment on July 27, 2021. The matter in essence proceeded as an undefended cause.

Analysis and Determination

10. I have carefully considered this Appeal the Response filed thereto as well as the written submissions filed by both parties.
11. This being a first appeal it is the duty of this court to examine the evidence adduced during the trial and to draw its own conclusions on the same. In *Selle & Another v Associated Motor Boat Company Ltd & Others* [1968] E.A. 123 the court held as follows:

“An appeal to this court from trial by the High Court is by way of 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 through it should always bear in mind 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 facts if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally.....”

12. As a general rule the High Court will not interfere with findings made by the trial court unless it finds that the trial court erred in law and/or misapprehended the facts in interpreting the evidence. In *Kiruga -vs - Kiruga & Another* [1988] eKLR the court observed as follows:-

“An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.”

13. It is a fundamental principle of law that no person should be condemned unheard. This right to be heard stems from the latin maxim ‘audi alteram partem’ which literally means ‘listen to the other side’ or ‘let the other side be heard as well’. Natural Justice squires that a person be afforded the right to be heard before any orders adverse to himself are made.

14. Article 50 of the *Constitution of Kenya 2010* provides that

“50(1) every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.” [own emphasis]

15. In *Onyango Oyoo v Attorney General* [1986-1989] E.A 456 the court held as follows:-

“There must be ever present to the mind the fact that our laws of procedure are grounded on a principle of natural justice which requires that men should not be condemned unheard, that decisions should not be reached behind their backs, that proceedings that affect their lives and property should not continue in their absence and that they should not be precluded from participating in them. (See Sangram Singh vs. Election Tribunal, Kotah, AIR 1955 SC 664, at 711 – Supreme Court of India)” [own emphasis]

16. The fact that the Appellant was in contempt of court did not divest him of his fundamental right to a fair hearing. The proper cause of action would have been for the Hon. Kadhi to impose a punishment for contempt and thereafter proceed to hear the suit interpartes.

17. Indeed warrants of Arrest had already been issued against the Appellant. The Hon. Kadhi should have ordered for the arrest of the Appellant and his production in court or his committal to civil jail as the case may be. The punishment for contempt does not involve one being denied the right to be heard.

18. In *Ridge v Baldwin* [1963] AU ER 66, the Court while discussing the right to a fair hearing observed as follows:-

“The principle of fairness has an important place in the administration of justice and is also a good ground upon which courts ordinarily exercise discretion to intervene and quash the decisions of a tribunal or subordinate court made in violations of right to a fair hearing and due process.”



19. The Hon. Kadhi erred by denying the Appellant the right to be heard due to an existing contempt. The record shows that counsel for the Appellant was in court on the hearing day thus the Hon. Kadhi erred in proceeding with the matter as a undefended cause.
20. I find that the Hon. Kadhi as an arbiter had the obligation to hear both sides before rendering a judgement in the matter. His failure to do this denied the Applicant his right to a fair hearing.
21. In conclusion I find merit in this appeal and the same is allowed. The judgement and Decree of Hon T.W Karanja Senior Resident Kadhi in Kadhi Court Divorce Cause No 80 of 2020 are hereby set aside. I further direct that his matter be heard a fresh by a Kadhi other than Hon.T.W. Karanja. This being a family matter each side will meet their own costs.

DATED IN NAIROBI THIS 14TH DAY OF JULY, 2023.

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MAUREEN A. ODERO

JUDGE

