



**DMM & another v Njeru & another (Civil Appeal E040 of 2022)
[2024] KEHC 14085 (KLR) (14 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14085 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KITUI
CIVIL APPEAL E040 OF 2022
FR OLEL, J
NOVEMBER 14, 2024**

BETWEEN

DMM 1ST APPELLANT

SMN 2ND APPELLANT

AND

GMN 1ST RESPONDENT

DMK 2ND RESPONDENT

***(BEING AN APPEAL FROM THE JUDGMENT AND DECREE OF HON A.
ARINGO (SRM.) DATED 7th DECEMBER 2022, IN KYUSO PMCC NO. 6 OF 2020)***

JUDGMENT

A. Introduction

1. The Appellants were the plaintiffs in the primary suit, where they had sued the Respondents and sought orders of permanent prohibitory injunction to issue restraining the respondents from engaging or threatening to engage, in behavior including intimidation, harassment, or stalking which amounts to physical, emotional, verbal or psychological abuse of the Appellants, a permanent prohibitory injunction restraining the 1st and 2nd respondents by themselves their servants, employee or Agents from trespassing, encroaching or evicting or in any manner from interfering with the Appellants exclusive quiet enjoyment of their matrimonial home, General damages for assault, Exemplary, aggravated and punitive damages and costs of the suit.
2. In the plaint filled, the Appellants averred that the 1st respondent had been married to the 2nd Appellant, but their marriage had irretrievably broken down, which led to the 2nd Appellant filing for divorce, and a divorce decree absolute was eventually granted. The 1st respondent, who was a member of the Kitui county Assembly had refused to move on and resorted to frustrating the 2nd Appellant's marriage to



the 1st Appellant by using her vast network of connections that her public office accorded her. She had continued to harass the Appellants who were intent on living their lives peacefully.

3. Towards her illegal action, the 1st respondent accompanied by armed police from Kyuso police station stormed the Appellant's matrimonial home, where she assaulted the 1st Appellant, claiming she was a stranger in her home before she was rescued by her parents-in-law, who stood by her as the legal and know wife of the 2nd Appellant.
4. The Appellants further pleaded that the 2nd respondent had been roped in by the 1st respondent and had been sending unpalatable messages to the 2nd Appellant, on the instigation of the 1st respondent, which messages they reproduced verbatim and also provided a couple of downloaded SMS messages to confirm the same. The 2nd respondent's messages were centered on demeaning the reputation of the 2nd Appellant and also threatening his well-being.
5. The respondents herein did file their defense and counterclaim and denied all the averments made in the plaint. The 1st respondent contended that it was the Appellants who were harassing, and threatening to evict her from her matrimonial home. She was still legally married to the 2nd Appellant and denied that their marriage was irritably broken down nor were there any divorce proceedings that had been instituted or finalized. The 2nd respondent also denied insulting or publishing any defamatory messages on WhatsApp or any social group tarnishing the Appellant's reputation and averred that the opposite was true as it was the 2nd Appellant who had done so via several media social platforms.
6. The 1st respondent further averred that the Appellants had colluded to deny her access to her matrimonial home, which she and the 2nd Appellant had struggled to build for over five years since 2015 and further had also colluded to deny her access to motor vehicle BMW registration Number KCA xxxR. The respondents also filed their counterclaim where they reiterated the averments made in the statement of defense and the 1st respondent urged the court to grant her unlimited access to the matrimonial home, return of motor vehicle registration Number KCA xxxR and also prayed for an injunction restraining the 1st Appellant either by herself, her agents, servants and/or employee from trespassing, encroaching or in any manner interfering with her matrimonial home and/or property. The respondents also prayed to be paid damages, which they urged the court to assess at trial.

B. Evidence at Trial.

7. The parties did file several interlocutory Applications, which delayed the hearing of the main suit, but eventually the suit proceeded for hearing on 1st November 2021, when only the respondents and their counsel were present in court and the respondents gave evidence in support of the counterclaim filed. The Appellant's counsel later on 5th November 2021, applied to set aside the proceedings held and vide the trial court ruling dated 22nd June 2022 the said proceeding was set aside and the Appellants case re-opened, with a rider that they fix the suit down for hearing within 45 days.
8. The Appellants did not abide by the directions issued, and the respondents' counsel again fixed the suit for hearing on 29 August 2022, some 60 days after the initial order setting aside the proceedings was issued. The court satisfied itself that the Appellant's counsel had been served with the hearing notice but failed to attend court. The court subsequently adopted the previous evidence of the respondents.
9. DW1 Dr. GMM adopted her witness statement as her evidence in chief. she further testified that the property at [Particulars Withheld] village, Mumoni ward was her matrimonial property and the Appellants had wrongfully denied her access thereto and also threatened her life. She produced their marriage certificate, a bundle of family and wedding photographs, and photographs of vacant land before the construction of their matrimonial home, and after it was put up. She prayed for damages as



she had incurred a lot of expenses and possession of motor vehicle KCA xxx R BMW which she alleged was in the possession of the 2nd Appellant.

10. DW2 DMK also adopted his witness statement as his evidence in chief. The Appellants had wronged him, but still went ahead and filed a complaint against him. He had never authored any defamatory messages against the Appellants, and to the contrary, it was the Appellants who authored the messages and sent them out on social media. He was a national figure and by the said action, he had been defamed and sought damages as he had incurred a lot of expenses in defending this suit.
11. DW3 CMM adopted his witness statement as his evidence in chief and stated that the 2nd appellant was his brother, and he also knew the 1st respondent as his brother's wife. He knew the property in dispute as his brother and the 1st respondent had contracted him to clear the site before they started building and later engaged him in supervising the construction works undertaken. When the 1st respondent developed political ambitions, the 2nd appellant called the local community and rallied them to support her. It was therefore his wish that the 1st respondent be allowed to occupy the suit property.
12. The trial court did consider the evidence presented and on 7th December 2022 entered judgement in favour of the respondents in terms of prayer (1) and (3) of the counterclaim and further awarded them damages of Kshs.2,000,000/=. The court also awarded the respondents costs of the main suit and the counterclaim.

C. The Appeal.

13. The Appellants being dissatisfied by the judgement of the trial court did file their Memorandum of Appeal and raised several grounds of appeal namely:-
 - a. That the learned trial Magistrate erred in law and in fact by interpreting the statutes disjunctively and constrictively hence occasioning a miscarriage of Justice to the appellants.
 - b. That the learned trial magistrate erred in law and in fact by misinterpreting the provisions of the law by making a decision on the matrimonial properties whereas he did not have jurisdiction as matters pertaining matrimonial property are a preserve of the high court.
 - c. That the learned trial magistrate erred in law and in fact in awarding damages on a subject matter he did not have jurisdiction.
 - d. That the learned trial magistrate erred in law and in fact by making an award of kshs 2,000,000 without any material that was placed before them.
 - e. That the learned trial magistrate erred in law and in fact by granting drastic orders whereof no material had been placed before him in support thereof.
 - f. That the learned magistrate erred in law and in fact by proceeding with the matter exparte whereas there was no proof of service on record
 - g. That the learned Trial magistrate erred in law and in fact by failing to make a finding that the suit property is registered and solely belongs to the 1st appellant and it is thus not a matrimonial home
 - h. That the learned magistrate erred in law and in fact by making a finding that the suit land was matrimonial property and that the respondent had to use the same exclusively to the detriments of the appellants



- i. That the learned magistrate erred in law and in fact by not making a finding that the 1st appellant and the interested party had divorced and they were no longer a married couple.
- j. That the learned Trial magistrate erred in law and in fact by finding that the respondent was entitled to use of the appellants' home whereas she had been divorced and the said property was solely in the name of the 1st appellant
- k. That the learned magistrate erred in law and in fact by making a finding that the respondent was dispossessed use of her matrimonial property whereas the divorce judgement in the circuit court for the County wayne which was adopted as orders of the Kenyan High Court awarded all personal property to the person who was registered owner at the time of the judgement and the registered owner of the said homestead is the 1st appellant herein
- l. That the learned magistrate erred in law and in fact by not recognizing the sanctity of the title of the 1st appellant which is indefeasible and it is supposed to be protected.
- m. That the learned magistrate erred in law and in fact by dispossessing the appellants parcel of land and their homestead indefinitely therefore infringing on the rights of the appellants under article 40 of *the Constitution*.
- n. That the learned magistrate erred in law and in fact in shifting the burden of proof to the appellants instead of the applicant.

C. Determination

14. I have considered the pleadings, evidence presented and submissions of the parties in this appeal, this court first and foremost is enjoined to subject the whole proceedings to fresh scrutiny and make its own conclusions.
15. As held in *Selle & Another Vs Associated Motor Boat Co ltd & others* (1968) EA 123 where it was stated that;

“I accept counsel for the respondent’s proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the high court is by way of retrial and the principals 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 conclusion though 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 fact 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 demeanor of a witness is inconsistent with the evidence in the case generally. (*Abduk Hammed saif V Ali Mohammed Sholan*(1955), 22 E.A.C.A 270

16. In *Coghlan V Cumberland* (1898) 1 Ch, 704 , the court of appeal of England stated as follows;

“Even where, as in this case, the appeal turns on a question of fact, the court of appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the material before the judge with such other material as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong..... when the question arises



which witness is to be believed rather than the other and that question turns on manner and demeanour, the court of appeal always, is and must be guided by the impression made on the judge who saw the witness. But there may obviously be other circumstance's quite apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court had not seen.

17. Therefore, this court has a solemn duty to delve at some length into factual details and revisit the evidence as presented in the trial court, analyze the same, evaluate it, and arrive at its own independent conclusion, but always remembering and giving allowance for it, that the trial court had the advantage of hearing the parties.
18. This appeal, turns on the question as to, if the court had jurisdiction to determine the issues which arose in the counterclaim, whether the suit property is matrimonial property or not, and if the respondents were entitled to the declarations made in the counterclaim and any damages awarded.

Jurisdiction.

19. What then is matrimonial property? Section 6 of the *Matrimonial Property Act* defines 'matrimonial property' as:
 - (a) the matrimonial home or homes;
 - (b) household goods and effects in the matrimonial home or homes; or
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage
20. Section 7 of that Act, provides as follows:

Ownership of the matrimonial property vests in the spouses according to the contribution of other spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.
21. Section 17 of the *Matrimonial Property Act* further provides that;

Action for declaration of rights to property

 - (1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.
 - (2) An application under subsection (1)—
 - (a) shall be made in accordance with such procedure as may be prescribed;
 - (b) may be made as part of a petition in a matrimonial cause; and
 - (c) may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.
22. The Appellant challenged the court's jurisdiction to hear and determine the suit and argued that matters relating to matrimonial property were a preserve of the High Court. The Court's jurisdiction must be ascertained at the earliest stage. A court of law must always examine the pleadings and decide at the earliest opportunity even without being prompted by any party, as to whether it has jurisdiction to hear and determine the suit before it. This is because jurisdiction is everything without which a court



of law acts in vain and therefore where it finds that it is devoid of jurisdiction, it must down its tools and do no more.

23. Section 17 of the *Matrimonial Property Act*, which is under part V of the Act deals with jurisdiction. It is noted that the Act does not define the ‘court’. It is my view that the parliament intended that a party may apply to a court in which (1) the petition in a matrimonial cause has been filed, (2) The court with jurisdiction i.e depending on the monetary value and geographical jurisdiction of the court, (3) whether or not a matrimonial cause has been filed.
24. It should be noted further that by the time the suit was filed Matrimonial Property Rules 2022 had not been promulgated and only provisions of Section 17 of the *Matrimonial Property Act* Applied and allowed a party to a suit to apply for various declarations of right regarding matrimonial property.
25. Based on the provisions of Section 17 of the *Matrimonial Property Act*, I do find that the trial court had jurisdiction to determine the matrimonial property dispute between the 2nd Appellant and the 1st respondent because the matrimonial property was based within the court jurisdiction and the value of the said property did not exceed the court’s pecuniary jurisdiction.

Declarations Awarded.

26. Though the 1st respondent strenuously denied that their marriage with the 2nd Appellant was not dissolved, the 2nd Appellant did file a decree absolute dated 27.09.2019 from the State of Michigan, In the circuit court of the county of Wayne-Family division, which confirmed that indeed the divorce proceedings were finalized.
27. The pleadings clearly reveal that the bone of contention was the ownership, possession, and control of the matrimonial property built on a parcel of land not described in the pleadings but situated at [Particulars Withheld] village, Mumoni ward in Kitui County. Both the Appellant’s and the 1st respondent in their pleadings did refer to the said property as matrimonial property and DW3 also confirmed the same. It was thus proved that the said property was built during the cohabitation of the 2nd Appellant and the 1st respondent as man and wife and is properly deemed to be matrimonial property.
28. The Appellants were represented by counsel and were given an opportunity to present their evidence, but failed to do so, despite being given a second bite at the cherry, after the initial ex parte proceedings of 1st November 2021 were set aside. The suit again proceeded for hearing ex parte on 29th August 2022, after the court confirmed that their counsel had been served but they did not attend court. The respondent’s evidence was thus not controverted and it was further supported by the evidence of DW3 CMM, the 2nd Appellant’s brother.
29. It remains basic law that the only forum where the respondent’s evidence could have been challenged was at trial Since the Appellants failed to call any witness the respondent’s evidence remained uncontroverted and thus proved.
30. In *Motrex Knitwear Vs Gopitex Knit wear Mills Ltd Nairobi (Millimani)HCCC NO 834 OF 2002* Lessit J citing the case of *Autar Singh Bahra & Another Vs Raju Govindji, HCCC NO 548 OF 1998* where it was appreciated that;

“ Although the defendant has denied liability in the amended defence and counter claim, no witness was called to give evidence on his behalf. That means that not only does the evidence rendered by the 1st plaintiff case stands unchallenged but also that the claims made by the



defendant in his defence are unsubstantiated. In the circumstances, the counter claim must fail.”

31. In the case of *Shaneebal Limited v County Government of Machakos* [2018] eKLR, Odunga, J, in reaching his judgment relied on the case of In *Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001*, where it was stated that;

“it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the plaintiff against them is uncontroverted and therefore unchallenged.”²

32. I therefore do find that the 1st respondent’s evidence regarding her claim on the matrimonial property was not controverted and was proved.

Damages

33. The trial Magistrate awarded the respondents damages of Kshs.2,000,000/=. The 1st respondent in her evidence in chief did not claim damages, while the 2nd respondent urged the court to award him damages for defamation and the costs incurred in defending himself, yet he was the one who was wronged.

34. The court of Appeal in *Catholic Diocese of Kisumu vs. Sophia Achieng Tete Civil Appeal No. 284 of 2001* [2004] 2 KLR 55 set out the circumstances under which an appellate court can interfere with an award of damages in the following terms:

“It is trite law that the assessment of general damages is at the discretion of the trial court and an appellate court is not justified in substituting a figure of its own for that awarded by the Court below simply because it would have awarded a different figure if it had tried the case at first instance. The appellate court can justifiably interfere with the quantum of damages awarded by the trial court only if it is satisfied that the trial court applied the wrong principles, (as by taking into account some irrelevant factor leaving out of account some relevant one) or misapprehended the evidence and so arrived at a figure so inordinately high or low as to represent an entirely erroneous estimate.”

35. The respondent’s counterclaim was scantily pleaded and no particulars of defamatory words were brought out therein as mandatorily required by Order 2 Rule 7 of the Civil Procedure Rules. The 2nd respondent further did not prove that indeed the SMS or various publications were published by the Appellants nor were the mobile messages referred to, admissible for lack of compliance with provisions of Section 106B of the *Evidence Act*, Cap 80. The damages awarded were therefore wrongly awarded and must be set aside.

E. Disposition.

36. The Upshot from the above analysis is that this Appeal is partially successful and the following orders are issued;
- a. The judgment and decree of Honouble A Aringo (SRM) delivered in Kyuso Magistrate Civil Case No 6 of 2020 dated 7th December 2022, is partially set aside and the damages awarded of Kshs.2,000,000/= is set aside and the said claim is dismissed.



- b. The 2nd Appellant and the 1st respondent, who are the main protagonists herein are blessed with children and it is not in the interest of Justice to exacerbate the vitriol and bad blood that they exhibit. They are tied at the hip, concerning raising their three children, and thus each party will bear their own costs for this Appeal and the costs of the primary proceedings before the Magistrates court.

37. It is so ordered.

JUDGMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 14TH DAY OF NOVEMBER, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual Platform, Team this 14th day of November, 2024

In the presence of: -

No appearance for Appellants

No appearance for Respondents

Susan/Sam Court Assistant

