



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MURANG'A**

**DIVORCE APPEAL NO. 23 OF 2017**

**PWK.....APPELLANT**

**VERSUS**

**SKM.....RESPONDENT**

***[An appeal against the decision of J. W. Onchuru, Principal Magistrate, in Murang'a CM's Divorce Cause No. 3 of 2016 delivered on 22<sup>nd</sup> May 2017]***

**JUDGMENT**

1. The appellant is aggrieved by the decree for divorce issued on 22<sup>nd</sup> May 2017.
2. The Memorandum of Appeal raises four grounds: Firstly, that the learned trial magistrate disregarded her written submissions; secondly, that the court erred by “*considering that mistrust fueled by [the underlying] land dispute made the marriage irredeemable*”; thirdly, that the court below meandered outside the grounds for divorce pleaded by the respondent; and lastly, that the learned trial magistrate failed to consider that the couple had cohabited for over fifty years.
3. The appeal is opposed by the respondent.
4. The appellant filed submissions in the appeal on 9<sup>th</sup> September 2020 while the respondent replied on 26<sup>th</sup> October 2020. On 11<sup>th</sup> May 2021, I heard further arguments from learned counsel for both parties.
5. This is a first appeal to the High Court. It is thus on both *facts* and the *law*. ***Peters v Sunday Post Limited*** [1958] E.A 424, ***Selle v Associated Motor Boat Company Ltd*** [1968] E.A 123.
6. The appellant and respondent married in 1970 under *Gikuyu* customary law and were blessed with eight children. The respondent applied for divorce in the lower court vide a Petition dated 5<sup>th</sup> February 2016 on grounds of *inter alia* cruelty and adultery. The respondent filed a Reply and Cross Petition praying for dismissal of the petition; and, that the petitioner be stopped from evicting her from her matrimonial home.
7. It is thus *not* accurate, as submitted before me by learned counsel for the respondent, that the appellant’s cross-petition had *also* sought for dissolution of the marriage. In fact, she pleaded that the marriage had “*not irretrievably broken down but rather the petitioner [was] being manipulated by the 2<sup>nd</sup> wife and her son...in an attempt to disinherit [the appellant]*”.
8. No evidence was taken by the learned trial magistrate. Instead, the parties opted to proceed by way of written submissions. When the matter was mentioned on 10<sup>th</sup> April 2017, the appellant’s counsel told the court that: “*I am yet to file submissions but we can take a judgment date*”. Judgment was then reserved for 8<sup>th</sup> May 2017.
9. It would appear that the judgment was not ready on that date and was only delivered on 22<sup>nd</sup> May 2017. At page 3 of the typed judgment, the learned trial magistrate said-

*“The respondent however did not file her submissions in respect of the petition. This thus means that I am left to consider the petitioner’s submissions”*

10. Submissions are *not* pleadings and are only for *guidance* of the court. But here is a situation where *none* of the parties led *evidence* but

elected to have the dispute resolved by submissions. The learned trial magistrate conceded that the appellant's submissions were *not* considered. As earlier stated, the appellant had opposed the divorce in her reply and cross-petition. She denied the allegations by the petitioner and pleaded that their disagreements revolved around a land dispute. She also pleaded that her marriage had not irretrievably broken down.

11. I thus readily find that the grounds in the Petition for divorce were *not* proved by any evidence; and, fundamentally, that the appellant was never *heard* on her Reply and Cross-Petition. Ground 1 of the appeal thus succeeds and is sufficient to dispose of the matter. Having so found, and, in view of the orders that I propose to make, I will not delve any further into the matter.

12. My final orders are thus as follows:

- a) That the appeal is allowed.
- b) That the decree issued by the lower court on 22<sup>nd</sup> May 2017 that dissolved the marriage between the parties is hereby set aside in its entirety.
- c) That the Petition for Divorce and the Cross-Petition shall be heard afresh by any other magistrate at Murang'a except J. W. Onchuru, Principal Magistrate.
- d) That each party shall bear its own costs in this appeal.

It is so ordered.

**DATED, SIGNED and DELIVERED** at MURANG'A this 8<sup>th</sup> day of July 2021.

**KANYI KIMONDO**

**JUDGE**

***Judgment read in open court in the presence of:***

Mr. Ogara holding brief for Mr. Kamonjo for the appellant instructed by Kaingati Kamonjo & Company Advocates.

Ms. Waititu holding brief Mr. Kirubi for the respondent instructed by Kirubi, Mwangi Ben & Company Advocates.

Ms. Dorcas Waichuhi & Susan Waiganjo, Court Assistants.