



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL APPEAL NO. 76 OF 2021

SMO.....APPELLANT

-VERSUS-

AJS.....RESPONDENT

JUDGMENT

1. The appellant SMO and respondent AJS got married under Islamic Law at Eastleigh in Nairobi on 13th December 1997, and got 6 children. In an amended petition filed before the Kadhi's Court on 6th February 2018 the respondent sought the dissolution of the marriage on account of cruelty on the part of the appellant. The petition sought payment of unpaid dowry; custody, care and control of the children; payment of Kshs.30,000/= per month during Iddah period; a permanent injunction to stop the appellant from evicting the respondent and children from the matrimonial home (House No. 105, Fivestar Estate in South C, Nairobi in LR No. 209/12221/62); an order evicting the appellant from the matrimonial house; payment of Kshs.129,500/= monthly towards the children's maintenance; payment of school fees for the children; the appellant to cater for madrasa classes for the four youngest children; and the respondent to pay for the children's medical expenses.

2. The appellant filed a response denying the averments in the amended petition. He denied that he had been cruel to the respondent, and denied that he was bound to pay the sought items. He denied having failed to provide for the family. He stated that he did not support the dissolution of the marriage, and said that he loved the respondent and wanted her back. He asked that the petition be dismissed with costs.

3. The record kept by the Kadhi's Court in **Divorce Cause No. 140 of 2017** shows that on 17th December 2018 the matter came for hearing. The respondent and appellant were present, each with counsel. The file was ordered to be placed aside for 30 minutes. When the court resumed the respondent and her advocate were present. The appellant and his advocate were absent. The respondent testified and called three witnesses. The respondent's counsel informed the court the he was closing his client's case, and sought 7 days to present submissions. The case was adjourned to 19th December 2018 at 11.00 am. Come that day the appellant and counsel were still absent. The cause was adjourned to 8th January 2019 to take a hearing date. The respondent's counsel had not filed submissions.

4. On 8th January 2019 the respondent's counsel was present and informed the court that he had filed an application which he had served. The application was dated 7th January 2019 under **Order 51 rule 1** of the **Civil Procedure Rules** and **sections 1A, 3 and 3A** of the **Civil Procedure Act**. It requested the court to re-open the matter to allow the appellant to call his witnesses so that the matter could be decided on the merits of each case. The appellant stated that on 19th December 2018 he was not in court because he had on 14th December 2018 taken the children to Mombasa for vacation and did not return until 21st December 2018. On 19th December 2018, he stated, his counsel had attended a hearing in **High Court Misc. Appl. No. 71 of 2018** before Justice Mutende. He had asked his pupil to come before the Kadhi's Court to try and get an advocate to hold his brief to seek adjournment. The pupil was unable to get an advocate. He deponed that he did not deliberately fail to attend, and sought that court's indulgence to tender his evidence and call witnesses so that both sides could be heard, before a decision. The court heard the application and dismissed with costs. The respondent had filed a replying affidavit to oppose the same.

5. The Kadhi's Court took into consideration that the hearing date of 17th December 2018 was taken in the presence of both counsel. The court did not indicate in the ruling, but on 17th December 2018 the respondent counsel was present and when the file was placed aside he did not turn. Neither did his client. The court indicated in the ruling that when the matter was adjourned to 19th December 2018 it was to allow for defence hearing. In short, the Kadhi's Court did not take seriously the application for non-attendance. It follows that the judgment of 10th June 2019 that allowed the amended petition did not have the benefit of the appellant's evidence.

6. In the Memorandum of Appeal dated 2nd April 2019 the appellant challenged the ruling and complained that it had without legal basis denied him an opportunity to give his defence, and in so doing had thrown him out of the judgment seat.

7. In dismissing the appellant's application, the Kadhi's court acknowledged it had a discretion to allow or not to allow, and made reference to the decision in **Shah –v- Mbogo [1967]EA 116**, at page 123 where it was observed that –

“The discretion is intended to be exercised to avoid injustice or hardship resulting from accident, in advertence or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion, or otherwise, to obstruct or delay the course of justice.”

The Kadhi's Court then observed that:-

“Ordinarily the court will stay proceedings or re-open a case because it would essentially be setting back the petitioner's progress in prosecuting its case causing it to suffer prejudice. The out most therefore be satisfied that the applicant has offered a very plausible explanation as to why he failed to prosecute his case before such order can be issued.”

It is material that the appellant had defended the amended petition by filing a response. The defence raised triable issues. This was a matrimonial cause. One party wanted to divorce, and the other did not. The couple had 6 children. From the ruling of the Kadhi's Court the appellant and his advocate had no previous history of not coming up for hearing. Yes, the events of 17th December 2018 and 19th December 2018 did not paint the appellant and his advocate in good light. But were they inexcusable? Were they such that the appellant be denied the opportunity to defend the matter? It is considered that when the application was filed, even the respondent's advocate who had promised to file submissions after chasing his case had not. There was no judgment at that stage. Would the court say that, given what happened, the intention of the appellant was to deliberately obstruct or delay the cause of justice?

8. The appellant had a constitutional right under **Article 50(1)** to be fairly heard. A fair hearing meant that he was entitled to have an opportunity to present his evidence to support his case. It is appreciated that both the appellant and the respondent were entitled to have their matter to begin and be concluded without unreasonable delay. The question is whether the appellant had behaved in such a manner that the dispute could not be concluded within a reasonable time. Considering that, after all this, judgment was not rendered until 10th June 2019, could it still be said the appellant was delaying his case?

9. In **Richard Ncharpi Leiyagu –v- IEBC & 2 Others, Civil Appeal No. 18 of 2013**, the Court of Appeal stated as follows:-

“The right to a hearing has always been a well protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality.”

10. In **Philip Chemwolo & Another –v- Augustine Kubende [1982-88] KAR 103 at 104, Apaloo J.A.** observed as follows:

“Blunders will continue to be made from time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. This court as is often said exists for the purpose of deciding the rights of parties and not for the purpose of imposing discipline.”

11. I have indicated the nature of the dispute. The Kadhi's court did not address its mind on that and on whether the respondent could reasonably have been compensated by costs for the delay occasioned by the appellant. Lastly, it has to be remembered that justice is best served when the parties' case is decided on merits.

12. In conclusion, I find that the Kadhi's court did not properly exercise its discretion with the result that the appellant was unfairly denied the opportunity to defend the cause.

13. The result is that I allow the appeal, set aside the judgment delivered on 10th June 2019 and ask that the matter be reheard by another Kadhi. The appellant will, however, pay the costs of the appeal.

14. In view of this decision, the appeal dated 31st January 2020 challenging the merits of the judgment is overtaken by events. The question whether or not the Kadhi's Court has jurisdiction to hear and determine the part of the amended petition that deals with the custody, care and maintenance of the children should be taken up as a preliminary issue before the Kadhi who will hear the dispute.

DATED AND DELIVERED AT NAIROBI THIS 4TH NOVEMBER 2021.

A.O. MUCHELULE

JUDGE