



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CORAM: A.K NDUNG'U, J

Civil Appeal No. 92 Of 2016

DKM.....APPELLANT

VERSUS

HMN.....RESPONDENT

(An appeal from the judgement of Hon. S.N Makila, SRM delivered on the 10th November, 2016

in Kisii Divorce Cause No. 37 of 2014)

JUDGEMENT

1. This is appeal arises from the judgement of the Senior Resident Magistrate (S.N Makila) dated 10/11/2016.
2. In the primary suit, the respondent had sued the appellant for dissolution of the marriage between the two, costs of the suit and interest.
3. After hearing the testimony of the plaintiff and the defendant, as well as that of 4 witnesses called by the defendant, the trial court in a judgement dated 10/11/2016 the court dissolved the marriage between the plaintiff and the defendant and ordered each party to bear its own costs.
4. Aggrieved by this judgement, the appellant lodged this appeal and based her appeal on the following grounds;
 1. **The trial magistrate erred in failing to appreciate that the plaintiff (now the respondent) failed to establish a prima facie case with a probability of success.**
 2. **The trial magistrate erred in failing to address her mind to the basic principles/grounds for granting divorce and sickness of a stroke, diabetes and blood pressure should not be a basis of sympathy to award divorce.**
 3. **The trial magistrate erred in law by failing to note that the plaintiff (now respondent) did not have supportive evidence as compared to the defendant (now the appellant) who had enough evidence.**
 4. **The trial magistrate failed to note that the divorce cause was presented and prosecuted in collusion with the 1st wife and her son to take all properties and exclude the defendant and other wives respectively.**
 5. **In the circumstances the trial magistrate's judgement was oppressive to the appellant as it amounted to aiding the respondent to benefit by using the divorce order to bar the appellant from getting her properties (the shop at Nyachenge market).**
 6. **The trial magistrate's judgement was bad in law and against the weight of evidence as laid down in the proceedings before her.**
5. The appeal was canvassed by way of written submissions.
6. I have had occasion to consider the appeal and the submissions on record. Of determination is whether the respondent proved his case to

the required degree and whether the trial court properly addressed itself on the question of matrimonial property.

7. This being a first appeal, I am duty bound to re-evaluate the evidence and make my own conclusions thereon bearing in mind that I never saw or heard the witnesses. This is in line with the principle set in **Selle –vs- Associated Motor Boat Co. Ltd [1968]EA 123** where the court stated;

“The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the court must 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 this respect. In particular the court is not bound necessarily to follow the trial Judge’s findings of fact if it appears either that he has clearly failed in 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.”

8. The trial court found as a fact that the appellant and the respondent had been estranged for over 3 years. This fact was confirmed by the appellant in her evidence. The court was satisfied that there was no indication that the marriage can be salvaged. The court concluded that the marriage had irretrievably broken down.

9. Notably, the respondent is not willing to remain married to the appellant. Under **Article 45(2)** of the **Constitution**, marriage is a voluntary affair. The article provides;

“Article 45 (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”

10. Inclusive of the period since the decree herein was issued; it is now over 6 years of the parties living separately. The parties have drifted so far apart that in my view, it is a futile exercise to order that their union continues.

11. I have considered the evidence adduced by witnesses called by the appellant. The running thread in that evidence is a claim over property which the witnesses believe the respondent is entitled to.

12. The law is not deficient in avenues for redress on the part of the appellant in so far as any claim to property against the respondent is concerned. The appellant is at liberty to prosecute any such claim within the Law.

13. No cross petition raising issue of matrimonial property was filed by the appellant in the trial court such that even assuming the trial court had the jurisdiction to determine the question of matrimonial property, this question was not properly before the court.

14. In the totality of the material before me, I find that this appeal has no merit. The same is dismissed. Each party to bear its own costs.

Dated, signed and delivered at Kisii this 19th day of February, 2020.

A. K. NDUNG’U

JUDGE

M/s Ondeyo holding brief S.M Sagwe, advocate for the applicant

Wanjohi holding brief C.R Sagwa, advocate for the respondent