



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 21 OF 2019

AOJ..... APPELLANT

VERSUS

BAA..... RESPONDENT

[Being an Appeal from the Judgment of the trial court in Winam SRMCC NO. 2 OF 2010,

delivered on the 17th December 2018 by Hon. B. Kasavuli]

JUDGMENT

The appeal before me arises from the decision which the learned trial magistrate rendered on the costs of the suit.

1. The trial court held that the Magistrate's Court lacked jurisdiction to entertain the Counter-claim on the issue concerning the distribution of the Matrimonial Property.

2. Therefore, the aspect of the Counter-claim;

“..... seeking for orders on the distribution or otherwise of the matrimonial property is dismissed with costs to the plaintiff.”

3. Thereafter, the trial court pronounced itself thus;

“In conclusion and for avoidance of doubt, both the plaintiff's case and the counter- claim as far as it relates to the dissolution of the marriage between the plaintiff and the defendant are allowed, with each party bearing his/her own costs.”

4. The Defendant felt aggrieved with the award of costs to the Plaintiff, considering that the Plaintiff never defended the counter-claim.

5. As the record of the proceedings shows, the Plaintiff's claim was essentially for the dissolution of their marriage, and for the custody of the children who were the products of her union with the Defendant.

6. In his Defence, the Appellant herein denied the allegations of cruelty which had been leveled against him. He asked the court to dismiss the Plaintiff's case.

7. Over and above the Defence, the Appellant lodged a counter-claim against the Respondent herein. In the counter-claim, he sought the dissolution of the marriage. He also asked for the custody of their children.

8. Finally, the Appellant sought several reliefs, touching upon their matrimonial properties, including land and vehicles.

9. During the trial, the Plaintiff did not produce any evidence at all.

10. Meanwhile, the Defendant gave evidence, which touched on the issue of dissolution of the marriage, as well as the issue concerning the reliefs touching on the matrimonial property.

11. Both parties filed their respective submissions. On her part, the Plaintiff stated that;

“From the pleadings on record, the issue that falls for determination is whether or not the grounds for divorce have been

proved.”

12. Her conclusion was as follows;

“What is before this Honourable Court is a marriage by name and paper alone, a shell of its former self that has lost hope of being salvaged. It is irredeemable. It is nothing but a sham. The differences are irreconcilable and the marriage has irretrievably broken down. Each party wants to head to the opposite direction with the intention of not ever meeting again. An order of dissolution of marriage ought to be granted at this juncture owing to the unique circumstances of the case.”

13. As far as the Plaintiff was concerned, the only issue for determination by the court was about the dissolution of the marriage.

14. On his part, the Defendant reiterated his prayer, that the marriage between him and the Plaintiff be dissolved. He submitted that the marriage had broken down irretrievably.

15. Thereafter, the Defendant made the following submission;

“Your Honor, the Respondent and the Petitioner also acquired other assorted matrimonial properties, and prays that the same be sold and the proceeds thereof shared equally between them or be divided equally between the parties.”

16. Having given due consideration to the evidence on record, together with the submissions, the learned trial magistrate concluded that the Magistrates Court lacked jurisdiction to entertain the counter-claim;

“..... seeking for orders on the distribution or otherwise of the matrimonial property”

17. It was for that reason that the trial court dismissed that aspect of the counter-claim, with costs to the Plaintiff.

18. When canvassing the appeal before me, Mr. Mwamu Advocate submitted that the Plaintiff ought not to have been awarded costs, as she did not defend the counter-claim.

19. Secondly, he submitted that because this was a family matter, the Defendant should never have been condemned.

20. In answer to the appeal, Mr. Odumbe Advocate submitted that costs must follow the event. But he also added that the learned trial magistrate had discretion to award costs depending on the circumstances of the case.

21. He noted that it was because the Defendant decided to prosecute the issue concerning matrimonial property, (which was then dismissed) that the trial court awarded costs to the Plaintiff.

22. Assuming that the trial court awarded costs to the Plaintiff because the Defendant failed in one aspect of his claim, and based on the Plaintiff's contention that costs must follow the event, it would have been expected that the Defendant ought to have been awarded the costs of the Plaintiff's suit, when it was dismissed.

23. I so hold because justice cuts both sides, and is also balanced between the respective sides.

24. As regards the Plaintiff's claim, the same was never prosecuted. Therefore, on the grounds that no evidence was led by the Plaintiff, there would be no foundation of facts or of law, upon which the claim could be allowed.

25. As the Plaintiff stated in her final submissions before the trial court, the only issue which she wished the court to determine was about the dissolution of marriage. The Plaintiff did not make any submissions on the issue of matrimonial properties.

26. Therefore, the dismissal of the claim relating to matrimonial properties was not attributable to any contribution or effort on the part of the Plaintiff. Indeed the trial court noted that;

“The plaintiff's advocate never submitted on this issue in his filed submissions.....”

27. In those circumstances, I find that there was no justification in awarding costs to a party who never made any contribution to help in determining the issue of matrimonial properties.

28. Accordingly, the appeal is allowed. I thus set aside the award of costs to the Plaintiff, and substitute it with an order that each party will pay his or her own costs on the aspect of matrimonial properties.

29. Finally, the Respondent shall pay to the Appellant the costs of the appeal.

DATED, SIGNED and DELIVERED at KISUMU This 6th day of May 2020

FRED A. OCHIENG

JUDGE