REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL APPEAL NO. 81 OF 2016

TIE.....APPELLANT

VERSUS

BKM.....RESPONDENT

(*Being an Appeal from the judgment and/or decision of Hon. Malesi, Senior Resident Magistrate dated and delivered on 23rd September 2016***)**

JUDGMENT

1. This appeal stems from the judgment of the learned magistrate aforementioned and which the appellant herein was dissatisfied with, prompting the filing of a memorandum of appeal herein on 21st February 2017, where the appellant sought that the said decision be set aside in its entirety and be substituted by an order dissolving the marriage between the appellant and the respondent.

2. The appellant has raised various grounds: -

a) That the learned magistrate erred in both law and fact by arriving at conclusions that were perverse, based on no evidence, based on misapprehension of the evidence on record and/or unsupported by the established facts;

b) That the learned magistrate erred in both law and fact by overstepping his judicial mandate in the matrimonial cause by:

(i) proceeding *mero motu* to adjudicate over a property-related issue, namely the occupancy of a house built by the appellant herein, when the same had neither been pleaded nor fully conversed; and

(ii) That purporting to render a conclusive decision that sought to grant a proprietary remedy to the respondent when such remedy had not been formally prayed for as is required by law;

(c) That the learned magistrate erred in law by flouting the principles of judicial precedent and *stare decisis* and by generally acting on wrong principles in making his findings and final determination in the matrimonial cause;

(d) That the learned magistrate erred in both law and fact by not fully addressing his mind to the applicable statute and by disregarding the undisputed and uncontroverted evidence and/or evidentiary materials placed before him in determining the appellant's petition thereby rendering a perverse judgment; and

(e) That the learned magistrate erred in law by rendering/delivering a judgment in the matrimonial cause that totally failed to comply with the preemptory provisions under Order 21 rule 4 of the Civil Procedure Rules, 2010.

3. The appellant had filed a petition in the Chief Magistrate's Court at Kakamega vide Matrimonial Cause No. 18 of 2015, seeking a dissolution of the marriage between him and the respondent. The respondent filed a reply to the petition seeking that the appellant's petition be dismissed with costs. In a judgement delivered on 23rd September 2016, the learned magistrate stated that the appellant's prayer for dissolution of the marriage to the respondent had failed and that the respondent shall take occupancy of the matrimonial home built for her by the appellant. It is this judgement that forms the basis of the instant appeal.

4. As a first appellate court, I have a duty to examine matters of both law and facts and subject the whole of the evidence to afresh and exhaustive scrutiny, drawing a conclusion from that analysis bearing in mind that I did not have an opportunity to hear the witnesses first hand and test the veracity of their evidence and demeanor. This is captured by Section 78 of the Civil Procedure Act, Cap 21 Laws of Kenya,

which espouses the role of a first appellate court which is to'…re-evaluate, reassess and reanalyze the extracts of the record and draw its own conclusions.' This was buttressed by the Court of Appeal in *Peter M. Kariuki v Attorney General* [2014] eKLR where court stated that -

> *'We have also, as we are duty bound to do as a first appellate court, reconsider the evidence adduced before the trial court and revaluated it to draw our own independent conclusions and to satisfy ourselves that the conclusions reached by the trial judge are consistent with the evidence. See Ngui vs. Republic (1984) KLR 729 and Susan Munyi vs. Keshar Shiani, Civil Appeal No. 38 of 2002 (unreported).'*

5. In *Ndung'u Dennis vs. Ann Wangari Ndirangu & Another* (2018) eKLR, the court quoted *Selle & another vs. Associated Motor Boat Co Limited & others* (1968) EA 123 in stating the duty of the court in a first appeal as follows: -

> *'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 principles 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 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, 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 demeanour of a witness is inconsistent with the evidence in the case generally (Abdul Hammed Saif vs. Ali Mohamed Sholan (1955), 22 EACA 270).'*

6. The issues that emerge from the appeal for determination are -

> a) whether or not the grounds cited for divorce were proved by the appellant; and
>
> b) whether the learned trial magistrate adjudicated on an issue that had neither been pleaded nor canvassed and granted a remedy not prayed for.

7. The parties herein were in agreement that they were married under Luhya Customary Law having lived together since December 1997 and formalizing the same through dowry payment in the year 2007-2008 or thereabouts. In his petition filed in the lower court, the appellant cited the grounds of cruelty, depravity and the marriage having irretrievably broken down.

8. Section 69(1) of the Marriage Act, 2014 provides for the grounds for the dissolution of a marriage under customary law, where the said section provides as follows

> *'Grounds for divorce of Customary marriages*
>
> *(1) A Party to a marriage celebrated under Part V may petition the court for the dissolution of the marriage on the ground of—*
>
> *(a)adultery;*
>
> *(b)cruelty;*
>
> *(c)desertion;*
>
> *(d)exceptional depravity;*
>
> *(e) irretrievable breakdown of the marriage; or*
>
> *(f)any valid ground under the customary law of the petitioner.'*

9. In the case of *KAS vs. MMK* [2016] eKLR, the court said as follows about cruelty that: -

> *'Cruelty is defined by the Black's Law Dictionary 8th ed as "the intentional and malicious infliction of mental and physical suffering on a living creature. The dictionary points out that physical cruelty involves actual violence. It further defines "mental cruelty" the following terms: -*
>
> *"As a ground for divorce, one spouse's course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse."*
>
> *Justice GBM Kariuki SC (as he then was) in WMM vs. BML [2012] eKLR was of the view that: -*
>
> *"Courts have avoided formulation of an exhaustive definition of cruelty. Acts of cruelty, like acts of negligence in the law of torts, are said to be infinitely variable."*
>
> *Justice GBM Kariuki went on to state that "Conduct that may undoubtedly be cruel in one case may clearly not be cruel in another*

on account of differing circumstances." The learned judge stood guided by the finding by Sir Charles Newbold in Colarossi vs. Colagrossi [1965] E.A 129 where it was held that: -

"No comprehensive definition of cruelty has ever been accepted as satisfactory – much depends on the habits and circumstances of the matrimonial life of the husband and wife, their characters, the normal mode of conduct one to the other and the knowledge which each has of the true intention and feelings of the other. An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree."

Judge Kariuki referred to the House of Lords findings in Gollins vs. Gollins [1963] 2 All ER 966 HL [1964] AC 644 and Williams vs. Williams [1963] 2 All ER 944 HC [1964] AC 694 which established that the balance in claims of cruelty as a ground for dissolution of the marriage was in favour of giving relief to a complainant in a situation which has become intolerable. Such that if the spouse causes injure to the complainant's health or is likely to do so, "it will amount to cruelty if it is grave and weighty and is such that the Petitioner cannot reasonably be expected to put up with it or to tolerate it."

It was further held that "A reasonable apprehension that injury will result if the conduct persists will suffice for the simple reason that the court will not wait for a spouse to be actually injured before affording such spouse relief."

10. In *CBG vs. JLW* [2017] eKLR, it was said that: -

'This second issue revolves around African Customary Law and ought to be based on cogent evidence and not mere presupposition, inferences, speculations or assumptions. Black's Law Dictionary Ninth Edition at page 443, defines Customary Law as law consisting of customs that are accepted as legal requirements or obligatory rules of conduct; practices and beliefs that are so vital and intrinsic a part of a social and economic system that they are treated as if they were laws.

21. Makhandia J (as he then was), in the case of Nyariba Nyankomba vs. Mary Bonareri Munge (2010) eKLR, in which a party sought refuge in customary law stated that: -

"Time and again it has been stated that in cases resting purely on customary law it is absolutely necessary that experts versed in the customs be summoned to testify so as to assist the court reach a fair verdict since the court itself is not well versed in those customs and traditions. In the absence of such expert testimony, there can only be one conclusion, such claims remain unproved."

22. In the earlier case of Kimani vs. Gikanga [1965] EA 735 at pg 739 Duffus JA pronounced himself as follows on customary law:

"To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case."'

11. In the case of *JMM vs. JMN* [2016] eKLR, it was stated that:

'In Civil Appeal No. 5 of 2015 JSM vs. ENB MAKHANDIA, OUKO & M'INOTI, JJ.A., in defining what cruelty and on a marriage that has irretrievably broken down held as follows:

"There is consistent case law on what constitutes cruelty as a matrimonial offence. In Meme vs. Meme [1976-80] KLR 17, it was held that to establish cruelty, the petitioner must show to the satisfaction of the court:

(i)Misconduct of a grave and weighty nature;

(ii)Real injury to the complainant's health or reasonable apprehension of such injury;

(iii)That the injury was caused by misconduct on the part of the respondent; and

(iv)That on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.

In Mulhouse vs. Mulhouse, [1964] 2 All ER 50, which Chesoni, J. (as he then was) cited with approval in Meme vs. Meme (supra), Sir Jocelyn Simon P. while considering the gravity and weight of the misconduct that would constitute cruelty, stated as follows: [M] is conduct must be proved of a grave and weighty nature. It must be more than mere trivialities. In many marriages there are occasional outbursts of temper, occasional use of strong language, occasional offended silences. These are not sufficient to amount to cruelty in ordinary circumstances, though if carried to a point, which threatens the health of the other spouse, the law will not hesitate to give relief."

Thus conduct, which is part of the "reasonable wear and tear" of a marriage, does not constitute cruelty. Regarding the nature of

injury to the petitioner's health, real or apprehended, that is necessary to prove cruelty, his Lordship stated:

"[I] it must be proved that there is a real injury to the health of the complainant or reasonable apprehension of such injury. Of course, if there is violence between the parties the court will not stop to inquire whether there is a general injury to health; but in the absence of acts of violence which themselves cause or threaten injury, the law requires that there should be proved a real impairment of health or a reasonable apprehension of it."

And in Nunzio Colarossi vs. Michelina Colarossi [1965] EA 129, Newbold, JA., speaking for the former Court of Appeal for Eastern Africa stated thus:

"An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree."

Chesoni J. further stated in Meme vs. Meme, (supra), that the burden lies on the petitioner to establish injury or reasonable apprehension of injury to life, limb or health to herself, or himself before the respondent's conduct can be described as cruel.

As regards the standard of proof required to satisfy the court that the matrimonial offence of cruelty has been proved, this Court, in Kamweru vs. Kamweru (2000) eKLR, stated as follows:

"Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established."

The Court of Appeal went further to hold that -

"That there is no comprehensive definition of cruelty. Each petition founded on cruelty must be decided on its own facts because whether cruelty is proved or not is a question of fact and degree. The conduct complained of must be looked at holistically and in the light of the parties themselves. Therefore, it is not very helpful to rely on facts of previously decided cases as precedent.

As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the Marriage Act, 2014 and was not recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties.

...It is worth noting that although adultery, cruelty and desertion are distinct and separate grounds for divorce, those matrimonial offences also constitute evidence of irretrievable breakdown of a marriage…

What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down."'

12. In the case of *EAO vs. SAA* [2018] eKLR, it was stated that:

'Traditionally, there has been three grounds upon which a marriage would be dissolved. They were adultery, desertion and cruelty. The Act, which repealed seven Acts of Parliament on family law introduced two more grounds for dissolution of a Christian marriage, a civil marriage and a customary marriage under Sections 65, 66 and 69 respectively. The two grounds are 'exceptional depravity by either party' and 'if the marriage has irretrievable broken down'. On the rationale behind the two further grounds, this is what I stated in Meru High Court Civil Appeal No. 29 of 2015 Zachary Keberia Nabea vs. Janet Karimi Zachary (2017) eKLR: -

"35. As the three grounds in support of the Petition have failed, I would have, without any hesitation, dismissed this appeal. However, there is need to look at the Act and in view of the other grounds of divorce which were introduced on enactment. Section 65 of the Act introduced two more grounds of divorce. They are exceptional depravity by either party and if the marriage has irretrievable broken down. I believe the two further grounds were introduced as to take care of the instances where parties would not be able to remain married but fall short of the proving the traditional grounds of adultery, cruelty and desertion whose standard of proof remain high."

11. To me the two further grounds echo the words of Madan, J. (as he then was) in N vs. N (2008)1 KLR 16 when the Learned Judge stated that: -

"If two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to the intolerable, or unreasonable to

continue to bear them, they are entitled to be released from their matrimonial union...'"

13. In his petition, the appellant cited various particulars of cruelty where he says, among others, that the respondent had been disrespectful, rude, arrogant, scornful, abusive, intimidating, domineering together with other acts that have apparently caused psychological and mental torture to the appellant. The appellant further stated that the respondent laced the meal and or drinks with concoctions that later made the appellant suffer from kidney problems and ailments. On depravity, the appellant stated, among others, that the respondent failed to be submissive to him as was prescribed under Luhya Customary Law and inviting strangers into their matrimonial home to perform cult-like activities at odd hours. On the marriage having irretrievably broken down, the appellant stated that it has been over two years since he shared the matrimonial bed with the respondent and there is absolutely no likelihood of the two ever reconciling or living together. He added that the respondent neglected him. He added that traditional reconciliatory measures to remedy the breakdown have been undertaken to no avail. In his testimony on cross-examination, he stated that he disagreed with the respondent and drove her out of their matrimonial home. He added that they disagreed with the respondent in 2008 and it got worse in 2012. He admitted to meeting one MW in 2012 and that she visit and slept in the new house the appellant built. The appellant added that he had children with the said MW.

14. The appellant's witness, one Tom Isiye, testifying as PW2, stated that there were reconciliation efforts led by one Fred Ndumbi, now deceased, and who was PW2's brother. PW2 stated that the reconciliation had broken down. According to PW2, the appellant was married to MW for close to 5 years.

15. On her part, the respondent denied the allegations of cruelty and depravity and instead stated that it was the appellant who had been cruel by chasing her away and locking her out of their matrimonial home, threatening her via SMS messages to vacate their matrimonial home, which she eventually did for fear of her life. The respondent stated that the appellant had made no attempts to have their marriage reconciled despite the respondent's numerous efforts, together with that of the respondent's family, to have their issues amicably settled so that they could live together.

16. One of the respondent's witnesses, RNI, mother to the appellant, denied that the respondent was cruel and repulsive. She admitted that the respondent and appellant had not been living together for two years since 2013, and thus it was impossible that the appellant ate the respondent's food and developed kidney complications in July 2014 as he claimed. She further admitted that the appellant made no attempts or efforts to peaceful reconciliation with the respondent and that such attempts were rebuffed by the appellant. In her testimony, she stated that 'Later BKM came to complain to me that they were no longer living with TIE as husband and wife but brother and sister.' She added that the appellant had abandoned the matrimonial bed and left the matrimonial home. On cross-examination, she stated that she could not do anything to reconcile the appellant and the respondent. MMM, testified as the respondent's third witness and he said that the appellant was deliberately denousing his wife and that the appellant had locked the respondent out of their matrimonial home.

17. The respondent testified that the problems in the marriage started when the appellant married MW in 2012. She added that the appellant stopped coming to the matrimonial home and even locked the doors of the home thereafter chasing her away from their home. The respondent testified that the appellant sought a separation because he had gotten another wife. On cross-examination, the respondent admitted that under Luhya Customary law, a man could marry many wives; was not supposed to be disrespectful to her husband; if the husband chased the wife away, the society could not say otherwise; and Luhya customs did not force people to stay as husband and wife. The respondent admitted that she had not slept with the appellant since 2013 and that she was in court because her relationship with the appellant had been deteriorating. She concluded by stating that she had never sat in any forum to reconcile their differences with the appellant.

18. From the authorities above and evidence on record, the marriage between the appellant and the respondent has irretrievably broken down. The respondent in her own testimony acknowledged the fact of the deterioration of the marriage and she did not indicate that there were signs of reconciliation. All the witnesses who testified seemed to conclude that attempts at reconciliation had not been fruitful. I agree with them and feel that any further attempt to reconcile the appellant and the deceased would not be helpful. The appellant clearly does not want to be with the respondent because of his association with the said MW. He has abandoned the matrimonial home and has not been intimate or been with the respondent for close to 5 years now at least since 2013. The respondent's attempt to somehow salvage the sinking marriage is but clutching at straws because like *the Titanic*, the marriage is going down.

19. However, I agree with the learned magistrate that the ground of cruelty on the part of the respondent has not been proved. There is nothing to suggest that the appellant was poisoned by the respondent and that he had any kidney ailment as a result of such poisoning. There was no evidence to indicate that failure to be submissive constitute depravity according to Luhya Customary Law. There is nothing in evidence to indicate that the respondent was disrespectful, rude, arrogant, scornful, abusive, intimidating, domineering together with other acts that could have apparently caused psychological and mental torture to the appellant. None of the witnesses suggested these character traits that could be attributed to the respondent. On the flipside, it is the appellant who was cruel to the respondent for chasing her away from their matrimonial home after starting a relationship with MW.

20. It was the appellant's submission that the issue as to who is entitled to occupy the matrimonial house was neither pleaded nor canvassed by the appellant and that he never delved deeper into the issue of occupancy of that house. He stated that nowhere in his pleadings or testimony did he mention that he had built a house for the respondent. He added that it was not known whether the house in question was built before or after the parties had contracted their marriage. The respondent on the other hand submitted that the issue was clearly stated in her statement dated 10th June 2016 that was filed on the lower court on 14th June 2016 at paragraph 13 where the respondent states:

> 'I still love the Petitioner and have no bad blood with him staying with his second wife and I pray that the petitioner allows me to stay in our matrimonial home together with my issues and the Petitioner stay with his second wife in the other house.'

21. The respondent submitted that based on the above, the issue of occupancy was not strange and that it flowed from the pleadings and her testimony and her witnesses. She added that the issue of occupancy of the matrimonial home was alive to both parties and the court during the trial and the course of the hearing making the trial magistrate duty bound to make a determination on the same.

22. The appellant cited *Caltex Oil (Kenya) Limited vs. Rono Limited* [2016] eKLR where the Court of Appeal held:

'This appeal raises two important issues. The first relates to the jurisdiction of this Court as to whether the court has powers to grant an order not specifically pleaded in the plaint, pleadings are a shield and a sword for both sides. They have the potential of informing each party what they expect in the trial before the court. If a party wishes the court to determine or grant a prayer it must be specifically pleaded and proved. The pleadings are a precursor for a party to lead evidence in satisfaction of the prayers he seeks to be granted in his favour. Where no such prayer is pleaded in a specific and somewhat particularized manner, the party is not entitled to benefit and the court has no jurisdiction to whimsically grant those orders…In the plaint, we have noted that the respondent never claimed to have suffered any damage as a result of the appellant's breach. In the circumstances, having not made a claim for general damages, there cannot be a basis for awarding the same. The court has no inherent jurisdiction to award damages whether separate or in addition to specific performance where no such plea was made in its pleadings. Damages cannot be plucked from the air simply because a party alleges to have suffered an injury or loss. Damages must be pleaded so that the other party can reply through the defence. That is not what happened in this matter. It was not right for the trial court to purport to engage in an exercise in futility. No matter how many times it is canvassed before court, the respondent is not entitled to damages and the court has no basis to grant the same. To find otherwise would amount to the court exercising a power it does not have and rendering decisions without any parameters or borders which would lead to total disorder and abuse of the judicial process. It would also be a recipe for the formation of public anger against the judiciary.'

23. Order 2 rule 4 of the *Civil Procedure Rules, 2010* states as follows: -

'(1) A party shall in any pleading subsequent to a plaint plead specifically any matter, for example performance, release, payment, fraud, inevitable accident, act of God, any relevant Statute of limitation or any fact showing illegality—

(a)which he alleges makes any claim or defence of the opposite party not maintainable;

(b)which, if not specifically pleaded, might take the opposite party by surprise; or

(c)which raises issues of fact not arising out of the preceding pleading.

(2) Without prejudice to sub-rule (1), a defendant to an action for the recovery of land shall plead specifically every ground of defence on which he relies, and a plea that he is in possession of the land by himself or his tenant shall not be sufficient. (3) In this rule "land" includes land covered with water, all things growing on land, and buildings and other things permanently affixed to land.'

24. In the case of *Mohamed Abdikadir Mohammed vs. Sammy Kagiri & another* [2016] eKLR, it was held that: -

'…Thus, the trial magistrate erred in his decision to dismiss the suit on the basis of un-pleaded issue-limitation. This is not a case where the thinking in the case of Odd Jobs vs. Mubia (1970) EA 476 would apply. The exception to the general rule which allows the court to determine a case on an issue that is not pleaded, will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. See the case of Joseph Amisi Omukanda vs. Independent Elections & Boundaries Commission & 2 Others [2014] eKLR, where the Court of Appeal, held as follows:

"There is however a well-known exception to the general rule when the court can determine an issue even though it was not pleaded. This applies where the parties have raised an un-pleaded issue and left it for the decision of the court. The exception will apply where the issue is placed before the court, the parties address the issue and no party is taken by surprise or otherwise made to suffer any prejudice. (See Odd Jobs vs. Mubia (1970) EA 476)."'

25. Section 2 of the Civil Procedure Act defines "pleading" as including "…a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counterclaim of a defendant."

26. In the case of *Vijay Kumar Davalji Kanji Gohil vs. Suresh Mohanlal Fatania & 8 others* [2006] eKLR, it was said that:

'Pleadings are those that originate the action or the claim and those that respond to such a claim. The Black's Law Dictionary defines pleadings as:

"The formal allegations by the parties to a law suit of their respective claims and defences with the intended purpose of being to provide notice of what is to be expected at trial."'

In the case of *Eurobank Limited (In Liquidation) vs. Riveton Investments Limited & 2 others* [2007] eKLR, it was stated that:

'Although the said definition is inclusive rather exclusive, I would agree with the advocate for the 2nd and 3rd defendants that affidavits do not fall within the category of documents which constitute pleadings. Affidavits are constituted of evidentiary statements, made under oath. Whilst pleadings constitute no more than allegations or assertions made by either a plaintiff or a defendant, or by a party to litigation; in which such party is laying out, in broad terms, its case. Thus a Plaint would be a pleading, as would a Petition or an Originating Summons; a Defence; or a Reply to Defence.'

27. In the instant case, pleadings in the trial court were the appellant's petition and respondents reply to the petition. Witness statements are not pleadings and cannot be categorized as such. In the foregoing, I find that the issue as to whether the respondent should occupy the

matrimonial home was neither pleaded by the appellant nor the respondent. The parties never raised the un-pleaded issue so that it was left to the trial court for determination. The proclamation by the learned magistrate clearly caught the appellant by surprise and prejudiced him.

28. Having gone through the record of appeal together with the referenced authorities, I find that the marriage between the appellant and the respondent has clearly and irretrievably broken down. There is nothing or little to salvage in that marriage. The appellant has made it clear that he wants nothing to do with the respondent and is much more interested in staying with MW. The respondent seems to have given up on the marriage as well and is only keen on her well-being and that of her children with the appellant. Reconciliation has hit rock bottom and there is no chance of the parties herein being brought back together again. I do not see how the parties are likely to cope up as a married couple even when compelled to remain in such a relationship.

29. I find that the proclamation by the learned magistrate in his judgment on the respondent occupying the matrimonial home was erroneous as the issue was never pleaded by the parties in their pleadings. The respondent ought to have specifically pleaded the issue in her reply to the petition so that the appellant could prepare his answer on the issue before the hearing of the case.

30. The issue of the occupancy of the matrimonial home, together with other issues to do with matrimonial property, and maintenance and upkeep of the children, can be canvassed and determined in a different suit either before this court or the Magistrate's Court depending on pecuniary jurisdiction.

31. In the end I shall make the following final orders:

(a)That the appeal herein is merited and is hereby allowed and that the order of the trial court dismissing the petition is hereby accordingly set-aside;

(b)That the marriage between the appellant and the respondent herein is hereby dissolved and a *decree nisi* be issued which shall be made absolute after thirty days;

(c) That each party to bear their own costs; and

(d) That any party aggrieved by the outcome of this appeal has a right to challenge the same on appeal to the Court of Appeal.

DATED DELIVERED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 14th DAY OF June 2019

W MUSYOKA

JUDGE