



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 49 OF 2016

MRK.....APPELLANT

VERSUS

MKM.....RESPONDENT

(Being an Appeal from the Ruling of Hon T.Obutu (PM) in Kisumu CMCC Divorce Cause No.36 of 2014 delivered on 1st July, 2016)

JUDGMENT

1. **MRK (hereinafter referred to as respondent** sued **MKM (hereinafter referred to as appellant)** in the lower court for dissolution of their marriage, custody of the issues of the marriage, alimony and distribution of all assets on a 50:50% and costs of the petition.
2. Appellant filed a statement of Defence, denied the petitioner's claim and urged the court to dismiss it with costs.
3. The court record shows that on 25.8.15, appellant and his advocate did not attend court. On the ground that the plaintiff's case had already been closed, the court set down the case for judgment which was delivered on 8.10.15 in the absence of the appellant and his advocate.
4. The record also shows that by an application dated 28.1.16, appellant sought to set aside the *ex parte* judgment and in a ruling delivered 1.7.16, that application was dismissed with costs.

The Appeal

5. The Appellant being dissatisfied with the lower court's decision preferred this appeal and filed the Memorandum of Appeal dated 9th July 2012 which set out 3 grounds wit:-

1. **The Learned trial Magistrate erred in law and in failing to evaluate the evidence as adduced by the appellant in the Notice of Motion dated 28.1.16**
2. **The Learned trial Magistrate misdirected himself in law and in fact in breaching the principles of natural justice and the fact that appellant has been denied a chance to be heard**
3. **The Learned trial Magistrate misdirected himself on the assessment of affidavit evidence adduced before him**

Parties' Submissions

Appellant's Submissions

6. It was submitted for the appellant that his right as enshrined under Article 50 of the Constitution had been breached by the denial to give him a chance to be heard. It was further submitted that giving the appellant that his failure and that of his counsel to attend court on the hearing date was occasioned by the fact that the cause was not diarized. It was additionally submitted that the dispute herein relates to a husband and wife and that giving the appellant a chance to present his case would not occasion the respondent any prejudice. In support of the appeal, appellant placed reliance on **P.K v D.A.A [2013] eKLR** where the court set aside an *ex parte* judgment and allowed the respondent to be heard.

Respondent's Submissions

7. It was submitted for the respondent that the appellant did not attend court on the date that the defence case was closed and that his conduct of not taking the case with the seriousness it deserved was visited upon him by the trial court and should not be interfered with.

Analysis and Determination

8. I have carefully considered the appeal in the light of the grounds of appeal, the record of appeal and submissions on behalf of both parties. In support of his application dated 28.1.16 for setting aside of the *ex parte* judgment, petitioner averred that the court had on 2.6.15 set aside the *ex parte* proceedings and directed that the case be heard on 27.7.15. He further avers that the case did not proceed on 27.7.15 because the respondent's advocate was not available. According to him, the matter was fixed for hearing on 27.7.15 but when he came to court the case was not listed and it was not until 4.1.16 that he learnt that the case had proceeded *ex parte* on 25.8.15 and judgment against him delivered on 8.10.15.

9. Parties are in agreement that the *ex parte* proceedings of 17.3.15 in which the respondent testified were set aside by consent on 2.6.15 and the court directed that the case be heard on merit. When appellant and his advocate did not attend court on 25.8.15, the court set down the case for judgment which was delivered on 8.10.15 in the absence of the appellant and his advocate.

10. I have considered the provisions of Order 12 which provides as follows:

2. If on the day fixed for hearing, after the suit has been called on or hearing outside the court, only the plaintiff attends, if the court is attended satisfied—

(a) that notice of hearing was duly served, it may proceed ex parte;

11. The court after satisfying itself that appellant had been duly served to attend court on 25.8.15 and had failed to do so was under the provisions of Order 12 rule 2 under an obligation to proceed to take the evidence of the respondent and not to revert to the previous proceedings that had been set aside.

12. Having said that, I find that the proceedings of 25.8.15 and the final judgment delivered on 8.10.15 were irregular. This is a matrimonial matter that from the pleadings raises substantial issues that cannot be wished away. I therefore find that the best interest of the parties and the interest of justice will be served if this appeal is allowed and the appellant is allowed to ventilate his case.

Orders

13. In the final analysis, this court makes the following orders:

- 1. The appeal is allowed and the *ex parte* proceedings and the final judgment and subsequent orders and/or decree issued therefrom are all set aside**
- 2. This file shall revert to Kisumu Chief Magistrate's Court for hearing and disposal by a magistrate other than the trial magistrate**
- 3. This being a matrimonial cause, each party shall bear its own costs**

DATED AND DELIVERED THIS 8TH DAY OF FEBRUARY 2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix & Caroline

Appellant - Mr Ariho

Respondent - Ms Wafula/Masoma