



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

CIVIL APPEAL 7 OF 2016

S Y T.....APPELLANT

VERSUS

T A.....RESPONDENT

JUDGEMENT

(An Appeal from the Judgement of Hon. Sheikh Abdulla Mwidani Kadhi delivered on 18.2.16 in Civil Suit No. 125 of 2014)

1. S Y T the Appellant and T A the Respondent were married in Mwingi Kitui on 6.9.89 under Islamic Law. They were blessed with 2 children who are both adults. It would appear that the marriage hit some headwinds for on 19.5.14 the Respondent filed Kadhi's Court Civil Case No. 125 of 2014 by way of Complaint dated 12.5.14 seeking dissolution of the marriage. The Respondent accused the Appellant of cruelty and infidelity and marrying a woman who was HIV positive which led to the irretrievable break down of the marriage. The Appellant on his part accused the Respondent of infidelity and in his counterclaim demanded that the Respondent return household goods worth 600,000/= taken from the matrimonial home, the Appellants personal documents and property ownership documents for a house in Mikindani and land in Samburu, the sum of Kshs. 800,000/= being security for a loan taken by the Respondent. He also prayed that the Respondent be ordered to account for rent collected from a shop in the matrimonial home from May 2014. He prayed that the marriage be dissolved only upon his aforesaid demands being met. His other prayer was that the Respondent be restrained from disposing of the properties and household goods.

2. In his judgment delivered on 18.2.16, the Hon. Kadhi dissolved the marriage between the parties. As regards the counterclaim, the Hon. Kadhi found that the matter before him was not about matrimonial property but dissolution of marriage and further found that the Appellant failed to support his claim by failing to argue the same.

3. Being aggrieved by the Hon. Kadhi's decision the Appellant preferred the Appeal herein seeking that the orders of the Hon. Kadhi be set aside, varied or reviewed. The grounds of Appeal in summary are the Hon. Kadhi erred in law and fact in he:

- 1) Found that the issue for consideration was purely divorce and failed to consider the issues raised by the Appellant regarding property the two being inseparable.***
- 2) Delivered judgment without hearing the Appellant thus denying him the constitutional right to a fair hearing.***
- 3) Failed to consider the doctrines of Khul and Sulhu and their application in context of the issue before the Court.***
- 4) Allowing the proceedings to proceed in open Court yet there were allegations that the Appellant was HIV positive thus violating his fundamental rights.***

4. Directions were given that the Appeal would be disposed of by way of written submissions and parties duly filed their respective submissions. The Respondent did not however file submissions nor did she nor her advocate attend Court for highlighting of submissions. The Court was satisfied that the mention notice for highlighting of submissions was duly served upon Mr. Munzyu, advocate for the Respondent. The submissions were highlighted before me with the Hon. Chief Kadhi sitting as assessor as required by Section 65(1)(c) of the Civil Procedure Act which provides:

“(1) Except where otherwise expressly provided by this Act, and subject to such provision as to the furnishing of security as may be prescribed, an appeal shall lie to the High Court...

(c) from a decree or part of a decree of a Kadhi's Court, and on such an appeal the Chief Kadhi or two other Kadhis shall sit as assessor or assessors.”

5. I have considered the record of appeal, the submissions as well as the authorities cited to buttress the Appellant's position.

6. The Appellant submits that he filed an interlocutory application dated 1.12.16 seeking injunctive orders against the Respondent in respect of the matrimonial home. The Appellant contends that he sacrificed a lot to put up the matrimonial home but his right to enjoy the same has been curtailed as the Respondent is occupying the same and collecting rent. Citing several authorities to support the grant of an injunction, the Appellant submitted that the application ought to be granted with costs. It is difficult to follow the Appellant's submissions in this regard. The record clearly shows that on 12.7.17, Mr. Gitonga holding brief for Mr. Ondindiko learned counsel for the Appellant withdrew the said application. He stated:

"We wish to withdraw the Application dated 1.12.16 and go straight to the appeal. We pray for a date. We can file submissions within 14 days."

Mr. Munzyu learned counsel for the Respondent stated:

"I have no objection"

The Court then stated:

"The Application dated 1.12.16 is hereby marked as withdrawn."

7. Even if the Application had not been withdrawn, the same being an interlocutory application cannot be heard at the stage of the main appeal. The submissions in this regard are therefore misplaced.

8. As regards the ground that the Appellant was not given an opportunity to be heard, I have looked at the record which shows the contrary. When the Respondent testified and closed her case on 4.8.15, the Appellant's advocate stated that his witness was not in Court and asked for another date. On 9.9.15 Mr. Khisa counsel for the Appellant did not attend Court. The Hon. Kadhi gave 22.9.15 as the final date and in default of the Appellant's attendance, a judgment date would be given. It would appear that the matter did not proceed on 22.9.15 and on 18.11.15 the matter was fixed for hearing on 9.12.15 and notice was to issue to the Appellant. On that date, a Mr. Mukhaya informed the Court that the Appellant's advocate was not served and requested another hearing date. The Court fixed the hearing for 27.1.16 however, neither the Appellant nor his counsel was in Court. The Court said it had no option but to fix a judgment date which it did and judgment was delivered on 18.2.16. From the foregoing it is clear that the Hon. Kadhi gave the Appellant ample opportunity to attend Court to defend the Plaintiff and to argue his counterclaim. I am satisfied that the Hon. Kadhi accorded the Appellant a fair hearing and his rights in this respect were not violated as alleged. The Appellant has only himself to blame for failing to attend Court.

9. The Appellant submitted that the Hon. Kadhi failed to have the Respondent take an oath of purification given that the Appellant had accused her of adultery. This was irregular and unprocedural and shut out the Appellant from prosecuting his defence to his satisfaction and resulting in the ends of justice not being met. As stated earlier, the Appellant did not prosecute his counterclaim in which he accused the Respondent of adultery. As such, he cannot be heard to say he was locked out from prosecuting the same. Accordingly I find that this ground fails.

10. The Appellant states that the Hon. Kadhi erred in his finding that the issue for consideration was purely divorce and failed to consider the issues raised by the Appellant regarding property the two being inseparable. It was argued for the Appellant that the issue of the properties be adjudicated upon before the marriage was dissolved. The Appellant thus filed the preliminary objection dated 2.12.14 but was not given a chance to litigate on the same which was highly prejudicial to him and infringed upon his constitutional rights. I have looked at the record. The preliminary objection is on the ground that:

"THAT the Defendant in his statement of Defence and Counter-Claim has raised issues that are beyond the jurisdiction of this court and in particular SECTION 13(1) of THE ENVIRONMENT AND LAND COURT ACT, 2011 NO. 19 OF 2011 as read together with ARTICLE 162(2) (b) OF THE CONSTITUTION."

REASONS WHEREFORE the Defendant objects to the proceedings of the current suit as it is as the Defendant in his statement of Defence and counter claim raises issues that are beyond the jurisdiction of this court."

11. In the hard to follow proceedings, it would appear that contrary to the Appellant's assertion, he did argue the preliminary objection. The record shows that the Appellant's counsel submitted that the issue of the properties should be taken to the Environment and Land Court. That the issue of property should be determined first before the divorce. On his part, the Respondent's counsel argued that the Appellant has raised a preliminary objection against his defence and counterclaim. As such the preliminary objection should not affect the Respondent but the Appellant. It is not clear what the ruling of the Court was but the Appellant's counsel applied for 14 days and a certified copy of the ruling to appeal. It would appear that no appeal was filed as the matter proceeded to full hearing with the participation of the Appellant until the Respondent closed her case. Thereafter the Appellant failed to attend Court for his case. The ground in my view fails. It is also my view that for the Appellant to raise a preliminary objection against his own defence and counterclaim was an attempt to subvert the proceedings in the Kadhi's Court which is an abuse of the court process.

12. On the ground that the Hon. Kadhi Failed to consider the doctrines of Khulu and Sulhu and their application in context of the issue before the Court, the Appellant submitted that the Hon. Kadhi dealt with the sulhu part but ignored the khulu part thus erring in law and fact. He contends that having been married to the Respondent and catering for her needs for 27 years he was entitled to khulu. His judgment, the Hon Kadhi stated:

“The Defendant asked the Court to order the Plaintiff to back (sic) all of his properties she has been holding, a house at Mikindani, Mombasa, and a shamba at Samburu as well as Custody of the child, but the matter herein is not about Matrimonial Property is about the Dissolution of Marriage. The Defendant actually, he as if (sic) praying for KHULUU but failed to support his prayer because of his failure to argue the same.”

13. From the foregoing it is clear that the Hon. Kadhi did consider the prayer for khulu but noted that the Appellant did not argue the same. My finding is similar. It bears repeating that only the Respondent testified before the Kadhi’s Court. The Appellant did not offer any evidence in support of its Defence and Counterclaim. The Respondent’s evidence therefore remained uncontroverted. It is trite law that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statement of fact.

14. In the case of **Linus Nganga Kiongo & 3 Others v Town Council of Kikuyu [2012] eKLR**, Odunga, J. pronounced himself on the consequences of failure by a party to call evidence and stated:

“What are the consequences of a party failing to adduce evidence? In the case of Motex Knitwear Limited vs. Gopitex Knitwear Mills Limited Nairobi (Milimani) HCCC No. 834 of 2002 Justice Lesiit, citing the case of Autar Singh Bahra and Another vs. Raju Govindji, HCCC No. 548 of 1998 stated:

“Although the Defendant has denied liability in an amended Defence and Counterclaim, no witness was called to give evidence on his behalf. That means that not only does the defence rendered by the 1st Plaintiff’s case stand unchallenged but also that the claims made by the Defendant in his Defence and Counter-claim are unsubstantiated. In the circumstances, the Counter-claim must fail.”

Again in the case of Trust Bank Limited vs. Paramount Universal Bank Limited & 2 Others Nairobi (Milimani) HCCS No. 1243 of 2001 the Learned Judge citing the same decision stated that it is trite that where a party fails to call evidence in support of its case, that party’s pleadings remain mere statements of fact since in so doing the party fails to substantiate its pleadings. In the same vein the failure to adduce any evidence means that the evidence adduced by the Plaintiff against them is uncontroverted and therefore unchallenged.

15. From the foregoing holdings, it is clear that the Appellant cannot rely on his unsubstantiated allegations in his Defence and Counterclaim which were not proved by evidence to challenge the decision of the Hon. Kadhi which was based on the uncontroverted and unchallenged evidence of the Respondent.

16. On the ground that the Hon Kadhi erred in allowing the proceedings to proceed in open Court yet there were allegations that the Appellant was HIV positive thus violating his fundamental rights. The record shows that the Respondent accused the Appellant of having affairs with women and marrying a woman who was HIV positive. She further stated that she has no evidence that the Appellant was HIV positive. In the circumstances, I am not persuaded that the Appellant’s fundamental rights were violated and even if they were, this cannot be a ground for setting aside the decision of the Hon. Kadhi. His remedy in this regard lies elsewhere.

17. Hon. Sheikh Al Muhdhar A. S. Hussein, Chief Kadhi was of the view that the Appeal should be allowed and the Appellant be given another opportunity to defend himself in a retrial. The Hon. Chief Kadhi stated in part:

“On the Issue of Islamic Law, the Kadhi erred in granting the divorce to the plaintiff unconditionally, while the defendant in his counter claim made it clear that, if the court is to grant a divorce, then it should be based on “KHULUU” where the wife should give back what the husband asks for in lieu of divorce... this appeal should be allowed in first place, then setting aside the judgment/orders made on 18.2.2016. I will also opine that, this case be retried again and the defendant be given the right to defend himself.”

18. With respect, I disagree with the Hon. Chief Kadhi. While the foregoing may be the correct position in Islamic law, khulu cannot be considered based on a counterclaim that is not supported by evidence and the veracity of which has not been tested at the hearing. As stated severally before, the Appellant did not argue his defence or prosecute his counterclaim. It is my view therefore that the finding of the Hon. Kadhi that the Appellant failed to support his prayer for khulu was correct. A Court cannot give orders in favour of a party who has not supported his claim with cogent evidence. As regards the proposed retrial, the record shows that the Appellant failed to attend Court to argue his defence and prosecute his counterclaim in spite of being given several opportunities to do so. Equity assists the diligent and not the indolent. Further failure of a party to adduce evidence to support his own case is not a recognised ground for retrial.

19. In view of the foregoing, I find no reason to interfere with the decision of the Hon. Kadhi. My conclusion is that the Appeal herein lacks merit and is hereby dismissed. There shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 4th day of May 2018

M. THANDE

JUDGE

In the presence of: -

..... **for the Appellant**

..... for the Respondent

..... Court Assistant