



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. 11 OF 2015

W K K..... APPELLANT

VERSUS

R C T.....RESPONDENT

JUDGMENT

In his plaint dated the 14th January 2014, the plaintiff sought in the lower court, the following orders:

- (a) An order to compel the Defendant to vacate the plaintiff's matrimonial home.
- (b) An order restraining the Defendant from interfering with the plaintiff's peaceful occupation of his estate and entire family members
- (c) Costs
- (d) Interest on costs.

In his judgment dated 8th July 2015 the learned trial magistrate framed the issues for determination thus

- (a) Whether the Defendant forcibly entered upon the plaintiff's matrimonial home.
- (b) Whether the remedies sought by the plaintiff are available to him in the present circumstance of the case.

The learned trial magistrate found that no force was pleaded nor was it proved. Further that the plaintiff did not seek the services of community elders to resolve the issue nor seek the services of law enforcement officers.

The trial magistrate declined to grant the orders of eviction.

Being aggrieved and dissatisfied by the decision of the learned trial magistrate the appellant has now lodged this appeal, on the grounds that the learned trial magistrate found that there was acquiescence and failure to seek ways of removing the Defendant from the land in question within a reasonable time.

Further that the trial magistrate created a limitation period of four years against the established legal statute of limitation.

Ground no. 6 is an allegation of bias for refusing to enter judgment against the Defendant in default of entering appearance and filing defence within the stipulated period and causing an Advocate to draft and file documents for the defendant free of charge when the defendant was not a declared pauper.

In his evidence before the lower court the plaintiff testified to have married the defendant under the Kipsigis customary law but they divorced in the year 1988 under Kipsigis customary law by the refund of bride price and the severance of all relations including children born to them in accordance to Kipsigis customary law.

It was the contention of the plaintiff that the Defendant left but returned after the death of W's parents and forced herself into the plaintiff's land.

In her defence, the Defendant did concede to have been married to the plaintiff but as a result of marital differences she decided to go back to her parents. In the year 2006 the plaintiff asked that his two sons that he had sired with her do return. In the year 2007 upon request from

the plaintiff she decided to return back with her children and were accepted and a house constructed for them and they had been living together peacefully till a fight broke out between one of her sons and another person.

She conceded therefore having been divorce proceedings between her and the plaintiff's family. She admitted having had children out of wedlock staying with her.

The orders sought in the lower court were that of eviction as the Defendant was a trespasser on account of a divorce having been undertaken under Kipsigis customary laws.

The presumption appears to be that a divorced woman has no property rights under the Kipsigis customary laws.

In the case of MK-Vs-MK 2008 KLR pg 204 the court of appeal sitting in Nairobi held, "The married women's property Act of 1882 is one of the Acts of general application in Kenya.

African customary law in relation to the ownership of property if applied, would be in conflict with the written law and in particular with the provisions of S.17 of the married women property Act 1882 of England," The matrimonial property Act of 2013 borrows heavily from the present Act.

Article 45 (3) of the constitution provides:- "Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

(4) Parliament shall enact a legislation that recognizes

(a) Marriages concluded under any tradition or system of religions, personal or family law, and

(b) Any system of personal and family law under any tradition or adhered to by persons professing a particular religion to the extent that any such marriages or systems of law are consistent with this constitution."

A prayer for eviction presupposes that a party has no rights to the property. In the present case the Defendant was married to the plaintiff under Kipsigis customary law and they were blessed with two children. Subsequently, there was a divorce performed under Kipsigis customary law.

But for one reason or another the Respondent returned to the matrimonial home together with her children including other three sired out of wedlock.

A prayer for eviction does not lie as under the constitution each party in a marriage is entitled to equal rights at the time of the marriage, during and at the time of dissolution of the marriage.

Kipsigis customary law must be consistent with the written law for it to be operative.

I find the appeal has no merit and same is dismissed with costs.

Judgment delivered dated and signed this 8th day of March 2017 in open court and in the presence of learned counsel for the appellant Mr. Koech present. Respondent in person absent.

M. MU YA

JUDGE

8/3/2017