REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY AND PROBATE DIVISION

CIVIL APPEAL NO. 13 OF 2016

PI N…….APPELLANT

VERSUS

F N……....RESPONDENT

(*Being an appeal filed against the ruling delivered in Milimani CCMCDC No. 62 of 2016 on 11th February 2016)*

JUDGMENT

1. The appellant lodged herein on 12th February 2016 a memorandum of appeal dated 12th February 2016, in which he averred that at the hearing which led to that decision, the subject of appeal, the ruling delivered on 11th February 2016 in Milimani CCMCDC No. 62 of 2016 he was not heard, the trial court had no jurisdiction to make the orders it made, the court made orders that were not even sought by the respondent, the court did not have regard to due procedure and it did not consider the welfare of the children who are with him.

2. The ruling of the lower court of 11th February 2016 arose from an application dated 5th January 2016, where the respondent had moved to court seeking to have the appellant cited for contempt of court and punished accordingly, and to have the police intervene. The application dated 5th January 2016 was placed before Hon Muholi RM on 6th January 2016 under certificate of urgency. It was certified urgent, with directions that all applications and orders in the matter be served on the law firm of Messrs Mwaniki Ireri & Company Advocates, then representing the appellant. It was directed that the appellant appear in court on 11th January 2016 to show cause why he was disobeying court orders. The application was to be given a date for *inter partes* hearing upon the appellant's appearance on 11th January 2016. Come 11th January 2016, the appellant attended court, but it transpired that Messrs Mwaniki Ireri & Company Advocates had not been served for the firm had allegedly closed shop. The appellant appeared to disown the firm, stating that his advocate was a Gumbao Mutua, who was yet to come on record. Hon Muholi RM did not make any substantive orders that day for he directed that the matter be placed before Hon Chesang RM, who had heard the main suit, for mention on 27th January 2016.

3. On 27th January 2016 the matter was placed before Hon Chesang RM. Mr. Swaka, Advocate appeared for the appellant, holding brief for Mr. Ireri. There was no appearance for the respondent, whereupon the matter was stood over generally for there was no one to prosecute the application. The following day, 28th January 2016, counsel for the respondent, Mr. Ndung'u, had the file placed before Hon Chesang RM, *ex parte*, when he obtained dates for the hearing of the matter *inter partes* on 3rd February 2016. It was further directed that the matter be served personally on the appellant. Come 3rd February 2016, Mr. Ndung'u appeared for the respondent, but the appellant was not represented and was not in court. The matter was then given a date for hearing on 10th February 2016. On 10th February 2016, both Mr. Ndung'u and Mr. Swaka appeared for their respective clients. Mr. Swaka, for Mr. Ireri for the appellant, sought adjournment on ground that he wanted to apply to cease acting for the appellant. Hon Chesang RM declined the application for adjournment saying Mr. Ireri had had adequate time to file the application to cease acting. The court read mischief in the conduct of the appellant or his counsel. It was

directed that the matter would proceed at 10.00 that morning. At 10.00 AM Mr. Ndung'u presented the case for the respondent and the appellant replied to the application in person. Thereafter the court reserved ruling for 11th February 2016. The ruling the subject of this appeal was duly delivered on 12th February 2016.

4. The application dated 12th February 2016 was argued on 9th March 2017. Mr. Oronga urged the case for the appellant, while Mr. Ndung'u presented the case for the respondent. Mr. Oronga argued that the trial court had no jurisdiction to handle the matter post-judgment as the cause was exhausted after the divorce petition was disposed of. He further argued that the court went beyond the application by granting orders that had not been sought by the respondent, with particular reference to the eviction orders. He also argued that the appellant had been denied an opportunity to obtain legal representation, saying that he was ambushed into prosecuting the case in person. In response, Mr. Ndung'u asserted that the trial court had jurisdiction over the matter with regard to matrimonial property given that divorce and matrimonial property were intertwined. He argued that the appellant had over the period of the case been represented by three able advocates. He pleaded urgency of the matter as the reason the court chose to go ahead with the matter without according the appellant opportunity to engage counsel.

5. My very humble view is that this is a straightforward matter. The matter before the lower court was a divorce cause initiated by the appellant, where he sought two principal orders – dissolution of his marriage to the respondent and custody of their two children. The respondent filed an answer to the petition, but no cross-petition. She denied all the allegations made against her in the appellant's petition. She prayed for dismissal of the petition and custody of the children. I need to state that the respondent did not file a cross-petition, there was therefore no basis for the prayers that she sought in the answer. Such prayers are only available in a cross-petition. The petition was heard by Hon Chesang RM. The appellant testified and called a witness, while the respondent also testified but did not call any witness. Judgment was delivered in the matter on 9th June 2015, dismissing the petition with no order as to costs.

6. The divorce cause was geared to obtaining dissolution of marriage and custody of the children of the marriage. The divorce petition had no prayers on matrimonial property. As noted hereabove the respondent filed only an answer to the petition, which merely responded to the allegations in the petition. There was no cross-petition, and therefore the respondent did not have a suit of her own which could survive the dismissal of the petition. On 5th June 2015, the trial court merely dismissed the petition and did not make any consequential orders, save for costs. The effect of it was that the matter came to an end. The cause died. It was exhausted, spent. It was the divorce petition that gave it life, and once it was dismissed the cause terminated. There was nothing substantive that could be done thereafter in the dead cause by either of the parties, save for recovery of costs by the respondent.

7. In view of what I have stated in paragraph 6 hereabove, I would agree totally with the appellant. The cause in Milimani CCMCDC No. 62 of 2016 met its natural death on 5th June 2015 when the divorce petition was dismissed. Nothing remained to be determined by the court. There was no surviving cause that could be the subject of further litigation. The only applications entertainable by the court thereafter would be those relating to recovery of costs by the respondent or attempts by the appellant to have his petition revived by way of review. No other application of whatever shade or character could possibly be of entertainment by the court, meaning that the court became effectively *functus officio* on 5th June 2015 so far as that divorce cause was concerned, save for the permissible post-judgment processes mentioned above. It would also mean that the court would then have had no jurisdiction to entertain such applications as the one dated 5th January 2016 and to grant the orders that it purported to make on 12th February 2016.

8. I do not think the other issues raised are of any importance or weight following my finding in paragraphs 6 and 7 hereabove. They are academic. I shall not therefore advert to them at all.

9. In the end I shall hold that the only relevant prayer to grant in respect of the appeal is prayer (a), the rest are irrelevant in view of the sentiments that I have expressed hereabove. The appeal herein is accordingly allowed in terms of prayer (a) of the Memorandum of Appeal dated 12th February 2016. The

appellant shall have the costs of the appeal.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH DAY OF JULY, 2017.

W. MUSYOKA

JUDGE