



MWK v CWN (Civil Appeal 250 of 2018) [2023] KECA 235 (KLR) (3 March 2023) (Judgment)

Neutral citation: [2023] KECA 235 (KLR)

REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 250 OF 2018
HM OKWENGU, HA OMONDI & PM GACHOKA, JJA
MARCH 3, 2023

BETWEEN

MWK APPELLANT

AND

CWN RESPONDENT

(Being an appeal from the ruling of the High Court of Kenya at Nairobi (J N Onyiego, J) delivered on January 15, 2018 in High Court Civil Case no 26 of 2010 (O S))

JUDGMENT

1. The appellant and the respondent are estranged wife and husband. They have engaged in litigation relating to their marriage and matrimonial property since the year 2010. To contextualize this appeal, it is necessary to set out the background to the dispute that has triggered this appeal.
2. From the record before us, there is an allegation that the marriage between the appellant and the respondent has irretrievably broken down. As a result, the appellant filed divorce cause no XX of 2010 in the chief magistrate’s court at Milimani, Nairobi. In addition to the filing of the divorce cause, the appellant filed an originating summons no HCCC XX of 2010 (O S) at the High Court in Nairobi. In the matrimonial cause, the appellant prayed that the respondent be ordered to execute all necessary documents to transfer a property known as L R no Nairobi/Block xxx/xx (House no xx South “B”) Nairobi to her. In the alternative, the appellant prayed that, the said property be valued, sold and proceeds of sale be shared equally between them. The suit relating to the matrimonial property, is the one that is material in respect of the appeal before us.
3. The dispute relating to the matrimonial property was heard by the High Court (G B M, Kariuki, J as he then was.) The court held that, the main issue for consideration was whether the appellant was entitled to a 50% share of the said property that was acquired during the subsistence of the marriage



and registered in their joint terms. Upon considering the evidence and submissions by the parties, the learned judge held as follows:

“ 17. I am satisfied that in the circumstances of this case, the plaintiff is entitled to equal share of the said property. I say so particularly with reference to the assignment agreement dated June 15, 2006, the sale agreement dated April 13, 2007 all refer to both the plaintiff and the defendant as jointly called ‘the purchasers’ and further, a perusal of the transfer of lease dated April 13, 2007 reveals that they hold the leasehold interest as equal joint proprietors. It is noted that the defendant’s main wish is that this court should exercise its discretion to create a trust in favour of the child, a position that the Plaintiff vehemently opposes.

However, it is observed that the defendant has failed to establish that the creation of a trust was their intention. In the absence of such proof, this court cannot exercise its discretion as sought by the defendant. This court cannot devise arrangements which the parties never made. Similarly, the court cannot ascribe intentions which the parties in fact never had.

18. In view of the foregoing this court makes the following orders:

- a) That the plaintiff is entitled to half share beneficial interest in the property known as LR no Nairobi/Block [Particulars Withheld] – House no [Particulars Withheld] – Hazina Estate South “B” Nairobi;
- b) That the said property shall be valued with the participation of both parties and shall thereafter be sold and the proceeds realized from the sale shared equally between the plaintiff and the defendant;
- c) That, in the alternative, the defendant shall buy out the beneficial interest of the plaintiff in the said property in monetary terms; and
- d) That the plaintiff shall have costs of the suit.”

4. We note from the record, that the respondent filed a notice of appeal on June 18, 2014. However, nothing on record shows whether an appeal was eventually filed and therefore the judgment of the High Court remains undisturbed.

5. As can be noted from the judgment of the High Court, the learned judge gave very clear directions on the disposal of the matrimonial property. Rather than pursue the execution of that judgment, the appellant filed a notice of motion dated October 22, 2014, which has triggered this appeal. In the application the appellant sought the following orders:

- a)
- b) That the respondent be ordered to tender accounts or records relating to collection of rent for the property known as House 17 Hazina Estate L R number Nairobi/Block xxx/xx from June 2010 up to date.
- c) That the respondent be ordered to remit to the applicant half of all the rent collected from June 2010 up to date.



- d) That the respondent be ordered to remit to the applicant half of the future rent for the said premises until execution of the judgment or the final determination of the issues between the parties.
- e) That the honorable court do make such other or alternative direction/orders as meets the interest of justice.
6. It was the appellant's contention, that the respondent had been collecting rent from the matrimonial property which as at June 2010, was a monthly rent of kshs 40,000. The appellant claimed that she was entitled to half of all the rent collected since the year 2010.
7. The respondent in a replying affidavit sworn on April 13, 2015, opposed the application on the grounds: that the application was *res judicata* as similar orders were sought in an application dated March 2, 2011; that the appellant was reviving an application that had been withdrawn; that the appellant had by a letter dated July 23, 2014, requested the respondent to buy her share, and the respondent's lawyers responded in the affirmative vide letter dated August 6, 2014; that the appellant failed to co-operate in the process of valuation of the property, to allow the buying out process to commence; that the respondent was paying the appellant, a monthly maintenance of kshs 30,000; and that the application was an abuse of the Court process.
8. The High Court Judge (J N Onyiego, J) upon hearing the parties held that the application was not *res judicata* and held as follows:
16. As regards the pending appeal yet to be decided, Order 42 rule 4 of *Civil Procedure Rules* provides that no appeal shall operate as a stay of execution. In this particular case there is no stay of execution orders obtained from either the trial court or court of appeal. It therefore means that the orders of the court are alive for any interested party to execute.
17. The key issue for determination however is; is the applicant entitled to half share and a statement of account from the year 2010 out of the rental income being collected from the joint property now in question pending sale or formal transfer to the respondent who has expressed interest to buy out the applicant's beneficial interest on the said property? As clearly stated by both parties, a similar application dated March 2, 2011 was withdrawn before hearing of the main suit. The court was not invited to determine the issue of rental income hence no orders made to that effect. This court cannot therefore revisit the rental aspect prior to the delivery of judgment on June 6, 2014.
18. What about rent collected after judgment to date? As stated above, the trial court was not requested to address the issue of rent in its judgment. The court judgment does not include an order for recovery and accountability of rent. To allow a claim for recovery of rent from the respondent will amount to reopening the suit hence a fresh suit within the main suit which has already been determined. In any event, parties are to blame for the delay in execution process. The only remedy available in my opinion, is for the parties to expedite the process of execution by valuing and selling the property since there is no order for stay of execution.
- The claim by the defendant that he has been paying maintenance to the plaintiff to the tune of Kshs 30,000 is not relevant in this case as it relates to Divorce and child maintenance proceedings.
19. However, in the interest of justice and in exercise of its inherent jurisdiction to preserve the sanctity and credibility of court orders, this court cannot watch the rights of a litigant pronounced in a court judgment being trampled upon by a party who will stop at nothing but



apply delaying tactics in frustrating execution process of a decree to defeat the ends of justice. The applicant must benefit and enjoy the fruits of her judgment.

20. For those reasons, this court will direct that, pending execution of the court decree herein, both parties are hereby directed to open an account held in their advocates' joint names within 30 days from the date of this ruling and the amount collected as rent from house no [Particulars Withheld] Hazina South B estate L R no Nairobi/block [Particulars Withheld] shall be deposited and shared equally on completion of the execution process less house maintenance and necessary expenses including such utilities as shall be necessary and agreed upon by both parties from time to time with the approval of the deputy registrar."
9. The appellant aggrieved by the ruling of the learned judge has filed this appeal.
- The appellant raises six (6) grounds which we can summarize as follows:
- a) The learned judge did not address all the prayers sought and therefore failed to grant all the reliefs sought;
 - b) The learned judge erred in failing to address the issues of the accumulated rent even after finding that the issues were not *res judicata*;
 - c) The learned judge erred in holding that the accumulated rent was not among the issues canvassed at the trial yet the appellant had prayed for half share of the property and the rent that the respondent had collected;
 - d) The learned judge erred in holding that the prayers sought by the appellant amounted to reopening the case;
 - e) The learned judge erred in denying the appellant rent for 7 years; and
 - f) The learned judge erred in failing to uphold article 159 of the Constitution that require courts to determine disputes expeditiously, conclusively, and without regard to technicalities.
10. The appellant has filed written submissions dated September 10, 2020 which were adopted at the hearing. In a nutshell, the appellant submits as follows: that the learned judge missed one of the substantive prayers for remittance of half of the rent collected since June 2010; that the court should have ordered for the rendering of accounts; that having decided that the application was not *res judicata*, the learned judge should have made a determination on the issue of rent; that since the appellant and respondent were joint owners, the court should have made a finding, that the appellant was entitled to rent from June 2010 to June 6, 2014 when the judgment of the High Court was delivered; and the court failed to do justice as required by article 159 of the Constitution.
11. The appellant relied on the case of Peterson Ndung'u, Stephen Gichanga Gituro, N. Ojwang, Peter Kariuki, Joseph M. Kyavi & James Kimani v Kenya Power & Lighting Company Ltd [2018] eKLR which basically states; this being a first appeal, this court has a duty to re-evaluate, re-assess and re-analyze the evidence and reach its own conclusions.
12. The respondent's advocates, Muthoga, Gaturu & Co Advocates did not attend the hearing, though the record shows, that they were duly served with a hearing notice. We also note that the respondent did not file written submissions.
13. We have analyzed the record and the evidence that is on the record. Though the appellant has raised six grounds, they all revolve around one issue, whether the trial court exercised its discretion properly in dismissing the application. In other words, was the learned judge right in holding that the court could



not revisit the issues of rent collected from 2010, as that was not one of the issues that were determined in the judgment delivered on June 6, 2014.

14. As correctly submitted by the appellant this being a first appeal, we are duty-bound to re-evaluate, re-assess and re-analyze the extracts on record and then determine whether the conclusions reached by the learned Judge are to stand or not and give reasons either way. (See *Peterson Ndung'u, Stephen Gichanga Gituro, N Ojwang, Peter Kariuki, Joseph M Kyavi & James Kimani v Kenya Power & Lighting Company Ltd* [2018] eKLR).
15. To determine the issues raised in the grounds of appeal, it is necessary for us to revisit the background to this appeal. It is not in dispute that the appellant filed an originating summons in the High Court dated July 28, 2010. The only prayer that the appellant sought, was an order for the transfer of the property to her, or in the alternative 50% share of the property to be transferred to her. The appellant was successful, and since there is no stay of execution, the appellant was at liberty to enforce the decree, from June 6, 2014.
16. We further note that, in support of the originating summons, the appellant filed a supporting affidavit sworn on July 28, 2010. The only reference to the issue of rent, is in paragraph 8 of the affidavit, where she deposes that: "further, the respondent has gone ahead and directed that all rental payments be deposited with his advocate, Muthoga, Gaturu & Co Advocates." There was no prayer in regard to, the rendering of the account for rent at all. It is also not in dispute, that the appellant had filed an application dated March 2, 2011, in which the main prayer was, for the rendering of the account from July 2010 up to the time of the hearing of that application.
17. As the appellant readily admits, when responding to the issue of whether the second application was *res judicata*, that she voluntarily withdrew the application dated March 2, 2011. The appellant on her own motion, failed to seek a prayer for an account of rent, in the main suit, and withdrew the application she had filed in respect to the rendering of an account on the rent.
18. This is the chain of events that faced the learned judge. The appellant in the notice of motion, the subject of this appeal, was attempting to re-open the issue of rent after the conclusion of the suit. The learned judge correctly held that the issue of rent, was not one of the issues for determination in the suit and the court could not revisit the issue of rental income that had been collected prior to the delivery of the judgment on June 6, 2014. The learned judge held, and correctly so, in our view that that issue should have been raised at the hearing.
19. We note that the learned judge, also addressed himself to the issue of rent collected, after the date of judgment. The judge stated, and in our view correctly so, that the judgment and the decree did not include an order for recovery and accountability of rent. It was the trial court's view, that allowing a claim for recovery of rent from the respondent, as sought in the application, was tantamount to re-opening the suit afresh within the main suit, which has already been determined. The learned judge cannot be faulted for this holding. Courts have stated time and again that parties are bound by their own pleadings.
20. The Court of Appeal restated this position in the case of *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR. The court cited Judge Pius Aderemi J S C, with approval, in the case of *Adetoun Oladeji (Nig) Ltd v Nigeria Breweries Plc S C 91/2002*, where the judge expressed himself as follows:

"...it is now a very trite principle of law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings,



or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.”

21. The Supreme Court of Kenya in its ruling on *inter alia* scrutiny in the case of *Raila Amolo Odinga & Another v IEBC & 2 others* [2017] eKLR found and held as follows in respect to the essence of pleadings in an election petition:

“In absence of pleadings, evidence if any, produced by the parties, cannot be considered. It is also a settled legal proposition that no party should be permitted to travel beyond its pleadings and parties are bound to take all necessary and material facts in support of the case set up by them. Pleadings ensure that each side is fully alive to the questions that are likely to be raised and they may have an opportunity of placing the relevant evidence before the court for its consideration. The issues arise only when a material proposition of fact or law is affirmed by one party and denied by the other party. Therefore, it is neither desirable nor permissible for a court to frame an issue not arising on the pleadings ”

22. A look at all the grounds clearly show that the appellant is trying to re-open a concluded case to enable her fill some gaps, that should have been addressed in the main suit. This wrong adventure was stopped in its tracks by the learned judge. This is a scenario where the learned judge was exercising his discretion to grant or not to grant the orders sought. This court has addressed the question of exercise of discretion by a judge in the following cases:

- a) In Civil Appeal no 22 of 1994 *K D Shah v Prakash Vrajilal Malkan & Another*, [1994] eKLR it was held that the Court of Appeal will not interfere with the exercise of a trial court’s discretion unless it is satisfied that the decision is clearly wrong because the trial court has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and, in doing so, arrived at a wrong conclusion.
- b) In *Mbogo & Another v Shah*, EA 93 the Court held that the principles governing the exercise of judicial discretion are twin. Firstly, there are no limits or restrictions on the judge’s discretion except that if the judge does so, it must be on such terms as may be just. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules. Secondly, this discretion is intended to be so exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.

23. Before we conclude, we note that the appellant accuses the learned Judge of not taking article 159 of the *Constitution* of Kenya, into account. Contrary to that assertion, we note that the learned judge in the interest of justice and in the exercise of inherent jurisdiction of the court, ordered both parties to open a joint account, between the respective advocates within 30 days of the ruling, and that all future rents be deposited in that account. The appellant cannot blame the court on issues, in regard to this property, as the court has pronounced itself in the judgement and also in the further orders for opening of a joint account for payment of rent. Therefore, nothing stops the appellant from executing the decree to obtain her 50% share in the property. In Our view, all the grounds of appeal, which revolve around the issue of rent, have no merit as they have been raised too late in the day as held by the learned Judge.

24. We think we have said enough to show that this appeal has no merit at all and is for dismissal. Accordingly, we dismiss the appeal. Since the respondent did not file written submissions or attend



the hearing and bearing in mind that this is a matrimonial dispute, we order that each party should bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF MARCH, 2023.

HANNAH OKWENGU

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JUDGE OF APPEAL

H A OMONDI

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JUDGE OF APPEAL

M. GACHOKA, CIArb, FCIArb

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JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

