MRWN v SJN (Civil Appeal 267 of 2018) [2023] KECA 457 (KLR) (20 April 2023) (Judgment)

Neutral citation: [2023] KECA 457 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 267 OF 2018

W KARANJA, AK MURGOR & HA OMONDI, JJA

APRIL 20, 2023

BETWEEN

MRWN ..... APPELLANT

AND

SJN ..... RESPONDENT

(Being an appeal from the Ruling and Order of the Environment and Land Court at Nairobi (M. Gitumbi, J.) dated 15th September, 2017 in ELC Case No. 3087 of 1981)

JUDGMENT

1. The appellant, MRWN and the respondent, SJN were married, and were blessed with 3 children. But in the course of time, the marriage broke down due to irreconcilable differences and the couple divorced in 1970. Subsequently thereto, the appellant filed an Originating summons for the distribution of their matrimonial property on 28th October 1981.

2. In a judgment delivered on 7th June, 2002, the trial court determined that the appellant was entitled to a half share of the following properties;

    a. Land Reference Number N/N/xxx

    b. Land Reference Number xxx66/xx

    c. Plot No. 4x M

    d. Plot No. xx M Market

    e. Plot No. N/K/ T.xxx

    f. Plot No. N/K/ T.1xx (the properties)

3. The court also ordered that the appellant was entitled to 50% of the sale price of any of the properties, were they to be sold. Conversely, the respondent was ordered to deposit the title documents to the properties in court.

4. By an application dated 26th June 2014, the respondent sought a review of the judgment, but his application was dismissed. Thereafter, by a court order dated 16th May 2014, the respondent was committed to civil jail for contempt of court for selling Land Reference Number xxx/xx/xx to a third party. This order was followed by a Notice of motion dated 16th June 2014 filed by the appellant seeking cancellation of the transfer of Land Reference Number 209/66/15 to the third parties. But, in a ruling dated 29th January 2016, the trial court dismissed the application on the basis that the appellant did not have a valid claim against the purchasers.

5. On 22nd March 2022, the appellant filed another motion, the subject of this appeal, seeking to be declared the sole owner of Land Reference Number N/N/xxx, Plot Number T.xx "B", M Market; Land Reference Number N/N/390, Plot Number xx "B" M Market, Githunguri Sub-County. A further order was sought for the respondent to pay to her Kshs. 97,890,000.

6. Upon considering the application, in a *ruling* delivered on 15th September 2017, the trial court ruled that;

> " Notice of Motion dated 22ndMarch 2016 by the Plaintiff is hereby dismissed with no order as to costs for the reason that the prayers sought are contrary to the Judgment delivered in this suit and no application to review the judgment is before Court."

7. The appellant was aggrieved by this decision of the trial court, and filed this appeal on the grounds that; the learned judge was in error in failing to provide any reasons at all for arriving at her decision; in failing to exercise her judicial discretion to vary or determine the appellant's spousal entitlement in matrimonial properties forming the subject matter of the application; in failing to take into account and to consider the evidence adduced on behalf of the appellant in support of her application; in failing to appreciate the submissions of the appellant's counsel and failing to find that the appellant's application was non-contested. The appellant concluded that the decision was unsupportable on the basis of the evidence adduced or in law.

8. In support of the appeal, the appellant filed written submissions, which learned counsel for the appellant, Mr. H. Orina informed us at a virtual hearing that he would be adopting in their entirety. The respondent did not file any written submissions, and nor was there any appearance from his counsel despite their having been served with a hearing notice.

9. The appellant submitted that the learned judge, delivered a ruling of less than one page dismissing the appellant's application after the lapse of over 1 year 6 months without providing any reasons for concluding that the prayers sought in the application were contrary to the judgment was reached; that the judge simply threw down a statement without considering the substantive merits of the application, and further, failed to exercise her judicial discretion to determine the question of spousal entitlement in matrimonial property.

10. It was further submitted that though the appellant's submissions expounded on the factual circumstances of the case which facts were buttressed by legal authorities and the law, the judge, without due consideration of the materials that were before the court, arrived at a decision that was unsupported by the facts or the law, and which decision, should therefore be set aside.

11. We have considered the application, the parties' submissions and the law. The questions that fall for consideration are; i) whether the learned judge failed to issue a reasoned ruling; and ii) whether there was an inordinate delay in delivery of the ruling. See *Mbogo v Shah* [1968] EA 93.

12. Order 21 rule 4 of the *Civil Procedure Rules* provides that;

> " Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decisions".

13. In effect, the provision requires judgments in defended suits to contain a concise statement of the case, the points for determination, the decision and the reasons for such decision. Although "rulings" as is the case here, are not defined in the *Civil Procedure Act*, a ruling being a pronouncement of a court, would similarly be required to take the above specified form.

14. The duty to give reasons is enshrined in article 10 of the *Constitution* on National Values and Principles of Governance, more particularly because, reasoned rulings or judgments would in and of themselves, be a manifestation of the tenets of transparency and accountability.

15. In line with this, the duty of courts to hand down reasoned rulings and judgments was well set out in the case of *Soulmezes v Dudley Holdings* [1987] 10 NSWLR 247 it was stated thus;

> " The giving of reasons for a judicial decision...enables the parties to see the extent to which their arguments have been understood and accepted as well as the basis of the Judge's decision. As Lord Macmillan has pointed out, the main object of a reasoned judgment "is not only to do but to seem to do justice."

16. More particularly, in the case of *Machira t/a Machira & Co. Advocates v Wangethi Mwangi & another*, Civil Appeal No. 179 of 1997, Akiwumi, JA had this to say on rulings arising from applications;

> " I think as required by Order XX rule 4 (now Order 21 rule 4) of the *Civil Procedure Rules* in respect of judgments, a ruling in an application which is opposed such as the one made by the appellant and opposed by the respondents, must be self-contained and should contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision..."
>
> See also the case of *Godffrey Gatere Kamau v Peter Mwangi Njuguna* [2008] eKLR.

17. The English case of *Flanner v Halifaz Agencies Ltd* [2001] ALL ER 273 further explains the rationale for reasoned rulings and judgments thus;

> " 1. The duty is a function of due process, and therefore of justice. Its rationale has two principal aspects. The first is that fairness surely requires that the parties especially the losing party should be left in no doubt why they have won or lost. This is especially so since without reasons the losing party will not know (as was said in Ex parte Dave) whether the court has misdirected itself, and thus whether he may have an available appeal on the substance of the case. The second is that a requirement to give reasons concentrates the mind, if it is fulfilled, the resulting decision is much more likely to be soundly based on the evidence than if it is not.
>
> 2. The first of these aspects implies that want of reasons may be a good self-standing ground of appeal. Where because no reasons are given it is impossible

> to tell whether the judge has gone wrong on the law or the facts, the losing party would be altogether deprived of his chance of an appeal unless the court entertains an appeal based on the lack of reasons itself..." (emphasis ours)

18. So that, to reach a decision, it was incumbent upon the trial court to consider the application, the affidavit in support, the replying affidavit and the parties' submissions, and on the basis of these materials, set out the points for determination, pursuant to which, the rationale behind the decision would be apparent. The final orders would then of necessity, bear a direct corelation to the points determined.

19. The record shows that the respondent strenuously opposed the appellant's application. And therefore, it was not sufficient for the trial judge to dismiss the application without sufficient reasons. The ruling that was less than a page did not contain a concise statement of the case, or the points for determination. And although it stated that the prayers sought in the application were contrary to the judgment delivered earlier, and it was noted that no application for review was filed, nothing demonstrated in what way the two decisions were in conflict. This was notwithstanding that all the requisite materials were before the trial judge.

20 Hence, we find that, the ruling fell short of the strictures spelt out under order 21 rule 4 (formerly order xx rule 4) of the *Civil Procedure rules*, thus rendering it at best, a mere statement devoid of any juristic content. It is little wonder that the appellant sought to appeal in the manner that she did, because, given that the ruling was unreasoned, there was no other basis upon which she could possibly have mounted an appeal.

21. Turning to the complaint that the ruling was delivered after a year, order 21 rule 1 of the *Civil Procedure* rules provides;

> " In suits where a hearing is necessary, the court, after the case has been heard, shall pronounce judgment in open court, either at once or within sixty days from the conclusion of the trial notice of which shall be given to the parties or their advocates.
>
> Provided that where judgment is not given within sixty days the judge shall record reasons thereof copy of which shall be forwarded to the Chief Justice and shall immediately fix a date for judgment."

22. In considering the question of delay in delivering judgements in the case of *Jubilee Insurance Company Limited v Kishor Ramji Hirani & 2 others* [2019] eKLR, this Court observed that;

> Pronouncement of judgment is a part of the justice dispensation system and Judgments should be pronounced without undue delay. An unreasonable delay between hearing of arguments and delivery of judgment, unless explained by exceptional or extraordinary circumstances, is highly undesirable even when written arguments are submitted. It is not unlikely that some points which the litigant considers important may have escaped notice; however, what is more important is that litigants must have complete confidence in the results of litigation. This confidence tends to be shaken if there is excessive delay between hearing of arguments and delivery of judgment".

23. And citing the case of *Elizabeth Braganza v Tysons Habenga Limited*, Civil Appeal No. 285 of 1997, in the above case, this Court expressed that;

> "What constitutes delay, however, depends on the particular circumstances of each case. ... In this case, the delay was too inordinate and should not have occurred unless there were compelling reasons which the learned judge should have explained in the judgment."

24. In this regard, not only was there a delay of one and a half years in delivering the judgment, it is apparent that, in addition to the delay, the learned judge failed to provide any explanation for delay in delivery of the ruling.

25. Judging from the time taken to deliver the ruling, the length of the ruling, and the failure to take into account the requirements of order 21 rule 1 and 4 of the *Civil Procedure rules*, as pertains to judicial decisions, and given that no explanation was provided for the delay in delivering the ruling in terms of order 21 rule 1 of the *Civil Procedure rules*, we are satisfied that the appeal is merited.

26. In sum, the appeal succeeds and is allowed. The ruling dated 15th September 2017 is hereby set aside. We order that the Notice of motion dated 22nd March 2016 be remitted to the High Court for determination by another judge of the Environment and Land Court, other than Gitumbi, J. The respondent will bear the costs in this Court and in the Environment and Land Court.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 20TH DAY OF APRIL, 2023.

W. KARANJA

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JUDGE OF APPEAL

A.K. MURGOR

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR