



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MUSINGA, GATEMBU & MURGOR, J.J.A.)

CIVIL APPEAL NO. 2 OF 2015

BETWEEN

S M M ALIAS G S M ALIAS S S M APPELLANT

VERSUS

C A K M ALIAS C A K MRESPONDENT

(Being an appeal from the Judgment of the High Court of Kenya at Machakos, (Makhandia, J.) dated 20th September, 2013

in

HCCC No. 58 of 2009)

JUDGMENT OF THE COURT

INTRODUCTION

1. The central issue for determination in this appeal is whether the respondent, who was lawfully married to a third party under the Marriage Act, had legal capacity to marry the appellant under Kamba Customary Law during the subsistence of the statutory marriage. The appellant contended that there existed a customary marriage between her and the respondent from 1990 until November 2008 when the respondent divorced her and claimed, *inter alia*, equal share of all the income and properties that they acquired together between 1990 and 2008.

2. The High Court dismissed the appellant's suit, hence this appeal. This being the first appellate Court, it is entitled to revisit the evidence on record, evaluate it and reach its own conclusion. The Court however appreciates that an appellate Court will not ordinarily interfere with findings of fact by the trial court unless they are based on no evidence at all, or on a misapprehension of it, or the trial court is shown demonstrably to have acted on wrong principles in reaching the findings. See **MWANASOKONI v KENYA BUS SERVICES LIMITED (1982-88) 1 KAR 278.**

THE APPELLANT'S CLAIM BEFORE THE TRIAL COURT

3. In her plaint, the appellant stated that in 1986 she was employed by the respondent as a [particulars

withheld] in the respondent's dressmaking school in Machakos then known as "[particulars withheld]" which at the time was in its inception, with only 3 students; that owing to her diligence and excellent services the student population rose to 160 as at 1990; that in 1990 the respondent, who was already married to A N K under the Marriage Act, proposed to marry and did marry her as a second wife under Kamba Customary Law, having misrepresented to her that his first marriage had equally been solemnized under the Kamba Customary Law.

4. After the marriage, the appellant, the respondent and respondent's first wife incorporated a company by the name [particulars withheld] Company Limited and from the realized profits acquired various properties which the appellant listed as hereunder:

“(a) M/V Registration Nos KAG [...], KAG[...], KAH [...], KYH [...] all in the names of the Defendant,

(b) Motor vehicle Registration Nos KAG [...]and KAG [...] in the names of [particulars withheld] Co. Ltd.

(c) A plot in the Industrial Area, Machakos Town in the names of the Defendant,

(d) Plot Nos [...] and [...] in Katelembo Athiani Muvuti Farmers and Ranching Cooperative Society Ltd in the sole names of the Plaintiff.

(e) Numerous plots in Katelembo Athiani Muvuti Farmers and Ranching Co-operative Society Ltd in the names of the Defendant, the numbers of which the Defendant has refused to disclose to the Plaintiff,

(f) Shares in Universal Traders Sacco (Formerly Masaku Traders Sacco) in the sole names of the Plaintiff,

(g) A large number of shares in the said Universal Traders Sacco in the sole names of the Defendant, the exact number of the shares not having been disclosed to the Plaintiff by the Defendant,

(h) Shares in Kyanzavi Farmers Co Ltd in the sole names of the Plaintiff,

(i) Dairy cows,

(j) Other properties in the Defendant's names which he acquired secretly and has refused to disclose the particulars to the Plaintiff,

(k) Cash in millions of Kenya Shillings in Bank Account No [...] in Standard Chartered Bank Machakos which the Defendant has prevented the Plaintiff from accessing.”

5. The appellant further stated that in 1997 she established a home and a farm in one of the plots at Katelembo Athiani Muvuti Farmers Co- operative Society (“Katelembo”), and was in occupation of the same until 20th November, 2008 when the respondent broke the padlocks to the main house and installed new ones and denied her access hereto; that on the following day, that is 21st November, 2008, the respondent wrote a letter to the appellant purporting to divorce her under Kamba traditions for alleged infidelity.

6. Following the incident, the appellant filed a suit and thereafter an application seeking to restrain the respondent from evicting her from her home, saying that she was his wife. The respondent filed a defence and a replying affidavit stating that he had never been married to the appellant, since he was already married to D N since 29th April, 1967 under the Marriage Act, which marriage was still subsisting. The respondent annexed to his affidavit a copy of the marriage certificate between him and D N.

7. The appellant argued that the respondent's conduct towards her was wrongful, illegal, fraudulent, exploitative and driven by ill motive and malice. She set out the particulars thereof in her plaint.

8. The appellant sought judgment against the respondent as hereunder:

“(a) Permanent injunction orders restraining the defendant by himself, his agents/servants from entering upon and evicting the Plaintiff from her home whether on Plot Nos [...], [...] held in the Plaintiff's names or any other plot in Katelembo Athiani Muvuti Farmers and Ranching Co-operative Society Ltd acquired in the names of the Defendant with the proceeds of the joint businesses of the Plaintiff and the Defendant,

(b) Permanent injunction orders restraining the Defendant from alienating disposing of or dealing with in any manner whatsoever prejudicial to the Plaintiff's rights and interests with all the properties acquired whether in the names of the Plaintiff, the Defendant or of Mshono Co Ltd with proceeds of the businesses that have been operated jointly by the Plaintiff and the Defendant from 1990 to 2008,

(c) A declaration that the Plaintiff and the Defendant have been and are in joint partnership in the said businesses that they have conducted together in the period between 1990 and 2008,

(d) Accounts of all the income of the said businesses and of all the properties acquired with the proceeds of the said businesses in the said period,

(e) That the Defendant do give the Plaintiff an equal share of all the income and properties of the said businesses and that the Defendant do return to the Plaintiff all the clothing, personal effects and other properties which he has seized from her,

(f) General damages for receiving the Plaintiff's services of a wife upon deceit, misrepresentation and fraud,

(g) Costs of this suit,

(h) Any other or further relief this Honourable Court may deem fair and just in the circumstances.”

THE RESPONDENT'S DEFENCE BEFORE THE TRIAL COURT

9. The respondent denied the appellant's claims in total, and in particular that he had ever proposed to marry or did marry the appellant under the Kamba Customary Law. He contended, *inter alia*, that all along the appellant knew that he was married to his lawful wife under the Marriage Act; that initially the appellant was his salaried employee; that if any relationship existed between them it was adulterous, secret and a wrongful one; that the appellant while working for him was married to one B M and they had their matrimonial home in Miondoni, Wamuyu within the then Mwala District; that he had not entered into any joint venture with the appellant.

10. Regarding the residential house on plots Nos. [...] and [...] in Katelembo, the respondent stated that the house erected thereon is his own property which he developed in 1994 and the appellant was living there as a licensee.

THE APPELLANT'S TESTIMONY BEFORE THE TRIAL COURT

11. The appellant testified in line with her pleadings and stated that she was employed by the respondent in 1986; that the respondent told her that he had married his wife under the Kamba Customary Laws; that in 1990 she got married to the respondent under the Kamba Customary Laws; that the respondent paid dowry to her parents; that together with the respondent they put up a residential house at Katelembo and moved there in 1997; that most of the properties she had listed in the plaint, though registered in the

respondent's name, had been acquired through profits realized by [particulars withheld] Company Limited where she was one of the shareholders.

12. The appellant testified that plots number [...] and [...] Katelembo were registered in her personal name but the respondent had fenced them off; that the respondent had unlawfully evicted her from their matrimonial home situate on plots Nos.[...]to [...].

13. In cross examination, the appellant stated that her intimate relationship with the respondent started three months after her employment, that by then she was aware that the respondent was a married man but she did not know it was a statutory marriage; that she was running her own charcoal business and had also acquired several properties in her own name; and that they had also jointly acquired several properties with the respondent which she wanted the Court to distribute.

14. Regarding ownership of the Katelembo properties, the appellant called a witness by the name Simon Maithya Mbaluka, an Assistant Farm Manager at Katelembo Kathiani Muvuti Farmers & Ranching Co-operative Society. The witness told the trial Court that according to the Society's register, the appellant was shareholder number [...] and the respondent was shareholder number [...]; that the appellant was the allottee of plots numbers [...] and [...] while the respondent was the allottee of plots numbers [...] and [...]. However, the witness could not tell how the two parties acquired their respective plots.

THE RESPONDENT'S TESTIMONY BEFORE THE TRIAL COURT

15. The respondent testified that in 1986 he employed the appellant as a Trainee Instructor; that in 1987 she tendered a a resignation letter, saying that she was getting married to one B M, a police officer who was working at Wajir Police Station; she however wrote again on 5th June, 1987 requesting to resume employment; that he took her back and she worked for him until 31st January, 1997; that upon her return to work they became lovers; that in 1997 he incorporated [particulars withheld] Company Limited and he gratuitously allotted her one share, the same as his wife, A (D) N.

16. The respondent conceded that he had been in adulterous relationship with the appellant but denied that he ever married her, saying that he had no capacity to marry her. The respondent contended that the appellant had no right to claim any share of his properties; that he had assisted the appellant to acquire a plot at Katelembo and another one at Kyanzavi; that he had surrendered his charcoal business to her; that they had jointly bought a motor vehicle (a pick up), that was registered in the appellant's name; and that he had bought her shares at Universal Traders Sacco.

17. In cross examination, the respondent stated that prior to the filing of the suit, the appellant was not living at his house at Katelembo; that she forcefully occupied it after she filed the suit; and that she was not cultivating the land. Further, the respondent denied having ever married the appellant under the Kamba Customary Law.

THE TRIAL COURT'S FINDINGS

18. In a considered judgment, Makhandia, J. (as he then was), noted that from their written submissions, both parties had framed the issues for determination as follows:

“1. Whether there exists and/or existed a presumed marriage between the plaintiff and the defendant?”

2. Whether the plaintiff and the defendant should share the defendant's properties at all and if so, the proportions?”

3. If the answer to question 2 above is in the affirmative, whether the order of an injunction should issue against the defendant?”

4. Existence of a partnership or not and the consequences flowing therefrom.

5. Who should bear the costs of this suit?”

19. On the first issue, the learned judge held that no marriage could be presumed to have existed between the appellant and the respondent since there was still in existence a monogamous statutory marriage between the respondent and A N K.

20. As to the question whether the appellant and the respondent should share the respondent’s properties, the trial court answered it in the negative, simply because there existed no marriage, statutorily or otherwise, between the parties.

21. Regarding the third issue, the trial court held that there was no basis of granting an injunction against the respondent as sought in the plaint.

22. On the issue of the alleged partnership between the appellant and the respondent, the trial Court invoked the provisions of **Section 4** of the **Partnership Act** and came to the conclusion that the mere fact that the appellant benefited by way of sharing profits or managing the businesses in question did not entitle her to claim partnership in the same.

23. On the whole, the trial Court dismissed the entire suit and ordered that each party bears their own costs.

APPEAL TO THIS COURT

24. Being aggrieved by the said judgment, the appellant preferred an appeal to this Court. In her memorandum of appeal filed through B.M. Musau & Advocates, the appellant faulted the learned trial judge for failing to find that the appellant’s belief that the respondent’s marriage to Nzisa was under Kamba Customary Laws was based on the respondent’s direct representation to her; for failing to find: that the appellant was entitled to a share of the matrimonial property; that there was no presumption of marriage between the appellant and the respondent; that the appellant and the respondent were both shareholders in [particulars withheld] Company Limited; that the appellant had an interest in the matrimonial home, whether as a wife or as a business partner; that there was a partnership between the two parties; in failing to order distribution of the business profits; and by failing to hold that the appellant was the sole owner of plots numbers [...], [...] and [...] in Katelembo Athiani Muvuti Farmers & Ranching Co-operative Society Limited.

25. When the appeal came up for hearing, both Mr. B.M. Musau and Mr. Kioko Kilukumi, learned counsel for the appellant and the respondent respectively, told the Court that they would rely entirely on their written submissions and authorities that each party had filed, as well as the record of appeal.

26. The appellant’s submissions raise three issues for determination. They are as follows:

“(i) Whether there was marriage between the Appellant and the Respondent to entitle the Appellant to share matrimonial property?”

“(ii) Whether the Respondent is entitled to property solely owned by the Appellant?”

“(iii) Whether there was joint business venture or partnership between the Appellant and the Respondent thus entitling the Appellant to share business proceeds.”

27. On the other hand, the respondent’s submissions raise only two issues, namely:

“(a) Whether there exists an actual marriage and/or a presumption of marriage between the Appellant and the Respondent entitling the Appellant to share matrimonial property.

“(b) Whether there existed a joint partnership between the Respondent and the Appellant entitling the Appellant to share the proceeds of the partnership business.”

28. In our view, the issues we are called upon to determine are whether there was a marriage between the appellant and the respondent that could have entitled them to share matrimonial property upon collapse of the marriage; whether either of the parties could claim ownership of property that is solely owned by the other; and whether there was any joint business venture between the parties and if so, whether the appellant had any lawful claim to any part thereof.

DETERMINATION

WHETHER THERE WAS A MARRIAGE BETWEEN THE PARTIES

29. From the evidence adduced by both the appellant and the respondent, the latter was lawfully married to D N M on 29th April, 1967 under the Marriage Act. They were issued with Marriage Certificate No. [...]. The said marriage had not been dissolved by the time the respondent allegedly married the appellant under Customary Law.

30. **Section 37** of the **Marriage Act** makes it clear that a person who is married under the Act has no capacity to contract a customary marriage during the subsistence of the statutory marriage. The section states as follows:

“Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted.”

31. That position was affirmed by this Court in **Irene Njeri Macharia v Margaret Wairimu Njomo & Another [1976] eKLR**. It follows therefore that the respondent had no capacity to marry the appellant under the Kamba Customary Laws.

32. The respondent may have visited the appellant’s home where he met her parents, purported to pay dowry and performed functions that otherwise would have amounted to contracting a Kamba customary marriage. All that was in vain, as long as his statutory marriage to D was still subsisting. The affidavit that he deposed on 25th October, 2003 averring that he and the appellant solemnized their marriage in 1992 under Kamba Customary Law could not invalidate the express provisions of **Section 37** of the **Marriage Act**; and neither can a presumption of marriage between the appellant and the respondent be inferred in the circumstances.

33. When they were starting their illegal relationship, the appellant said that she was well aware that the respondent was a married man. It matters not that he may have lied to her that he had married D under Kamba Customary Laws, that could not change the legal position that all along the respondent had no capacity to contract any other marriage. Since the appellant was well aware that she was getting into a relationship with a man who was already married, she ought to have exercised due diligence to establish the legal status of that marriage; she did not.

34. Although in her plaint the appellant had sought as against the respondent “General damages for receiving the plaintiff’s services of a wife upon deceit, misrepresentation and fraud”, that claim was not proved. No submissions on that claim were made before the trial court and consequently the trial judge did not pronounce himself on it.

35. The appellant’s learned counsel further urged this Court to presume that there was a marriage between the appellant and the respondent because of the long cohabitation between the two. He cited several authorities, including **Beth Nyambura Kimani v Joyce Nyakinyua Kimani & 2 Others [2006] eKLR** and **Hortensiah Wanjiku Yahweh v Public Trustee, Civil Appeal No. 13 of 1976**.

36. Counsel did not, however, address the all-important issue of legality of a statutory marriage under **Section 37** of the **Marriage Act**, which does not permit a person who is married under that law to

contract any other form of marriage during the subsistence of the marriage. In the same vein, the doctrine of presumption of marriage cannot supplant express statutory provisions.

37. We therefore hold that there was no marriage between the appellant and the respondent and neither was there a presumption of marriage between the two. That being the case, the question of sharing “*matrimonial property*” does not arise.

Under **Section 6** of the **Matrimonial Property Act, 2013**, matrimonial property means:

“(a) the matrimonial home or homes;

(b) household goods and effects in the matrimonial home or homes; or

(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.”

Section 17 of the **Married Women Property Act, 1882**, which ceased to apply in Kenya from the commencement date of our Matrimonial Property Act states that:

“In any question between husband and wife as to the title to or possession of property either party may apply for an order to the Court and the judge may make such order with respect to the property in dispute.”

It follows therefore that in the absence of a marriage between the parties it cannot be argued that there is any matrimonial property for distribution between the appellant and the respondent.

38. We now turn to consider whether there existed a joint business venture between the appellant and the respondent entitling the appellant to a share of the proceeds of the business. It is not in dispute that the appellant is a shareholder of [particulars withheld] Company Limited, where the other shareholders are the respondent and his wife, A (D) N. The company’s main business is making and distribution of uniforms. The appellant alleged that the company owns substantial properties as listed under paragraph 10 of her plaint. The company’s bankers are Standard Chartered Bank, Machakos Branch. Alternatively, the appellant argued that the respondent had used the company’s funds to purchase and register several properties in his personal name. No evidence to that effect was adduced.

39. The appellant did not also adduce evidence to demonstrate ownership of the said properties by [particulars withheld] Company Limited. In any event, the company is a legal entity, separate from that of its shareholders and/or directors. See **Salmon v Salmon [1897] AC 22**. The company, being a juristic person, was not a party to the proceedings before the High Court, and neither was it joined in this appeal, and no order can issue against it or in respect of any property owned by it. The appellant’s claim as a shareholder of [particulars withheld] Company Limited is therefore misplaced. Such a claim can only be brought as against or by the company but not in the nature of the proceedings as instituted before the trial court.

40. Having established that there was no marriage, statutory or otherwise, between the appellant and the respondent, the appellant cannot on the basis of the alleged marriage, claim any share of property that is registered in the name of the respondent, and likewise, the respondent cannot on the basis, claim any share of property that is registered or owned by the appellant.

41. According to the respondent’s evidence in chief, the residential house where the parties were living before their differences erupted is standing on plot numbers [...] in Katelembo Athiani Muvuti Farmers and Ranching Co-operative Society Limited. That plot (*including any developments thereon*), being owned by the respondent, the appellant has no lawful claim over it whatsoever. Likewise, plots numbers [...], [...] and [...] are owned by the appellant. The respondent has no valid claim over the same. That also applies to the appellant’s shares at Kyanzavi Farmers Company Limited, Universal Traders Sacco and any other property that is registered in the appellant’s name.

42. In view of the foregoing, and having taken into consideration the appellant's prayers in her plaint as set out under paragraph 8 of this judgment, we come to the conclusion that the only prayer that ought to have been allowed by the trial court, and which we hereby grant, is prayer (a) which sought a permanent injunction to restrain the respondent by himself, his agents and/or servants from entering upon and/or evicting the appellant from her home on plots Nos. [...] and [...] or any other plot held in the appellant's name in Katelembo Athiani Muvuti Farmers and Ranching Co-operative Society. The appellant's appeal succeeds to that extent only. We further hold that the rest of the appellant's prayers in the plaint could not be granted and were rightly dismissed by the trial court.

43. The appellant is awarded one quarter of the costs of this appeal as well as one quarter of the costs of the High Court proceedings. Orders accordingly.

DATED and DELIVERED at Nairobi this 28th day of April, 2017.

D.K. MUSINGA

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCI Arb

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy

of the original.

DEPUTY REGISTRAR