



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WARSAME, SICHALE & OTIENO-ODEK, JJ.A.)

CIVIL APPEAL NO. 148 OF 2009

BETWEEN

C. O. O.....APPELLANT

AND

R.O.O.....RESPONDENT

(An appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Rawal, J) dated 18th September, 2008

in

H.C.C A No. 33 of 2001)

JUDGMENT OF THE COURT

1. The appellant and respondent are legally separated spouses. At all material times in the suit, the appellant had three wives. By a plaint dated 29th November, 2000, the appellant filed suit at the Chief Magistrate's Court for judicial separation having been married to the respondent under Luo customary law in 1975. The respondent filed defence and counterclaim for reasonable maintenance for herself and issues of the marriage.

2. By a Chamber Summons application dated 14th July, 2001, the respondent applied for interim maintenance and upkeep for herself and the children. It is instructive to note that the application was not accompanied by an Affidavit of Means. The appellant opposed the application in an affidavit dated 6th July, 2001, stating that the full hearing of the judicial separation suit between the parties had begun and the appellant had testified and closed his case; that the respondent had given her evidence in chief and was awaiting further cross-examination. He deposed that it was improper for the respondent to lodge an application for maintenance when the hearing of the suit had commenced and the appellant had closed his case and gave oral testimony that included evidence on maintenance.

3. Upon receipt of the replying affidavit, the respondent filed in court an Affidavit of Means detailing that since 1997, she had not worked and was doing voluntary social work with no income. In her Affidavit of Means, she prayed to be awarded the sum of 152,000/= as reasonable maintenance from the appellant.

4. The Senior Resident Magistrate, Mrs. G. Nzioka (as she then was), heard the dispute and on 15th August, 2001 granted the order for maintenance, on terms that:

“(i) The Plaintiff to pay Kshs.4, 000/= each for the defendant’s house help, watchman and gardener and Kshs.40, 000/= for her maintenance.

ii. The Plaintiff to settle the electricity, water and telephone bills.

iii. The Plaintiff do transfer the motor vehicle which the defendant was using to her and to maintain the same.

iv. The Plaintiff do meet the costs of this suit.”

5. Aggrieved by the order for maintenance, the appellant’s appeal to the High Court was partially allowed and the learned judge (Rawal J. as she then was) made the following orders; -

“i. The appellant do pay Shs.30, 000 per month for the respondent’s maintenance with effect from the date of judgment i.e. 15th August, 2001.

ii. The appellant to pay electricity, water and workers of the Homa Bay home.

iii. The appellant to pay telephone bills of the respondent not exceeding Kshs.5, 000 per month.

iv. No order as to costs.”

6. Aggrieved by the High Court judgment, the appellant has lodged this instant second appeal citing the following grounds in the memorandum of appeal:

“(a)The learned Judge erred in failing to properly analyze and evaluate the evidence on record as a result of which she arrived at a wrong decision.

b. The Judge erred in failing to allow the appellant’s appeal against the order for filing of affidavit of means even after finding that the trial court’s order for filling the affidavit was irregular the order having been made after the close of the case.

c. The Judge erred in relying wholly and or Substantially on the averments contained in the affidavit of means filed by the respondent even after finding that the veracity of the affidavit evidence was not tested; the Judge further erred in making an order for maintenance of Ksh. 30,000/= per month when there was no evidence on record to support such an award.

d. The court erred in making an order for the payment of Ksh. 5,000/= per month to the respondent towards telephone bills when no such claim had been made and there was no evidence on record to support such an award.

e. The Judge erred backdating the awards made to 15th August, 2001.

f. The court erred in failing to appreciate that the respondent was only one of the wives of the appellant and the appellant was already providing for her and the Judge further erred in failing to appreciate that the award of Ksh. 30,000/= per month was not only an unbearable burden on the appellant but amounted to condemning the appellant to servitude.”

7. At the hearing of this appeal, learned counsel Mr. P. R. Amuga appeared for the appellant while learned counsel Ms Virginiah Kimenyi appeared for the respondent.

8. Counsel for the appellant noted that both the appellant and respondent gave oral evidence before the

trial magistrate; that the trial magistrate erred in law in admitting and relying upon the respondent's affidavit of means filed after close of hearing; that having found that it was wrong for the trial magistrate to have relied on the affidavit of means that had been filed after close of hearing, the judge erred when she went ahead and relied on the same affidavit of means. It was submitted that affidavit of means relied upon by the two courts below alleged rental income earned by the appellant while no oral evidence was tendered by both parties adducing any rental income; that it was an error of law for the two courts below to rely on the irregular affidavit of means that had sneaked rental income into the case. Counsel submitted that the appellant had demonstrated that his monthly income was a pension of approximately Kshs.15,000/=. It was submitted that the respondent had an obligation to contribute towards maintaining herself under the concept of equality of partners in a marriage as enshrined in the Constitution.

9. Counsel for the respondent, Ms. Virignia Kimenyi, in opposing the appeal submitted that the appellant had an opportunity to file his affidavit of means but he did not do so; that the two courts below did not err in relying on the duly filed affidavit of means as a basis for determining the amount of maintenance to be awarded to the respondent; that choices have consequence and the appellant having chosen the respondent as his wife, he is under a legal obligation to maintain her despite the separation.

10. We have examined the record of the trial court and established that the appellant testified on 27th March, 2001, and was recalled on 22nd May, 2001. The respondent testified on 27th June, 2001 and 1st August, 2001. During the proceedings held on 1st August, 2001, before the trial magistrate, the respondent sought leave from the trial court to accept the Affidavit of Means that had already been filed in court or in the alternative leave be granted to file another Affidavit of Means. In a brief ruling delivered on 3rd August, 2001, the trial magistrate expressed as follows:

“The Affidavit of Means herein was filed without the court’s leave, the same is therefore not properly on record and I ignore it and/or strike it out for I cannot grant leave to regularize what is irregular. Counsel should have sought leave before filing it. However, although the parties have closed their cases, I find that to assist the court determine the issue of maintenance, Affidavit of Means be filed. I order each party to do so. If need will arise for cross-examination of either deponent, each party will be at liberty to do so”.

11. The record shows that on 15th August, 2001, after the trial magistrate had read her ruling, the appellant informed the magistrate that he had filed an Affidavit of Means. The court confirmed that the affidavit by the appellant was not on record at the time judgment was written.

12. In the final judgment, the trial magistrate ordered the appellant to pay the respondent a sum of Ksh. 4,000/= per month each as salary for house help, watchman and gardener and Ksh. 40,000/= per month for maintenance of the respondent. The appellant was ordered to settle electricity, water and telephone bills for the respondent at her Homa Bay residence.

13. Aggrieved by the trial magistrate's judgment and orders, the appellant lodged a first appeal to the High Court. The learned judge in partially allowing the appeal expressed as follows:

“I do note, and which is not denied by the respondent before the trial court, that the appellant has other children and wives to cater for and that the learned magistrate did not consider that aspect of the appellant’s case in her judgment.

I may observe at the end, that the order made by the learned trial magistrate of leave to file affidavit of means simultaneously with the order of judgment was irregular to say the least. By doing so, she has barred and or deprived the parties to test the veracity of affidavit evidence. She should have made an order permitting any party to cross-examine the other party’s averments made in the affidavit”.

14. In her judgment, the Judge reviewed downwards the monthly maintenance sum ordered by the trial magistrate; the Judge ordered the appellant to pay a monthly sum of Ksh. 30,000/=for the respondent's

maintenance with effect from the date of the trial magistrate’s judgment i.e. 15th August, 2001. The appellant was further ordered to pay electricity, water and workers at the Homa Bay home; the appellant is to pay telephone bills of the respondent in a sum not exceeding Ksh. 5,000/= per month.

15. Prior to the hearing of this appeal, counsel for the respondent filed a Notice of Preliminary Objection dated 15th October, 2015, to effect that the respondent shall raise a preliminary point of law that the appellant’s right of audience before this Court be nullified because he had failed to comply with the orders of the High Court given by Hon. Justice W. Musyoka, on 1st August, 2013, requiring the appellant to remit a monthly sum of Ksh. 10,000/= to the respondent pending hearing and determination of the instant appeal. The Notice stipulate that the respondent shall adduce such oral evidence and facts in support thereof. The said preliminary objection was argued as a response to the arguments of the appellant.

16. This is a second appeal which must be confined to points of law. (See **Kitivo -v- Kitivo, (2008) KLR 119**). The central argument in this appeal is that the learned Judge erred in law in failing to properly re-evaluate the evidence on record and consequently arrived at a wrong decision. It is contended that the learned Judge having found that it was irregular for the trial magistrate to order that an affidavit of means be filed simultaneously with the order of judgment, it was not open to the learned Judge to rely on the same affidavit of means that had been irregularly filed by the respondent. Counsel submitted that the learned Judge correctly held that the affidavit of means filed before the trial court prejudiced the appellant as it barred and or deprived the parties an opportunity to test the veracity of the affidavit evidence. Counsel submitted that having held that there was irregularity and prejudice vide the affidavit of means; the Judge erred in law in relying on the same irregular and prejudicial affidavit whose veracity had not been tested.

17. We have considered the memorandum and submissions by the advocates for the parties herein. The learned Judge held that the affidavit of means filed by the respondent after the close of hearing was irregular. Despite this finding, the Judge relied on the facts deposed in the irregularly filed affidavit of means to arrive at her decision on the quantum of maintenance that the appellant was to pay the respondent. We agree with the appellant’s submission that having found that the affidavit of means was irregularly filed, it was not open to the Judge to rely upon the same in making her decision. The learned Judge correctly held that the veracity of the contents of the affidavit of means was not proven. Having made this finding, the Judge ought to have remitted the issue of maintenance to the trial court for hearing and determination. In failing to do so, the Judge erred in law.

18. The upshot is that we find this appeal has merit and is hereby allowed; we set aside in entirety the judgment of the High Court dated 18th September, 2008, and all consequential orders and decrees. We hereby remit the suit to the Chief Magistrate’s court for fresh hearing of the application for maintenance of the respondent by the appellant. The respondent is to make a formal application with a supporting affidavit of means; the appellant is to make a reply thereto. Either party is at liberty to cross-examine the deponent. Each party shall bear his/her costs before the High Court and in this Court.

Dated and delivered at Nairobi this 26th day of February, 2016

M. WARSAME

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. OTIENO-ODEK

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR