



LKI v GK (Civil Appeal 21 of 2021) [2024] KEHC 3285 (KLR) (19 March 2024) (Judgment)

Neutral citation: [2024] KEHC 3285 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAPSABET
CIVIL APPEAL 21 OF 2021
JR KARANJA, J
MARCH 19, 2024**

BETWEEN

LKI APPELLANT

AND

GK RESPONDENT

JUDGMENT

1. In the statement of claim dated 27th June 2013, the Plaintiff LKI, prayed for the dissolution of the marriage contracted between him and the Defendant, GK, under the Luhya Customary Law. Additional prayers included costs of the suit and any other relief that the court deemed fit to grant.
2. The Defendant, in her statement of defence dated 17th July 2013 denied the claim and prayed for its dismissal while also counter claiming against the Plaintiff for maintenance and upkeep and to be allowed access into their matrimonial home without hindrance.
3. After the hearing of the claim ex-parte the Defendant, the trial court rendered its judgment on 14th October 2014 in favour of the Plaintiff. The Defendant's counter-claim was dismissed in the course of the hearing.
The traditional marriage between the Plaintiff and the Defendant was therefore dissolved.
4. However, on application by the Defendant dated 24th February 2015, the ex-parte judgment was set, set-aside by the court on 14th May 2015, thereby paving way for a fresh full hearing of the Plaintiff's claim with both parties giving their respective testimony.
5. Thereafter, on the 12th March 2018, the court rendered it's Judgment, this time in favour of the Defendant in her counter-claim. The present appeal by the Plaintiff/Appellant is against that judgment and is premised on the grounds set out in the memorandum of appeal dated 9th April 2018. These include: -



- i. That the Learned Magistrate erred in law and in fact in allowing the counter-claim after failing to sufficiently or at all consider the Appellant's issues raised before the honourable court against the counter-claim.
 - ii. That, the honourable magistrate erred in law and in fact in disregarding and or failing to address the issues raised by the Appellant in answer to the Respondent's counter-claim and pleadings.
 - iii. That, the Trial Magistrate erred in failing to consider sufficient or at all the issues before him by the Appellant.
 - iv. That, the Learned Magistrate misdirected herself by failing to appreciate in law that the Respondent must proof her case.
 - v. That, the Learned Magistrate misdirected itself (sic) by failing to appreciate in law in allowing the Divorce and the counter-claim on the same breath.
 - vi. That, the magistrate took into account irrelevant facts while failing to consider all relevant facts.
6. The Appellant therefore prays that the appeal be allowed and the judgment of the trial court be set aside in its entirety with costs.

The Respondent opposed the appeal and prayed for its dismissal with costs.

7. At the hearing of the appeal, learned counsel, Mr. Choge, appeared for the Appellant while Learned Counsel, Ms. Akweyu, appeared for the Respondent. Both parties filed and fully relied on their written submissions which have been given due consideration by this court whose main duty was to revisit the evidence and draw its own conclusions bearing in mind that the trial court had the benefit of seeing and hearing the witnesses' (See, *Selle Vs. Associated Motor Boat Company and Others* (1968) EA 123).
8. In summary, the Appellant's case was that on or about the year 1977, the Appellant (PW1) met the Defendant (DW1) at a dance club and fell in love with her. He then took her as his wife and left her at the matrimonial home when he left for [particulars Withheld] College in the month of June 1978, He however, visited her over the weekends until he completed his training as a teacher in the month of April 1980. Thereafter, he was posted to Marakwet District and Kerio Valley where he remained upto the year 1986 when he was transferred to a primary school at Kapkangani within the vicinity of his home, but due to transport expenses he rented a house at Kamobo.
9. All along, the Respondent was at their matrimonial home within a parcel of land occupied and belonging to his (Appellant's) parents and within the period, they were blessed with four male issues only that the marriage became tense leading to frequent disagreements and arguments such that in the year 1987 the Respondent threatened to leave the matrimonial home and did in fact leave and later disappeared after dumping their youngest son within their home compound.
10. In 1988, the Appellant married another woman and could do so since his marriage with the Respondent was under Luhya Customary Law and she had not returned to the matrimonial home seven years after she left.
- This progressed to twenty four (24) years as at the time she returned in the year 2011.
11. The Appellant implied that the Respondent sneaked back into the matrimonial home with the intention of causing disturbance and being a nuisance as she had deserted the home and marriage for a long period of time and returned in the year 2011 having been married elsewhere contrary to the Luhya Customs. It was this main reason that caused him to institute the present suit for dissolution of the marriage between him and the Respondent.



12. The Respondent's case was that the Respondent married the Appellant in 1978 under Luhya Customary Law and with the payment of one cow as dowry. Thereafter, they lived for ten (10) years as a married couple but later the Appellant married another woman called BA and chased away the Respondent who denied the allegation that she deserted her matrimonial home. She attributed her marital problems with the Appellant to the other woman but indicated that she returned to her matrimonial home where she lives in her son's home due to the Appellant's refusal to allow her access their matrimonial house which remains intact. She prayed for the dismissal of this suit with costs.
13. After considering the evidence by both the Appellant and the Respondent, the trial court appreciated that there was a previous judgment delivered on 14th October 2013 on the same matter, but failed to indicate that the ex-parte judgment was later set aside together with all consequential orders thereby giving way to a full fresh hearing of the case inter-parties.
14. The final trial court which delivered the impugned judgment noted that it had taken over the matter at the stage of defence hearing. The court therefore concentrated more on the Respondent's counter claim having noted that the Appellant's claim on the dissolution of the marriage was settled by an order issued under seal on the 23rd January 2015. The court, being alive to the ruling of the court setting aside the ex-parte judgment, opined that the issues which arose for determination were Firstly, the question of maintenance and upkeep of the Respondent, Secondly, the question of compelling the Appellant to allow the Respondent free access into their matrimonial home and Thirdly, the question of costs.
15. After framing the foregoing issues for determination, the trial court rendered itself thus: -

“I will confine myself to the counter claim issues as above and having analyzed the evidence above, I find that the issues therein to cause the marriage to collapse or so to speak was the second marriage by the Plaintiff to one BA both over cruelty and desertion in their evidence.

In a summarized conclusion I will allow this application as per the sought prayers in the counter claim that: -

- i. Plaintiff do pay alimony to the Defendant
- ii. That Plaintiff to let Defendant into her matrimonial home.
- iii. Each party will bear their costs.

Parting shot is that this marriage was done under Luhya Customary Law and since the court had not the benefit of getting an expert witness on matters Luhya Customary Marriage/ Divorce, I will be inclined to affirm that the only issues for determination are in the counter claim upon analyzing the evidence.

Plaintiff had since married and the Defendant is not asking her co-wife leaves but what she seeks is only alimony and to stay in her home and this the court grants her.”

16. It is evident from the foregoing observations and finding of the trial court that the judgment was essentially on the Respondent's counter-claim, yet the trial and the evidence adduced therein by both the Appellant and the Respondent basically related to both the Appellant's claim for dissolution of the marriage and the Respondent's counterclaim for maintenance and unhindered access to the matrimonial home.

As it were, the success of the counterclaim was dependent on the success of the claim for the dissolution of the marriage. So, the actual basic issues for determination were firstly, whether the Appellant/ Plaintiff was entitled to an order of dissolution of the marriage and Secondly, if so whether the Respondent was entitled to an order of alimony and/or maintenance against the Appellant together



with an order of unhindered access to their matrimonial home on the basis of the dissolution of their marriage.

17. With regard to the first issue, if the order alluded to by the trial court dated the 23rd January 2015, did lawfully amount to an order dissolving the marriage between the Appellant and the Respondent, then it may safely be stated that there being a valid order of dissolution of the marriage the first issues for determination was spent and/or settled thereby justifying the trial court's finding that the only issues which emerged for determination at that juncture related to the Respondent's counter-claim against the Appellant's settled claim.
18. But, if the alleged order dated 23rd January 2015, was invalid for purposes of marriage dissolution, hence settlement of the Appellant's claim, then it was a misdirection on the part of the trial court to find that the impugned marriage was dissolved thereby placing the Respondent's counter-claim as the sole issue falling for determination.

The decision which followed in favour of the Respondent was invalid and untenable for the main reason that there being no valid order for the dissolution of the marriage, the Respondent was not entitled to the orders sought in her counter-claim.

19. The impugned judgment of the trial court would in the circumstances be ripe for invalidation and setting aside at, this juncture, hence validating this appeal.

Be that as it may, by way of revising the whole case and the evidence in relation thereto, the first question would be whether the Appellant was entitled to an order of dissolution of the marriage between him and the Respondent. In that regard, there arose no dispute that the marriage was contracted under Luhya Customary Law. As such, the Appellant was required to establish and prove by necessary evidence the applicable customary grounds for dissolution of the marriage.

20. In the publication "Restatement of African Law", the learned author Eugene Cotran, with regard to the law of marriage and divorce stated that among the Luhya divorce or dissolution of marriage is granted either by the family and clan elders. It may alternatively be granted by the court where a party seeking for dissolution of marriage may sue for divorce. This case instituted by the Appellant was one such case, but he was still required to establish and prove any of the grounds, of divorce available under customary law.
21. Such grounds as noted in Contrans Restatement of African Law (supra) include refusal of sexual intercourse without just cause, witchcraft, habitual theft, willful desertion, incest and excessive physical cruelty. These grounds apply to both the husband and the wife. There are other grounds which are specific to the husband and to the wife e.g. failure of a husband to maintain his wife and adultery by the wife.
22. The Appellant did not in his evidence establish and prove any of the aforementioned grounds against the Respondent. Other than making bare allegations he did not provide cogent corroborative evidence to prove his claim and convince the court that he was indeed entitled to an order of dissolution of the marriage between him and the Respondent. He could not be heard to say that the marriage had broken down irretrievably because such a ground is not available under Luhya customary law.
23. There was no demonstration on the part of the Appellant to show that the Respondent was cruel to him in any manner or in a manner which was excessive. Neither, did the Appellant demonstrate that the Respondent willfully deserted the matrimonial home particularly on the background of the Respondents contention that she was chased away by the Appellant after he contracted a second marriage with another woman.



24. The Appellant's veiled allegation of adultery against the Respondent was not established at all by any substantial evidence. The allegation was clearly based on rumours that the Respondent was married elsewhere after leaving the matrimonial home and had since given birth to a baby girl.

Basically, the Appellant's evidence was insufficient and lacking in probative value to prove his case against the Respondent and entitle him to an order of dissolution of marriage. This was made worse by his failure to provide expert evidence from an elder of the Luhya Community with proper knowledge of Luhya Cultural Laws and matters.

Indeed the trial court was alive to this fact when it noted that it did not have the benefit of hearing an expert witness on matters Luhya Customary Marriage or divorce.

25. It would therefore be the finding of this court that the Appellant's claim against the Respondent was not established even on a balance of probabilities.

In the circumstances, the Respondents claim for maintenance and related orders was rendered obsolete and untenable for grant of the orders sought against the Appellant. And if the claim was tenable it was incumbent upon the Respondent to establish and prove by credible evidence that she was entitled to a reasonable amount of money on a regular basis from the Appellant for her maintenance.

26. The Respondent was thus required to prove her incapacity to maintain herself in terms of her welfare, personal expenses and related matters. In her evidence she said that she was in casual employment as a tea picker but still prayed for daily upkeep and maintenance from the Appellant without showing any justification for that. In doing so, she implied that she was out to financially benefit from the dissolution of her marriage with the Appellant thereby making a mockery of Article 45 (3) of *the Constitution*.

27. A claim for maintenance must be considered with regard to the provisions of Article 45(3) of *the Constitution* which recognizes that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.

In the cited case of *WMN Vs. BML* (2012) eKLR it was held that: -

“No. spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or to turn the other spouse into a beast of burden but where a spouse deserves to be paid maintenance in the event of a divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”

28. In the same case, it was further held that: -

“.....under *the Constitution* the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself and there is no greater obligation on the part of the Petitioner to support himself than there is on the part of the Respondent to support herself.”

In this case, the Respondent did not demonstrate that she was justly and truly deserving of spousal support from the Appellant to maintain herself on dissolution of their marriage. Her evidence in that regard was inadequate to support her counterclaim for which she ought not to have benefitted via the impugned judgment which in the opinion of this court was clearly against the weight of the evidence and therefore erroneous in both law and fact.



29. For all the reasons foregoing this court must and hereby allows the appeal to the extent that the impugned judgment of the trial court is hereby set aside and substituted for a judgment dismissing both the Appellant's claim and the Respondent's counter-claim.

The parties shall bear their own costs of the suit and the appeal.

Ordered accordingly.

DELIVERED AND DATED THIS 19TH DAY OF MARCH, 2024

J. R. KARANJAH,

JUDGE

