REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 72 OF 2011

P.K.....APPELLANT

VERSUS

D.A.A.....RESPONDENT

[Being an appeal from the Ruling of Senior Resident Magistrate's Court at Winam SRMC Divorce Cause No. 19 of 2009 before Hon. Mr. Biwott]

J U D G M E N T

The appellant and the respondent got married on 6-12-1997 at St. Stephen's Anglican Church of Kenya in Kisumu and set up a matrimonial home in Kisumu. The marriage was blessed with two children: J.B.O (now 15) and A.J.O (now 12). On ground cruelty, the respondent on 11-11-2009 petitioned for divorce. She sought to be granted custody of the children and an order that the appellant contributes towards their maintenance. On 22-12-2009 a default judgment was entered against the appellant on basis that he had been served with the petition but that had failed to enter appearance or file an answer. The petition was formally proved on 27-1-2010 when the respondent gave evidence. Judgment was on 17-2-2010 granted in her favour. The appellant filed an application dated 12-1-2011 to set aside the default judgment, formal proof and the final judgment and to have the matter heard afresh. The application was dismissed with no order as to costs in a ruling delivered on 25-5-2011. The appellant was aggrieved by the ruling and filed this appeal.

Several grounds were raised in the Memorandum of Appeal, but the issues can be summarized as follows:

a. the default judgment that was entered was irregular;
b. the appellant had filed a memo of appearance and was therefore entitled to be served with a hearing notice on the formal proof;
c. the trial court erred in finding that the application to set aside was brought late when the appellant was unaware of the proceedings in formal proof and the consequent judgment;
d. the proposed answer to the petition had raised triable issues which should have gone to hearing; and that
e. the nature of the proceedings (involving divorce and custody) were such that justice could only be done by hearing both parties.

Mr. Ragot for the appellant and Mr. Omondi for the respondent filed written submissions which have been considered.

Counsel are in agreement that the marriage between the appellant and the respondent was celebrated under the African Christian Marriage and Divorce Act (Cap. 151) and therefore the procedural

law that regulated their dispute was to be found in the Matrimonial Causes Rules made under the Matrimonial Causes Act (Cap 152). The parties agreed that under rule 12 (1) and (2) of the Rules any party who desires to challenge a petition served on him shall enter appearance by filing a Memorandum of Appearance in the prescribed Form 9 provided for in the Appendix to the Rules, and that notice of such entry of Appearance must be served on the opposite party. The Memorandum of Appearance was indeed filed. The same was served on the respondent. The respondent's argument was that what was required to be served on her was the notice of appearance (Form 10 of the Appendix), and not the memo itself (Form 9). This is being technical for nothing. The substance of the matter is that an appearance was entered and the same was served to inform the respondent of the fact of entry.

Under rule 31 of the Rules the appellant, who had entered appearance, had the right to be heard irrespective of whether or not he had filed an answer to the petition. It follows that the appellant was denied the right to be heard on the petition, now that he had entered appearance. He was not served with a hearing notice. The formal proof and the consequent judgment were irregular and ought to have set aside ex debito justitiae.

Further, before the petition was set down for hearing, the respondent was required under rule 29 (1) and (2) to refer the pleadings to the registrar for his certificate that they were in order and subsequently for directions to be given before trial. These mandatory steps were not followed before the petition was heard. The hearing and subsequent judgment were to that extent irregular.

The respondent argues that there is no provision under the Matrimonial Causes Act or the Rules that provides for setting aside a default judgment, formal proof and final judgment; that the Act and Rules do not have the equivalent of Order 10 rule 9 of the repealed Civil Procedure Rules under which the application and impugned ruling were made. My view is that, even assuming that the Act and Rules did not provide for the setting aside of exparte or default proceedings and/or judgment the court would still be minded to do substantial justice as between the parties as commanded by Article 159 (2) (d) of the Constitution of Kenya 2010. But more important, under Articles 25 (c) and 50 (1) of the Constitution the appellant was entitled to the fair hearing of the petition, and there could have been no fair hearing without him being given an opportunity to be heard by being at least served with a hearing notice. In **Adolf Gitonga -VS- Mwangi Thiongo [1982-1988] 1 KAR 1027** it was observed by the Court of Appeal that a judgment cannot be imposed on a litigant who has not been heard; that proceedings and judgment entered without a hearing are a nullity and should be, in the interest of justice, set aside.

In short, I agree with the appellant that once these substantive matters were brought to the attention of the learned magistrate he ought to have found that the default judgment, the formal proof and the final judgment were all irregular and ought to have been set aside a matter of course as there was no discretion to exercise.

The complaint by the respondent is that since the judgment that granted divorce, the parties have moved on; that both the petition and the proposed cross-petition sought divorce and therefore the appeal is only an academic exercise. The court, however, is dealing with the denial of the substantial and constitutional right to be heard and everything else will be secondary.

In conclusion, I allow the appeal. The default judgment, exparte proceedings and the final judgment (and any decree issued) are all set aside. The proposed answer shall be deemed to be properly filed with the respondent being given 14 days to file a reply. Following that the parties shall obtain certificate, take directions and list the petition for hearing. This is a marital dispute. Each party shall pay own costs.

Dated, signed and delivered at Kisumu this 30th day of September, 2013.

A.O. MUCHELULE
JUDGE