EH v CSM (Civil Appeal 16 of 2020) [2024] KEHC 16842 (KLR) (21 August 2024) (Judgment)

Neutral citation: [2024] KEHC 16842 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL 16 OF 2020

G MUTAI, J

AUGUST 21, 2024

BETWEEN

EH ..... APPELLANT

AND

CSM ..... RESPONDENT

(Being an appeal from the judgement and decree of the Honourable M O Rabera, SRM, dated 4th September 2020 at the Chief Magistrate's Court at Mombasa; Mombasa Divorce Cause No. 48 of 2016)

JUDGMENT

1. The respondent herein petitioned the Chief Magistrate's Court through a petition dated 8th September 2016 seeking the orders that the marriage between her and respondent be dissolved; that a declaration be issued that the petitioner is entitled at least half of the assets acquired during the marriage, including the house on Plot Number XXX/1/MN and the specified motor vehicles; an injunction restraining the respondent, his servant and/or agents from selling, alienating, disposing or in manner dealing with the matrimonial property to the exclusion of the petitioner and maintenance.

2. The Petition was opposed. The Appellant filed a Notice of the Preliminary Objection dated 20th September 2016. After hearing the parties the court below delivered a ruling on 14th October 20216 in which the Notice of the Preliminary Objection was dismissed with costs to the Respondent in this appeal. The Appellant herein filed a Reply to the Petition dated 13th October 2016, in which he denied that there was a marriage between the parties hereto.

3. Upon hearing the parties, the trial court delivered a judgment on 4th September 2020, whereby it held that there was a presumption of marriage between the appellant and the respondent by virtue of long cohabitation and acts of general repute. In the judgment, the court stated that there was no evidence placed before it to prove the status of the alleged previous marriage of the respondent. On the basis of its finding, the court below issued a decree nisi, which was to be made absolute after six months.

4. Aggrieved the appellant sought to have the judgement and decree of the trial court varied and/or set aside and the appeal allowed with costs. The appeal is based on the following grounds:-

    a. That the learned magistrate erred in law and fact in his judgment in failing to draw inferences from the primary facts established to determine whether the respondent proved her case, whereby he wrongly found that there was a valid marriage between the appellant and respondent capable of being dissolved;

    b. That the learned magistrate erred in law and fact in his judgment by failing to totally address his mind as regards the gravity of the denial of the subject marriage raised by the appellant and to appreciate the facts and circumstances of the matter before the court, the submissions made on behalf of the appellant and the respondent whereby he exercised his discretion on wrong principles and reached a wrong decision;

    c. That the learned magistrate erred in law and fact in failing to hold that, in view of the substance of the appellant‘s previous 13 years of marriage in the absence of proof of divorce and the respondent’s relationship, the presumption of essential validity of a marriage between the respondent and the appellant could not be made in the face of the evidence, and if made there was sufficient evidence to rebut it;

    d. That the judgement of the learned magistrate does not stand on sound law and proper analysis and evaluation of the evidence before the court and is against settled principles of the law on the presumption of marriage;

    e. That the learned magistrate erred in law and fact in his judgement in failing to analyse the exhibits (if any) placed before him and failing to consider the evidential value of such exhibits in his judgement;

    f. That the learned magistrate erred in law and fact in failing to appreciate that documents filed with pleadings do not ipso facto amount to evidence since such documents are not introduced on court record by consent or on oath.

    g. That the learned magistrate erred in law and fact by wrongly imposing matters relating to the Children’s Act and the petitioner’s children into his judgement, whereby he exercised his discretion on wrong principles and reached a wrong decision. The learned magistrate was duty-bound to act on the evidence on record rather than advancing theories that had no foundation or basis in that evidence;

    h. That the learned magistrate erred in law and, in fact, in his judgement in considering pleadings in files which were not before the court for determination, nor had they been consolidated with the file before him; and

    i. That the learned magistrate erred in law and fact in making his decision by citing and relying on authorities that were irrelevant to the cause before him.

5. During the hearing of this appeal, the appellant sought leave to produce additional evidence. Although the application was opposed, this Court, relying on Order 42 Rule 27 of the Civil Procedure Rules, 2010 allowed the adduction of additional evidence. Consequently, both parties appeared before this Court and were heard and cross-examined on their evidence. The hearing was by viva voce evidence in open court.

6. During the hearing, the appellant, as the PW1 in the appellate hearing, produced additional evidence to prove that he was not the husband of the respondent as she swore in her pleadings before the children’s

court that she was married to Solomon Genya Nyale. He asked the court to excuse him from this case as he was not the one married to the respondent.

7. During the cross-examination, he stated that in 2006, the respondent sought his assistance as she needed accommodation. Being a fellow Rwandese exile he hosted her in his servant's quarter. He denied that he had any relationship with the respondent. That being the case he denied that there could have been a prenuptial agreement between them.

8. The respondent, as the DW1, also testified and was cross-examined. She stated that the case in the court below was against NN, who at the time was her employer. She denied that she had ever been married to him officially nor that had she ever been married before. She signed the affidavit without knowledge as she speaks French, Kinyarwanda and a little English. She testified that the documents were prepared for her by the appellant.

9. It was her evidence that she had been the wife to the appellant from 2006 to 2012 and that they lived in Nyali during coverture. She testified that the Appellant walked out of the matrimonial home in 2012.

10. During cross-examination, she stated that the appellant prepared the documents with her lawyer and that she never read them before signing. She got the children with Nyale, who was her friend. Further, the appellant paid half a dowry to her parents, and they got married under Kenyan laws.

11. She stated that she signed the documents for reasons that she wanted her children back and also out of trust.

12. The appellant, through his then advocates Adagi & Associates, filed written submissions dated 17th March 2021. The submissions of the Respondent are dated 26th October 2021.

13. I have considered the contents of the record of appeal, the evidence adduced before this Court, and the written submissions of the parties. To my mind the sole issue that I am required to determine is whethere there was sufficient evidence for the court below to presume that there was a marriage between the Appellant and the Respondent.

14. In the matter before the court below, the learned magistrate found that there were grounds to presume marriage between the parties. This was on the basis of a nuptial agreement, oral testimony of the PW3 and PW4 and photos of the parties together.

15. Having found that there was a marriage, the court proceeded to dissolve the ground that:-

> " it is apparent that there is no love between the petitioner and respondent herein, and this court cannot force parties to stay together."

16. Was the trial court right to presume marriage between the parties? The locus classicus applicable in cases of presumption of marriage is MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) [2023] KESC 2 (KLR). The Supreme Court, in paragraph 64 thereof, laid out strict parameters within which a presumption of marriage can be made:-

> " 64. We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:
>
> 1. The parties must have lived together for a long period of time.
>
> 2. The parties must have the legal right or capacity to marry.
>
> 3. The parties must have intended to marry.

4. There must be consent by both parties.

5. The parties must have held themselves out to the outside world as being a married couple.

6. The onus of proving the presumption is on the party who alleges it.

7. The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.

8. The standard of proof is on a balance of probabilities.

65. The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it."

17. I note that the impugned decision was made before the Supreme Court of Kenya settled the law. That notwithstanding the case law at the time, the learned magistrate made his decision was similar to what the Supreme Court restated.

18. In the case Hortensia Wanjiku Yawe v. The Public Trustee Nairobi [1976] eKLR the Court of Appeal held that long cohabitation and general repute will give rise to a rebuttable presumption that marriage exists between a man and a woman.

19. Similarly The Court of Appeal in Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR held as follows: -

> " Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed"

20. My understanding of the foregoing decisions is that the parties must have lived together for a long period of time together, during which they held themselves out as husband and wife. It would also be necessary that the parties have the capacity to marry as such presumption cannot be made in aid of an illegality.

21. Did the respondent meet the standard required?

22. Based on her evidence, the parties lived together for a period of 5 years (from 2007 to 2012). Is the said period sufficient? I do not think so.

23. Even assuming that a 5-year period of living together was sufficient to prove a marriage, did the parties have the capacity to marry? This is the crux of the matter. In the evidence adduced in the supplementary Record of Appeal, it is apparent that the respondent averred that she was married to Mr SG in the proceedings before the Children's Court. Although the respondent attempted to shift the blame for the said pleadings to the appellant on the grounds that she didn't understand English, it was apparent to the court that the respondent was quite familiar with the English language. I am therefore unable to agree with her that she wasn't aware of what she deposed.

24. In any case, she is bound by her signature. She cannot resile from it. Apart from her oral testimony, there was nothing to show that the pleadings in the children's case were prepared by the Appellant and that she was made to append her signature to documents she couldn't understand. She is bound be her own previous depositions.

25. Having been married to SG, it was incumbent on the respondent to show that her marriage to SG had been dissolved. No such evidence was produced. In the circumstances, I find and hold that the respondent lacked the capacity to marry the appellant.

26. It was also stated that the parties got married under the customary law of the Hutu People. There is a debate as to whether there is such ethnicity as the Hutu or if the correct nomenclature is the Banyarwanda People. That said, I see no bar to this Court recognising the customary laws of the alien residents of Kenya. The burden of proof as to whether there was a customary marriage existed would fall on the party seeking to assert it.

27. In Sakina Sote Kaittany & another v Mary Wamaitha [1995]eKLR, Gicheru, J.A. (as he then was had this to say concerning proof of customary law and practices:

> ...the onus of proof to establish a particular customary law rests on the party who relies on that law in support of his case. call evidence to prove that customary law, as would prove the relevant facts of his case.

28. I have read the proceedings of the Court below. I am not persuaded that marriage under the customary laws of the Hutu/Banyarwanda people was propounded to a sufficient level of cogency.

29. In my view, the learned magistrate fell into error and made a presumption of marriage without sufficient evidence. His decision cannot, therefore, stand.

30. The upshot of the foregoing is that I find that the appeal has merit; I set aside the judgment of the court below and substitute it with a judgment dismissing the petition.

31. Each party shall bear his/her own costs of this appeal and also of the court below.

32. Orders accordingly.

DATED AND SIGNED AT MOMBASA ON THE 21ST DAY OF AUGUST 2024. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms Kemunto, for the Appellant;

Mr Angima, for the Respondent; and

Arthur – Court Assistant.