



**AKK v PKW (Family Appeal E013 of 2023)
[2024] KEHC 11948 (KLR) (Family) (14 August 2024) (Judgment)**

Neutral citation: [2024] KEHC 11948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
FAMILY APPEAL E013 OF 2023
SN RIECHI, J
AUGUST 14, 2024**

BETWEEN

AKK APPELLANT

AND

PKW RESPONDENT

*(Being an Appeal from the Judgement and Decree of the Hon. E.K.Kagoni
in Nairobi MCDC no.867 of 2017 delivered on 20th January 2023)*

JUDGMENT

1. The appeal herein challenges a decision made by the lower court in the divorce cause No.867 of 2017 on the grounds that the trial court dismissed the petition on the basis that Ngunario which is an essential element of a Kikuyu Customary marriage was not undertaken as well as the fact that section 96(2) and (3) of the Marriage Act 2014 requires parties to a customary marriage to register the marriage which was not done. The appellant has now filed the instant appeal on the ground that the trial Magistrate erred in finding that there was no marriage between the parties.
2. The appellant seeks that the judgment of the trial court be set aside, that the court reverse the decision and determine the matter with finality, and the respondent be ordered to pay the costs of the appeal.
3. When the matter came up for directions on 22nd February 2014, the parties consented to disposing the appeal by way of written submissions. The record before this court indicates that the appellant filed her written submissions, dated 27th March 2024. The respondent filed written submissions dated 3rd March 2024 On the facts, the appellant submitted that the parties started cohabiting as husband and wife in 1999 and in November they conducted a Kikuyu Customary Marriage, thus they cohabited for a period of 17 years. The appellant submitted that the couple was blessed with two children namely



RWK born on 21st May 2020 and RKK born on 17th July 2001 and named after Anne's father in accordance with Kikuyu tradition.

4. On whether the trial court erred in finding that there was no marriage between the parties, the appellant submitted that she placed evidence before the trial court that there exists a marriage. The appellant submitted that the witnesses who testified in court being EMK Appellant's mother, Wachira Kabiriu one of the elders who conducted the Kikuyu ceremony and another elder Samuel Muchiri testified and gave elaborate evidence on the chronology of the Kikuyu customary law ceremony as follows;
 - i. Introduction- Anne introduced Peter to her parents in 1997.
 - ii. Cohabitation- the parties started cohabiting in 1999.
 - iii. "Kuhada Ithigi" - Peter, his family representatives and friends visited A's home and declared his intention to marry her. A's family accepted their request and they proceeded to set a date for the traditional wedding ceremony.
 - iv. "Ruracio" – the appellant submitted happened in November 2000 and It is the Kikuyu traditional wedding ceremony which entailed the following:- Peter's family visited Anne's home in Karatina, Nyeri; A's family locked the gate and required Peter's family to sing for them and entice them; Peter's family enticed A's family with song and dance and her family then ushered them into their compound. An introduction ceremony then followed during which a member from each family introduced their respective families; The senior representatives from each family then retreated to the house to officially deliberate on the dowry payment. The dowry was quantified ('kuninve miti") and part of it was paid; Both families agreed that Peter's family met the requirements set by Anne's family, and they were officially declared married in front of all people present. Their families officially became "athonis" - in-laws; and Their firstborn child was blessed by the elders.
5. The appellant submitted further that the elder present who was PW3 testified that he is chairman of clan called "Agaciku a Mbari ya Mbogu". He testified that he was chairman of the negotiations and stated that what is critical in the creation of a Kikuyu wedding is the presentation of the she and he goats in Kikuyu as "Mwati na Harika". He testified that they were paid for with money presented. He testified that this constitutes Kikuyu customary marriage. The appellant submitted the elder testified that Ngurario ceremony is not a mandatory ritual in constituting a Kikuyu marriage. The appellant placed reliance on decision In re Estate of Joseph Mwaura Nderi (Deceased) (Succession Cause 578 of 2015) /2022/ KEHC 598
6. The appellant further submitted that It is clear that the presentation of "mwati na harika" is mandatory to establish a marriage relationship between parties. The appellant submitted that on the other hand, "ngurario" is a ceremony that has no specific timeline and can even be performed after the death of a spouse. The appellant submitted that according to Kikuyu Customary Law, dowry is not paid all at once and is an ongoing process.
7. The appellant submitted on payment of additional dowry by the respondent that the respondent brought more dowry in 2016 whose details are; On the 8th October 2016, respondent's family visited appellant's family with the intention of paying additional dowry. Those present were respondent, his father, his four brothers, his sister and his longtime friend Mr. Samuel Muchiri who is PW4.
8. The appellant submitted the respondent paid an additional dowry of 6 goats in cash equivalent to Kshs.60,000/= being part of the remaining balance of the original dowry items requested during "ruracio". The appellant submitted Mr. Samuel Muchiri, PW4 was the representative elder who presented the dowry to A's parents on behalf of Peter and his family as required by Kikuyu Customs.



9. The appellant submitted that on admission in pleadings the existence of a Kikuyu Customary Marriage that the respondent in his replying affidavit dated 15th October 2010 filed in children's court in Children Cause No.652 of 2010, existence of a Kikuyu Customary Marriage was also admitted by respondent. The appellant referred to pages 36-40 of the appellant's Bundle of Documents under paragraph 5 of the affidavit.
10. The appellant submitted that the statement of defence and counterclaim in Children Cause No.652 of 2010, The appellant submitted that the respondent in his pleadings therein claims to be a loving husband and referred to the marriage and matrimonial home severally. The appellant referred to page 41-42 of appellant's Bundle of Documents. The appellant submitted that under section 61 of the *Evidence Act*, facts that are admitted need not be proven.
11. The appellant submitted that based on this admission alone there was marriage under Kikuyu Customary Law. The appellant submitted the learned Trial Magistrate took note of the admissions made by Peter in the Children's Cause No.652 of 2010. However, the Court rejected the submissions that such admission has probative value in establishing a marriage. The Appellant submitted that the learned Trial Magistrate erred in law and fact in the finding above.
12. The appellant submitted on cohabitation that the parties started cohabiting as husband and wife in 1999. After the traditional wedding ceremony, they continued cohabiting as husband and wife at Tena Estate from 1999-2005 and later on at Loresho Estate from 2005 -2016. The appellant submitted this fact was not disputed by respondent.
13. The appellant submitted on integration of the couple after marriage that families of the couple acknowledged the appellant and respondent marriage and they were integrated into the extended family life. The appellant referred to pictures on pages 54-62 of the appellant's bundle of documents. The appellant submitted on respondent induction into the "KIAMA KIA ATHURI" -Kikuyu Council of Elders that the respondent was initiated into the " kياما کیا Athuri" in 2014 as "Muturi wa Kياما". The appellant submitted that this being a respected position in the Kikuyu Society,culture dictates one has be married for them to be a member. The appellant submitted that expert witness testimony on Peter's initiation into the "Kياما کیا Athuri" in 2014 clearly shoes that Anne was Peter's wife. The appellant is support of her case placed reliance on the Court of Appeal case in Hottensiah Wanjiku Yawe Vs. The Public Trustees [1976]Eklr that set out principles regarding proof of customary marriage.
14. The appellant submitted that she has adduced evidence to prove that there was a valid Kikuyu Customary Marriage. The appellant submitted that failure to perform the "ngurario" was a modality and did not impede the customary marriage between the parties.
15. The respondent on his part submitted that the existence of customary marriage is a matter of law and the essentials of a Kikuyu customary marriage have been set out in numerous case law. The respondent placed reliance on the decision in court of appeal in Eva Naima Kaaka & another v Tabitha Waithera Mararo[2018]eklr.
16. The respondent submitted that there is no argument whatsoever that Ngurario was carried out in the instant case. The respondent submitted that he called a Kikuyu elder and customs expert Mr.Warorua RW1 who testified that there was no Ngurario ceremony. The respondent submitted that Ngurario is mandatory and referred the court to decision in Nderitu Ndirangu v Patrick Mwago Wanjau[2011]eklr.
17. The respondent submitted on presumption of marriage that appellant upon realizing that a Kikuyu Customary Marriage cannot be construed between parties,the appellant now attempts to depart



from her Petition and pleadings by asking court to make presumption of marriage. The respondent submitted that it would be highly prejudicial to the respondent for the Appellant to now change her tune to seek presumption of marriage. The respondent submitted that an allegation for a presumption of marriage go to the root of the matter and must be specifically pleaded. The respondent relied on the decision in *Raila Amolo Odinga & Another v IEBC & 2 Others*[2017]ekLR. In conclusion the respondent submitted that the appellant having failed to prove existence of a customary marriage as pleaded she is not entitled to orders for divorce.

18. The pleadings and evidence presented by the parties in this case disclose that the main issues for determination to which the Court will focus its legal analysis is whether the parties herein were married under Kikuyu Customary Law. This is a first appellate Court. The duties of a 1st Appellate Court was set out in *Selle And Another V Associated Motor Boat Company Ltd & Others*,[1968] EA 123, Sir Clement De Lestang, Vice President of the Court of Appeal for East Africa stated those principles as follows:

“An appeal to this Court from a trial by the High Court is by way of a retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this Court is not bound necessarily to follow the trial judge findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities, materially to estimate the evidence or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally.”

19. On whether there was sufficient evidence to support the contention that appellant was married to the respondent under Kikuyu customary law, the trial magistrate in his judgment stated.

“..... Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage. The intention of the legislature was to have customary marriage celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage and where payment of dowry is required, as part of the fulfilment or to prove a marriage under customary law, the payment of a token amount of dowry, shall be sufficient to prove a customary marriage. Therefore, where parties intended to celebrate any customary marriage, - the guiding principle is that, it has to be in accordance with the customs of the communities of one or both of the parties to the intended marriage. The intention of the legislature in the second limb of Section 43 of the *Marriage Act* 2014, is that, where to celebrate a customary marriage, dowry is required, then the payment of a token amount of dowry shall be sufficient to prove a customary marriage. In this case, evidence on record suggest that the parties intended to celebrate the marriage under Kikuyu customs. However, the Petitioner failed to consider that, part of the Kikuyu customary law, is the nguracio, there is testimony before this court, that this process was not undertaken at any given moment in the interactions of the parties herein. I have read the Court of Appeal decision i.e., *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* (Supra) and also the decision of Justice Muchemi in *Re Estate of Neru Njagi (Deceased)* (Supra). In as much as the Court of Appeal was emphatic that customary law is not static, it was very clear that, “..the essential steps and ceremonies must be performed, respective of the form in which they are performed”.



20. The court is well aware of the admission made by the Respondent, in the Children's Cause No. 652 of 2010. However, the court rejects the argument that such admission, makes the Petitioner and the Respondent married lawfully under kikuyu customary law as the issue whether a kikuyu customary marriage has been conducted is not a matter of pleadings but one of law. Pleadings cannot make that which is not lawful, to be lawful, merely because an admission exist. The court is further minded to highlight the demerits of the Petitioner's case. The law governing customary marriages is contained under Part V of the Marriage Act 2014 and precedent. With respect to registration of a customary marriage, and particularly one celebrated prior to the commencement of the Marriage Act 2014, Section 96(2) and (3) of the Marriage Act 2014, stipulate as follows; "96 (1) ... (2) Parties to a marriage contracted under customary law, the Hindu Marriage and Divorce Act (Cap. 157) (now repealed) or the Islamic Marriage and Divorce Registration Act (now repealed) before commencement of this Act, which is not registered shall apply to the Registrar or County Registrar to assistant Registrar for the registration of that marriage under this Act within three years of the coming to force of this Act. (3) The parties to a customary marriage shall register such a marriage within three years of the coming to force of this Act.
21. The Marriage Act stipulates the legislation commenced on 20.05.2014. The Petitioner filed this case in 06.12.2017. Therefore, when the Petition was filed before this court, the three years upon which the parties were required to comply with the law, had lapsed. What is the effect of this? Since there is evidence of admission that the marriage was not registered as per the law, it therefore follows that, by operation of law, the failure to comply with Section 44, 45 and 55 of the Marriage Act 2014, No. 4 of 2014, was fatal. [See the decision of Justice Ngaah Jairus in CWN v DK [2021] eKLR] Reasoswherefore Judgment is hereby entered as follows; a. The Petition dated 5* December 2017, is hereby dismissed. b. The Respondent is awarded the costs of the Petition."
22. The appellant in this case filed for divorce in the Magistrates' Court stating that she prayed that the marriage between her and the Respondent conducted under Kikuyu Customary Law dissolved. In paragraph 1 of the Petition the appellant stated:
1. That in the year 1999 your humble petition then a spinster stated cohabiting with the respondent herein PK then a bachelor and in the year 2000 the petitioner lawfully married the respondent under the Agikuyu Customary Law.
- Proof of Customary marriage is a question or fact. which is proved by evidence.
- The Court of Appeal in Hottensiah Waniiku Yawe vs. The Public Trustees [1976] eKLR laid down three principles regarding proof of customary marriages in court as follows:
- i. The onus of proving customary law marriage is generally on the party who claims it;
 - ii. The standard of proof is the usual one for a civil action, namely, one on the balance of probabilities; and
 - iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.
23. The appellant having approached Court for divorce on the foundation that they were married under Agikuyu customary law, was required to prove the customary marriage. The Ingredients of a Kikuyu Customary marriage was stated in Eugene Cotran Restatement of African Customary Law as
1. Capacity; the parties must have capacity to marry and also the capacity to marry each other.
 2. Consent; the parties to the marriage and their respective families must consent to the union



3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.
5. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride grooms home".

This position has been restated in several decisions by the courts. In *Mary Wanjiru Gathatha v Esther Wanjiru Kiarie Eldoret CA 20/2005*. Nyamu J. gave:

The essentials of a Kikuyu Customary marriage as;

1. Co-operating Consent
 2. Ngurario – slaughtering a ram
 3. Ngurano – Bride price
 4. Commencement of cohabitation
24. In the evidence before the trial Court, the appellants witnesses confirmed that Ngurario ceremony was not done. Indeed Pw3 confirmed that Ngurario the slaughtering of a ram was not done. This is also confirmed by the mother of the appellant. The court of appeal in *Naima Kaaka v Thabiti Mararo 2018 eKLR*. the court of appeal stated:
 25. For instance, the Ngurario is an integral part of the ceremony that signifies the existence of a Kikuyu customary marriage. But our reevaluation of the evidence, does not point to a ngurario having taken place. This is because a fundamental component of a ngurario is the slaughtering of a ram or goat.
 26. During the visit to Nyeri in 2011, no slaughter of a ngurario ram was evident. The closest evidence alluding to the slaughter of a goat was to be found in Stephen Mbuthia's affidavit where it was deponed that;

"...finally, the suitor requested that a he goat be slaughtered in accordance to traditional ritual called, "ngoima". The family/clan however declined to offer him his noble request.. " This averment was repeated in Elizabeth Mararo's affidavit.

From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the deceased."
 27. Court of Appeal similarly in *Nderitu Ndirangu v Patrick Mwago Wanjau 2011 eklr* stated as follows;
 28. The Ngurario ceremony is what seals a marriage and there can be no valid marriage under Kikuyu customary law without the Ngurario (slaughtering of a ram)



29. Nyamu J: In *Mary Wanjiru Githatu v Esther Wanjiku Kiano* (supra) states:

It is important to observe that Customary law marriages have some important ingredients without which they cannot possibly qualify as such. The ingredients are essentials in the making of a customary law marriage.

30. A customary law marriage is a covenant of marriage sealed by the other customary ingredients and for the Kikuyu these ingredients are well known and documented. If the courts were to fail to take this into account, they would be giving recognition to the “come we stay” marriages which are neither customary nor statutory.

31. From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the *ngurario* ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between the appellant and respondent.

32. In my view, the omission of *Nguracio* as a rite negated the existence of a Kikuyu customary marriage. I therefore find that the trial magistrate did not error in making a finding in this instant case that rites of customary marriage must be performed as required and that *Nguracio* was not conducted and therefore parties were not married under Kikuyu Customary Law.

33. Having found that the parties were not married under Kikuyu Customary Law I find no reason to deal with the issue on whether the trial court erred in finding that customary marriage was not registered therefore the same does not constitute a marriage under Kikuyu Customary Law.

34. Also I note that the appellant raised issue that this court should find that there was presumption of marriage between the parties. I have analyzed the Petition and from the pleading appellant did not seek an order of presumption of marriage. The appellant has raised the issue at appeal stage and I find the same will be prejudicial to the respondent and I cannot determine it at this stage.

35. The Courts have stated now and again that the issue of marriage under customary law is a question of fact. That presumes that the Petitioner knows as a fact whether he or she is married or not. Marriage is a fact. One cannot say that he or she is somehow married. A person cannot be some-how married. You are either married or not. You must also know as a fact who your spouse is. Just as you should know under what legal regime you are married. One cannot come to court in divorce proceedings and state that I think I am married under statute. If not then it is under Customary law. If you find I am not married under the above see if I am married under the doctrine of presumption of marriage. This in my view is juridically unhygienic. In the petition the appellant pleaded and had evidence to prove Agikuyu customary marriage. The trial magistrate found rightly in my view that she did not prove Agikuyu customary Marriage. I find the trial magistrate’s judgment grounded on evidence before Court.

36. I therefore find no merit in this appeal which is hereby dismissed with costs.

DELIVERED AT NAIROBI THIS 14TH DAY OF AUGUST, 2024

.....

S. N. RIECHI

JUDGE

