



**AOO v EAO (Civil Appeal E016 of 2023)
[2023] KEHC 27261 (KLR) (20 December 2023) (Judgment)**

Neutral citation: [2023] KEHC 27261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E016 OF 2023**

**G MUTAI, J
DECEMBER 20, 2023**

BETWEEN

AOO APPELLANT

AND

EAO RESPONDENT

JUDGMENT

1. This is an appeal filed against the decision of the Hon M. Nabibya, PM, delivered on 15th December 2022 in Mombasa Chief Magistrate Divorce Cause No. E026 of 2020; E O versus A O O. In the said decision, the trial court found that there were grounds justifying a presumption of marriage between the parties. Thereafter the Court dissolved the said marriage on the grounds of desertion by the appellant and irreconcilable difference between the then petitioner and the respondent.
2. Being dissatisfied with the said judgement, the appellant moved this court through an appeal dated 27th June 2023 seeking to vary and or set aside the judgement of the court below, dismissal of the divorce petition, and to have the matter referred for fresh hearing before another judicial officer other than M. Nabibya, PM. The appeal is based on the following grounds: -
 - a. That the learned magistrate erred in law in finding that there was marriage by cohabitation between the appellant and the respondent;
 - b. That the learned magistrate erred in law in purporting to dissolve a marriage which was not proved by the respondent;
 - c. That the learned magistrate erred in law and in fact in disregarding the evidence adduced by the appellant that there was no marriage between him and the respondent;
 - d. That the learned magistrate erred in law and fact by not finding that the respondent had not proved that there was marriage by cohabitation;



- e. That the testimonies of the parties are inelegantly captured, the learned magistrate failed to record the testimonies of the parties as presented but instead, in a biased manner, left out testimonies of the parties and introduced foreign testimony not presented by parties during the hearing, in a predetermined fashion to influence the outcome of the matter;
 - f. That the learned magistrate erred in law and in fact by ignoring cardinal principles of law and precedents on the threshold for marriage by cohabitation, and disregarding several binding authorities cited by the applicant, thereby failing to correctly interpret and apply the law;
 - g. That the learned magistrate erred in law and in fact in taking into consideration irrelevant issues, misguiding herself and misinterpreting facts and the law, and in granting too much weight to the submission by the respondent while taking no consideration of the evidence placed before the court by the appellant;
 - h. That on the whole, the decision of the Magistrate’s Court at Mombasa (Hon. M. Nabibya, PM) dated and delivered on 15.12.2022 is inimical to justice, the overriding principles, and contrary to the pleadings, evidence, precedent /practice and law.
3. This being a first appeal, the court has a duty to reconsider and evaluate the evidence and draw its own conclusion, bearing in mind that it did not see nor hear the witnesses. I am guided by the case of *Gitobu Imanyara & 2 others versus the Attorney General* [2016] eKLR, where the Court of Appeal stated that: -
- “This being a first appeal, it is trite law that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect.”
4. What then was the evidence before the trial Court? I shall set out below, in precis, the proceedings before the trial court and the decision made thereat.
 5. The respondent, then as a petitioner, moved the court below (hereinafter referred to as the “trial court”) vide a petition filed on 28th October 2020 seeking the dissolution of the marriage between herself and the appellant.
 6. The respondent testified that she met the Appellant in 2013 and lived with him as husband and wife in the Mshomoroni Area before relocating to Railways. They stayed together for more than 3 ½ years in the same house, and when she met him, he was single. It was her evidence that they do not have children together and that the appellant had never been to her ancestral home. They invested together by constructing a house in Migori County financed by the proceeds of the sale of her Matatu.
 7. The respondent’s second witness was L A O. She testified the court that she knew both parties and that she had known the respondent for about 20 years. The appellant was introduced to her as a husband to the respondent. The two parties lived together and were her neighbours in Mshomoroni. It was her evidence that she helped them get a house.
 8. The third witness was Nancy Achieng. In her evidence, the said witness stated that she knew both parties as a couple as she used to work for them as a house help. She worked for the petitioner for seven years and knew A O O as the husband of the petitioner. They moved from Mikindani to Mshomoroni and then to Railways Estate [particulars withheld]. However, the parties separated at some point for



- reasons unknown to her. She further testified that she had been to the petitioner's rural home in Seme and that the parties were not blessed with children.
9. H N was the respondent's fourth witness. She told the court that she knew the respondent through the appellant. They lived as a husband and wife for about two years. It was her evidence that Abel introduced the respondent to her as his wife.
 10. The 5th witness of the respondent was George Odhiambo. Mr Odhiambo is the brother of the respondent. Mr. Odhiambo told the court that in 2013 his sister called him and told him that she had gotten married to A O O. They visited his place in Nakuru, and since then, he had known A O O as E A O's husband. They lived together for four years; however, in 2016, they had a dispute that forced him to come to Mombasa to resolve. The two were living in railway quarters, and he stayed with them for a week. It was his evidence that Abel had never been to their rural home and that the meeting was held at Abel's cousin's place and not their parents' home.
 11. The last witness for the respondent was D A O. Ms Oduor told the court that she knew both parties and that she had known the respondent since 1990 while in college as they graduated together. She testified that the respondent and the appellant That both parties visited them in Nairobi in 2013 and introduced themselves as husband and wife to her and her husband. The two lived together up to 2016 when she heard that there were issues between them.
 12. The appellant testified that in the years 2013 to 2016, he lived in Bamburi and that the dealings with the respondent herein were purely of a business nature as he lent her Kes.750,000/- which she was to repay. He further testified that he is married to Mary with whom he has four kids, and that he has never stayed with the respondent herein.
 13. The appellant's second witness was Samwel Otieno. Samwel told the court that the appellant lived in Bamburi; however, he never visited him. It was his evidence that the appellant never married the respondent neither did he cohabit with her.
 14. The third witness of the appellant was A A A. She stated that the petitioner was not known to her however she was the appellant's witness in the agreement of sale of parcel of land known as LR No. Kanyamkago/Kawere/11/4620 which she sold to the appellant.
 15. Upon consideration of both parties' evidence, as well as that of their witnesses together with their written submissions, the trial delivered its judgement on 15th December 2022 where it presumed that a marriage had hitherto existed between the appellant and the respondent and held that the respondent had proved grounds of desertion and irreconcilable differences between them and dissolved the marriage.
 16. The appeal was canvassed by way of written submissions. Subsequently, the appellant, through his advocates Midenga & Company Advocates, filed written submissions dated 23rd October 2023.
 17. Counsel submitted on four issues for determination, namely, whether marriage by way of cohabitation is a marriage capable of being dissolved through divorce proceedings; whether the subordinate court erred in presuming marriage between the parties and dissolving it; if the answer to the above issues above are in the affirmative, whether the various grounds for divorce were proved; and who should bear the costs.
 18. On the 1st issue, counsel submitted that the presumption of marriage does not create a marriage capable of being dissolved, as was erroneously done by the subordinate court, but is used by courts to answer a different kind of question lodged before it for determination.



19. Counsel relied on several authorities and submitted that the presumption of marriage is a secondary issue to a main issue in judicial proceedings and does not create a marriage that is capable of being dissolved. He submitted that there was no marriage capable of being dissolved. For that reason, the petition ought to have been dismissed.
20. Counsel further submitted that marriage by cohabitation is not recognised by statute as a type of marriage capable of being dissolved. The trial court did not, therefore, have jurisdiction to presume marriage by cohabitation.
21. On the second issue, counsel submitted that there are material contradictions, several inconsistencies and missteps in the impugned judgement which include; no overt acts as there was no dispute on the fact that the appellant never visited the respondent's ancestral home and no ceremony of any sort or in accordance with Luo customs was ever conducted with the intention to create a marriage between the parties; failure to evaluate the respondent's testimony properly. Further, the court failed to evaluate the evidence of the appellant's second and third witnesses as they are not mentioned anywhere in the judgement of the trial court. Further, there had been a dispute as to how long the parties stayed together, which ought to have been resolved first, something that did not happen.
22. Further the court did not address the issue of lack of children between the parties as it is not captured in its judgement. The court did not address the issue of capacity to marry as the appellant, in his witness statement in paragraph 3, stated that he is married to one Mary Awour, with whom they have four children. The court did not address the issue of matrimonial home as it ought to have been certain that, indeed, the matrimonial home existed before finding that parties lived together. It was submitted the testimonies of the parties were inelegantly captured as the testimony of PW-1 at page 9, thereof indicates re-examination, then ends with cross-examination of PW-2 testimony at pages 11 and 12, where it is not indicated whether there was cross-examination or not yet all the witnesses were cross-examined. Thus it is impossible to discern the different stages of trial.
23. On the third issue counsel submitted that the respondent did not prove grounds for divorce.
24. On the fourth issue counsel submitted that the respondents should bear the costs of the appeal and the costs of the proceedings at the subordinate court.
25. On the other hand, the respondent, through her advocates G. A Okumu & Co. Advocates, filed written submissions dated 9th November 2023.
26. Counsel submitted that the appeal lacks merit as the magistrate made a correct finding in arriving at her decision. It was submitted that the evidence of PW-1, PW-2, PW-3, PW-4, and PW-5 was to the effect that the appellant and the respondent cohabited for more than 1 ½ years, evidence which the appellant did not challenge. Counsel referred to the appellant's evidence as captured in pages 128-129 of the record of appeal and also in his witness statement dated 14th April 2022 and submitted that he only denied cohabiting with the respondent but did not dispute the evidence of PW-3 and PW-4 that they had cohabited at Railways Estate for two years.
27. Counsel further relied on several case laws and submitted that the respondent proved her case on a balance of probability as required. The appellant did not tender any evidence that would lead to a different holding by the court. The magistrate indeed considered the appellant's evidence and arrived at a correct decision.
28. On the testimonies of the parties being inelegantly captured counsel submitted that the appellant has not specified which evidence was not captured nor show evidence of the alleged bias. The magistrate



had the benefit of noting the witnesses and recording the evidence presented and, therefore, made the correct finding in arriving at her decision.

29. On the 6th and 7th grounds of appeal counsel submitted that the court did not consider erroneous factors at all.
30. On the 8th ground of appeal counsel submitted that it is not clear what the appellant meant by this ground.
31. On jurisdiction, counsel submitted that Section 2 recognises cohabitation, and thus, the court has jurisdiction to hear this matter. Counsel submitted that points which were neither pleaded nor made an issue at the trial court cannot be the basis of a judgment or an appeal. It was further submitted that the lack of children cannot negate the fact that parties have cohabited, and neither are children a yardstick to confirm cohabitation or marriage.
32. Counsel submitted that costs follow the event and urged the court to dismiss the appeal and uphold the judgement of the Magistrate's Court.
33. I have considered the appeal and the rival submissions by both counsels and will condense the grounds of appeal into three issues for determination: -
 - a. Whether the trial court had jurisdiction to determine the matter;
 - b. Whether there was marriage by cohabitation between the appellant and the respondent; and
 - c. Whether the trial court considered the evidence of the witnesses.
34. I have perused the proceedings of the court below. On 19th April 2021, counsel for the appellant told the court that they had filed a preliminary objection dated 13th November 2020 challenging the jurisdiction of the court. The court directed that the preliminary objection be heard by way of written submissions on 20th May 2021. On the 20th day of May 2021, the preliminary objection wasn't canvassed as the appellant was bereaved. When the matter came up on 10th June 2021, the counsel for the appellant told the court that he had talked with his colleague and agreed to forego the preliminary objection. Thus the preliminary objection was withdrawn by consent.
35. Faced with a similar situation, the court in the case of CSO versus RBO [2019] eKLR stated: -

“ Article 159 (2) (d) of *the Constitution* 2010 imposes a duty on the court to administer justice without undue regard to procedural technicalities so that a court of law will be more concerned with administering substantive justice.

Sub- Article 2(e) requires that the purpose and principles of *the Constitution* shall be protected and promoted.

Article 259, which deals with the construing of *the constitution*, requires that the same be interpreted in a manner that promotes its purpose, values and principles, advances the rule of law and fundamental freedom and permits the development of the law.

In my view, therefore, the provisions of the *Marriage Act* and other pieces of legislation relevant herein must be interpreted with the knowledge that *the Constitution* is the basic norm and its values, purpose, and import must be borne in mind.

Marriage by cohabitation as a principle of common law has been recognised over time in Kenya. My understanding of the Respondent's pleadings is that she alludes to marriage by cohabitation which is a common law marriage.



Indeed, Section 98(1) of the *Marriage Act* is a saving clause and states that any marriage which under any written or customary law hitherto in force constituted a valid marriage before coming into force of this Act is valid for purposes of this Act.

The *Judicature Act* in Section 3(1) a & b alludes to the application of the common law and doctrine of equity as a source of law...

In *SWG versus AM* [2015] eKLR Musyoka J, in applying the doctrine of common law marriage, had this to say;

“When a marriage does not comply with the relevant formalities laid down by the *Marriage Act* or under customary law, it may be rescued by the presumption of marriage by cohabitation.”

Clearly, the courts have not shied away from applying the common law of England, where the circumstances of this country permit, as the courts breathe life into the provisions of *the Constitution* and as it applies the saving clause, Section 98 of the *Marriage Act*.

With the foregoing, I am in concurrence with the trial court’s decision. Firstly, an amendment to the petition will cure a defect to the same so that the court does not take the drastic measure of dismissing the suit on a technicality. Error, if any, is curable. Secondly, the court has jurisdiction as the common law principles are still applicable in Kenya and the court has the power to presume the marriage referred to in the Petition.”

36. Accordingly, I concur with the findings of the court in the case law above and find that the trial court had the jurisdiction to hear and determine the matter.
37. On whether there was marriage by cohabitation between the appellant and the respondent, the respondent, through oral evidence and her submissions, argued that she cohabited with the appellant for three years. She also called several witnesses who corroborated her evidence. On the other hand, the appellant argued that he was not married to the respondent, and neither did they cohabit.
38. In dealing with the issue of presumption of marriage by cohabitation the Supreme Court in the case of *MNK versus POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (Petition 9 of 2021)* [2023] KESC 2 (KLR) (Family) (27 January 2023) (Judgment) stated: -

“Presumption of marriage is a well-settled common law principle that long cohabitation of a man and woman with a general reputation as husband and wife raises a presumption that the parties have contracted marriage. However, a presumption of marriage is a rebuttable presumption and can disappear in the face of proof that no marriage existed.

According to Halsbury’s Laws of England, 5th Edition 2015, Matrimonial and Civil Partnership Law (Volume 72): “Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary.”



Similarly, Bromley Family Law 5th Edition provides that:

“If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married.”

Section 119 of the [Evidence Act](#), cap 80 Laws of Kenya is also instructive. It provides as follows:

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

From the foregoing, courts are permitted to make a prima facie legal inference that certain facts exist without proof, regard being taken to the common course of natural events and human conduct, in relation to the facts of a particular case.”

39. Further the supreme court in the case of MNK v POM; Initiative for Strategic Litigation in Africa (ISLA) (Amicus Curiae) (supra) outlined several factors to be considered in determining whether a presumption of marriage should be made. The Court held that: -

“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.

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.”

40. I have considered the evidence tendered by the parties as well as their witnesses. It is my view that the respondent established on a balance of probabilities that a marriage between her and the appellant existed. On the other hand, the appellant did not tender strong, distinct, satisfactory and conclusive evidence to rebut the presumption of marriage; all he and his witnesses did was present bare denials. In the circumstances, it is my finding that there was a marriage by long cohabitation between the appellant and the respondent and that the trial court was right to make that presumption.



41. On whether the trial court considered the evidence tendered by all witnesses, the trial court, in its judgement stated: -

“I have analysed the petitioners’ witnesses’ evidence and that of the respondent in order to determine whether the petition is proved on a balance of probability.”

42. The court proceeded to analyse the evidence and stated: -

“what comes out clearly is that the parties herein lived or cohabited as husband and wife with independent persons who were not their relatives i.e. PW2-PW4 confirming this fact. That at least 1 and 1/2 years was long enough for this court to make a presumption that the two were married. The fact that the petitioner could finance various prospects with the support or agreement of the respondent is not a demonstration of any ordinary business relationship.”

43. The court then proceeded to find that the petition was proved on grounds of desertion and irrecoverable differences, and dissolved the marriage.

44. I have considered the proceedings and the judgement of the trial court, and it is my view that the trial court considered all evidence tendered before it in making its decision. Further the fact that the court did not rehash all evidence in its judgement does not mean the court did not consider the evidence tendered by the parties. It had the chance to hear and see the witnesses before making its final decision. On how the evidence is captured in the typed proceedings it is my view that the said error that does not go to the root of the matter. Therefore, the ground that all evidence was not captured and or was inelegantly captured must fail.

45. The upshot of the foregoing is that it is the finding of this Court that the appeal lacks merit. The same is hereby dismissed. The judgment of the court below is thus upheld.

46. This being a family appeal, each party shall bear his/her own costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF DECEMBER 2023 VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Midenga for the Appellant;

No appearance for the Respondent; and

Arthur – Court Assistant.

