Ngeywa & another v Watima (Civil Appeal 61 of 2021)
[2022] KEHC 13421 (KLR) (24 May 2022) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 61 OF 2021

DK KEMEI, J

MAY 24, 2022

BETWEEN

VICTORIA SIRIRA NGEYWA ..... 1ST APPELLANT

BENSON SIMIYU NAMASWA ..... 2ND APPELLANT

AND

HUDSON WANGILA WATIMA ..... RESPONDENT

(Being an Appeal from the judgement and Decree of Hon. C. A. S. Mutai, Senior Principal Magistrate given at Bungoma on 27th September, 2021 in Bungoma Chief Magistrate's Court Civil Suit No. 183 of 2021)

JUDGMENT

1. This matter is a burial dispute revolving around the body of Mary Namwiko Ngewya (hereinafter referred to as the deceased), a caretaker at the property of the respondent who died on July 18, 2021 at Webuye sub-county Hospital after a short illness.

2. According to the plaint, upon the deceased's demise the appellants stealthily wanted to bury the body of the deceased on a piece of land No Bokoli/Chwele/1069 which is registered to the respondent.

3. The appellants defence averred that that deceased was a wife of the respondent and that her name was Mary Namwiko Watima. It was further contended that the respondent married the deceased in the year 1973 and that she has been staying on land parcel No Bokoli/Chwele/1069 as a wife and that the respondent should bury the deceased as his wife.

4. The respondent called four (4) witnesses in support of his case. PW1, Hudson Wangila Watima, the sole proprietor of land No Bokoli/Chwele/1069 adopted his statement and testified that the parcel of land in question is registered in his name. He occupied the land in 1963 after his marriage to his first wife, Dinnah Watima, who now resides at Lugulu. He later married a second wife, Rose Watima, and

settled her at the Ndalu scheme. He knew the deceased as he had hired her as a bar maid after purchasing a plot at Chebukaka market and constructed a bar and restaurant business. He was residing at a piece of land at Sichei Bokoli Chwele 1069. He testified that he never married the deceased and that he does not understand how the deceased changed her name on the identity card. He told the court that he had no children with the deceased, never visited her parents and no marriage customs were observed as per he Bukusu culture on the deceased. On cross examination, he testified that his business manager between 1970 to 1978 was one Jafred Watima and on Jafred's exit he appointed the deceased as the manager.

5. PW2, Jafred Watima, adopted his statement and testified that he knew the deceased in the year 1972 while working with her at the Silver Bar at Chebukaka Market. On exit, the deceased took over the running of the business and the respondent left the business to her when his wife was transferred to Lugulu in 1975. The deceased was employed by the respondent as a bar maid and later a caretaker at the plot Chwele/Bokoli/1069. On re-examination, he testified that the house built on the parcel No Chwele/Bokoli/1069 belongs to the respondent's 1st wife, Dinnah Watima and that the deceased only stayed there as an employee.

6. PW3, Chestimore Kituyi Maratani, adopted his statement and testified that he is a community leader and well versed with the Bukusu traditions. He told the court that there exist three types of marriages among the Bukusu people. Eloping can take place and dowry paid later, come we stay can be formalized, and that dowry can be paid after the death of a wife if it is a come we say scenario. He elaborated that the wife can be returned to her birth home to be buried in situations where she bore no children. On re-examination, he testified that dowry has to be paid.

7. PW4, Joel Kimitiosi Nasioma, adopted his statement and testified that he is the chair of the Batasama clan, which is the clan of the plaintiff. He last visited homestead of the respondent in 1985 where he saw the deceased living there. He never participated in the dowry negotiation for the respondent as he was a minor. He knew the deceased was an employee of the respondent. On re-examination, he testified that dowry negotiations do precede a marriage as per their customs.

8. The appellants, on their part called five (5) witnesses. According to DW1, Victoria Nasimiyu Nalianya, testified that she is the deceased's sister. She adopted her statementand testified that the deceased left to stay with the respondent in the year 1972. She visited them severally and that the deceased and the respondent lived as husband and wife. Her father never asked the respondent for dowry as he had many heads of cattle. On cross-examination, she testified that the deceased lived in the house of the respondent's 1st wife as a house had not been built for and that the deceased had two children with the respondent but they both died.

9. DW2, Benson Simiyu Wamaswa, the deceased's brother who adopted his statement testified that the respondent is an in-law and that when the deceased got married to the respondent, his father was not interested in dowry as he had enough heads of cattle. On cross examination, he testified that the deceased had two children but they died and that he had no proof to show the deceased was married to the respondent. On re-examination, he testified that the children were buried at the deceased's father's home since the deceased had not moved into the house she was staying in upon her death.

10. DW3, Benson Buyela Wanyama,adopted his statement and testified that he is the chief of Chwele and that the respondent married the deceased in 1973 and that the respondent's 1st wife left her house for the deceased to occupy. On cross examination, he testified that the respondent is his cousin and that he had three wives, and that the respondent never called him to witness the dowry payment for the deceased.

11. DW1, Victoria Nasimiyu Nalianya, was recalled to produce the identity card of the deceased. On cross-examination she testified that the location states Mukuyuni Central Division and that there is nowhere in the card written Chwele.

12. DW4, Bernard Simiyu Konya,adopted his statement and testified that he was a neighbour to the respondent. The deceased and the respondent lived as husband and wife for a period of 40 years. On cross examination, he testified that the deceased had two children who died but he never attended their burial. He is Bukusu and according to their custom one qualifies as a wife when dowry has been paid and a wedding ceremony conducted. He was never invited to the negotiations in respect of the deceased and the respondent.

13. DW5, Cosmas Mukolongolo Wanyao, adopted his statement and testified that the deceased was his immediate neighbour. He testified that the deceased lived with the respondent as husband and wife from the year 1973 and that he is not aware if marriage rites took place. On cross examination, he testified that he is Bukusu and according to custom where a bride is from another tribe the customs followed during marriage negotiations are that of the husband. Payment of dowry is a requirement before legitimization of a marriage but the same can still be paid at a later date. He testified that there was some introduction but he could not recall when the same took place.

14. DW6, Patrick Kundu Mukolongolo, adopted his statement and testified that the deceasedwas his neighbour. He testified that the deceased got married in 1973 to Marijan Watima. On cross examination, he testified that he has never visited that home where the deceased was staying and that he is well versed with Bukusu customs, where some interest has been shown on a prospective bond one writes a letter to the father of the bride and the same is followed by negotiations for dowry. He testified that he is not aware if any introductions took place. On re- examination, he testified that the bridegroom or his family writes a letter to the family of the bride.

15. In his judgement, the learned trial magistrate found that the appellants did not tender in any evidence which confirmed that there was a statutory marriage or customary marriage or even a presumption of marriage and that under the *Land Act* a registered proprietor of land has right over such property which includes and is not limited to user, disposal or change. He further held that, the respondent is at liberty to decide on the burial of the deceased on his piece of land.

16. Aggrieved by these findings, the appellants have preferred this appeal citing the following grounds:

    i. That the learned trial magistrate erred in law and in fact in allowing the respondent's claim when there was no sufficient evidence to prove that the deceased was a caretaker.

    ii. That the learned trial magistrate erred in law and in fact construing the law that marriage only exists if it is anchored on statute and customs and not on presumption of marriage.

    iii. That the learned trial magistrate erred in law and in fact in allowing the respondent's claim without appreciating that the deceased was the respondent's wife noting that the respondent had other two wives apart from the deceased herein.

    iv. That the learned trial magistrate erred in law and in fact and contradicted himself in holding that the deceased should be buried by those who lived with her yet the deceased spent her entire life living on land parcel No Bokoli/Chwele/1069.

    v. That the learned trial magistrate erred in law and in fact in importing unnecessary reasons of allowing the respondent's claim when the suit was not a succession matter.

vi. That the learned trial magistrate erred in law and in fact in disregarding the evidence of the defence which was overwhelming in proving a presumption of marriage.

vii. That the learned trial magistrate erred in law and in fact in slapping the appellants with costs not withstanding the relationship that existed between the parties.

viii. That the learned trial magistrate failed to analyze the entire evidence as presented to him, misapprehended the evidence and therefore came to a conclusion that was against the weight of the evidence.

17. It was sought by the appellants that the appeal be allowed, the subordinate court's judgment and orders be set aside and the same be substituted with this court's own decision and the costs of this appeal.

18. The appeal was canvassed by way of written submissions. On behalf of the appellants, it was submitted that no evidence was adduced by the respondent to prove that indeed the deceased was a caretaker of his property and not a wife. Counsel relied on section 119 of the *Evidence Act* to stipulate that they did prove beyond reasonable doubt of the existence of a presumption of marriage between the deceased and the respondent. He further relied on the case of *POM v MNK* (2019) eKLR. It was further submitted that the deceased stayed on the parcel of land and from 1973 without interruptions and that the appellants were simply justifying that indeed the deceased was married to the respondent.

19. It was submitted on behalf of the respondent that a party with the desire to be granted by a court of law any legal rights ought to prove the existence of facts which he asserts gave rise to the liability. Counsel relied on section 107 of the *Evidence Act*. On the doctrine of presumption of marriage, it was submitted that the respondent denies that there was cohabitation for the purpose of presumption of marriage. There was no evidence tendered to show the respondent and the deceased lived together rather than the fact that the respondent could visit his home to check up on his agricultural projects. It was submitted that no evidence was produced by the appellants apart from claims that the respondent sired two children with the deceased, no support/upkeep of the said children and even on the death of the children no elaboration on the role the respondent played. At the death of the deceased, it is also clear that the respondent simply ordered that the deceased be taken to the hospital.

20. It was submitted that on the aspect of costs, section 27 of the *Civil Procedure Act* is very clear that the same shall be in the discretion of the judge. The parties are not relatives to each other and the award of the costs to the respondent was as at the trial's court discretion.

21. Upon consideration of the record of appeal as well as the submissions, I find the issues for determination in this instant appeal are:

i. Whether there was a presumption of marriage.

ii. Whether the respondent should bury the deceased on land parcel No Bokoli/Chwele/1069.

22. This being a first appellate court, it was held in *Selle v Associated Motor Boat Co* [1968] EA 123 that:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal from a trial by the High Court is by way of a retrial and the principles upon which the Court of Appeal acts are that the 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 the court is not bound necessarily to follow the trial Judge's 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 demeanour of a witness is inconsistent with the evidence in the case generally."

23. Therefore, this court is under a duty to delve at some length into factual details and revisit the facts as presented in the trial court, analyze the same, evaluate it and arrive at its own independent conclusions, but always remembering, and giving allowance for it, that the trial court had the advantage of hearing the parties.

24. However, in *Peters v Sunday Post Limited* [1958] EA 424, it was held that:

> "Apart from the classes of case in which the powers of the Court of Appeal are limited to deciding a question of law an appellate court has jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this really is a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate court will bear in mind that it has not enjoyed this opportunity and that the view of the trial Judge as to where credibility lies is entitled to great weight. This is not to say that the Judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstances that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to the courts of appeal) of having the witnesses before him and observing the manner in which their evidence is given...Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion. The appellate court may take the view that, without having seen or heard the witnesses it is not in a position to come to any satisfactory conclusion on the printed evidence. The appellate court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court. It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question...It not infrequently happens that a decision either way may seem equally open and when this is so, then the decision of the trial judge who has enjoyed the advantages not available to the appellate court, becomes of paramount importance and ought not be disturbed. This is not an abrogation of the powers of a Court of Appeal on questions of fact. The judgement of the trial Judge on the facts may be demonstrated on the printed evidence to be affected by material inconsistencies and inaccuracies, or he may be shown to have failed to appreciate the weight or bearing of circumstances admitted or proved or otherwise to have gone plainly wrong."

25. It was therefore held by the Court of Appeal in *Ephantus Mwangi and another v Duncan Mwangi* civil appeal No 77 of 1982 [1982-1988] 1KAR 278 that:

> "A member of an appellate court is not bound to accept the learned judge's findings of fact if it appears either that (a) he has clearly failed on some point to take account of

particular circumstances or probabilities material to an estimate of the evidence, or (b) if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

26. On the first issue, the question of whether the deceased was married to the respondent in accordance with the bukusu customs can be disposed of relatively easily; by the evidence of PW3, PW4, DW3, DW4, DW5, DW6 in that it is clear that marriage is deemed to have occurred when dowry negotiations have been conducted and dowry paid. According to the written witness statement of PW3, the deceased resided in the house of the respondent's 1st wife and that the said wife was still alive and therefore according to the Bukusu Customary Law, if at all the respondent had married the deceased, he ought to have built for her, her own house as a man cannot marry a wife in his other wife's house. No evidence was adduced by the appellants to show that dowry negotiations were conducted and dowry has been paid. My own assessment of the evidence adduced by the appellants show no such negotiations were held and if so, no evidence was adduced to support their allegations.

27. But even assuming that the necessary customary rites were performed to the extent that the deceased would consider herself as having been married under these customs, the appellants are caught out by section 96(2) and (3) of the *Marriage Act*, 2014 which require that customary marriages contracted before the commencement of the Act are to be registered within three years of the date of commencement of the Act; that section reads 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.

(4) ...

28. The appellants did not avail evidence that the alleged marriage between the deceased and the respondent had been registered in accordance with this Act. Section 96 (4) provides that the Cabinet Secretary may extend the registration period by notice in the gazette; however, if there was such an extension, no evidence was provided that the plaintiff was still within time to register the marriage.

29. If the marriage had been registered in accordance with the Act, the deceased and, of course, the respondent, would have been issued with a certificate under section 55(1) thereof and, according to section 59 of this Act, this certificate would have been conclusive proof that indeed the deceased and the respondent were married under customary law. As far as they are relevant to this judgment, the pertinent parts of this section provide as follows:

59. Evidence of marriage

(1) A marriage may be proven in Kenya by—

(a) a certificate of marriage issued under this Act or any other written law;

(b) a certified copy of a certificate of marriage issued under this Act or any other written law;

(c) ... an entry in a register of marriages maintained under this Act or any other written law;

(d) a certified copy of an entry in a register of marriages maintained under this Act or any other written law; or

(e) ...

30. In the absence of proof of a customary marriage through any of the means prescribed in this section, the appellant's claim that the deceased was married to the respondent under bukusu customary law is wanting both in fact and in law.

31. As far as presumption of marriage is concerned, it is a status of relationship that turns much on evidence as much as it is a presumption of law. According to *Halsbury's Laws of England*/*Matrimonial and Civil Partnership Law* (Volume 72 (2009) 5th Edition, para 6 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. It is ordinarily referred to as 'common law marriage' though this characterization is misnomer. It is a misnomer because in English law it is not a term that connotes marriage as known in law but it is used to refer to unmarried, cohabiting heterosexual couples. It is a term that does not confer on cohabiting parties any of the rights or obligations enjoyed by spouses or civil partners.

32. In Kenya, the *Marriage Act*, 2014 does not recognize this kind of marriage. section 2 of that Act defines the word cohabit, in its technical term, as follows:

> " cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage."

33. Three things that stand out of this definition are, one, regardless of what the intentions of a cohabiting couple may be, they do not acquire any other status than that of being unmarried and, two, perhaps to drive the point home, the relationship of the cohabiting couple only 'resembles' a marriage; in other words, it is not a marriage. The third aspect of this definition is, regardless of how long the couple lives together, the status of its legal relationship will not change.

34. When this section is read alongside sections 6 and 59 of the *Marriage Act*, it is reasonable to conclude that presumption of marriage by cohabitation no longer stands on a solid foundation in our marriage law infrastructure.

35. Section 6 lists the kinds of marriage that are recognized under the law; it states as follows:

6. Kinds of marriages

(1) A marriage may be registered under this Act if it is celebrated—

(a) in accordance with the rites of a christian denomination;

(b) as a civil marriage;

(c) in accordance with the customary rites relating to any of the communities in Kenya;

(d) in accordance with the Hindu rites and ceremonies; and

(e) in accordance with Islamic law.

(2) A Christian, Hindu or civil marriage is monogamous.

(3) A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.

36. It is clear that presumption of marriage by cohabitation has been left out. One may argue that this provision of the law particularly section 6(1) thereof only refers to marriages registrable under the *Marriage Act*; however, there is no suggestion anywhere else in this Act or any other law, for that matter, that there are other forms of marriage that may be given the force of law other than those recognized in the Act.

37. Section 59 would buttress this point in that it specifies how a marriage may be proved in this country. This section reads as follows:

59. Evidence of marriage

A marriage may be proven in Kenya by—

(a) a certificate of marriage issued under this Act or any other written law;

(b) a certified copy of a certificate of marriage issued under this Act or any other written law;

(c) ... an entry in a register of marriages maintained under this Act or any other written law;

(d) a certified copy of an entry in a register of marriages maintained under this Act or any other written law; or

(e) ...

38. Once again, no provision has been made as proof marriage by cohabitation. As much as it is a presumption, certain facts must be demonstrated to exist before such a presumption can be inferred; the Act neither refers to the presumption nor the facts which, like in certain States in the United States, ought to be proved.

39. It is worth noting that the *Marriage Act* itself is anchored on article 45 (4) of the *Constitution* stipulates that: -

(4) Parliament shall enact legislation that recognizes—

(a) marriages concluded under any tradition, or system of religious, personal or family law; and

(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.

40. I am guided that under section 3 of the *Judicature Act* cap 8 the jurisdiction of this court, as that of the Court of Appeal, is to be exercised in conformity with, inter alia, the substance of the common law; but common law is subject to our written laws; it can only apply to where our written laws do not extend or apply, and only 'so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances render necessary'.

41. This concept of presumption of marriage by cohabitation, would be viewed and applied in those limited circumstances, if there was any valid basis for the assumption that it is common law or it is a common law phenomenon.

42. In cases decided by the English courts that I have come across in my extensive research, marriage was presumed only because the couple had mistakenly missed out on some essential step or steps towards

formalizing their marriage but cohabited thereafter believing that their marriage was formal or, rather, was in accordance with the law.

43. In the case of *Toplin Watson v Tate* (1937) 3 ALL ER 105. The circumstances here were that the man lived in Rockhampton, in Australia, from 1860 to 1870 with a certain lady; they held themselves out to be husband and wife, and they and their children were received in local society, which would not have been the case had there been any suggestion of irregularity. The birth certificates of the children recorded the marriage of the parents as having taken place at Ballan, Victoria, on January 10, 1860, but no such marriage was registered there, although registration had there been compulsory for some years. In 1873, man's father, who lived in England, executed a deed covenanting to make certain payments to the children or their mother and this deed contained these words: "the following reputed children of his deceased son," T B, "which children are now in England with their mother EM, otherwise EB."

44. It was held that the absence of any entry in the register of marriages was not sufficient to rebut the presumption of marriage of the couple and that the words in the deed of 1873 were insufficient to rebut the presumption. That the presumption of marriage can be rebutted only by evidence of the most cogent kind, and the children in question ought to be declared to be the lawful children of the man and his wife.

45. This case, besides dealing with the strong presumption in favour of marriage, decided that such presumption is not rebutted by reason of there being no entry in the register of marriages in respect of a marriage of known date and place celebrated in an area where registration of marriages was compulsory.

46. In *Eva Naima Kaaka & another v Tabitha Waithera Mararo* (2018) eKLR the respondent applied for revocation of grant of letters of administration intestate to the deceased's estate mainly on the ground that although she was the deceased's second wife, she was not incorporated in the succession proceedings and, ultimately, she was apprehensive that she would be disinherited. Her case was that she had not only cohabited with the deceased since the year 2008 till his death in 2014 but also that their marriage had been blessed with one issue. She also, contended that she had been married to the deceased under Kikuyu customary law.

47. It was established as a fact that indeed the respondent lived in the deceased's house though not as the deceased's wife but as a tenant.

48. The court (Nyakundi, J), held that the respondent was the deceased's wife and that a child had been born out of their union. Accordingly, he revoked the grant of letters of administration made to the appellants and directed that a fresh application for the grant of letters of administration in which the respondent would be a joint administratrix be made.

49. On appeal, the Court of Appeal (Nambuye, Kiage, Murgor, JJA) held that contrary to the respondent's contentions, there was no evidence that the respondent had been married to the deceased under Kikuyu or Maasai customary law. The court made reference to Eugene Cotran's book, Casebook on Kenya Customary Law, where, at page 30, the essentials of a Kikuyu customary marriage are spelt out; these essentials are as follows:

> " 1. capacity; the parties must have capacity to marry and also 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 bridegroom's home"

In coming to the conclusion that there was no valid marriage between the respondent and the deceased, the learned judges of appeal held:

> "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."

50. On the question of whether there was a valid basis for a presumption of marriage, this court cites with approval the case of *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another* (2009) eKLR where it was held that a presumption of marriage could be drawn from two factors; long cohabitation and acts of general repute. The court held that:

> " Before 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.

51. On the same point, this court cites the case of *Mary Njoki v John Kinyanjui Mutheru* (1985) eKLR where a presumption of marriage was rebutted on the ground that there was no evidence that 'an essential element of a valid kikuyu marriage' had not been satisfied.

52. In *Joseis Wanjiru alias Joseis Wairimu v Kabui Ndegwa Kabui & another* (2014) eKLR the Court (Visram, Koome and Odek, JJ A) held that the doctrine of presumption of marriage is based on section 119 of the *Evidence Act*, cap 80 which states as follows:

119. 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.

53. I am of the humble view that the marriages enumerated in the *Marriages Act* (section 6) are the only marriages recognized in law in this country; and, when this provision of the law is read alongside section 2 of the Act and article 45 of the *Constitution*, the concept of presumption of marriage is rendered indolent and of historical importance only.

54. I certainly cannot think of a situation where a presumption, whether or law or fact, would be applied to effectively oust clear and express provisions of the law.

55. It must be remembered that the period of cohabitation is material to a presumed marriage and therefore it behoves the party seeking to prove its existence to be certain about the period when the alleged cohabitation took place. Any falsity on when cohabitation took place would justify the conclusion that either there was no cohabitation or that it was not of such a period that is necessary to presume the parties as a married couple.

56. I am not satisfied that the appellants have provided evidence on a balance of probabilities that deceased cohabited with the respondent and if she did the cohabitation was of such prolonged period in circumstances that would have led an objective observer to the conclusion that the deceased was married to the respondent.

57. It was the evidence of PW1, that she allowed the deceased to stay at the only house available on the parcel of land after considering her request to do so. He would travel back to his 1st wife in Lugulu where he officially stayed and only came by to observe the progress of his agricultural projects on the land. It still baffles him how the deceased was able to change her identification details and incorporate his surname with her details.

58. It is my humble opinion that PW1, was very open about his polygamous nature with the clear statement that he has two wives and it would not have prevented him from acquiring more wives if that was his intention. The relationship between the deceased and the respondent was that of an employer and employee, the respondent proceeded to even offer her a room in his 1st wife's house for her to reside as she had noted she had no intentions of going back home after the demise of her parents.Given the evidence herein, I am satisfied that no presumption of marriage can be made. There is no long period of cohabitation and neither did the parties take themselves to be married. What existed was a simple and trusted long term employer employee relationship. The relationship cannot be held to be a marriage.

59. When I consider this evidence, I am inclined to come to the conclusion that the alleged marriage falls far below the qualitative and quantitative thresholds for marriages by presumption as set forth in *Mary Njoki v John Kinyanjui Mutheru* [1985] eKLR.

60. On the second issue of whether the respondent should bury the deceased on land parcel No Bokoli/Chwele/1069, from the foregoing analysis the respondent being the sole proprietor of the land parcel has rights under the *Constitution* of Kenya and the *Land Act* No 6 of 2012 which include and are not limited to user disposal or change. The respondent has made himself very clear that he was never married to the deceased and he cannot be made to bury her remains in his ancestral land.

61. The appellants challenged the trial court's order on costs. Indeed, the award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In *Morgan Air Cargo Limited v Evrest Enterprises Limited* [2014] eKLR the court noted that

> "The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that ''cost follow the event'' was driven by the fact that there could be no ''one-size-fit-all'' situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case."
>
> From the foregoing, I uphold the decision of the trial court on awarding the respondent's costs.

62. The upshot of the forgoing observations is that the appeal herein is devoid of any merit. The same is dismissed with costs to the respondent.

DATED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF MAY, 2022.

D. Kemei

Judge

In the presence of:

Onganki Wanyiki for the Appellants

Natwati for the Respondent

Kapkota Court Assistant