TMN v PKW (Civil Appeal E042 of 2021)
[2022] KEHC 13019 (KLR) (21 September 2022) (Judgment)

Neutral citation: [2022] KEHC 13019 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL E042 OF 2021

LM NJUGUNA, J

SEPTEMBER 21, 2022

BETWEEN

TMN ..... APPELLANT

AND

PKW ..... RESPONDENT

((Being an appeal from the judgment and decree of Hon. T. K. Kwambai, SRM in Embu CMCC No. 12 of 2020 and delivered on 06.10.2021))

JUDGMENT

1. The appellant herein was the plaintiff in Divorce Cause No 12 of 2020 wherein she sued the respondent *vide* a plaint dated August 3, 2020, in which she sought for judgment as enumerated in the plaint.

2. The respondent sought for dismissal of the suit in its entirety with costs to him. It was the respondent's defence that the suit as filed did not disclose any cause of action and that at the appropriate time, he would seek for the same to be struck out. He conceded to having been involved in a relationship with the appellant but denied that the same evolved to a marriage. He prayed for judgment against the appellant herein and urged the court to declare that there was no marriage between the parties herein. By a judgment delivered on October 6, 2021, the trial court reached a determination that the appellant did not prove the existence of a customary marriage and dismissed the case.

3. The appellant having been dissatisfied with the judgment of the trial court filed the appeal herein and listed six (6) grounds of appeal as enumerated therein.

4. When the appeal came up for hearing, directions were issued that the same be canvased by way of written submissions and both parties complied with the said directions.

5. The appellant submitted that the trial magistrate erred by holding that, the fact that the appellant failed to particularize the grounds of divorce was fatal. It was submitted that the act has not provided

the format but only requires that the same be pleaded and proved. That the fact that the appellant stated that she was chased away by the respondent is a clear proof that the respondent was cruel to the appellant. It was her case that she proved that indeed there existed a customary marriage between her and the respondent given that the respondent had paid some dowry before seeking her hand in marriage and proceeded to rely on sections 43 (1)(2) of the *Marriage Act* and 107 (1) of the *Evidence Act* to support her case.

6. The appellant faulted the trial court for having relied on cases that could be distinguished with the case herein in that she believed that this was a simple straight forward case involving two parties who lived together for ten years; with their two children whose birth certificates were produced before the trial court showing the name of the respondent as the father. In the end, the appellant submitted that she proved her case well and this court should find in her favour by setting aside the determination by the trial court and grant her prayers as sought in the plaint.

7. The respondent submitted that the determination by the trial court was right given that the appellant herein never adduced any evidence to support her claim that there existed a marriage between them. That the evidence required is proof of unions under the customary law and upon production of such evidence, parties are required to apply to the registrar within six months of the said marriage for a certificate. He submitted that the ingredients as alleged by the appellant did not meet the threshold for a customary marriage given that dowry payment must always be included and the same must follow a prescribed format. He relied on section 109 of the *Evidence Act* to support his case. He averred that the appellant did not call any expert witness to support her case to confirm whether indeed the essential elements of Kiembu Traditional Customary Marriage were met.

8. It was his case that the law provides for the process for annulment of a marriage and /or divorce which in this case, the threshold was never met. He relied on the High Court decision being Migori HCCA No 133 of 2019 and further submitted that the courts shall be guided by African customary law in civil matters where one or more of the parties is subject to it or affected by it, in so far as the same is not repugnant to justice and morality. He denied that the appellant and him sired the two children herein. It was his case that the first born child having been sired by another man, the appellant proceeded to have his name inserted in the birth certificate in as much as the child was living with her grandparents even during the subsistence of the alleged marriage. Further, it was submitted that the appellant did not provide any form of evidence to show the existence of the alleged matrimonial property that she claimed to have contributed in developing. He further relied on the case of *KO & Another v JO* [2018] eKLR. It was submitted that the allegations by the appellant that there existed a marriage between them was never supported by any document as is required by the law under section 55(1) of the *Marriage Act* and as such, the credibility of the appellant was diminished. In the end, the respondent urged this court to dismiss the appeal herein with costs.

9. I have considered the grounds of appeal together with the rival parties' submissions and I find that the issue for determination is whether the appeal herein is merited.

10. This being the first appeal, this court is obligated to re-evaluate, re-analyze and reconsider the evidence before it and come up with an independent finding. [*See Williamson Diamonds Ltd and another v Brown [1970] EA 1*].

11. The appellant herein has averred that there was a customary marriage between her and the respondent. A determination of the existence or non-existence of a marriage will be based on satisfaction of the provision of section 43 of the *Marriage Act*, No 4 of 2014 which provides that;

> 43 (1) A marriage under this part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.

(2) 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.

12. In this appeal, two major questions arise; the first question is whether the appellant and the respondent were indeed married and the second one is whether the alleged suit property is a matrimonial property; they are, in a way related, to the extent that the appellant's case is that she was not only married to the defendant but that they both dwelt in this property in their capacity as a married couple and, for this reason, she urges the court to declare the property a matrimonial property.

13. On whether there was a valid marriage, the appellant herein submitted that indeed there existed a customary marriage between her and the respondent given that the respondent had previously paid some dowry before seeking her hand in marriage. That the parties got married under the Kiembu customary law in the year 2009 and that the respondent adopted the appellant's first child and that they later sired the second child. That they stayed together and developed the properties on LR Gaturi/Githimu/4600; but on a sudden change of heart, the respondent chased away the appellant hence the filing of the matter herein.

14. *The Court of Appeal in Gituanja v Gituanja (1983) KLR 575* held that the existence of a customary marriage is a matter of fact which must be proved with evidence.[Also see the *Court of Appeal in East Produce (K) Limited v Christopher Astiado Osiro Civil Appeal No 43 of 2001* where the court held that the onus of proof is on he who alleges]; and in this case, the appellant having pleaded that she was married to the respondent and that the marriage was solemnized under Kiembu customary law, it was incumbent upon her to prove that indeed there existed such a marriage. [See *DMK v IL* [2021] eKLR].

15. In this case, the only proof that the appellant has offered to demonstrate the alleged existence of Kiembu customary marriage are birth certificates for her two children. There is no evidence of any negotiations between the two families; no evidence of bride price negotiations; and no demonstration of any other customary formalities. Indeed, as I will demonstrate shortly, even evidence of cohabitation was quite sparse and did not rise to the required threshold. The only other evidence is the alleged letter from the chief which was never produced given that the chief allegedly didn't want to get involved in court matters.

16. But even assuming that the necessary customary rites were performed to the extent that the appellant would consider herself as having been married under this custom, the appellant is caught up by section 96(2) and (3) of the *Marriage Act*, 2014 which requires that customary marriages contracted before the commencement of the act 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) ...

17. The commencement date of the *Marriage Act* was May 20, 2014; as at the time the appellant testified on June 23, 2021 there was no evidence that the alleged marriage had been registered in accordance with this act.

18. If the marriage had been registered in accordance with the act, the appellant and 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 appellant and the respondent are married under customary law. As far as they are relevant to this judgment, the pertinent parts of this section provides 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) ...

19. In the circumstances, I am constrained to conclude that the appellant did not demonstrate the existence of Kiembu customary marriage.

20. The definitive definition of marriage by presumption in our jurisprudence is provided in the judgment by Nyarangi, JA in *Mary Njoki v John Kinyanjui Mutheru & 3 Others* 1985 eKLR and *Hortensia Wanjiku Yawe v Public Trustee* (supra).

21. Since then, our case law has been consistent in following the English Common Law in requiring that a presumption of marriage arises only when a person proves two factual elements:

> a) Quantitative element – namely the length of time the two people have cohabited with each other; and
>
> b) Qualitative element – namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative element include whether the parties had children together; whether the community considered the two as husband and wife – and so forth.

22. As the court held in the *Mary Njoki case*, whether or not a presumption of marriage arises in a particular case and whether or not that presumption is rebutted is a question of fact. The person asserting the presumption must put in sufficient evidence which, on a balance of probabilities, demonstrates the quantitative and qualitative elements. Once this happens, it would then be up to the other party and in this case, the respondent to rebut the presumption.

23. What evidence did the appellant herein adduce to support her case and further convince this court to make the presumption alluded to? She asserted that she and the respondent cohabited between the years 2009 and 2011. However, there is nothing to prove such cohabitation save for the birth certificates

of the two children depicting the name of the respondent as the father. The respondent on the other hand submitted that the appellant used to frequent his house during the time that they were still seeing each other but denied that he sired the last born child that the appellant alleged to be his.

24. In my view, what emerges from the evidence in this case is a narrative of a lady and a man who were admittedly in a romantic and intimate relationship for some time dating back to 2009 and from it, a child was sired. While the appellant insists that the relationship rose to the level of a marriage during the cohabitation and in spite of lack of formalities, the respondent deny the assertion and submits that the relationship between the two was purely one of girlfriend and boyfriend and that the same never graduated to the level of marriage by presumption or otherwise.

25. After combing through the evidence, I am unable to say that the presumption of marriage favours the appellant in this case. There is simply not enough evidence to demonstrate the qualitative factors she would have to show as evidence of "general repute" that she and the respondent lived as husband and wife and held themselves as such.

26. With regard to the issues of custody and maintenance of the children, the orders sought by the appellant in the divorce cause could not issue. The same can only be dealt with under part ix of the *Children's Act*. [See *DK v AWN* [2014] eKLR also *KDM v PMSC* [2014] eKLR].

27. Similarly, the order of access to rent out of the rental units and the sub division of the properties are issues that can only be dealt with by the High Court under the *Matrimonial Property Act*. The trial court does not have jurisdiction to entertain and issue orders in that regard. [See *JMM v MM* [2019] Matrimonial Cause No 31 of 2017 and *FS v EZ* [2016] eKLR].

28. In the premises aforesaid, I find the appeal has no merits and the same is hereby dismissed but with no order to costs.

29. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 21ST DAY OF SEPTEMBER, 2022.

L. NJUGUNA

JUDGE

.....for the Appellant

.....for the Respondent