BKG v NWT (Civil Appeal 147 of 2019) [2022] KEHC 16399 (KLR) (Family) (16 December 2022) (Judgment)

Neutral citation: [2022] KEHC 16399 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL 147 OF 2019

MA ODERO, J

DECEMBER 16, 2022

BETWEEN

BKG ..... APPELLANT

AND

NWT ..... RESPONDENT

JUDGMENT

1. The appellant herein BKG filed in the High Court the memorandum of appeal dated November 28, 2019 seeking the following orders:-

> "(a) This appeal and costs of the lower court be granted to the appellant.
>
> (b) That this honourable court finds that no valid marriage existed between the appellant and the respondent, and, if at all a marriage existed between the appellant and respondent the same be declared a nullity. "

2. The respondent NWT opposed the appeal. The matter was canvassed by way of written submissions. The appellant filed the written submissions dated June 29, 2022 whilst the respondent relied upon her written submissions dated July 26, 2022.

Background

3. This appeal arises from the judgment delivered on November 22, 2019 by Hon DO Mbeja Senior Resident Magistrate in Nairobi CM's Divorce Case No 369 of 2019.

4. In that case the respondent had filed a petition seeking dissolution of her marriage to the appellant. After hearing evidence from both parties the learned trial magistrate found that indeed a marriage did

exist between the couple. The court proceeded to dissolve said marriage and directed that a decree nisi be issued.

5. The respondents case was that she got married to the appellant in the year 2009 under Kikuyu Customary Law. That the couple cohabited as man and wife in the Ongata Rongai area of Kajiado County. Their union was not blessed with any children although the respondent had five (5) children from her previous marriage to one SGM who unfortunately died as the result of a road traffic accident along the Naivasha road on November 14, 2014.

6. The respondent filed a petition for divorce in the Chief Magistrates Court alleging adultery and cruelty by the appellant. She told the court that the marriage had irretrievably broken down.

7. On his part, the appellant denied that he had ever married the respondent under customary law or indeed under any other system of law. appellant does however admit that he met and started a relationship with the respondent. That in the year 2009 he introduced himself to the family of the respondent in Naivasha and expressed an intention to marry her.

8. However, the appellant states that he did not proceed with the marriage because he discovered that the respondent was actually married to one SGM. The appellant says that following this discovery he felt cheated and terminated the relationship. That he later got married to one LKM on June 10, 2014 at the Registrar's office in Nairobi. The appellant produced a copy of his marriage certificate as proof of his marriage.

9. As stated earlier the learned trial magistrate delivered a judgment on November 22, 2019 in which he found that a marriage did exist between the couple and proceeded to allow the petition for dissolution of that marriage.

10. Being aggrieved by the judgment of the subordinate court and particularly with the finding of the trial court that a marriage existed between the couple the appellant filed this appeal.

11. The appeal was based on the following grounds:-

> " 1. That the learned Magistrate erred in law and in fact in finding that a presumed marriage existed between the appellant and respondent since 2009 when the parties began courtship.
>
> 2. That the learned Magistrate erred in law and in fact in failing to appreciate that the respondent did not lay any legal basis or grounds for granting a divorce nor did she produce evidence to support her claim of a customary marriage.
>
> 3. That the learned Magistrate erred in exercising judicial discretion and hence finding that a presumed marriage existed between the appellant and respondent despite the fact that the respondent did not lay any basis at all or proper basis or legal foundation to justify the exercise of judicial discretion in her favour.
>
> 4. That the learned magistrate erred in law and in fact in finding that the matrimonial home was built by the respondent together with the appellant.
>
> 5. That the learned magistrate erred in finding that a presumed marriage existed between the appellant and respondent despite the fact that the respondent did not prove existence of the marriage yet the onus was on her who was alleging the existence of the same to do so.

6. That the learned magistrate erred in finding that the marriage had irreversibly broken down due to cruelty yet it was the respondent's evidence on oath, and the same is on the court record, that the appellant was never cruel and in fact was a good man who treated her well, was a provider and took care of her.

7. That the learned magistrate erred in finding that there was cogent evidence that the appellant was cruel and hostile to the respondent yet no evidence or explanation of the hostility is tendered. Further, no evidence was adduced by the witness called by the respondent to the effect that she was treated in a hostile or cruel manner. Similarly, no documentary evidence was tendered to demonstrate cruelty, and most importantly, the respondent gave her testimony on oath that the appellant was never cruel to her and was provider and care for her.

8. That the learned magistrate erred in finding that there was evidence of dowry payment, yet the respondent did not produce any documentary and/or photographic evidence of dowry payment. What the respondent instead produced was a document from 1971 that did not belong to either her or the appellant.

9. That the learned magistrate erred in finding that the respondent's previous marriage was dissolved yet the respondent did not produce any evidence to that effect and in any event, the appellant produced documentary evidence demonstrating that up until 2014, when the respondent's husband died, and by which time the appellant and the respondent had already parted ways, the respondent was still recognized as the deceased's wife.

10. That the learned magistrate erred in finding that a marriage existed yet the absence of a divorce or evidence that dowry was returned, a marriage subsists until death.

11. That the learned magistrate erred in finding that a marriage exists because cohabitation that resulted in the birth of two children yet both parties pleaded and gave evidence that they had no children together.

12. That the learned magistrate erred by taking into consideration of the oral evidence of CNM who was the respondent's witness and whose entire testimony on the court record as based on hearsay.

13. That the learned magistrate did not exercise his discretion judiciously."

Analysis and Determination

12. This being a first appeal the court is obliged to reconsider and re-evaluate the evidence adduced in the trial court and to draw its own conclusions on the same. In the case of *Selle & another vs Associated Motor Boat Co Ltd*[1968] EA the court held as follows:-

> "...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this 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 allowance in this respect..."

13. The appellant is not so much aggrieved by the dissolution of the marriage as much as he was aggrieved by the finding by the trial court that a marriage existed in the first place. The appellant insists that he did not marry the respondent. He states that he only made one visit to the family of the respondent in Naivasha. The appellant vehemently denies the evidence of the respondent and her witness that he gave out an amount of Kshs 35,000 to be given to the husband of the respondent to refund him for the dowry he had paid for the respondent.

14. It is not disputed that before the respondent met the appellant she was married to another man with whom she bore five (5) children. Obviously, the respondent cannot be said to have married the appellant whilst she was still married to another man. The respondent states that she and her first husband separated in the year 2000. That she met the appellant in the year 2008 and they got married in 2009.

15. The respondent insists that her marriage to her 1st husband which was conducted under Kikuyu Customary Law was also dissolved in accordance with the Kikuyu customs by refunding the dowry paid by the first husband. The respondent states that it was the appellant himself who gave out Kshs 35,000 to be given to the 1st husband as a refund of his dowry.

16. PW2 GNT who is a brother to the respondent corroborated the evidence of the respondent. PW2 confirms that the appellant came to visit their family in Naivasha to seek the hand of the respondent in marriage. That however the respondents family declined to receive any dowry from the appellant until the downy paid by the first husband had been refunded.

17. PW2 confirmed that the appellant gave out Kshs 35,000 to refund the dowry. He states that he was sent by his parents and elders to deliver the money to the respondents first husband. That he went to the family of the first husband (who later died in 2014) and gave them the Kshs 35,000 which they accepted. In this way, the respondents 1st marriage was dissolved customarily leaving her free to marry again.

18. PW3 CNM an uncle of the respondent told the court that he was an elder and stated that he was allowed to perform Kikuyu traditions. PW3 also confirmed that the respondents marriage to her first husband was customarily dissolved. In his evidence PW3 says:-

> " the petitioner had another husband. The marriage was dissolved. Kshs 35,000 was paid out. There is no other ceremony done."

19. All the witnesses gave consistent evidence and corroborated each other. I therefore find that the respondent's marriage to her first husband had been dissolved customarily and she had the capacity to enter into another marriage.

20. The next crucial question is whether the appellant and the respondent were actually married. The appellant denied that he ever got married to the respondent. On the other hand, the respondent insists that she and the respondent got married under Kikuyu Customary Law. That the couple began to cohabit in the year 2001 and later got married in the year 2009.

21. The evidence of the respondent was that the appellant came to visit her family in Naivasha. Although the respondent speaks of a ruracio ceremony she does not give details of said ceremony.

22. PW3 told the court that the appellant paid a dowry of 130 goats and Kshs 390,000. Neither the respondent nor his brother PW2 made any mention of the goats or the Kshs 390,000. More pertinently,

no witness stated that the 'Ngurario' ceremony which is central to a Kikuyu customary marriage was even conducted.

23. All in all I find that the evidence relating to the existence of a customary marriage is sketchy. The witness state that the appellant was expected to return after the first visit to Naivasha but he never returned. Presumably, the appellant was to return to complete the marriage rites. His failure to return means that the Kikuyu marital rites were not concluded. All in all I am not persuaded that all the rites for a Kikuyu customary marriage were conducted.

24. Having discounted the existence of customary marriage the next question is whether a presumption of marriage could be found to exist. The respondent told the court that she met the appellant in the year 2001 and the two began to cohabit as man and wife. The appellant says he met and befriended the respondent in the year 2005. The appellant does not deny that the two were cohabiting during this period. The couple eventually parted ways in November 2012. Therefore even if the court were to go with the appellants version of events it is clear that the couple cohabited from 2005 – 2012 a period of seven (7) years.

25. In the case of *Hortensia Wanjiku Yawe vs Public Trustee* [1976] KLR the Court of Appeal states as follows:-

> " By general repute and in fact the parties had a cohabited as man and wife in a matrimonial home for 9 years before the deceased died..... long cohabitation as man and wife gives rise to the presumption of marriage in favour of the appellant, only cogent evidence to the contrary can rebut such a presumption" (own emphasis)

26. There is evidence that the respondent after meeting the appellant and beginning to cohabit with him obtained an identity card which gave her name as NWK ie the respondent took on the appellants name as her surname. It is unlikely that she would have done this without the knowledge and consent of the appellant. This is proof that the couple represented themselves as a married couple.

27. The period of cohabitation being seven (7) years is in my view leads to a presumption of marriage – this was not a fleeting love affair. The appellant admits that he went to introduce himself to the family of the respondent in Naivasha.

28. In *Beth Nyandwa Kimani vs Joyce Nyakinywa Kimani & others* [2006] eKLR the court held as follows:-

> " For it matters not whether statutory or customary marriage requirements are strictly proved in a marriage. The court must go further and consider whether, on the facts and circumstances available on record, the principle of presumption of marriage was applicable in the appellant's favour. Such was the situation facing the predecessor of this Court in *Hortensiah Wanjiku Yaweh v Public Trustee*, Civil Appeal No 13 of 1976. Mustafa JA in his leading judgment stated: -
>
> > " "I agree with the trial judge that the onus of proving that she was married to the deceased was on the appellant. But in assessing the evidence on this issue, the trial judge omitted to take into consideration a very important factor. Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence to the contrary can rebut such a presumption." (own emphasis)

29. Annexed to the divorce petition is a deed of separation dated January 3, 2013. The agreement is made between the appellant and the respondent and is duly executed by both parties in the presence of witnesses.

30. Clause (1) of that deed of separation provides as follows:-

> "(1) The parties have for a period of eleven years cohabited and lived together as husband and wife and got married under kikuyu Customary Law during the year 2009" (own emphasis)

31. This document clearly provides that the appellant and the respondent were cohabiting as man wife for a period of eleven (11) years. The document was signed by the appellant. The appellant does not deny having signed the document. Under cross-examination, the appellant admitted that he had voluntarily signed the deed of separation.

32. The appellant claims that when he signed the deed of separation he was sick and he only signed it to get rid of the respondent because he wanted to be left in peace. If that was the case then why did it take so long for the appellant to raise the issue of this alleged coercion? Why did he not move to have the document repudiated as soon as he had recovered from his illness? I reject the appellants allegation that he was coerced into signing the deed of separation.

33. By his own admission the appellant conceded that he and the respondent cohabited as man and wife for a period of eleven (11) years. Cohabitation for that length of time certainly gives rise to a presumption of marriage between the two.

34. In his judgment the learned trial magistrate stated as follows:-

> " This court is satisfied that having all the above factors into consideration that the prevailing circumstances herein cumulatively strongly suggest that the Petitioner and the respondent held themselves out as a married couple having cohabited together for over a decade and they had two children together. The long cohabitation gives rise to the presumption of marriage. I am inclined to presume the existence of a marriage between the two parties, and the same prevailed based on the pleadings filed, the evidence so far on record in court and the testimony of the witnesses." (own emphasis)

35. I cannot fault this finding by the trial court. Based on the evidence adduced by the parties it is clear that the appellant and the respondent held themselves out as a married couple. Accordingly, I find that a marriage did exist between the two.

36. Finally I find no merit in this appeal. The same is dismissed in it's entirety. The costs of the appeal will be met by the appellant.

DATED IN NAIROBI THIS 16TH DAY OF DECEMBER, 2022.

.....

MAUREEN A. ODERO

JUDGE