REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL CASE NO 7 OF 2018 (O.S)

LNN.....PLAINTIFF

VERSUS

MKNG.....RESPONDENT

JUDGMENT

1. By the Originating Summons (OS) filed on 17th January 2018, **LNN** the Applicant herein, sought several orders against **MKN,** hereinafter the Respondent. The live prayers in the OS, for purposes of this judgment being that: -

> a). the Court be pleased to issue a declaration that the properties described as **LR No. XX ; LR No. Ruiru/Kiu Block XX and a Plot at Mwiki Estate** commonly known as **'MR'** with all buildings and developments thereon (all hereinafter referred to as the suit property) were acquired through the joint funds and efforts of the Applicant and the Respondent during the subsistence of their marriage and are therefore owned jointly by the Applicant and the Respondent.
>
> b) the Court be pleased to issue a declaration that the suit property is matrimonial property and that the Respondent holds it in trust for himself and the Applicant.
>
> c) the Court be pleased to settle the suit property for the benefit of the Applicant and the Respondent in equal shares or in such manner and proportion as the Court deems fit and just.

2. The OS is premised on the chief ground that the suit property was acquired by and developed through joint efforts of the parties during cohabitation as a married couple. The OS is supported by the Applicant's affidavit. Therein, she deposed that she is married to the Respondent under Kikuyu customary law since 2012 and during cohabitation as a married couple, they acquired and developed the suit property ; that the Respondent moved out of the matrimonial home in November 2015 and has since evinced an intention to alienate through sale, the said matrimonial home erected on **LR No. Ruiru/Kiu Block XX** within Mwihoko Estate where the Applicant resides with the couple's only child; that the suit property though registered in the Respondent's name is held in trust for the Respondent and the Applicant; and that the suit property was jointly developed by the parties during the subsistence of the marriage. She therefore urged the court to declare that the suit property is matrimonial property, a share of which she is entitled to.

3. The Respondent filed his replying affidavit on 21st February 2018. He asserted that he was married to one **RWM** since 1994, a fact well known to the Applicant. He denied that he was married to the Applicant as alleged and deposed that he had only engaged the Applicant as his caretaker to supervise his construction work in the period when he worked in Haiti between 2009 and 2012. He denied siring a child with the Applicant, cohabiting with her or paying dowry to the Applicant's family. He asserted that the Applicant has not made any direct or indirect contribution towards the purchase of or development of the suit property.

4. In her further affidavit filed on 11th May, 2018, the Applicant maintained the position that she is the Respondent's wife and denying that she was his caretaker. She deposed that the matrimonial home located at Mwihoko Estate was financed by a joint loan obtained by the parties. Subsequently, the Respondent filed his supplementary affidavit reiterating the contents of his replying affidavit and further emphasising that the Applicant was his caretaker.

5. When the matter came up for hearing, the parties and their witnesses adopted their filed respective affidavits and were cross-examined on thereon as had been earlier directed. The Applicant, testifying as **PW1** adopted her affidavits as her evidence. Under cross-examination, she maintained that she was married to the Respondent under Kikuyu Customary Law. She also admitted that it was the Respondent who had acquired the three land parcels herein but that she had contributed towards the development of the parcels. She also stated that the Respondent while working abroad had supported her financially through remittances. She asserted that the Mwiki Plot aka "MR" was purchased and developed by the Respondent during cohabitation period.

6. Second on the witness stand was the Applicant's witness **Teresia Gachambi Njuguna (PW2)** who also adopted her affidavit as evidence to the effect that Respondent had introduced the Applicant to her as his wife in 2015 and that she hence knew the parties as a married couple

who on several occasions purchased building materials from her hardware shop. **GGN** (**PW3**) testified that as the Applicant's brother, he had in February 2012 witnessed the dowry ceremony to cement the customary marriage between the parties. He contended that the Applicant contributed towards the development of the parties' matrimonial home, wall and gate and that she also put up rental units.

7. The Respondent gave his evidence but did not call a witness. Testifying as **RW1**, the Respondent adopted his affidavits as his evidence. Upon cross-examination, he maintained that during the material period, the Applicant was his caretaker and not a wife. He denied ever cohabiting with the Applicant and explained that he only visited with her sick parents and not in connection with the alleged ceremony or marriage. He admitted that he had financially supported the Applicant and her child as a good Samaritan. He further stated that the parcel **LR No. Ruiru/Kiu Block XX** was developed in 2013 without any contribution by the Applicant. In regard to the Mwiki plot (**MR**) he denied that its name '**M'** is an acronym derived from the first letters of his first name and that of the Applicant. He asserted that the Applicant did not contribute towards the development of the suit property.

8. The parties eventually filed their respective written submissions. The Applicant urged the court to find that the Respondent had been married to her under custom, and alternatively, that he held her out as his wife after a long period of cohabitation raising the presumption that she was the Respondent's wife. Reliance was placed on the case of **Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another (2009) eKLR** as to the circumstances giving rise to a presumption of marriage. Further, the Applicant asserted that she had made substantial direct and indirect contribution to the development of the three land parcels herein and especially of the house erected at Mwihoko estate which the parties intended to use and did occupy as their matrimonial home. Counsel for the Applicant also cited the case of **OKN v MPN (2017) eKLR** for the proposition that in a case of this nature, the conduct and intentions of the parties ought to be considered. In conclusion, the court was urged to find that the Applicant is entitled to a 50% share of the suit property and/or in the alternative the matrimonial home where she resides**.**

9. The Respondent in his written submissions filed on 10th July, 2019, reiterated that there has never been a marriage between the Applicant and himself as no dowry was ever paid by him to the Applicant's parents. He took issue with the authenticity of the alleged dowry ceremony minutes relied on by the Applicant asserting that the maker thereof did not testify. It was also submitted further that there was no proof of long cohabitation or that the parties jointly owned a bank account or any property. Therefore, the quantitative and qualitative elements necessary to proof of a presumptive marriage were not established. He urged that the OS be dismissed.

10. The Court has considered the respective evidence and submissions by the parties. The undisputed facts of this case are that the Applicant and the Respondent were in a relationship, whose nature is disputed, in the period between 2011 and 2015. The Respondent is the registered owner of the three parcels of land stated in the OS. The Applicant admits that she did not make any contribution to the acquisition of the parcels themselves. As at 2015, all three parcels were developed, and the Applicant herein occupied the house or premises at Mwihoko Estate with her daughter (not sired by the Respondent) and remains in occupation to date. The issues falling for determination are whether:

a) There exists a marriage between the Applicant and the Respondent;

b) Whether the suit property comprises matrimonial property whose acquisition and development the Applicant contributed to and is therefore is entitled to the orders sought.

11. Regarding the first issue upon which the entire Applicant's case clearly rests, it was the Applicant's case that she got married to the Respondent pursuant to Kikuyu customary law and that since 2012 she has been in cohabitation with the Respondent in the house erected within Mwihoko Estate which she describes as the matrimonial home. The Respondent for his part, asserted that the Applicant was his employee who worked as a caretaker responsible for supervising construction of the Mwihoko house and that he had temporarily allowed her to occupy the said house in April 2015 after its completion. He stated that he was married to one Rachel Wangari Mbugua on 16th November 1994 and sired one child, **C.W,** with her. He exhibited a copy of the marriage certificate and birth certificate as proof.

12. In supporting her claim, the Applicant relied on her own evidence and that of **PW3** her brother, and the document marked "**LNN1"** and annexed to her supporting affidavit which is headed:

"<u>DOWRY PAYMENT CEREMONY</u>

DATE: 11TH February 2012

PAYER: MKN

PAYEE: SNM

GIRL: LNN".

13. The document states that the purpose of the ceremony was ***"to start a marriage process between LN and MK by paying dowry according to Kikuyu customs".*** The Applicant asserted that the Respondent's family and representatives comprised the visiting team of the proposed groom, which was hosted by her family, which included **PW3** who, by his own admissions, did not participate in the negotiations of the dowry. The document concludes by stating:

"They (the proposed groom's side) paid the first two items as per the customary marriage:

1) Mwati na Harika - KShs.20,000/=

2) Njohi ya Njurio - KShs.10,000/=

3) KShs.150,000/= to be allocated items and their value in the second visit."

14. The essentials of a Kikuyu customary marriage are described in **Eugene Cotran's "Case Book on Kenya Customary Law"** at page 30 to be:

"1**) Capacity: The parties must have capacity to marry and also to marry each other.**

2) Consent: The parties to the marriage and their respective families must consent.

3) Ngurario: No marriage is valid under Kikuyu customary law unless the Nguarario ram is slaughtered.

4) Raracio: There can be no valid marriage under Kikuyu customary law unless a part of the ruracio (dowry) has been paid".

5) Commencement of cohabitation. The moment at which man and woman legally became husband and wife is when the man and woman commence cohabitation."

See also **Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] e KLR, MNM v NMK & 13 Others (2017) e KLR** and **Eva Naima Kaaka & Another v Tabitha Waithera Mararo [2018] e KLR.**

15. Quite apart from the fact that the Applicant's evidence on the dowry ceremony and fulfilment of customary requirements is scanty as none of the actual participants on the two sides, save the Applicant and her brother gave evidence, the Respondent put the Applicant on notice right from his first response by stating that the Applicant was aware that he was already a married man. The Applicant for her part did readily concede this fact, but appeared to set her hopes on an affidavit sworn by the Respondent on 30th September 2013 (annexure "**LNN5"** to the Applicant's Further affidavit filed on 11th May 2018) which *inter alia* stated that:

"2. THAT I was married to RWM on 11th November 1994 and we had one child.

3. THAT we separated on 3rd May 2003 and we have not lived together since".

16. Regarding this affidavit, the Applicant deposed in the Further affidavit that:

"THAT I am part of the Respondent's (family) as his wife. Indeed, on 30th September 2003 (sic), the Respondent swore an affidavit stating that he had separated with RWM from 3rd May 2013 (sic) prior to the dowry ceremony at my parent's home on 12th February 2012. I attach herewith a copy of the said affidavit and Mark it as LNN5." (sic**)**

17. Apart from the mix up of dates in the above deposition (the affidavit was sworn on 30th September 2013 and the alleged dowry ceremony happened earlier on 12th February 2012), there is no evidence that the Respondent's marriage to RWM had ever been dissolved as provided under the Matrimonial Causes Act (now repealed) as at the date of his alleged marriage to the Applicant. According to the copy of the marriage certificate annexure "**NK1"** to the Respondent's Replying affidavit, the Respondent's marriage to the said **RWM** was solemnized at the Marriage Registrar's office, Nairobi on 16th November 1994 and a marriage certificate **No. XX** issued on 19th October 2007. The marriage was solemnized under the Marriage Act (now repealed). Section 37 of the repealed marriage Act is in similar terms as Section 9 of the current Marriage Act 2014.

18. The former provides that

"Any person who is married under this Act, whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage, of contracting a valid marriage under any native law or customs, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted."

19. There is no evidence whatsoever that the Respondent's earlier monogamous marriage contracted under the Marriage Act (now repealed) had ever been dissolved. Indeed, by his affidavit sworn on 30th September 2013, all that the Respondent could declare was that he was separated from his wife Rachel Wangari Mbugua. The affidavit could not have the effect of dissolving the marriage as the Applicant appears to suppose. A man who has contracted a statutory monogamous marriage has no capacity to contract another marriage under any system of marriage during the subsistence of the previous monogamous marriage. Thus, the Respondent was by virtue of Section 37 of the Marriage Act (now repealed) under disability and had no capacity to contract a valid customary or other marriage, even if the Applicant had been able, which she has not, to demonstrate that the full customary rites required under Kikuyu customary law, especially *ngurario* had been performed.

20. Regarding the centrality of the *ngurario* rite in the contracting and sealing of a marriage under Kiukuyu customary law, the Court of Appeal in **Eva Naima Kaaka's case** stated that:

"When the particulars of the alleged ceremony are compared with the "essentials of a Kikuyu customary marriage" as described by Eugene Contran, and Gituanja v Gituanja (supra) it is plain to see that certain basic elements necessary for a Kikuyu customary Marriage were absent. For instance, the *Ngurario* is an integral part of the ceremony that signifies the existence of a Kikuyu customary marriage. But our re-evaluation of the evidence does not point to a *Ngurario* having taken place. This is because a fundamental component of a *Ngurario* is the slaughtering of a ram or goat… 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." See also **Case v Ruguru [1970] EA 56.**

21. Concerning the alleged customary ceremony of 11th February 2012, if the exhibit **"LNN1"** is taken on face value, it was a dowry ceremony. Neither the Applicant nor her only witness to the ceremony **PW3** could give much detail on the goings on or discussions held in the private negotiations concerning the alleged dowry payment. The Applicant inexplicably failed to call any key and knowledgeable participant to the alleged ceremony. Not even the recorder of the minutes of the alleged dowry ceremony who could have shed some light especially on the cultural significance of the itemized gifts or payments in the minutes, was called as a witness. The purpose of the meeting as stated in the minutes was to "**start a marriage process between LN and MK by paying dowry."** Did the itemized gifts/payments represent dowry payment or fulfilment of other requirement? It is not clear. Neither the Applicant nor **PW2** appeared to understand the requirements of a Kikuyu customary marriage. There is no mention of by them or in the minutes of a *ngurario* ceremony being performed, or evidence of the follow up meeting intimated in the document. In absence of evidence that *ngurario* was performed, there can be no basis for the Applicant's assertion that a Kikuyu customary marriage was contracted by the parties.

22. What of the presumption of marriage between the parties? Capacity to marry is equally a condition precedent thereto. In **M v RM [1985] e KLR** the Court of Appeal observed:

"Mr. Muthoga very properly pointed out that this court must give a logical interpretation to Section 37 of the Marriage Act (Cap 150). To answer the spirit of this provision, it would be impossible to evade its unambiguous terms, and to hold that a marriage existed during the continuation of a previous monogamous marriage. It would not be right to acknowledge that existence by presuming that a marriage at customary law had been entered into. Indeed, if Fender v Mildmay [1938] AC 1, is considered, it would be wrong to "promise" to marry a third party before a decree *nisi* of divorce had been granted. Hence, if the adulterous association arose and ended during the continuance of a previous marriage, it would always be an illegitimate association. The presumption covers two aspects, that the parties had capacity to enter into the new marriage, and that they did so in effect.

During the continuance of previous marriage, the already married party would have no capacity to enter into the new marriage, and the new marriage would be null until the previous marriage had been brought to an end by a final decree of divorce; such as a decree absolute (see Rayden on divorce 12th Edition volume 1 page 600…) … This is not a case which falls within the ambit of Hortensia Yawe v Public Trustee Misc. Case No. 16 of 1977, or Mary Njoki v John Mutheru & Others Civil Appeal No. 71 of 1984. This case falls under Hill v Hill [1959] 1 ALLER 281 if it is to be upheld at all. In view of the statutory prohibition, the most that the parties could achieve was a state where they intended to marry when free to do so."

23. Similarly, in this case, there can be no presumption of marriage as the Respondent lacked the requisite capacity to enter into a new marriage during the subsistence of his monogamous marriage. This in no way suggests that this court believed the Respondent's description of his relationship to the Applicant. The Applicant's evidential material, which included photographs, financial support for herself and her child by the Respondents , the admitted visit to her parents by the Respondent , parties' communication exchanged via emails which are replete with endearments and the Applicant's introduction as the Respondent's wife to the bank and to others by the Respondent, leave no doubt that the two were indeed in an amorous relationship. Nobody can believe that a male employer would be obligated merely as a good Samaritan , to accompany his female caretaker on visits to her parents, visits to her daughter's school, to pay fees for the said child , send financial support to the employee and pay her fees to undertake a degree course, and eventually allow her to occupy his house for more than a year without paying rent. The Respondent's assertion that the Applicant was merely a caretaker can only be a tall tale.

24. In **Naima Kaaka's case**, the Court of Appeal observed that

"This court in the case of Phylis Njoki Karanja and 2 Others vs Rosemary Mueni Karanja [2009] e KLR in holding that the presumption marriage could be drawn from two conjoined factors, namely, long cohabitation and acts of general repute. It stated that:

"Before a 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 a woman is not a mere concubine but that the long cohabitation has crystalized into a marriage and it is safe to presume the existence of a marriage."

25. On the facts of this case, no cohabitation could have started prior to 2013 or at the earliest, in late 2012 when the Respondent returned to Kenya from Haiti where he had worked since 2009 even though he apparently first met the Applicant in 2011. According to the Applicant, the Respondent deserted the so-called matrimonial home at Mwihoko Estate in November 2015. Even if the Respondent had had the necessary capacity, the period of alleged cohabitation cannot by any stretch be described as sufficiently prolonged as to give rise to the presumption of marriage. **PW2** only met the parties as the construction of the Mwihoko Estate property neared completion. At best, the rather brief cohabitation in this case could only signal an intention to marry whenever the Respondent was free to do so, and which intention was not executed as the Respondent quickly ended the cohabitation.

26. The court therefore finds that no marriage by custom or presumption existed or exists between the Applicant and the Respondent. Consequently, the Applicant's entire claim to alleged matrimonial property, based as it was, on an alleged marriage, must fail. Accordingly, the OS is dismissed but parties will bear own costs in view of the nature of the litigation. Equally, mindful of the obtaining social disruptions occasioned by the COVID-19 pandemic, and the obvious consequences attending the outcome of this case, the court will grant the Applicant

an order to stay execution for 30 days from the date of

this judgment, to enable the Applicant seek alternative accommodation for herself and her daughter.

SIGNED AND DELIVERED ELECTRONICALLY TO THE PARTIES ON THIS 26TH DAY OF JUNE 2020.

C. MEOLI

JUDGE