



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL APPEAL NO. 116 OF 2018**

**CSO.....APPELLANT**

**VERSUS**

**RBO.....RESPONDENT**

**JUDGMENT**

1. The Respondent in this appeal **RBO** petitioned for divorce in CMC Divorce Cause No.116 of 2018 on the 21<sup>st</sup> of February 2018 seeking *inter alia* dissolution of the marriage between the two on the basis that from around May 1988 she and the Petitioner/Appellant herein cohabiting as husband and wife until 2007. She further pleaded that from of the union they sired 5 issues. She also sought for distribution of matrimonial property.

2. The Appellant on his part filed a Notice of Preliminary objection to the petition in its entirety as follows:

**I. That marriage by cohabitation is unknown in Kenyan Law. Section 2 of the Marriage Act No. 4 of 2014 (“the said Act”) defines the word ‘cohabit’ as “to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage. Furthermore Section 6(1) of the Act only recognises four types of marriages and cohabitation is not one of them.**

**II. That even if the alleged marriage was presumed to be a customary marriage, it lacks merit since it was not registered as required by Section 3 of the Marriage (Customary marriage) Rules, 2017 and has been overtaken by events by dint of the Kenya Gazette notice Vol. CXIX No. 73 of 9<sup>th</sup> June 2017.**

**III. That the divorce and Matrimonial proceedings Rules (2018) Section 6 provides that a petition filed in court should disclose place and date of marriage.”**

3. In summary I understand the objection to say;

a. That the alleged union between the Appellant and the Respondent is not recognised under the current Marriage Act and therefore no marriage existed between them.

b. That even if one was to assume customary marriage the union between the two was not registered as provided for by the Marriage (customary marriage) rules 2017.

c. The petition does not disclose the place and date of the marriage and therefore the pleadings are defective.

4. The above referenced Preliminary Objection was heard and dismissed by the trial court. The appeal herein arises from the said dismissal. Being aggrieved the Appellant filed this appeal on grounds that may be summarised as follows:

- **The Trial Court has jurisdiction only to entertain petitions concerning marriages known to law.**
- **The Petition did not disclose a marriage capable of being dissolved.**
- **The issues raised in the Preliminary Objection were not based on technicalities but points of law that goes to the core of the matters in issue.**

5. The appeal was argued by way of submissions. Having considered the said submissions and the pleadings generally, I formed the opinion that the issues before this court being the 1<sup>st</sup> appellate court are;

**a. Whether or not the lower court had jurisdiction to determine the matter.**

**b. Whether or not marriage by cohabitation is recognisable in Kenya.**

**c. Whether failure to set time and place of marriage is fatal to the petition**

**6. 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** that 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.

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

8. 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.

9. 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.

10. Further in the case of **MDN versus SML**, Muigai J in applying the Principles of Common law in a similar matter referred to **Section 119 of the Evidence Act** which provides that :

**“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.”**

The Petition before court seeks to have the court presume the existence of certain facts. No answer to the petition was filed challenging the facts. If one is to go by the preliminary points raised, the pleaded facts are neither admitted. Therefore, In my view there is need for the court to hear the matter and not summarily dismiss the same as the concerns raised are not purely points of law. Further presumption of marriage can only be proved by way of evidence.

11. In **SWG vs AM 2015** Musyoka J in applying the doctrine of common law Marriage had this to said;

**“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 presumption of marriage by cohabitation.”**

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

13. 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 principle are still applicable in Kenya and the court has the power to presume the marriage referred to in the Petition

14. The Appeal therefore fails

15. Costs to the Respondent.

**SIGNED DATED and DELIVERED** in open court this 23<sup>rd</sup> day of **MAY, 2019**.

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**ALI-ARONI**

**JUDGE**