



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 37 OF 2007 (O.S.)

M M N.....APPLICANT

VERSUS

W I N.....RESPONDENT

JUDGMENT

1. The Applicant avers that she met the Respondent sometime in 2000 and cohabited with him and his 1st wife until the year 2007. The cohabitation in her view amounts to a legal and valid marriage in the eyes of the law. During the said cohabitation they did everything together from domestic responsibilities to taking care of the children and of the Respondent's ailing wife during her last days before her demise. That 4 years into the said cohabitation she and the Respondent acquired **Nairobi/Block/ [particulars withheld]** situated in Buru Buru Phase V (5) extension and **Wanjare/Bogiakumu/[particulars withheld]; Wanjare/Bogiak/[particulars withheld]**. The first property was sold for Kshs. 2.5 million which the Respondent could not afford on his own so she contributed Kshs. 1,000,000/- with the Respondent contributing Kshs. 1,500,000/-. The purchase of the house was intended to house the Applicant, Respondent and their children. The same was to be their matrimonial property. That in order to raise her share of the money she took out a loan from United Nations Sacco Society on 15th February 2004 and she handed over the amount to the Respondent on 2nd March 2004. That on 19th December 2005 she applied for further loan of Kshs. 1,600,000/- to facilitate the purchase of **Wanjare/Bogiakumu/[particulars withheld]**. The loan was approved and upon repaying Kshs.285,760 of the previous loan upon the amount being credited onto her account she paid the same towards the purchase of **Wanjare/Bogiakumu/[particulars withheld]** and the same was duly registered in her names whilst the Nairobi property Nairobi Block **[particulars withheld]** is registered in the names of the Respondent . Sometime in 2006 having not been blessed with any children of their own she and the Respondent agreed to adopt a boy and a girl and on 6th February 2007 they were given joint custody of two children B H and A N to foster with intention of adopting them. The Respondent however had a change of heart and abandoned them. The Applicant proceeded with the adoption process until conclusion. However, sometimes in April 2007 there arose some inexplicable irreconcilable differences and misunderstanding between her and the Respondent as a result of which the Respondent moved out of the matrimonial home. Later on 5th and 6th July 2007 she learnt from the Daily Nation that the Respondent had advertised the premises for sale and later on 23rd and 27th July 2007 she received a notice to vacate from the Respondent on the basis that she was a tenant. Further the Respondent also started interfering with the dealing and peaceful occupation of **Wanjare/Bogiakum/[particulars withheld]** threatening to take over the same. That he maliciously wrote to the welfare Society of Kenya requesting them to retrieve the children from the house. She avers that since the said differences she has continued to live at the said property as a wife and not tenant as alleged by the Respondent and has continued to pay rent and rates over the said property. Parties had been referred to mediation by the advocates in 2007 and they were advised to carry out a valuation of the suit property to determine specific monetary contribution with aim of obtaining a settlement. She avers that she seeks the court's intervention in determining her propriety right and interest and share in immoveable property purchased jointly with the Respondent during the period they cohabited together.

2. The Respondent in opposition to the said application filed his replying affidavit dated 13th April 2015. He denied Applicant's allegation that they got married under Kisii customary law nor ever cohabiting with the Applicant. Adding that since he worked with the Applicant they used to invest together when opportunity arose but the same was never in the capacity of a spouse. He avers that each party kept a record of their financial contribution towards purchase of the property. He avers in regards to **L.R. Nairobi Block/[particulars withheld]** the same was purchased for Kshs. 2,591,615/- whereby the Applicant contributed Kshs. 850,600/- while he contributed Kshs. 1,714,015/-. In regards to **L.R. No. Wanjare Bogiakumu/[particulars withheld]** was purchased at Kshs. 250,000/- with the Applicant contributing Kshs. 100,000 and him Kshs. 150,000/-. In regards to **L.R. No. Wanjare Bogiakumu/[particulars withheld]** which is said to have been purchased at Kshs. 1,098,000/- with the Applicant contributing Kshs. 408,000/- while he contributed Kshs. 690,000/-. He avers that **L.R. No. Wanjare Bogiakumu/[particulars withheld]** was extensively improved at a cost of kshs.363, 635/- with the Applicant contributing Kshs.100, 000/- and him Kshs. 263,635/-. More improvements were made on the same at a cost of Kshs.300, 000/- with the Applicant contributing Kshs.50, 000/- and him Kshs. 250,000/-. He avers that the Applicant was not blessed with any children and had explored to adopt a male and female child and she required a male guardian and she had sought his assistance on the same. However, when he discovered the plot hatched by the Applicant's sister and her lawyer he pulled out of the adoption process and the Applicant concluded the process as a single Applicant. He avers that there is no marriage between him and the Applicant and urges the court to determine with finality what belongs to who.

3. Parties in their testimonies in court testified as follows; the Applicant stated that she joined the UN as a security officer and that is when she met the Respondent. Though she knew that he was married with children she carried on a relationship with him. At the time his wife was ailing and knew her as the Respondent's colleague but later on they came to know her as the Respondent's 2nd wife. That the wife died on 23rd February 2003. She stated that she played the role of a mother to the Respondent's children even before their mother died as she was

ailing at the time. At the time she alleges that she stayed with the Respondent in his bedroom in [particulars withheld] and also in Kisii. She stated that the Respondent's father had requested him to remarry after the death of his wife and had told him to pay her dowry. That he visited her home officially with 3 of his children L, M and M. They slaughtered a goat and welcomed him which was a sign of accepting him as a son in law. She stated that there was no ceremony when she went to his home but saw her at Nairobi hospital when they went to visit. She stated that by the time she met I he had other properties a flat in Tena estate, a massionette in Umoja I, a property in Donholm and a bungalow in Kisii. She stated that jointly the purchased the following properties;

i. L.R. Nairobi Block/ [particulars withheld]

ii. L.R. No. Wanjare Bogiakumu/[particulars withheld]

iii. L.R. No. Wanjare Bogiakumu/[particulars withheld]

iv. A pick up KWS [particulars withheld]

She stated she contributed 1 million shillings towards the Buru Buru house which was to be their matrimonial home. She added that since it was taboo she could not live in the 1st wife's house in Kisii he asked her to look for a place and that is when they purchased **L.R. No. Wanjare Bogiakumu/[particulars withheld]** for her and the same was registered under her names. She seeks to have the Buru Buru house transferred in her name as she transfers the Kisii property into his name. She stated that since she adopted children and lives with them in the Buru Buru house it is most ideal for her and that she has been paying its land rates and rent.

4. On cross-examination she stated that though the Respondent and his family lived Donholm he stayed with her at times. That at times when the Respondent's late wife was in hospital she went to Donholm to take care of the children and left when she returned from the hospital. Adding that the longest time she stayed there was 4 months. While at the said home she stayed in the master bedroom and slept in the co-wife's house in Kisii but could not make it her home. She stated that she contributed Kshs. 750,000/- , Kshs. 106,000 and Kshs. 100,000 towards the Buru Buru house and the same was registered in the Respondent's home. She stated that the Respondent is the one who made payments after she transferred the money to him since he was the head of the family and she trusted him. That in regards to **L.R. No. Wanjare Bogiakumu/[particulars withheld]** which they purchased at 1 million she contributed Kshs. 408,000/- which was inclusive of stamp duty while the Respondent paid the rest. The same was registered in her names. The said comprised of a 3 bedroom bungalow but they later demolished and constructed a massionette and she contributed Kshs. 50,000/- towards installation of a septic tank and stated that she did not recall if the Respondent paid Kshs. 30,000/- towards the same.

5. **W I N** the Respondent in his testimony stated that he knew Moraa as a work mate and friend in 2000. His wife had suffered from cancer since 1985 and died in Feb 2003 and his colleagues including **M M N** attended the burial. On resuming work **M M N** become very close to him and would assist him with the children like taking them to school when he was on duty. That in 2004 he had intentions to marry the Applicant and had even travelled with her to the USA when her 2 daughters were graduating as he introduced her to his children but the children rejected her joining the family. Her efforts also to have 2 of his children move in with him also failed and she started drinking a lot which led them to fall out. Prior to this he and the Applicant had sought to adopt 2 children a boy and a girl since the Applicant could not bear children due to medical reasons. During the process he was to swear an affidavit stating that they were married and also took a photo to show they were a couple. The process was completed by the Applicant's sister A. That when the Applicant started drinking a lot and abusing the children he reported the same to the Children's officer and opted out of the adoption process but the Applicant proceeded with the adoption process to conclusion.

6. He denied allegations that he carried on a relationship with the Applicant before the demise of his wife and denied cohabiting with her. He acknowledged that she contributed towards the purchase of the Buru Buru house which was being sold at Kshs. 2,591,615/- whereof she paid Kshs. 1,741,015/- with the Applicant contributing Kshs. 750,000/- and an additional Kshs. 100,000/ all totaling to Kshs. 850,000/-. That the Applicant has occupied the Buru Buru house since then. That in regards to **L.R. No. Wanjare Bogiakumu/[particulars withheld]** he contributed Kshs. 690,000 while the Applicant paid Kshs. 408,000/- they reconstructed the same from a bungalow to a massionette for an estimated cost of Kshs. 600,000/- which the Applicant only Kshs.100,000/-. That L.R. No. Wanjare Bogiakumu/[particulars withheld] which were small plots costing Kshs. 250,000 he contributed Kshs.150, 000 while the Applicant contributed Kshs.100, 000/- adding that the property was bought even before the demise of his late wife and had registered the same in the late wife's name. That after they fell out they sought to distribute what each had contributed towards the acquisition of the property parties could not agree and went to court in 2009 the court ordered they obtain valuation reports of the said properties. He avers that he is not opposed to leaving the Nairobi property to the Applicant only if she gives him the difference in price since the same is more valuable than the property in Kisii and each takes what they contributed towards the acquisition of the said properties.

7. Parties filed written submissions. The Applicant in her submissions raised 3 issues for determination.

i. Whether the parties can be regarded to have been married to each other, whether under Customary law, presumption or otherwise?

ii. Whether the Applicant's contribution is instrumental in arriving at a decision or determination and if so, what was the value and extent of her contribution, monetary or otherwise?

iii. Whether the Applicant, by virtue of her contribution is entitled to a share as a cohabitant spouse or otherwise of any of any or all the suit properties?

i. On whether the parties can be regarded to have been married to each other, whether under Customary law, presumption or otherwise? The Applicant submits that she was married to the Respondent and prays that the marriage be declared valid and recognizable and should the court find otherwise she urges to invoke presumption of marriage. She refers the court to the black's Law dictionary 8th Edition defines marriage to include marriage by habit and repute which is an irregular marriage created by cohabitation and implies a mutual agreement to be married. She relied on the case of **Hotensia Wanjiku Yawe vs Public trustee**

C.A. No. 13 of 1976, greatly quoted in cases such as **Re Estate of Dickson Kihika Kimani (deceased) [2009] eKLR** where it was held “*the presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife, In my judgment before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute.*”

On long cohabitation the Applicant submits that she met the Respondent in 2000 and at the time he was married to his late wife under Kisii customary law and parties began a relationship and she carried on duties and roles of a wife to the Respondent, co-wife to the Respondent wife who was ailing at the time and step-mother to the Respondent’s children. She submits that she accompanied the Respondent on various occasions like traveling to the US to attend the Respondent’s daughter’s wedding and also to the Respondent’s rural home. That the Respondent also acted with concern as a husband especially when she was involved in an accident in Sondu and instructed his family to transfer her to Aga Khan Kisumu for treatment. That she took out loans with her Sacco to invest together with the Respondent.

8. On capacity to marry it was submitted that the Respondent had married his wife under Kisii customary law and though he claims otherwise he has not adduced any marriage certificate as he alleges to have solemnized his marriage in 1999. That with time they acquired properties. In 2004 they acquired Nairobi/Block [particulars withheld] which was intended to serve as their matrimonial home. She submits that she had cohabited with the Respondent for over 7 years and the same should be recognized as a marriage.

ii. On whether the Applicant’s contribution is instrumental in arriving at a decision or determination and if so, what was the value and extent of her contribution, monetary or otherwise? It was submitted that the Applicant contributed directly though it was difficult to give accurate figures of her contribution as she did not keep financial record as she trusted the Respondent. The Applicant also submits that she contributed indirectly by taking care of the Respondent, his wife and family. On this she relied on the case of **Kivuitu vs Kivuitu** where indirect contribution by the wife to the family income by looking after the welfare of the family must form a basis just like financial contribution.

iii. On whether the Applicant, by virtue of her contribution is entitled to a share as a cohabitant spouse or otherwise of any of any or all the suit properties? The Applicant submits that she is entitled to 50% share of the properties so acquired due to her direct and indirect contribution to the acquisition of the same.

9. The Respondent in his submissions argued two points.

i. Whether there was a marriage between the Applicant and Respondent?

ii. Acquisition of properties

10. It was submitted that the burden of proof to establish if the Applicant was married under Kisii customary law or cohabitation lies on the Applicant. He submitted that through she alluded to customary law marriage she did not allude to steps taken to validate a customary marriage e.g. payment of dowry which is a prerequisite and did not call any evidence to that effect. He relied on the case of **Rose Wambui Kiarie –vs- Jane Njeri Ngaruiya P & A No. 1870 of 2005** where it was held that marriage under customary law is a serious affair. Further, in **Mwangiru vs Mumbi (1967) EA 639** where the seriousness of customary marriage was restated and observed that it is not only an affair between two persons involved in the relationship but also their families and the community within which they live. It was submitted that where African Customary Law is neither notorious nor documented it must be established for the courts guidance by the party intending to rely on it. Further that where customary law is incapable of being noticed, the same should be proved by evidence or expert opinion adduced by parties who wish to prove existence of customary law. It was submitted that the Applicant has failed to prove the same adding that between 2000 to 2003 he had no capacity to cohabit with the Applicant as he was still with his wife on 16th October 1999 before her demise on 23rd February 2003. That a marriage by way of cohabitation must be established by way of cogent evidence adding that the duty to call evidence lies on the existence of long cohabitation and repute lies with the party alleging it. He relied on the case of the **Estate of Dickson Kihika Kimani alias Kihirika Kimani (deceased) 2009 KLR**, in quoting the case of **Njoki vs Mutheu (2008)1KLR 288** where it was held, “*to sum it, there has to be evidence that long cohabitation is not close friendship between a man and woman, that she is not a concubine, that the cohabitation has crystalized into a marriage, and that it is safe to presume that there is marriage.*”

Further

“Before it is made, there must be evidence of parties begetting children, owning bank accounts, or acquiring properties jointly or being visited by friends or relatives who would be surprised is not shocked to hear that the two are not married.”

11. On acquisition of property he submitted that after meeting the Applicant in 2000 they developed a close relationship to the extent of assisting each other acquire property. That though he intended to marry the Applicant he met opposition from his adult children. That since both were employed and earning a salary they kept a record of financial assistance they extended to each other. He submitted that if at all the parties were married nothing prevented them from registering the properties in joint names. He reiterated his averments on the contribution made towards the purchase of the said properties and improvements thereon. Adding that the Applicant advanced him 1,570,000 and requests that the properties to be shared proportionally according to each parties contribution.

Determination

12. I have carefully considered the pleadings, testimonies and submissions made by both parties and hold as follows. On whether the Applicant was married to the Respondent either under Kisii customary law or under presumption of marriage. In **KIMANI VS GIKANGA, (1965) EA 735, at page 739, Duffus JA** expressed himself as follows on proof of customary law:

“To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity the customary law must be accurately and definitely established. The Court has a

wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document of reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”

Although the Applicant has alleged to have been married to the Respondent under Kisii customary law she has not taken this court through the various steps taken to formalize a marriage under Kisii customary law. She did not call any witness involved in the process to give testimony or even take this court through the necessary steps taken to formalize a Kisii customary marriage. I find that she has failed to prove that she is a wife married under customary law.

13. On her claim as to marriage under presumption. In the case of appeal case of **Mary Njoki v John Kinyanjui Muthuru [1985] eKLR** Justice C.B MADAN stated that, *“Cohabitation, with habit and repute, in the absence of countervailing proof to the contrary, establish a marriage on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract that relationship.”*

14. It has not come out clearly whether the Respondent and his children had at any point moved in with the Applicant. From the Respondent’s evidence in court it appears that both parties continued to maintain separate homes. The Respondent in his testimony stated that his children did not move into the Applicant’s home and he and his children stayed together in Donholm while the Respondent stayed in Buru Buru with her nephew. I find that the Respondent has adequately rebutted the presumption of cohabitation of marriage alleged by the Applicant.

15. In case of **Mary Njoki v John Kinyanjui Muthuru [supra]** the court held as follows; *“In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the Yawe and in Mbiti (supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law.”*

16. The Applicant did not call any evidence to corroborate her testimony to prove general repute on how the family and friends viewed her and the Respondent and if at all the two were held out as a married couple. Though it is clear that there was indeed some relationship between the two parties there is no conclusive evidence to prove that the parties were married. The Applicant appears to have relied on the Respondent’s promise to marry but it appears he changed his mind along the way which is unfortunate for the Applicant who heavily relied on this.

17. The parties in this case have all along kept their investments separate they have not registered any property jointly each party has registered property in individual names despite joint contribution towards acquisition of the same. All in all I find the Applicant has failed to prove that she was ever married to the Respondent either under customary law or under presumption of law as such I find she is not a wife for purposes of these proceedings.

18. It is not in dispute that the Applicant made directly contributed towards the purchase of the properties purchased and held either in her name solely or in the defendant’s name. The Respondent in his testimony does admit that he had intentions to marry the Applicant but later on changed his mind. The Applicant on this reliance had invested time and carried on duties of caring for the Respondent’s children and maintaining a home. The parties acquired the said properties as early as 2000 at the time now the same has appreciated greatly.

i. L.R. Nairobi Block/[particulars withheld]

ii. L.R. No. Wanjare Bogiakumu/[particulars withheld]

iii. L.R. No. Wanjare Bogiakumu/[particulars withheld]

For this court to properly apportion the same the true value of the said property as at now needs to be availed to this court. Parties are hereby ordered to agree on a valuer to undertake valuation of the properties in issue and tender the reports before this court within sixty (60) days of this judgment to allow this Court to finally apportion the parties what they are rightfully entitled to. Cost of the said valuation services will be shared between the parties. Cost in the cause. It is so ordered.

Dated, signed and delivered this 3rd day of **November 2017**.

R. E. OUGO

JUDGE

In the presence of;

Absent For the Applicant

Mr. Olaha H/B for Mr. Mwangi For the Respondent

MS. Charity Court Clerk

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 37 OF 2007 (O.S.)

M M N.....APPLICANT

VERSUS

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FURTHER JUDGMENT

Further Judgment of the Court in HCC 37 of 2007 (OS) (June 2018)

1. At the time of delivery of the judgment in this matter on the 3rd November 2017, this Court ordered that the parties do tender valuation reports on the properties the subject of this case, which had been acquired by them jointly. Each contributed various sums. The reports tendered subsequently have great variances in the valuation of each property. At the last mention in Court Counsels for the parties agreed that the Court gives some percentages to enable the parties conclude the matter. I have considered the evidence adduced on the amounts contribution and in my view the parties share apportion the values of each of the properties at 50:50. This is in line with the holding of the Court of Appeal in the case of **PWK v JKG [2015] eKLR** where the Court stated as follows, **“We think that this is an appropriate case where, subject to what we shall say hereafter, a distribution of 50:50 would have been appropriate. This would not be on account of any compelling legal principle that spouses must share equally in matrimonial property but rather, as was succinctly put by a five-judge bench of this Court in ECHARIA -VS- ECHARIA (Supra) “Where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one spouse, the beneficial share of each spouse would ultimately depend on their proven respective proportions of financial contribution either direct or indirect towards the acquisition of the property. However, in cases where each spouse has made a substantial but unascertainable contribution, it may be equitable to apply the maxim “Equality or equity” while heading the caution of Lord Pearson in GISSING –VS-GISSING [1970] 2 All ER 780] at page 788 paragraph c that; no doubt it is reasonable to apply the maxim in a case where there has been very substantial contributions otherwise than by way of advancement, by one spouse to the purchase of property in the name of the other spouse but the portion borne by the contributions to the total purchase price or cost is difficult to fix. But if it is plain, that the contributing spouse has contributed about one quarter, I do not think it is helpful or right for the court to feel obliged to award either one half-or nothing?.”** Parties to share the properties at 50:50. It is so ordered.

Dated signed and delivered this 29th Day of June , 2018.

R.E.OUGO

JUDGE

In the presence of;

For the Applicant

For the Respondent

Court Clerk