



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KIAMBU**  
**CIVIL CASE NO. 5 OF 2016(OS)**

**M W K.....PLAINTIFF/APPLICANT**

**VERSUS**

**A M W.....RESPONDENT**

**JUDGMENT**

1. The Plaintiff took out an Originating Summons on 17/09/2015 at the High Court in Muranga seeking certain declarations and reliefs based, primarily, on the Matrimonial Property Act. The main relief sought is a declaration that the property known as LR [Particulars Withheld] Block (“Subject Property”) is matrimonial property between the Applicant and Respondent, and that, therefore, the Applicant is entitled to 50% ownership of the property.
2. The Respondent responded by filing, through his lawyers, J. Makumi & Co. Advocates, substantively denying that the Subject Property is Matrimonial Property. He also raised a preliminary objection to the suit. That Preliminary Objection was determined in favour of the Plaintiff hence paving the way for the hearing of the Originating Summons on its merits.
3. Following the directions of this Court, the suit was canvassed by way of viva voce evidence with each party presenting themselves as the only witnesses.
4. The Plaintiff testified as the lone witness for the Plaintiff. Here testimony was that she married the Respondent on 01/06/2000 but that they “legalized” (formalized?) their union on 19/09/2006. She testified that she lived together with the Respondent as husband and wife since June, 2000.
5. The Plaintiff testified that they first lived at their matrimonial house in [Particulars Withheld] Location, and then in 2003, they moved to a place called Toll Station. There at Toll Station, according to the Plaintiff, with the financial help of the Plaintiff’s father, they set up a business. By that time, the Plaintiff testified, they had a daughter together.
6. The business did well. It expanded to become both a wholesaler and a retail shop. It dealt with animal feeds, sodas, groceries and other such merchandise. According to the Plaintiff, the business lasted until 2007 when due to some differences between the Plaintiff and the Respondent, they were evicted. The Plaintiff says this was partly because the business belonged to the Respondent’s relatives who sided with the Respondent.
7. The Plaintiff’s narrative is that she lived together with the Respondent as husband and wife between June, 2000 until 2009 when they divorced. The Plaintiff’s narrative is that between June, 2000 when they

got married and sometime in 2005, they both lived in Kenya. In 2005, the Respondent travelled to the United Kingdom (UK) as a student where he remained until their divorce. However, the Plaintiff insists that even while he was in the UK, they maintained their matrimonial home in Ruiru as the Plaintiff continued taking care of their daughter.

8. The Plaintiff testified that they had an express agreement with the Respondent that she would maintain the matrimonial home and take care of their child while the money the Respondent would earn while in the UK would be used to buy property for the family i.e. Matrimonial Property. According to the Plaintiff, following this agreement, she ran the business (at least until it was no more in 2007) and used the proceeds to take care of the family as well as their child – including paying for the medical and educational needs of the child.

9. Meanwhile, the Plaintiff testified, the Respondent had a part-time job in the UK where he was raising money for a family property. He came back in 2006 and purchased the Subject Property for around Kshs. 600,000 or Kshs. 650,000. Documentary evidence produced and stipulated by the parties shows that the Respondent became the registered owner of the Subject Property on 08/12/2006 and that the title was issued on 18/01/2007.

10. Meanwhile, the Plaintiff and the Respondent formalized their marriage by entering into a civil union on 19/09/2006.

11. The Plaintiff's claim is that the property is joint Matrimonial Property since it was acquired during the subsistence of the marriage between the Plaintiff and the Respondent. Although their formal marriage lasted only seven days, the Plaintiff is categorical that they were married in June, 2000 and lived as husband and wife all along.

12. On Cross-examination, the Plaintiff admitted that the child in question, was not the biological child of the Respondent. The child was born on 21/10/2000. She admits that the child was born during their courtship but was not the Respondent's child. However, the Plaintiff claims that the Respondent had long accepted the child as his and that although the Respondent did not adopt her formally, he was, for all intents and purposes, the father. The Plaintiff testified, under cross examination, that she did not know that the child was not the Respondent's until a DNA test was conducted in 2006. It turns out that that DNA test was the death knell to the marriage between the Plaintiff and the Respondent.

13. The Plaintiff's testimony is that a Kikuyu traditional marriage ceremony was conducted. According to her, it involved the Respondent taking Kshs. 30,000/= to the Plaintiff's father as bride price on 09/09/2006. However, she testified that the Respondent's parents had come to visit her parents in December 2000 three months after the two had started living together. The objective of the visit, according to the Plaintiff, was to announce that the Respondent had taken the Plaintiff as his wife. To attest to this, the Plaintiff produced photographs which showed images of the Respondent, the child, the Plaintiff and the two sets of parents. She admitted on cross examination that the photos were taken when the parents came to celebrate the birth of the baby.

14. On his part, the Respondent contested that the Subject Property was Matrimonial Property. It was his testimony that he first met the Plaintiff in 1998 when she was a student at [Particulars Withheld] Secondary School and he was a student at Catholic University of Eastern Africa (CUEA). At the time, the Respondent testified, he was living with his father at Kibicho and he remained there until 2003.

15. The Respondent testified that he got a job at [Particulars Withheld] Motors on 07/03/2002 and remained an employee there until 31/12/2004. He produced a letter of recommendation from the firm to that effect. That letter was not contested.

16. The Respondent admitted that he lived at Toll Station between 2003 until 23/09/2005 when he immigrated to the UK. However, he testified that he was living alone at Toll Station and not with the Plaintiff as alleged. He came back on 18/09/2006 and the following day he conducted his wedding to the Plaintiff at the Registrar's Office.

17. It was the Respondent's testimony that he never married the Plaintiff in 2000 and certainly not before he returned to the country in 2006. His position is that the Plaintiff was only a girlfriend. Both of them, the Respondent claims, had other intimate partners. He says that the Plaintiff had led him to believe that he was the father to her child and that, as a result, he agreed to marry her in September, 2006 upon his return to Kenya. However, he immediately became suspicious that the child was not his and demanded for a DNA paternity test. Both parties agree that the paternity test was negative and conclusive that the Respondent is not the biological father of the child. Likewise, it is common among the parties that a Children's Court ruled that the Respondent was not liable to pay for any maintenance costs for the child since the Respondent was not the biological father and had not voluntarily accepted responsibility for the child.

18. The Respondent testified that when he relocated to the UK, he worked for [Particulars Withheld] Services and raised the funds he needed to purchase the Subject Property. He testified that he sent the money to his account in Kenya (not the Plaintiff) from one of the bureaus in London. When he came into the country, he then used the funds to buy the Subject Property from one, Ruth Juku. The Respondent exhibited the cheque and bank statement used to purchase the Subject Property and testified, as shown on the statements that it was not a joint account.

19. The Respondent testified that at some point he had discovered that the property had a caution placed on it. The caution had been placed by the Plaintiff. He therefore successfully sued the Plaintiff for the caution to be removed. After the caution was lifted, the Respondent says that he sold the property to a third party. The Respondent testified that the Court that had the suit over the removal of the caution found that he had cohabited with the Plaintiff for only 8 days and that the Plaintiff did not, therefore, have a valid claim on the property. The Plaintiff did not appeal against the decision but instead, later on, brought the current proceedings under the matrimonial property Act.

20. In sum, the Respondent categorically denies that he got married to the Plaintiff under any system of marriage before 19/09/2006. He further denies that the Plaintiff contributed in any way to the Subject Property either financially or in any kind. In particular, he denies that the Plaintiff ran any business on their behalf or maintained a matrimonial home or took care of any children they had together. As such, the Respondent is astounded that the Plaintiff claims any portion of the Subject Property.

21. The Plaintiff has brought this case against the Respondent under Sections 2, 12 and 17 of the Matrimonial Property Act No. 49 of 2013 seeking Legal protection and a declaration that the Subject Property is matrimonial property.

22. The Matrimonial Property Act No. 4 of 2014 provides:

## **2. Interpretation**

*In this Act, unless the context otherwise requires— “contribution” means monetary and non-monetary contribution and includes—*

*a. domestic work and management of the matrimonial home;*

*b. child care;*

*c. companionship;*

*d. management of family business or property; and*

*e. farm work*

## **12. Special provisions relating to matrimonial property**

*(1) An estate or interest in any matrimonial property shall not, during the subsistence of a*

*monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise.*

*2. A spouse in a monogamous marriage, or in the case of a polygamous marriage, the man and any of the man's wives, have an interest in matrimonial property capable of protection by caveat, caution or otherwise under any law for the time being in force relating to the registration of title to land or of deeds.*

*3. A spouse shall not, during the subsistence of the marriage, be evicted from the matrimonial home by or at the instance of the other spouse except by order of a court.*

*4. Subject to subsection (3), a spouse shall not be evicted from the matrimonial home by any person except—*

*a. on the sale of any estate or interest in the matrimonial home in execution of a decree;*

*b. by a trustee in bankruptcy; or*

*c. by a mortgagee or charge in exercise of a power of sale or other remedy given under any law.*

*(5) The matrimonial home shall not be mortgaged or leased without the written and informed consent of both spouses.*

#### **17. Action for declaration of rights to property**

*(1) A person may apply to a court for a declaration of rights to any property that is contested between that person and a spouse or a former spouse of the person.*

*(2) An application under subsection (1)—*

*a. shall be made in accordance with such procedure as may be prescribed;*

*b. may be made as part of a petition in a matrimonial cause; and*

*c. may be made notwithstanding that a petition has not been filed under any law relating to matrimonial causes.*

Alphonse is defending the suit. He denies that he is married to M. He has filed a counter-claim for the eviction of Faith from the farm. He maintains that LR [Particulars Withheld] -Machakos belongs to him and is not owned jointly with F. His defense to this action is the same.

In order for F to succeed in her suit, she must establish:

23. In this case, for the Plaintiff to prevail, she must demonstrate, on a balance of probabilities that:

a. She was married to the Respondent when the Subject Property was acquired;

b. She made a contribution to the acquisition of the Subject Property.

24. For the Plaintiff to succeed in this case, she must demonstrate that she was married earlier than the formal marriage date of 19/09/2006. This is because it is obvious that the proceeds for the acquisition of the property were accumulated before the date of the marriage at the Registrar's office.

25. The Plaintiff seemed well aware of this. She tried to marshal her evidence to show that though the marriage was formalized on 19/09/2006, the Plaintiff and the Respondent were, in fact, married in June, 2000 under some other system of marriage. The Plaintiff was not clear about which particular system of

marriage she hedged her argument in this regard – at times pivoting her claim on customary marriage and at other times on marriage by presumption.

26. Whatever system of marriage the Plaintiff alleges, it was incumbent upon her to prove it on a balance of probabilities. In ***Gituanja v Gituanja (1983) KLR 575***, the Court of Appeal held that the existence of a customary marriage is a matter of fact which must be proved with evidence. In that case, the Court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the “*ngurario*”. ***Hortensia Wanjiku Yawe v The Public Trustees, Civil Appeal 13 of August 6, 1976*** (Wambuzi, P Mustafa V-P and Musoke, JA) is to the same effect. In this case, Justice Kneller laid down three important and salutary principles regarding proof of customary marriages in Court. These are:

- i. The onus of proving customary law marriage is generally on the party who claims it;
- ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;
- iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.

27. Our case law and various writings evidencing Kikuyu customary law have established some of the elements necessary to prove a valid marriage under Kikuyu Customary Law. Cases which have judicially enumerated the essentials of a valid marriage under Kikuyu Customary Law include: ***Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR*** – a decision by the Court of Appeal as well as two High Court Cases cited to me by the Respondent’s lawyer to wit ***In the Matter of the Estate of Karanja Kigo [2015 eKLR*** and ***Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo [2004] eKLR***. These cases mention at least five elements:

- a. Capacity which includes age, physical and mental conditions and marital status;
- b. Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;
- c. The ceremonial slaughtering of a ram in a rite called *Ngurario*;
- d. *Ruracio* (bride price) partly paid;
- e. Commencement of cohabitation.

28. However, in the ***Eliud Maina Mwangi Case***, the Court of Appeal reminded us that customary law evolves with time. The Court stated thus:

Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed.

29. The progressive tone by the Court of Appeal is well taken. As customs are surely organic, the exact procedures for a valid customary marriage cannot be said to be codified. Even then, there is no denying that certain pre-requisites must be present. However, the failure of certain formalities does not per se invalidate a customary marriage if there is enough evidence to show that a customary marriage was intended and certain substantive pre-requisites performed.

30. In this case, the only proof that the Plaintiff has offered to demonstrate the alleged existence of a Kikuyu Customary Marriage are pictures which she admits were taken when the parents of the Respondents and a few other guests visited her after she had given birth to her child in 2000. There is no evidence of any negotiations by the family; 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 that Plaintiff offered was payment by the Respondent of Kshs. 30,000/= to her father shortly before they got married before a Registrar in 2006. She, however, does not claim that this was done in the setting of any formal traditional rites or as part payment of previously negotiated bride price.

31. In the circumstances, I am constrained to conclude that the Plaintiff did not demonstrate the existence of a Kikuyu Customary marriage.

32. The Plaintiff also sought to rely on marriage by presumption. Even assuming that marriage by presumption can be a ground for pivoting a claim under Sections 6 and 7 of the Matrimonial Property Act, a spouse has to prove the existence of certain elements for the Court to make the inference that a marriage existed between the parties. I say so because it is unclear whether Section 6 of the Marriage Act 2014 intended to comprehensively list the only forms of marriages that are recognized in Kenya. In any event, this point was not argued before me presumably because the parties were common on the point that the Marriage Act of 2014 did not apply to the case since the claim was that the marriage was contracted and dissolved before the enactment of the Act.

33. The definitive definition of marriage by presumption in our jurisprudence is provided in the majestic judgment by Nyarangi, JA in *Mary Njoki v John Kinyanjui Muthuru & 3 Others 1985 eKLR* in the following words:

The concept of presumption of marriage is with us, having been recognized and approved by this court's predecessor in *Hortensia Wanjiku Yawe v Public Trustee*.

This court did not although not expressly recognize and accept the concept of presumption of marriage in *Mbiti Mulu and*

*Another v Miwa Mutunga, Civil Application No NAI 17 of 1983*.

In *Yawe*, the deceased had declared to another that the appellant was his wife by general repute, there had been long cohabitation as man and wife, there was evidence of performance of marriage ceremonies and during the period of cohabitation the appellant bore the deceased man four children. In *Mbiti* the deceased woman had borne the respondent one child and there had been a marriage ceremony.

The presumption does not depend on the law of systems of marriage.

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. 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*. 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.

34. 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 predicates:

- 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 elements include whether the parties had children together; whether the community considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account – and so forth.

35. As the *Mary Njoki Case* held, 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 evidence 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 to rebut the presumption.

36. What evidence did the Plaintiff proffer to enable the Court to make the presumption? First, she asserted that she and the Respondent cohabited between 2000 and 2006. However, there is little to prove such cohabitation. The Plaintiff produced no rental agreement, no witnesses, and no other evidence to demonstrate the cohabitation. Indeed, the available evidence tends to militate against the argument of cohabitation because the Respondent lived in the UK for four of the years that the Plaintiff claims they cohabited together.

37. If the Plaintiff's demonstration of the quantitative elements required for the presumption of marriage to arise was shaky, her demonstration of the qualitative elements were tenuous at best. Of the commonest indicators of "general repute" as termed by Nyarangi JA, this is how the Plaintiff fared:

- a. There are no children produced by the alleged union between the Plaintiff and the Respondent. The only child of the Plaintiff is proven in an unchallenged Court decision not to be the child of the Respondent.
- b. There was no evidence – prima facie or otherwise – of any members of the community – including family members – indicating that they ordinarily considered the Plaintiff and the Respondent as husband and wife.
- c. There was not a single instance where the Plaintiff could demonstrate that the Respondent outwardly held out as her husband.
- d. There were no other pieces of evidence which could give an inkling that a spousal relationship existed: no business jointly registered; no properties jointly owned; no accounts jointly owned; no loans jointly taken; no chamas jointly belonged to; no rental agreements jointly signed. There is simply nothing in the alleged relationship between the Plaintiff and the Respondent that demonstrates that there was a spousal relationship.

38. On the contrary, the evidence tabled by the Respondent tends to militate against a presumption of marriage. As aforesaid, the Respondent lived and worked in the UK, alone, since 2005. When the Respondent decided to purchase property, he did not wire the money to the Plaintiff who was supposedly his wife: he wired the money to his own account in Kenya. That account was not co-owned with the Plaintiff. It was a sole account. Secondly, all the ownership documents – including, by the Plaintiff's admission, the Sale Agreement – were in the name of the Respondent only. Thirdly, it is copiously odd that the Sale and the transfer happened only eight days into the marriage of the Plaintiff and the Respondent – which was

followed, as stipulated by all parties, by an immediate separation.

39. What emerges from the evidence in this case is a narrative of a lady and a man who were on friendly, admittedly romantic and intimate terms for a long time dating back to 2000. While the Plaintiff insists that the relationship rose to the level of a marriage during the cohabitation and in spite of lack of formalities, the Respondent balks at the idea and asserts that the relationship between the two was purely one of girlfriend and boyfriend that never rose to the level of marriage by presumption or otherwise.

40. After combing through the evidence, I am unable to say that the presumption of marriage favours the Plaintiff in this case. There is simply not enough evidence to demonstrate the quantitative factors she would have to show as evidence of “general repute” that the Plaintiff and the Respondent lived as husband and wife and held themselves as such. While the evidence of cohabitation is shaky, the evidence of the qualitative factors which would turn a close on marriage into a sure verdict is even more wanting. Consequently, it is my finding that the Plaintiff was unable, as a matter of factual evidence, to establish the presumption that she was married to the Respondent before they formally got married on 19/09/2006.

41. If the parties did not get married until on 19/09/2006, can the Plaintiff still establish evidence of contribution to the Subject Property? The short answer is in the negative. It is an established fact, unchallenged on appeal, that the Plaintiff and the Respondent cohabited for only eight (8) days after their official wedding on 19/09/2006. There is no question that no property was generated by the spouses during the duration of their civil marriage which lasted only eight days. The Plaintiff has not even attempted to claim so. Instead, she hedged her bet on what she called a period of cohabitation which existed between June, 2000 and September, 2006. As I have found above, there is no evidence of such cohabitation.

42. If the official marriage only lasted eight days, the Plaintiff’s claim that she contributed to matrimonial property “in kind” cannot pass muster. For one, as established above, it is established that the couple had no children to take care of during the period. Secondly, there is no evidence that the Plaintiff had to take care of the home during a period sufficient to establish “in kind” contribution. Lastly, for avoidance of doubt, and by the Plaintiff’s own admission during her testimony, she did not contribute financially to the purchase of the Subject Property.

43. The conclusion, then, is clear: evidence presented at trial shows that the Plaintiff made no contribution to the purchase of the Subject Property and deserves no part of the property. The Subject Property is not proven to be Matrimonial Property within the meaning of Section 2 of the Matrimonial Property Act, and is, therefore, not liable for distribution between the parties.

44. Consequently, given my findings above, the obvious conclusions from this judgment is that the Originating Summons dated 17/09/2017 is hereby dismissed with costs.

**Dated and delivered at Kiambu this 28<sup>th</sup> day of June, 2017.**

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**JOEL NGUGI**

**JUDGE**