



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 3 OF 2015**

N L S .....PLAILNTIFF

VERSUS

B R P ..... DEFENDANT

**JUDGEMENT**

The Plaintiff in her plaint dated 29<sup>th</sup> January, 2015 seeks a declaration that the relationship between her and the defendant be presumed to be a marriage by cohabitation and repute and further that the suit property be declared matrimonial property. The Defendant has filed a defence stating that such a presumption cannot arise and as a result the property cannot be matrimonial property.

The Plaintiff in summary seeks the following prayers: -

*a) A declaration that there exists a presumption of marriage between the Plaintiff and the defendant and the two are legal wife and husband.*

*b) An order that property on plot No. 13655 (original No. 854/3 within Malindi Municipality and any other unknown properties (movable and immovable) owned during the time of cohabitation be declared as matrimonial properties and the same be registered jointly between the defendant and the plaintiff by the registrar of documents and Titles at Mombasa Lands registry.*

*c) A permanent injunction restraining the Defendant, servants, hiring or any other person acting on their behest from selling, evicting and or denying access to the Plaintiff and the minors to the suit premises.*

*d) General damages*

*e) Costs and any other relief the court deems fit to grant.*

**Plaintiff's Case**

The gist of the suit as pleaded is that the Plaintiff and Defendant met in April 2010 at a hotel in Mombasa where the Plaintiff worked as a headwaitress and earning Ksh.35,000.00 At the time, the Plaintiff was a spinster and the Defendant a divorcee. They fell in love and according to the Plaintiff the Defendant declared to her that he would take her as his wife in the presence of her parents and other family members.

The two then held themselves out to the public as husband and wife and the Plaintiff performed her wifely duties and the Defendant as a husband provided for their matrimonial and basic needs. The Defendant frequented Kenya from Europe three to four times annually and in his absence the Plaintiff remained faithful. During his visits to Kenya, they often came to Malindi whereby they got interested in purchasing a house. They instructed one **Mr. Nyiro** to look for a house for them. They eventually found a house on Plot No. 13655 within Malindi Municipality “*the suit property/ the villa*” and purchased it. The Plaintiff made her contribution towards the purchase by selling all her properties in Mombasa. The Defendant while leaving for Europe handed over the keys to the Plaintiff and she has been residing therein since. The Plaintiff also averred that she sold off all her movables amounting to a sum of Kshs.1.2 Million, which amount was included in the purchase of the suit property.

In order to reside at Malindi, the Defendant persuaded the Plaintiff to quit her job and move to Malindi after promising to cater for her basic needs. At the time of promising to marry her, the Defendant also promised to take care of her daughter **NRA, Pw4**, with intentions of adopting her as his own. He also persuaded to sire a child with him so that his dreams of a two- children family could take shape and they got a son, **NRP** who at the time of filing suit was 7 months old. The Defendant became the adoptive parent to **Pw4** and the two issues have not known of any other male parent since. The Defendant took up parental responsibility over **Pw4** as per Section 25 (2) of the Children's Act but has since disowned her. He used to send upkeep from Europe for their needs.

Due to the Defendant's non- commitment, his abusive behaviour and the fact that he was not a Kenyan citizen, the Plaintiff became apprehensive of the fact that he could abscond the jurisdiction of this court and that she and the minors would suffer if he happened to sell the suit property as he intends to do so. The Defendant gave them an oral eviction, threatening to use security guards and police to effect it though there is an ongoing children’s matter filed against him. The Plaintiff avers that that was not the first time the Defendant had made such threats. The children's matter was for upkeep and maintenance of the two issues as he had abdicated his parental responsibility by refusing to provide for them.

The Plaintiff pleads that a presumption of marriage arises from the fact that they cohabited for 5 years.

The Defendant in opposing the suit filed his defence denying that the two met at the material time in the circumstances laid out by the Plaintiff or that she worked at the place she alleged or earned the said amount. He denied falling in love with her, the promise to marry her or take care of her daughter. He also did not perform any spousal duties or that he maintained her or her daughter. He further denied visiting Kenya to perform matrimonial duties.

It was his defence that the two never purchased the suit premises together nor did the Plaintiff contribute towards the purchase, nor were her properties sold off to add to the purchase price. He stated that he did not hand the keys for the house to the Plaintiff to reside in a matrimonial home nor did he persuade her to sire with him a child. He admitted his biological relationship with **NRP** maintaining that he took care of the basic needs but denies adopting **Pw4** nor taking up parental responsibility to cater for her. He denied being uncommitted stating that he took care of his son. He also denied attempting to abscond the jurisdiction and sell the property. He admitted that there was a children's matter pending and that he had provided for his son an alternative shelter which was ready for occupation and has not given any eviction notice to the Plaintiff as pleaded. He denied sending the Plaintiff maintenance money stating that the same was her salary allowance and overhead expenses as she served as his caretaker at the suit premises. He stated that he occupied the suit premises on a permanent basis as from June, 2014 and stays independently in a separate locked room from that occupied by the Plaintiff. That since the purchase of the property he has occupied the property on three occasions totaling to 42 days. He denied abusing the Plaintiff stating that she was the one hurling abuses to him, mistreated and cheated him. He denied that a presumption of marriage could be drawn and that a promise to marry is not legally binding. He stated that the court lacked jurisdiction to determine the matter.

At the trial the Plaintiff adopted her written statement as part of her evidence testifying that she was a housewife residing in the suit property. She met the Defendant at her place of work, a hotel in the Kenyan Coast in the year 2010. Having fallen in love he was introduced to her parents **M. S and E W**

whereby in their presence promised to marry her. He also promised to take care of the Plaintiff's daughter **NRA, Pw4**, and adopt her. The Defendant catered for **Pw4's** school fees and the Plaintiff produced a bundle of receipts as **P.exh1**. When the Defendant visited Kenya they would stay in a hotel. He then rented a house for her at Bamburi, Mombasa at Kshs.15, 000.00 per month and would sometimes visit her there.

In the year 2011, they decided to look for a house to purchase as their matrimonial house. They requested **Geoffrey, PW2**, to assist in the search. They finally found a house and the Plaintiff contributed to its purchase by selling off her properties. The Defendant was present when they did the sale. They moved to Malindi on 15<sup>th</sup> April, 2013 and she managed the house as the Defendant's wife. The Defendant in the presence of her family requested that they sire a child together and this led to the birth of **NRP**, who was 8 months old at the time of trial. The Plaintiff did not trick the Defendant into siring the child it was an agreement. The Defendant by his affidavit dated 13th November, 2014 produced as **P.exb. 2** denied that they had agreed to get the child.

In her estimation, the public took them as a couple and they lived as husband and wife though he once threw her out of their bedroom. The Defendant would send money for the workers' wages and upkeep via western union receipts produced as **P.exb 3**. She testified that she knew one **Said Lewa Charo, Dw4**, who was employed as their worker, she also knew **Irene Chebet, Dw7**, employed as a house help but had been instructed by the Defendant not to assist her though the Plaintiff had had a cesarean birth and had back problems. She said she knew of one of the Defendant's friend **William Taylor, DW1**, who came to visit them for two weeks but did not interact with him or serve him breakfast.

She wishes that the court does recognise her as the Defendant's wife as she had lived with him for a long time and he made her leave her job and sell her property to contribute to the purchase of the suit premises and that the Defendant had conceded to the paternity in civil appeal number 30 of 2014.

Plaintiff further testified that she could not work as she has undergone surgery. When they met, she had been employed on casual basis as the hotel had some issues. She was earning Kshs.35,000.00 monthly, the payment of which was in form of petty cash. She also stated that the Defendant had no proof of her qualifications as a headwaitress.

She testified that her mother resided in Mombasa and that the Defendant made his declaration of marriage in the presence of her parents and a friend called **Irene**. He even gave her an engagement ring that was unfortunately stolen. The declaration was not in writing and no dowry arrangement were made or given. She prays that the promise to marry be legalised.

According to the Plaintiff, the Defendant made a promise to adopt **Pw4** but no formal adoption was done. She stated that the child was as a result of a sexual assault hence the name of the father does not appear on the birth certificate. There was no parental responsibility agreement with the Defendant about **Pw4's** welfare. In 2013, **Pw4** went to school just as they moved to the suit property, the Defendant joined them two months later. **NRP** was born on 30<sup>th</sup> June, 2014. They agreed to have the child, there was no luring involved. The Defendant had moved permanently to Kenya before that and they cohabited together. He came to live in Kenya permanently when she was 6 months pregnant with **NRP**. She was willing to take up a DNA test to prove the paternity if need be.

Prior to his permanent move, he would visit the country four to five times a year for two weeks at a time but once he visited for three weeks. She testified that the monies sent to her went to paying bills, wages and for her upkeep. He would send Kshs.10,000.00 to Kshs. 30,000.00. She would use part of the money to pay **Pw4's** school fees.

In Mombasa she used to reside with a friend and had a *posho* mill, washing machine, cooker, '*simu ya jamii*' for business, fridge and her sister's cooking utensils. She sold all these items and gave the purchasers receipts but had no sale agreements drawn for the same. She had two *simu ya jamii* each costing about Kshs. 160,000.00. The suit premises was furnished by the Defendant, they moved in together before he left for Europe and handed her the house keys. From Mombasa she only came with a

suitcase of clothes. She stated that she came to Malindi on 15th April, 2012.

Currently they are residing together though their relationship has become sour from the time she was 8 months pregnant. They do not have conjugal relationship and they no longer cook and eat together since 2014. She also stated that the Defendant assaulted her severally and she has reported the matter to the police. She has never been investigated by the police. The Defendant threw out her clothes. The Defendant started entertaining other women at the house claiming it to be his own house. She claimed that she remained faithful and that one **C Y B** was not her boyfriend.

She listed their workers as **Lucas, Lewa** and **Mapenzi**. That currently **Lewa** performed multiple duties including guarding the gate and he would know persons entering and leaving the compound. She stated that her friends and relatives would visit and she did not require the Defendant's permission as he was her husband. She did not entertain guests at the villa for a fee. She testified that one **Enrika** was not her friend and she came to the house with the Defendant in February, 2015. She denied chewing miraa at the house. She denied that **Enrika** helped them to identify the suit premises or that she knew her daughter.

The Plaintiff stated that she had no intentions of filing for divorce though the Defendant intends to sell the house. She also stated that she cannot force the Defendant to marry her though they have been living together for 5 years. She stated that the Defendant has two other issues, a boat and a house. She wishes the court to recognise her as the Defendant's wife for she has lived with him for a long time and he made her leave her job, sell her property to contribute to the purchase. They also frequently visited her parents in Mombasa.

**Pw2, Geoffrey M. Mwangi** testified that he resides at Malindi and wished to adopt his written statement as part of his evidence. He testified that he met the Defendant and the Plaintiff at *Scorpio Villas* where they were staying. He was a tour guide and the Defendant introduced the Plaintiff to him as his long term partner. He gave them a tour and while at it the Defendant took photographs which he sent him via email. After the trip the Defendant intimated his desire to purchase a property and requested him for his assistance. They communicated frequently over email on this. **Pw2** got ten possible houses but the one the Defendant selected had legal issues so he did not purchase it. Later **Pw2** learnt that the Defendant had made a purchase near *Scorpion Villas*.

**Pw2** further stated that the photographs taken did not mean that there was a marriage. The emails from the Plaintiff indicate that there was some form of relationship and he mentioned the Plaintiff in one email. He got to know the Plaintiff through the Defendant in year 2011. He has visited the suit premises twice and knows the two children but does not know their names. The property was purchased through another person. He stated that he knew **C Y B** who works at the *Scorpion Villas*. He testified that he did not know if the parties were married but they live together.

**Pw3, M S**, is the Plaintiff's father. He resides in Mombasa. He first met the Defendant in the year 2002 when he was brought to the house by the Plaintiff. She informed him that they were friends and had met at the hotel where she worked. He informed the Defendant about **NRA (Pw4)** and the Defendant informed him that he wished that the Plaintiff would sire another child with him. He also wanted the Plaintiff to leave her work but **Pw3** wished to have a further discussion on that proposal. The second time they came he was not there and only met his wife. The third time they ate a meal together when the Defendant told them of his intentions to take the Plaintiff and **Pw4**. He promised to educate the child. Later the Plaintiff informed him that they wished to get married. He gave his permission and the Defendant returned to his home. The Plaintiff then left her employment and went to live in *Bamburi*. **Pw3** then lost communication with them for 3 years, he later learnt that they were living in *Bamburi*.

The Plaintiff informed him that they would be moving to Malindi and she brought her parents to the Malindi house. He called elders in Mombasa informing them to expect a marriage but no dowry was paid. They only gave him soda. He stated that he was chased away by the Defendant when he went visiting his daughter at Malindi.

**Pw3** testified that they communicated with the Defendant in Kiswahili and the Plaintiff interpreted for

him. The Defendant promised to marry the Plaintiff but **Pw3** has never attended their wedding ceremony. He visited the Bamburi house. It was two bedroomed, furnished with a set of seats, a six-seater dining table, a fridge, 2 ceiling fans, a 21" flat screen T.V, carpet, microwave and a radio cassette player. He estimated the total cost of those items to be Kshs.150,000.00. He testified that the Plaintiff dropped out of school in form two but he did not know the reason, she did not offend him and stated that she wanted to work. She trained for one year after dropping out. He confirmed the sexual assault on the Plaintiff. He confirmed that the Defendant had promised to take care of **Pw4** but did not know if he adopted her.

It is **Pw3's** evidence that the Defendant went twice to their place and the soda was paid as elders had been called. Some money was given to his wife. He stated that they wanted a traditional wedding but they only took tea and gave the two their blessings. They poured milk and alcohol as part of their *Maragoli* customs. He testified that the two are like a married couple. Four elders (men) and four women attended when they took tea. He gave the Defendant permission to marry his daughter in church since they were in a hurry.

**Pw4, NRA**, a minor of 13 years, testified that the Plaintiff was her mother and the Defendant her father, **NRP** is her brother aged one year and nine months at the time of her testimony. She was aware that the Defendant was not her biological father and met him at their home for the first time in 2010 while she was in class 4. The Plaintiff introduced him as her boyfriend. They became a couple and lived together in Mombasa. The Defendant would come and go. They moved to Malindi in 2013 before her brother was born. The Defendant used to pay her school fees since 2010 but stopped in 2014. He used to treat her as his own daughter. She stated that they had access to the house and the Defendant who also resides there maintains it. She denied that her mother was the caretaker of the suit property. She stated that her parents used to sleep in the same room and her parents' friends considered them as a couple who were engaged. The parents fight and hurl abuses but she wishes to continue residing there and that the Defendant continues maintaining her as before. She stated that she did not know **Henrika**.

It is her evidence that there was a traditional function attended by a few people but could not recall the exact number and no photographs were taken. The Defendant never came with *William Taylor* to the function. She stated that she could not recall if the Defendant was requested to adopt her but her mother told her to call the Defendant "dad" who at the time was very generous. The Defendant promised to marry the Plaintiff but reneged and is currently mistreating the whole family and is no longer behaving like a dad. After delivery of **NRP** the Plaintiff moved into **Pw4's** room. The two parties engage in fights and once she heard the Plaintiff scream and call the watchman. The plaintiff has made numerous reports to the police.

**Pw4** further testified that the plaintiff purchases all the food using the maintenance money and takes care of the house when the Defendant leaves. The Defendant sends money for the bills, school fees and workers' salaries. She stated that she used to like the Defendant when he used to care of her but now she is weary of the abuses and needs a break. She has visited the police station as a result of the fights. The Defendant sometimes fights her mother while she is still holding the baby. **Pw4** stated that she was aware of the other property but has never paid it a visit. That since term 3 in 2014 the Defendant had not taken parental responsibility.

She further stated that her mother had a *posho* mill which the Defendant sold. The Plaintiff also had furniture, 2 T.V sets, a microwaves, beddings, fridge and other items which were sold so that they could move to Malindi. She never saw any contract of sale. She testified that the Defendant was the biological father of **NRP** but could not state that the Plaintiff and the Defendant were married. She also stated that she came to Malindi in 2012 after the Defendant gave his consent to her moving in. Her grandmother visited them at Malindi when **NRP** was born. She knew of the worker **Lucas, Dw5**, but did not know **C Y B** or **Henrika**. She stated that **Henrika** came home with the Defendant but she never attended any function organized by her.

### **The Defendant's case**

**Dw1, W. Taylor**, testified that he was a UK citizen and a retiree. He relied on his filed statement.

He accompanied the Defendant to his new retirement home at Malindi and the Plaintiff picked the p by taxi at the airport in Mombasa. After the vacation he and the Defendant went back to the UK leaving the Plaintiff to look after the house. He understood that her role was that of a caretaker pending her getting a job at a local hotel and the Defendant assisted in drafting her C.V.

In October, 2013 when they visited Malindi a second time, the Plaintiff claimed that she was married to the Defendant claiming that the law was that if one stays for 6 months together they are considered legally married. As a close friend, the Defendant had not disclosed to him any intentions to marry, furthermore he had no intentions to sire children due to his medical conditions. He stated that it was out of the generosity of his heart that the Defendant financially supported the Plaintiff who had the misfortune of falling prey to sexual assault at the age 14 years. In October, 2015 he visited the suit premises and found open hostility between the two parties. They slept in separate locked rooms.

His evidence is that since 2013, he has visited Kenya four times for a period of about two weeks each time. According to him the plaintiff was a caretaker of the defendant's house. In October 2013 when the Plaintiff made the statement on marriage the Defendant was left amazed and she immediately walked away. He stated that the Defendant had had his vacations in Kenya before 2013. According to him the two have never been married.

**Dw2, Henrika Kadzo Mwaro** is a business-lady residing in Malindi. She met the parties at *Mnarani Club* in 2012 while she was driving to Mombasa and they hiked a lift from her. They introduced themselves as boyfriend and girlfriend. According to **Dw2**, the parties cohabit but are not married. She testified that she did not know **Nyiro Wilfred** nor had she met him. It was her testimony that in 2012 she was introduced to **C Y B** at the suit premises by the Plaintiff as her boyfriend. **Dw2** and the Plaintiff were close friends before this case and she would spend at the suit premises together with her children and the Plaintiff would also stay at her place. Their children **Pw4** and **Dw3** were friends.

She brought the parties to Malindi in the search for a property as they wanted some property in Malindi. The Defendant requested her to look for property for him. The parties were always together and introduced themselves as boyfriend and girlfriend, they moved in together when they got the suit property and had a son together. The Defendant would leave the Plaintiff in charge of the property whenever he flew out of the country and they would both live together whenever he flew back. **Dw2** stated that she never saw a caretaker's contract and that the two cohabited in the suit premises.

The Defendant informed her that the Plaintiff was a caretaker although she did not want to be referred to as such. She stated that the Defendant is the one who requested her to look for a house. She also stated that the property that the Plaintiff had was a TV, radio, fridge and a *meko*- gas cooker but she did not see any maize flour machine nor did she know the amount the Plaintiff obtained from the sale of her property. **Dw2** stated that the two lived in separate rooms at the suit property and that their relationship was sour.

**DW3, Aurora Neema Wanje**, daughter of **Dw2** testified that she lived in Malindi and was just about to join college. She knew the parties as her mother's friends and she was a friend to **Pw4** and they would go for lunch and swimming together and have sleepovers at each other's home. She stated that the parties were her mother's friends and in her opinion they were boyfriend and girlfriend. She knew that they used to live in Mombasa and she would visit them when going to school whereby she always used to find the Plaintiff.

**Dw4, Said Charo Lewa**, stated that he resides in Malindi and is a pool attendant and gardener at the suit premises. He previously used to work for another employer in the same premises and then he got hired by the Defendant. The Plaintiff was the caretaker and housekeeper at the suit premises and used to sleep at the villa. He stated that currently the two parties live in the same villa but in separate rooms as they did before and they did not live like a couple. **Dw4** stated that the Plaintiff could go out as she pleased without informing the Defendant. He stated that the two do not see eye to eye and do not share anything. He testified that the Plaintiff who previously used to speak in English now deliberately speaks in Kiswahili which the Defendant does not understand and that there are times she likes to fight the Defendant.

It is **Dw4**'s further evidence that he was introduced to **C Y B** by the Plaintiff as her boyfriend and they used to live at the suit premises as husband and wife. The Plaintiff swore him to secrecy over the relationship. **Dw4** allowed **C Y B** into the suit premises and he last saw him when he drafted a letter asking **Dw4** not to testify in this case. **Dw4** testified that he had visited the police twice over the parties' disputes. Whenever the Defendant asked Plaintiff about her whereabouts she would become moody and be ready to fight.

**Dw5, Lucas Chea**, lives in *Msabaha* and is a gardener at the suit premises. He stated that currently the two live in separate rooms. He further stated that A party was once held, he provided the goat and those present were the Plaintiff, **C Y B**, **Pw4** and **Dw4**. He saw the parties coming to the villa as husband and wife. He does not know whether the two were a couple or friends, though he now knows that they are friends.

**Dw6, Edward Kingi Kitunga**, testified that he resides at Malindi and was a local tour guide. He met both the Plaintiff and Defendant outside the Scorpion Villa near the suit premises. The Defendant informed him that whenever he had clients who wanted a room they could come to the villa and he was to get a commission. Twice he took clients there. He further stated that he met the Defendant through **Dw1** who told him that the Defendant had purchased a villa near *Scorpio Villas*.

**Dw7, Irene Chebet** testified that she was the Defendant's housekeeper since December, 2014 and that she also knew the Plaintiff. At the time of her employment she found the two living in separate rooms and that they do not access each other nor does the Plaintiff cook for the Defendant. She found the rooms dirty and she also stated that she did not know why the Plaintiff did not cook for the Defendant. According to **Dw7** the Plaintiff was not the Defendant's wife. The two did not live together as husband and wife and are not married to each other.

**Dw7** stated that the Plaintiff did not like it when the Defendant interacted with his son and further that the Plaintiff would misbehave whenever the Defendant entertained visitors. It is her testimony that no police officer ever came to the suit property. She also testified that on 22/05/2016 the Plaintiff was out for a long time until late hours and both the Defendant and the watchman cautioned her not to let the Plaintiff in when she returned. The watchman then let her in and the Plaintiff fought the Defendant, the Defendant then pressed the security alarm. **Dw7** stated that she had witnessed two fights between the parties on three occasions.

It is her evidence that the Plaintiff started the fights whenever the Defendant attempted to hold the baby and used to use the baby as her shield.

**Dw8**, the Defendant, who relied on his written statement. He is retiree and a citizen of England with a permit to reside in Kenya. He was a chartered town planner and had retired on health grounds. He resides in Malindi at the suit property. He testified that in his lifetime he had toured many countries and had girlfriends from all over the world. He clarified that his relationships were not necessarily amorous and that recently he had played host to one of them for four days at his villa, the suit property. He stated that he had previously been married with two children for 29 years but is now a divorcee.

The Defendant stated that he had been residing in Kenya for over two years and first came to Kenya in 2008. He has had girl friends in Kenya. He met the Plaintiff in a hotel at the coast of Kenya where she was by then a trainee on attachment not earning a salary. The two became friends and the Plaintiff shared with him her rape incidence that brought forth **Pw4**. He got to see **Pw4**'s birth-certificate which did not bear the father's name. According to the Defendant the child's father was traced later. The Defendant testified that he has not met the Plaintiff's biological father and only met the mother once at the Plaintiff's house at *Bamburi* where the Plaintiff served them some dinner. He further stated that he never went to the home of the Plaintiff's parents. The Plaintiff's step-mother is currently out of the Country. At the birth of their son, he hired a private room at the hospital for the Plaintiff's biological mother. They then came over to stay at his villa. He testified that though the Plaintiff knows English she, together with **Pw4**, begun speaking in Kiswahili when their relationship broke down.

The Defendant testified that he purchased the villa in April 2013 and the Plaintiff agreed to take care of it at a salary of Kshs. 10,000.00 p.m. The Defendant would send her the salary together with other monies for paying the bills and the salaries of **Dw4** and **Dw5** which was Kshs.6,000.00 for each. The Defendant stated that initially the bills were modest but later became astronomical with the Plaintiff claiming that the meters were faulty but he suspected that the Plaintiff was using the rooms for other purposes. The Plaintiff had once requested to rent out the rooms but he declined. However when he moved to Kenya permanently, he discovered that a number of people called to inquire about accommodation there or to make use of the swimming pool though his was a private villa. On moving to Kenya he changed the meters and terminated the services of the Plaintiff as of 1/6/2014.

He further testified that his original plan was to tour Kenya once yearly but fell in love with the country and begun visiting two or four times yearly for 15 days at a time. According to his calculations he therefore visited for about 60 days yearly for three years making a total of 24 weeks. He denied ever taking care of the Plaintiff or **Pw4** stating that when she lost her job at *Shanzu* he made a decision to assist her for a period of six months as she was sharing a room with her sister and that she did not get another job.

He stated that a marriage union is like a contract which one enters into freely of which he did not do so with the Plaintiff as he had no intentions of remarrying. He made it clear to the Plaintiff that he was not proposing to marry her and if he ever were to remarry he would have to enter into a pre-nuptial agreement to safeguard the affairs of his children.

It is his evidence that the plaintiff treats him with disrespect and is evil. She did not love him at all. That she had on several occasions fought him physically and tore his shirts. He on the other hand filed reports with the police severally and the sentry guards have had to come to his villa severally. There was no peace at the villa and that it was terrible in fact **Pw4** did also threaten to pour hot oil on him. He stated that he could never contemplate marrying the Plaintiff and that they do not speak English. He further stated that his own children cannot visit him. That when his sister came over, the Plaintiff called her a prostitute and also abused his mother who had also visited. The Plaintiff's brother beat up a Kenyan girlfriend the Defendant had brought over. The Plaintiff would at the time go about shouting "guest house!", poured water on her as she took her breakfast and then locked herself in the room leaving the guest in tears. The Plaintiff also threatened to pour acid on the guest and they filed a report with the police but nothing took place. The Defendant now fears to bring any of his friends or relatives to the villa.

The Defendant further testified that he loved his son, **NRP**. However, he is restrained by the Plaintiff from interacting with him at all. The Defendant feels that if the situation is not remedied he might strike the Plaintiff and fatally injure her. He stated that at *Shanzu* he got information that the Plaintiff had plenty of boyfriends. She was not his lawful girlfriend. There was never a traditional *Luhya* customary marriage and neither had he ever met her father or step-mother. He further stated he has not had sexual intercourse with her since October 2013 when she conceived **NRP**. He never had any intentions of adopting **Pw4** and even refused to give permission to the Plaintiff to register him as the father of the child at the school.

It is his evidence that the Plaintiff has taken nude pictures of him without his knowledge and submitted them to the court. To him, that was not a sign of love and no presumption of marriage arose. He in addition stated that the two would stay in hotels when they toured Malindi. He testified that he paid the full purchase price for the Malindi property by himself through his advocate. The money was transferred from the U.K. The Plaintiff did not make any contribution towards the purchase and neither did she send her alleged contribution to him. He stated that he did not know what a maize milling machine looked like and that he never stayed at any of the places the Plaintiff rented.

As for **C Y B**, the Defendant met him at *Scorpio Villas Hotel* where he worked as a waiter. The Defendant resorted to eating out when the relationship at the villa became pathetic. He would take lady friends there for dinner and ongoing back home he would be physically abused. He came to realise that the said **C Y B** was a former boyfriend of the Plaintiff and would send her text messages to alert her. The Defendant even made inquiries about it at the hotel and the said **C Y B** is a witness against him in another case.

The Defendant testified that he met **Henrica** at *Mnarani Club*, Kilifi when she gave them a lift to Mombasa and introduced herself as a land agent. They then became friends and she would visit the Plaintiff and the Plaintiff would also visit her. **Henrica** helped him to find the villa and was paid a commission by the vendor.

In addition he testified that he at first doubted that **NRP** was his son, DNA test confirmed that he is the father. He stated that he wished to care of the boy for the rest of his life in Kenya. He has purchased a two bedroomed semi-detached house at *Ngala*, Malindi to be held in trust for **NRP**. He also stated that he was advanced in age. He is 66 years, suffering from glaucoma and his eye-sight is affected. According to the Defendant when he showed the Plaintiff the house at *Ngala* and told her he wished to speak to her advocate about it, she stated that she did not wish to live there but would rather go to work in Saudi Arabia and send money home. He revealed that there was a child's maintenance case before the magistrate's court where the child's needs were to be evaluated.

Before meeting the Plaintiff he had not been to Malindi and when he returned six months later they travelled along the North Coast since she was not working. At that stage they were boyfriend and girlfriend. In April, 2013 when he bought the villa he was still working in the U.K and he requested the Plaintiff to look after it and she agreed. They were still friends and she did not have any employment contract but was earning kshs.10,000.00. p.m. The other workers **Dw4** and **Dw5** earned Kshs. 6,000.00 p.m. **Dw5** was the daytime guard and **Dw4** the nighttime guard whilst the Plaintiff took care of the inside of the villa. He would send the monies over to the Plaintiff to settle bills she had send to him. He did not send a constant figure and he stated that **Dw5's** salary had increased.

The Defendant acknowledged the acquittance of **Pw2** stating that he was an English speaking tour guide who took them on a trip to *Mida Creek* and *Gede* with other tourists and the photos he took he sent them to him . That they used to communicate over email and even requested him to look for some property for him but did not find him any.

The Plaintiff testified that the Plaintiff has been paying **Pw4's** school fees and that the school had made confirmation of this. He also stated that when he came to Kenya he settled his bills and did not know how she got money for school fees. He stated that he allowed **Pw4** to stay over at the villa as she was the Plaintiff's daughter.

At one time during breakfast, the Plaintiff to his surprise announced in the presence of **Dw1** that they were married. He took her to the bedroom and told her to stop making such allegations and enquired why she was doing so though they had not lived together for even six months. **Dw1** at that time told him to be careful. He stated that he started living in Kenya in 2014 and introduced the Plaintiff to **Dw1** as his girlfriend. **NRP** was conceived in October, 2013 and born on 30/6/2014 at Twafiq Hospital. He stated that he does not ascribe to the *Luhya* or *Maragoli* customs and that if he were to marry it would not be under the African Customary law and he would bring his friends and relatives for the celebration. In addition he stated that the relationship between the parties including the assistance he offered to the Plaintiff cannot be equated to a marriage.

Parties filed written submissions. I have gone through the submissions. The Plaintiff's counsel elaborated on the evidence and would like the prayers in the plaint be granted.

### **Submissions**

On his part, counsel for the Defendant relied upon the past decided cases of **Mombasa HCCC 245 of 1997 Abida Tirindi v Karl Hasenfuss [eKLR]** and **Mombasa HCCC 197 of 1994 WB v EW [eKLR]**

### **Issues**

Whether or not the court has jurisdiction to determine the matter? Whether or not a presumption of marriage arises in the circumstances? Whether or not the subject property is matrimonial property and can it be jointly registered in the names of the parties? Whether or not an injunctive order be granted and

the plaintiff be awarded damages?

### **Jurisdiction**

The Defendant in his paragraph 20 denied the court's jurisdiction. The case of **Owners of the Motor Vessel "Lillian s" v Caltex Oil (Kenya) ltd [1989] KLR** held that the court cannot move any inch in a matter if it lacks jurisdiction. The Defendant did not however demonstrate the court's lack of jurisdiction nor submit on it. The prayers sought by the Plaintiff are within the court's mandate under the Matrimonial Property Act No. 49 of 2013. This court has jurisdiction to deal with the matter. The property was also bought for over Kshs.20 million which falls outside the Chief Magistrate's pecuniary jurisdiction.

### **Is there a marriage?**

Marriage as defined by the Black's Law Dictionary, 9<sup>th</sup> ed is "The legal union of a couple as husband and wife" It also elaborates the essentials of a valid marriage as: (1) parties legally capable of contracting to marry, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law.

The parties allegedly begun their relationship in 2010 hence the **Marriage Act, 2014** would not apply for the purposes of determining their union save for the transitional provision in Section 96. The definition of marriage under the Act however is in tandem with Black's law dictionary and I wish to adopt it. Under **Section 3 (1) the Act provides** that:

***Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.***

Article 45 (2) of the Constitution provides for the right to marry a person of the opposite sex based on the free consent of the parties.

**Pw1, Pw3** and **Pw4** testified that the Defendant visited the Plaintiff's parents to ask for her hand in marriage. **Pw3** stated that they wanted a traditional marriage in accordance with *Maragoli* customs were done but no dowry was given. There was no expert in *Maragoli* customs called as a witness to confirm that this was part of their marriage custom. Nevertheless **Pw3** stated that the Defendant sought his permission to marry his daughter and he gave him the permission. **Pw4** stated that it was **Pw1** who told her to call the Defendant 'dad' and he treated her as his daughter. She was only about 8 years when she met him. The Defendant submitted that under Section 44 of the Marriage Act, a notification of the customary marriage ought to have been made within three months of the marriage in the absence of which there was no marriage. The alleged marriage was allegedly in place in 2010 and the Act commenced in 2014 hence its provisions may not all apply to the alleged marriage.

**Pw1** and **Pw3** stated that whilst in Mombasa the Defendant visited them severally. In her pleadings the Plaintiff stated that he could come twice or thrice a year from Europe but in her testimony she testified it was four or five times a year for short periods. The Plaintiff pleaded that theirs was a marriage by cohabitation since 2010 and she testified that she had cohabited for a long time with the Defendant after he promised to marry her before her family and friends. That they held themselves out as a married couple and the public took them as such.

Under **Section 2** of the Marriage Act, to, "cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage. This is the definition I wish to go with. Under Black's Law Dictionary, a 'marriage by habit and repute' is defined as an irregular marriage created by cohabitation that implies mutual agreement to be married.

The Court of Appeal in **Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR** held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held as follows: -

***"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 the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed” (own emphasis)***

In cohabitation, two essentials must be present, the legal capacity to contract a marriage and consent. The Court of Appeal in ***P K A v M S A [2014] eKLR*** adopted the decision in the case of ***HORTENSIAH WANJIKU YAWE V PUBLIC TRUSTEES EACA C.A. NO. 13 OF 1976 (UR)*** where *Mustafa J.A.* Held that: -

***“...long cohabitation as man and wife gives rise to a presumption of marriage ...only cogent evidence to the contrary can rebut such a presumption”***

and *Wambuzi P* stated the following: -

***“The presumption is nothing more than an assumption rising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted.”***

The Defendant denies that there was cohabitation for the purposes of a presumption of marriage hence the burden is on him to disprove. I am guided by the finding of Judge *A.I Hayanga* in ***Christopher Nderi Gathambo & Samuel Muthui Munene. Vs Samuel Muthui Munene [2003] eKLR*** where the court adopted the treatise ***Bromley Family Law, 5th Edition*** which indicates at page 64 that: -

***“If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove that there was in fact no marriage, and not upon those who rely on it to prove that it was solemnized.” (Own emphasis)***

The **Black's Law Dictionary** defines 'presumption' as 'a legal inference or assumption that a fact exists, based on the known or proven existence of some other fact or group of facts'. As per the Court of Appeal in ***Joseis Wanjiru v Kabui Ndegwa Kabui & another [2014] eKLR*** the presumption of marriage is a presumption of fact. The Blacks' law Dictionary states that a presumption of fact is 'A presumption that may be, but as a matter of law need not be drawn from another established fact or group of facts'. And **Section 119 of the Evidence Act** 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 alleged period of meeting was in April, 2010. The parties allegedly fell in love and wished to marry. The Plaintiff does not state when she allegedly introduced the Defendant to her parents. **Pw4** at examination-in-chief and cross-examination states that it was in year 2002 when the Defendant first visited. He then visited again in year 2004. All these cannot at all be accurate in light of the Plaintiff's assertions. Plaintiff claims that they moved first to *Bamburi*. She does not indicate the year but stated that it was in year 2011 when the parties decided to purchase a house. Supposing that it was in year 2011 that they moved in together, though the Defendant was absent the better part of the years, can it be presumed that there was long cohabitation?

The Defendant would visit, given the testimony of the Plaintiff, that contradicts with her pleadings, say about 3 times in a year for only two weeks can it therefore be said they had long-cohabited? On this point it is important to point out that a party must stick to his pleadings. **Pw2**, could not tell whether or not the parties were married and was introduced to the Plaintiff as a long-term partner. He did not elaborate on his understanding of a long term partner.

The Plaintiff also leaned on an alleged promise to marry. It is not denied that the parties were once lovers and it would not be out of the ordinary for such promises to float about. However **Section 76** of the Marriage Act is clear that such a promise is not binding.

Most of the decided cases involving presumption of marriage involved issues dealing with succession. The current suit involves pure presumption of a marriage. The cases of ***Mbogo v Muthoni & Another [2008] 1 KLR; 357*** and that of ***Kimani v Kimani [2006] 2 KLR 292*** dealt with presumption of marriages during succession proceedings. In the latter case the parties had cohabited for 18 years. The Court of Appeal considered the following factors which could have led to a presumption of marriage in that particular case. It stated as follows: -

***...They included the long period of cohabitation in Kabati town and Gitura farm for 18 years; the undisputed fact that the deceased maintained and educated the appellant's two children from a young age of one year and less upto completion of secondary school, and that they adopted the name of the deceased as their father throughout; the undisputed evidence relating to the appellant's identity card which identified her as the wife of the deceased, and family photographs taken with the deceased; visits to the appellant's parents' home and the gifts given out, even if, as found by the judge, they did not amount to dowry or customary marriage negotiations; the evidence that the first wife, Wanjiru (deceased) and Joyce, 1<sup>st</sup> respondent, visited Beth when she was admitted at Thika maternity hospital; and the reluctance by the children of the 1<sup>st</sup> wife Wanjiru (deceased) to testify against the appellant as tacit acknowledgment that she was their father's third wife. We think, with respect, that those were all weighty matters of fact which would have made all the difference if they were considered. The evidential burden of proof is not on the appellant, but on the respondents to show that the appellant was not the deceased's wife or put another way, to rebut the presumption of marriage.***

In our current case, the parties met in 2010. It is part of both parties evidence that the plaintiff would visit Kenya for about two weeks and go back to his country. He would visit twice or thrice in a year. This is the period 2010 to 2013. That is a period of three years as the first contact was April 2010. The defendant has given the estimate of his stay in Kenya to be 24 weeks; about 60 days each year.

It is the defendant's evidence that since October 2013, the parties have not had any sexual intercourse. The effect of this is that their sexual relationship lasted between April 2010 and October 2013. By this time the defendant had not relocated to Kenya. Thus the contact between the parties was only through the short visits by the defendant.

The court has to consider all the facts of the case and the circumstances. The performance of a customary marriage is not a basic requirement for the court to presume marriage. As held in the Hortensiah Yaweh case (supra), long cohabitation as man and wife gives rise to presumption of marriage. How long should the cohabitation last? In this case the cohabitation was intermittent. Since October 2013 parties have not been cohabiting. Although visitors to the house see them living together, they have had a rough and brutal physical engagement leading to reports to the police. The period from October, 2013 cannot be considered as part of the long cohabitation of the parties. This leaves to be considered the period between April 2010 to October 2013.

According to the Plaintiff, the defendant promised to marry her. In a case involving presumption of marriage, an oral promise to marry is not sufficient. What counts is the behaviour of the parties. As indicated in the ***Kimani v Kimani case*** (supra) where the children adopted the name of the man, the man paid school fees for the children from the age of one year upto 18 years, change of identity card, family photographs among other things. There are no photographs for the Maragoli Customary rites, no photographs were taken showing the defendant and the plaintiff's parents. No photographs were taken showing the defendant in the Bamburi apartment or showing the plaintiff in her alledged Posho Mill or Commercial Simu Ya Jamii Phones. Indeed what we have is the plaintiff's word against that of the defendant.

Given the evidence herein, I am satisfied that no presumption of marriage can be made. There is no long

period of cohabitation and neither did the parties take themselves to be married. What existed was a simple friendship which led to the birth of the child. Giving birth to a child during such sexual relationship cannot lead to a presumption of marriage. The relationship cannot be held to be a marriage.

### **Matrimonial Property**

It would be an academic exercise to elaborate on this point in that matrimonial property arises where there is a marriage. It is clear that no presumption of marriage arose and therefore no matrimonial property can be considered. To clear the matter Section 6 of the **Matrimonial Property Act, No. 49 of 2013** defines matrimonial property as:

***(1) For the purposes of this Act, matrimonial property means—***

***(a) the matrimonial home or homes;***

***(b) household goods and effects in the matrimonial home or homes; or***

***(c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.***

***(2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.***

Section 2 of the **Matrimonial Property Act** defines a matrimonial home as: -

***“Matrimonial home” means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.”***

It would also be flogging a dead horse if the alleged issue of contribution is considered. Firstly because no presumption of marriage arises therefore there is no matrimonial property. Secondly, the Plaintiff did not prove that she used to work and earn a Kshs. 35,000.00 and left her employment for the sake of the marriage. At the very least a letter from her former employer may have sufficed to prove employment. Thirdly, the figure of Kshs.1.2 million she allegedly contributed towards the purchase of the house is not proved. There is no evidence to prove that the plaintiff sold her items.

### **Injunctive orders**

The principles governing the grant of an order for injunctions including temporary injunctions, were stated in *Mrao Ltd vs. First American Bank Kenya Ltd & 2 Others [2003] KLR 123* and in *Giella V Cassman Brown [1973] E.A 358*. Firstly, a *prima facie* case with chances of success must be established. Then a party must demonstrate that he/she is likely to suffer irreparable harm or damage of which damages will be insufficient compensation if not granted the prayer and where this is not clear the court may invoke the principle of balance of convenience' see also *EA Industries v Trufoods [1972] EA 420*

The *Mrao case* defined a *prima facie* case as: -

***“in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”***

The parties are litigating before the children's court. The children's matter has no bearing on this matter. The Defendant can deal with the property as he pleases. The orders issued in the children's case will be effected on their own as opposed to connection with this case.

### **On General Damages**

The Plaintiff did not prove that general damages accrued to her. The injury she suffered in is not pleaded or proved or demonstrated in evidence or even submitted.

She entered into a sexual relationship with the defendant and the two had a child together. Other than that, there is nothing more. She enjoyed the relationship when the parties were good friends. She cannot now claim damages since the relationship had broken down.

The upshot of this is that the plaintiff has not proved her claim. No marriage can be presumed. I do hold that the suit property belongs to the defendant exclusively. The plaintiff's suit is hereby dismissed. The circumstances of the case do not call for a ward of costs. Each party shall meet his/her own costs.

Dated and delivered Malindi this 28<sup>th</sup> day of September, 2016.

S.J. CHITEMBWE

JUDGE