



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL SUIT NO.8 OF 2010

E.N. W.....PLAINTIFF

VERSUS

G.N. K.....1ST DEFENDANT

R.K. K.....2ND DEFENDANT

R U L I N G

On 26th October 2010, the plaintiff filed an originating summons pursuant to various provisions of the law, including **Section 3A** of the **Civil Procedure Act**, **Section 3(1) & (2)** of the **Judicature Act**, **Section 20** of the **Matrimonial Causes Act**, **Sections 4, 5, 6, 22(2) & (3)** of the **Children Act** and **Section 17** of the **Married Women Properties Act, 1882** seeking various orders from the court. The plaintiff sought a declaratory order of the court that there exists a marriage under the presumption of the law or under Kikuyu customary law between herself and the 1st defendant. The plaintiff further prayed for an order of the court to permanently injunct the 1st defendant from entering or celebrating a marriage under statutory law with any other woman pending dissolution of the marriage between the plaintiff and the 1st defendant. She further prayed for an order that Plot No.[...], Waroma Investments, Juja belonging to the plaintiff and registered in the names of the plaintiff and the 1st defendant, be transferred to the plaintiff's sole name. The plaintiff further prayed that the 1st defendant be compelled to maintain the two issues of the marriage, namely M.N and B.W. The grounds in support of the originating summons are stated on the face of the originating summons. The summons is supported by the annexed affidavit of the plaintiff.

Contemporaneous with filing suit, the plaintiff filed an application pursuant to the same provisions of the law that are contained in the originating summons seeking interlocutory orders of injunction to restrain the defendants from celebrating a marriage between them pending the hearing and determination of the suit that the plaintiff seeks a declaration from the court that she is married to the 1st defendant. The plaintiff further sought for an order compelling the 1st defendant to surrender to her possession all her personal effects and in particular, the title documents in respect of Plot No.[...], Waroma Investments, Juja. The plaintiff further prayed that the 1st defendant be ordered to provide reasonable maintenance to the plaintiff and the two issues of the marriage. The grounds in support of the application are stated on the face of the application. In essence, the plaintiff contends that she was married to the 1st defendant under Kikuyu customary law. She further states that by virtue of the long period that she had cohabited with the 1st defendant, the court should presume that there exists a marriage between herself and the 1st defendant. The application is supported by the annexed affidavit of the plaintiff. The plaintiff filed an application under certificate of urgency. The plaintiff appeared in court and made an ex-parte application on 26th October 2010. On the same day, Nambuye J granted an interim order of injunction restraining the defendants, or any marriage officer or any other person from celebrating the marriage or any lawful civil union between the defendants that will make the defendants to be lawfully become husband and wife. Hearing interpartes was fixed for 9th November 2010. The defendants were served with the order. It is apparent that the defendants were aggrieved by this order. On 2nd November 2010, the defendants moved the court by notice of motion pursuant to the provisions of **Articles 20** and **45** of the **Constitution** and **Order XXXIX Rule 4** of the **Civil Procedure Rules** seeking the setting aside of the ex-parte order that was granted on 26th October 2010. It was the defendants' contention that the plaintiff had obtained

the said injunctive orders by concealment of material facts and by deponing to blatant falsehood. The 1st defendant denied that there existed a marriage between himself and the plaintiff. It was his contention that the plaintiff was living in Germany in another relationship with a man known as M. K. The defendants argued that the order obtained by the plaintiff was in breach of their Constitution rights that guaranteed them the right to marry. The defendants were of the view that the orders obtained by the plaintiff were calculated to intimidate and oppress them. The application is supported by the annexed affidavit of the 1st defendant. The plaintiff filed grounds in opposition to the application. She reiterated that she was married to the 1st defendant and therefore the 1st defendant could not enter into a monogamous marriage while the first marriage was still in existence.

At the hearing of the application, I heard oral rival submissions made by Mr. Muturi for the defendants and by Mr. Mugo for the plaintiff. I have carefully considered the said submissions. I have also read the pleadings filed by the parties herein in support of the respective opposing positions. The court had the benefit of the authorities cited by counsel for the parties to this application. The issue for determination by this court is whether the defendants established a case that indeed the plaintiff obtained the orders of interlocutory injunction by concealing material facts from the court. In determining this application, this court will of necessity consider whether, prima facie, affidavit evidence was placed before this court to enable this court reach a conclusion that there indeed existed a marriage between the plaintiff and the 1st defendant. The facts of this application are more or less not in dispute. It is common ground, and it is indeed conceded by the 1st defendant that he cohabited with the plaintiff as husband and wife for a period of thirteen (13) years. Their consortium resulted in the birth of two (2) children namely M.N and B.W. The two children were respectively born on 25th July 1994 and 7th June 2002. The birth certificates of the said children clearly indicate that the 1st defendant is the father. The 1st defendant admits paternity of the children. He however denies, as alleged by the plaintiff, that he had celebrated a Kikuyu customary marriage with the plaintiff. It is further common ground that during their cohabitation, the plaintiff and the 1st defendant purchased a property known as Plot No.[.....], Waroma Investments, Juja (the suit property). On the property is erected a residential house. The issue regarding the respective contribution of the plaintiff and the 1st defendant to the purchase and development of the suit property is in dispute. That issue will be resolved by the court that will ultimately hear the case. However, what is not in doubt is that the suit property is in joint names of the plaintiff and the 1st defendant. From this fact alone, it was evident that the plaintiff and the 1st defendant intended to jointly own the property.

From affidavit evidence, it is apparent that the plaintiff and the 1st defendant separated sometime between the years 2005 and 2007. According to the plaintiff, the 1st defendant was physically abusive towards her. She accused the 1st defendant of forcefully evicting from their matrimonial home. On his part, the 1st defendant contends that the plaintiff abandoned the matrimonial home and went to Germany in August 2005. It was the 1st defendant's case that the plaintiff deserted the marriage when she went to Germany. The 1st defendant further argued that while in Germany, the plaintiff started another relationship with a German. The 1st defendant annexed correspondence in the affidavit in support of the application to back up his claim that the plaintiff had engaged in an intimate relationship with a German known as M.K. The plaintiff denied the 1st defendant's assertion that she had engaged in an intimate relationship with a man while she was in Germany. The above claims and counterclaims by the plaintiff and the 1st defendant clearly indicate that the plaintiff and the 1st defendant had established a reputation in the society as husband and wife during their long period of cohabitation. From affidavit evidence of both the plaintiff and the 1st defendant, it was apparent that the plaintiff and the 1st defendant during their long period of cohabitation considered themselves as husband and wife.

What is the position in law in regard to a situation where a man and woman who have lived together for a considerable period of time that they have established a reputation as husband and wife? In **Hortensiah Wanjiku Yawe vs Public Trustee CA Civil Appeal No.13 of 1976** (unreported) the then Court of Appeal of East Africa (predecessor to the Kenyan Court of Appeal) held that a long period of cohabitation as man and wife may give rise to a presumption of marriage in favour of the party asserting it. Mustafa JA held as follows:

"I find nothing in the Restatement of African Law to suggest that Kikuyu customary law is opposed to the concept of presumption of marriage arising out of long cohabitation. In my view, all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes

and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case, should not apply just because she was married according to Kikuyu customary law. It is a concept that is beneficial to the institution of marriage to the status of the parties involved and to the issue of their union, and in my view, is applicable to all marriages, however celebrated. The evidence concerning cohabitation was adduced at the hearing and formed part of the issue concerning the fact of marriage ...”.

In **Mary Wanjiku Githatu vs Esther Wanjiru Kiarie [2010] eKLR** at page 4 Bosire JA, stated as follows in regard to when marriage can be presumed:

“The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance, a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife.”

In the present application, the plaintiff did establish, prima facie, that she had cohabited with the 1st defendant for a sufficiently long period of time that it can be presumed that the plaintiff and the 1st defendant had the intention to live together as husband and wife. Obviously, the plaintiff will be required to adduce evidence to establish this fact. However, from the affidavit evidence on record, it was clear that the plaintiff and the 1st defendant had lived together for a period of thirteen (13) years for all intents and purposes as husband and wife. Their union was blessed with two children. The plaintiff and the 1st defendant even went further to jointly acquire a residential property. It is the finding of this court that the plaintiff established, prima facie, that a case has indeed been made for this court to grant interlocutory orders of injunction to restrain the defendants from getting married under statutory law because the likelihood that the court will presume the existence of a marriage between the plaintiff and the 1st defendant is very high.

This court did not find any merit with the 1st defendant’s assertion that the plaintiff had concealed material facts from the court. The reality of the case is that it is the 1st defendant who concealed material facts from Registrar of Marriages in order to procure the Registrar’s certificate that was issued on 21st October 2010 when he described himself as a bachelor when in actual facts he knew that there were pending issues involving himself and the plaintiff especially in regard to whether or not he was married to the plaintiff. The evidence adduced before court by affidavit evidence, prima facie, established the fact that the 1st defendant does not have legal capacity to enter into a statutory marriage with any other woman other than the plaintiff. This is specifically provided for under **Section 11(1)(d) of the Marriage Act**. The reason for this requirement is because a statutory marriage under the **Marriage Act** or under the **African Christian Marriage and Divorce Act** is monogamous. Once a man and a woman celebrate a statutory marriage, they lack legal capacity to enter into any other marriage. This is unlike marriages under the majority of African customary law that are potentially polygamous.

In the present application, it was clear to the court that the only way that the 1st defendant can marry the 2nd defendant under statutory law is by legally divorcing the plaintiff. If the plaintiff and the 1st defendant were to pursue this course of action, there are ample grounds upon which the court may grant the divorce. In the premises therefore, it is clear from the foregoing that the defendants’ application seeking to set aside the ex-parte orders that were granted by this court on 26th October 2010 lacks merit and is hereby dismissed with costs. Since this court has already considered the substance and the merits of the plaintiff’s application dated 25th October 2010, interlocutory injunction is hereby issued restraining the defendants, or any marriage officer or any other person from celebrating the marriage between the 1st and 2nd defendants pending the hearing and determination of this suit. The plaintiff shall be at liberty to canvass the other prayers in the application regarding maintenance and the ownership of the suit property. Either party shall be at liberty to apply.

DATED AT NAIROBI THIS 8TH DAY OF NOVEMBER, 2010

**L. KIMARU
JUDGE**

