REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)

Civil Suit 25 of 2005

GEOFFREY WARURU KINYUA ………….PLAINTIFF/APPLICANT
VERSUS
SUSAN WAMBUI WARURU…………..DEFENDANT/RESPONDENT

J U D G E M E N T

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The plaintiff moved to this court by way of a plaint dated 14th day of September 2000 and filed on the 16th day of September 2000. The salient features of the same are as follows:-

§ He started cohabitation with the defendant in 1989.

§ They cohabited at Namanga, Kajiado, South B and Buruburu in Nairobi.

§ The Respondent already had one issue namely M.N.W but between them two issues were born namely L.W.W. aged 7 years and D.W.W. aged three and half years as at the time of presentation of the plaint to court.

§ The reason why the plaintiff has moved to court seeking relief is because of cruelity attributed to the defendant particularized in paragraph 10 of the plaint namely neglect of children of the marriage, disappearances from home to unknown places, obtaining money by false pretences from the plaintiffs friends thereby humiliating and embarrassing the plaintiff, refusing to contribute to domestic house hold expenses, removing the children of the marriage from the home without the plaintiff's knowledge, neglecting her house hold and maternal duties to the children, by being a habitual drunkard, using children as a weapon to fight the plaintiff and using the plaintiffs ATM card without his consent.

In consequence thereof the plaintiff seeks:-

(a) a declaration that the plaintiff and the respondent are husband and wife,

(b) custody care and control of the issues of the marriage,

(c) dissolution of the said marriage,

(d) costs.

The respondent filed a defence and counter claim dated 19th day of October 2000 and filed on the 7th day of November 2000.
The salient features of the same are as follows:-

§ Concedes cohabitation and deponing a joint affidavit saying that they were married to each other for purposes of being allowed to occupy married quarters,

§ Asserts that it is the plaintiff who has been absenting himself from the home for long without informing the defendant where he has been,

§ Denies existence of a marriage between them since the plaintiff did not pay any dowry to her parents,

§ Denies particulars of cruelity attributed to her. Instead it is the plaintiff who has been cruel to her. The particulars of cruelity attributed to the plaintiff are those set out in paragraph 7 of the defence namely neglecting defendant and children, leaving house without notice, causing the defendant mental anguish, abusing the defendant, lack of support for the defendant in whatever she does for the family, inciting his relatives against the defendant,

§ Denied committing adultery.

§ That she had only cohabited with the plaintiff on a few occasions.

§ Denied deserting the home.

In her counter claim, she stressed that there is no marriage between them and as such the plaintiff has no right to the custody of the children.

That in view of the age of the children their custody should be given to her.
In consequence thereof she counter claimed for:-
(a) custody, care and control of the children L.W.W. and D.W.W.,
(b) costs.

Four issues were raised:-
(1) Is there a marriage subsisting between the plaintiff and the defendant?

(2) If yes should the marriage be dissolved?

(3) Who between the parties should have custody of the children?

(4) Who should bear the costs of the suit?

Only the plaintiff gave evidence after the court was informed that the defendant had been served. In his oral testimony he reiterated the content of the plaint and then stressed the following:-
§ The defendant was wife by reason of long cohabitation.

§ Confirmed that two issues were born between them as per the birth certificates exhibited exhibits 2 (a), (b).

§ They separated in 1999 due to the particulars of cruelity attributed to the defendant.

§ Confirmed that the defendant used false preferences by alleging that the plaintiff had been arrested and she needed money to set him free. Only to turn out that she had been lying.

§ When the persons came to demand money the plaintiff was embarrassed.

§ It is his testimony that the defendant used to harass the plaintiffs relatives.

§ It is his testimony that he moved out of their residence leaving the defendant with the children therein but used to support them but for unexplained reasons she dropped the three children at his residence and then he left in August 2000. That is when the plaintiff moved to this court to file this case in order to protect the children.

§ That he sought custody, care and control of the said children which was granted to him with visitation rights to the defendant.

§ Concedes there are problems regarding visitation as the defendant does not adhere to time lines.

§ They have lived apart from 1999 and to him there is no hope for reconciliation because the defendant’s behaviour has never changed and at one time she was arrested and arraigned in court with a criminal offence in a Kibera court.

§ It is his testimony that he took dowry to her father in 1989 but he declined to accept the same.

§ The children have been named after their mothers. The first one being named after the plaintiffs' mother and the second after the defendants' mother.

The plaintiffs counsel filed written submissions and simply gave outline of the content of the pleadings filed by both sides and a summary of the plaintiffs' evidence both of which have already been set out herein and stressed that there exists a presumed marriage which has irretrievably broken down.

§ The fact that the parties have lived apart since 1999 is proof that there is no hope of reconciliation.

§ That the custody issues should be settled in favour of the plaintiff on his testimony that he is the one who has been staying with the children and meeting all their expenses which evidence has not been challenged.

§ The plaintiff will guarantee the defendant's access to the children as directed by the court.

There is no case law cited. That not withstanding the court has on its own decided to draw inspiration from own decision on a similar subject. There is the case of **RPM – VERSUS – PKM HCCCD.C. NUMBER 154 OF 2008** decided on the 24th day of May 2010. Case law on the custody of children is discussed between pages 23 – 27. There is the case of **MWASETI – VERSUS – RUMISA [1985] KLR 386** decided by Sherriden J. as he then was, where it was held inter alia that "***the main consideration in matters of custody is the welfare of the children . . .***"
The case of **BOYANI – VERSUS – MWAGHOTI [2002] 2 KLR** decided by Onyango Otieno J. as he then was now, JA where his Lordship held inter alia that:-
(i) In a situation where two spouses are separated and the children of the marriage are living separately with each parent and seem comfortable, the age of the children to be the deciding factor as to which of the parents is to get custody,

(ii) The two children of the marriage aged 7 and the other aged 2 ½ years were still within the ages that dictated that they live with their mother unless she be found to be hopelessly unable to take care of them.

The case of **MW – VERSUS KC [2005] 2 KLR 246** decided by G.B.M. Kariuki J. where his Lordship held inter alia that:- ***"(i)Amongst the rights of the child set out in the Children's Act 2001 part II is the right to live with and be cared for by both parents . . .***"

The case of **KARAN – VERUS KARAN [1975] EA 18** where the Court of Appeal stressed that there is now an accepted presumption that young children should be with the mother.

The case of **MEHRUNNISGA – VERSUS – PARVES [1981] KLR 547** where the court of appeal also held inter alai that "***the custody of a child of tender years should always be a mothers right except where she has through her own misconduct, divested herself of such right***".

Also the case of **GITHUNGURI – VERSUS – GITHUNGURI [1981] KLR 598** where it was held inter alia by the Court of Appeal that:- "***the rule is that the mother should normally have custody of children of tender years and where the court gives it to the father, it is incumbent on the court to make sure that there were really sufficient reasons to exclude the prima facie rule***."

Turning to the issue of presumption of the marriage there is the case of **JOSEPH MWANGI MUKIRA – VERSUS – HENRY GITARI NAIROBI HCCC NO. 18 OF 2009** decided by this court on the 24th day of August 2010. Case law on the subject is discussed from page 29 – 43 and summarized at pages 50 – 60. Those relevant to presumption of marriage are the case of **YAWEH HORTENSIAH WANJIKU – VERSUS – PUBLIC TRUSTEES, CIVIL APPEAL NO. 133 OF 1976** where the court of Appeal held inter alia that:- "***there is nothing in the Kikuyu customary law which is opposed to the concept of presumption of marriage. The presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary. The presumption is nothing more than an assumption that the parties must be married irrespective of the nature of marriage actually contracted and irrespective of marriage if one is not actually contracted***."

The case of **PHYLIS NJOKI KARANJA AND ANOTHER VERSUS ROSEMARY MWENI KARANJA AND ANOTHER, NAIROBICA NO. 313 OF 2001**, where it was held inter alia that "***This presumption arises from long cohabitation and repute between the man and the woman who have capacity to marry and have consented to do so. Before a presumption of marriage can arise, 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 not unsafe 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***."

The case of **GACHEGE – VERSUS – WANJUGU [1991] KLR 149** where Abdalla J. as he then was held inter alai that:- "***the mere fact that there was no child of the marriage did not negate the presumption of marriage if there is established long cohabitation and acts showing general repute***."

The court has given due consideration of the principles set by the own cited case law as set by the court of appeal and as dutifully followed by the superior court, and has considered the same in the light of the content of the pleadings of both sides as well as the sole oral testimony of the plaintiff and then proceeds to answer the agreed issues raised by the parties herein as hereunder.

The first issue deals with the issue as to whether there exists a marriage between the defendant and the plaintiff. It is not disputed that both the pleadings and the oral testimony of the plaintiff are in agreement, that there was no statutory marriage. But one thing which is clear is that parties lived together for 10 years and had two children between them. That they swore an affidavit holding themselves out as man and wife. Infact on the basis of that affidavit they were allotted married quarters where they lived as husband and wife. They also went on to live in various other places in a like manner.

There is however no independent testimony that they lived as such but that notwithstanding, there is no harm in going by the reasoning of Koome J. in the case **JAMES NJUGUNA KANGIRI – VERSUS MARY WANJIRU NJUGUNA, NAKURU HCCC NO. 215 of 2002**. Her ladyship made observations that:- "***payment of rurario is vital in the institution of a customary marriage but lack of performance of this ceremony may not necessarily lead to a finding of no marriage, if other ingredients such as capacity, consent, payment of dowry and commencement of cohabitation are proved. The learned judge went ahead to quote the example of "a modern day couple who move and start cohabiting in an urban setting away from their rural home. They face the financial and other modern day challenges together and therefore get children in their relationship. They are regarded by their neighbor and the community around them as married . . . such a couple can be presumed to be married***."

Applying that reasoning to the facts herein it is clear that parties had capacity to marry since they met while already employed as police officers. They consented to hold themselves out as man and wife and were held out as such. They commenced cohabitation and went ahead to have two issues between them. They lived as such for a period of 10 years. The court is satisfied that all the ingredients for presuming a marriage exist and the court will proceed to presume one. Such a presumption will not only solidify the union but will guarantee and protect the human rights of the two issues who will be in a position to draw support of parental care and support from both parents as presumed husband and wife and not as cohabittees.

As regards dissolution, it is evident parties have lost interest in each other. They have lived apart for over 10 years now. No efforts for reconciliation were ever made, neither is any possible. The marriage has irretrievably broken down and so it has to be considered as such.

As for custody the own case law cited is clear that priority goes to the mother. Herein the court gave to the father. There is no evidence to show that the circumstances which led the court to give custody, care and control of the minors to the father have since changed. In the absence of such evidence there is no need to interfere with the previous court arrangement. It means that the father will continue having the custody, care and control of the minors with access to the mother as previously ordered.

Each party will bear own costs.
For the reasons given in the assessment the court proceeds to make the following orders.

(1) An order be and is hereby made and declared that sufficient grounds have been demonstrated herein to enable the court presume the existence of a presumed marriage between the plaintiff and the defendant on account of long cohabitation.

(2) The facts show that the said presumed marriage has irretrievably broken down and is ordered to be dissolved.

(3) Since there has been no demonstration that the circumstances which led to the court granting custody, care and control of the children to the father have changed, the custody, care, and control of the issues of the marriage will continue being vested in the plaintiff with access being granted to the defendant along the same arrangement as are currently in place.

(4) The parties are at liberty to work out other terms of access as they so wish and for this reason there will be liberty to apply.

(5) Each party will bear own costs.

DATED, READ AND DELIVERED AT NAIROBI
THIS 5TH DAY OF NOVEMBER 2010.

R.N. NAMBUYE
JUDGE