



**H N N.....APPELLANT**

*Versus*

**M N)**

**L W ).....RESPONDENTS**

***(Appeal from original Judgment of the Senior Resident Magistrate's Court at Murang'a***

***in Civil Case No.177 of 2004 by T.W. Murigi – SRM)***

### **J U D G M E N T**

By a plaint initiated in the Senior Resident Magistrate's Court at Murang'a through **Messrs Kirubi, Mwangi Ben & Co. Advocates**, **H N N** hereinafter referred to as "*the appellant*" claimed as against **M N G** and **L W** hereinafter referred to as "*the 1<sup>st</sup> and 2<sup>nd</sup> respondents*" respectively a declaration that the first marriage between her and the 1<sup>st</sup> respondent was still valid and that the 1<sup>st</sup> respondent could not in law undergo a church wedding whilst the first marriage aforesaid still subsisted. She also prayed for costs.

The appellant's suit was informed by the following facts; in or about 1965 she got married to the 1<sup>st</sup> respondent under Kikuyu Customary Law and established their matrimonial home at Kingu village of Maragua District. From that union came along the following issues **C K N** born in 1966, **J N N** born in 1969 and **S N N** born in 1973. On or about the 25<sup>th</sup> April, 2004 barns of a wedding were announced through the vicar in charge, Kingu A.C.K Church that the 1<sup>st</sup> respondent was to undergo a church wedding ceremony with the 2<sup>nd</sup> respondent in the said Church on or about 1<sup>st</sup> May, 2004. The case for the appellant was therefore that such a wedding was null and void for all purposes as the first marriage between herself and the 1<sup>st</sup> respondent still subsisted and the 1<sup>st</sup> respondent would be committing a criminal offence called Bigamy if he went through with the church wedding aforesaid.

The 1<sup>st</sup> respondent reacted to the appellant's allegations aforesaid by filing a statement of defence through **Messrs J.N. Mbutia & Co. Advocates** in these terms; he denied that he was married to the appellant save that out of a brief relationship with her the first two children were conceived. The other child, **S N N** was however a total stranger to him. He went on to plead that the averments in the plaint were predicated upon a falsehood that there was a marriage between him and the appellant. Finally he contended that paragraph 10 of the plaint was untenable as the court could not declare as void that which did not exist.

Through the same firm of advocates, the 2<sup>nd</sup> respondent filed her statement of defence. She alleged therein that she was a stranger to the issues raised in the suit and particularly the allegation of a customary marriage between the appellant and 1<sup>st</sup> respondent. She stated that she had been married to the 1<sup>st</sup> respondent since 1974 a period spanning over 30 years and she had never shared the 1<sup>st</sup> respondent in anyway with the appellant. The appellant was thus a busybody interfering with other peoples lives for her own selfish motives.

On 10<sup>th</sup> August, 2004, the hearing of the suit commenced before **T.W. Murigi, SRM**. The appellant testified that she got married to the 1<sup>st</sup> respondent on 5<sup>th</sup> December, 1965 as a spinster whereas the 1<sup>st</sup> respondent was a bachelor. The marriage was under Kikuyu Customary Law. In pursuance to the said marriage the 1<sup>st</sup> respondent brought beer to her home whereas, women from the 1<sup>st</sup> respondent's home brought bananas as well. Her first child born in 1966 was named after 1<sup>st</sup> respondent's father. The 2<sup>nd</sup> born child was named after her own father. There was also a third child. He was born after the 1<sup>st</sup> respondent had chased her away from the matrimonial home and to her parents in 1972. She named the said child after her brother. On 25<sup>th</sup> April, 2004 she was told of a pending church wedding involving the respondents at Kingu A.C.K Church hence the suit. As far as she was concerned the 1<sup>st</sup> respondent could not go through with a church wedding as she was his first wife. Their marriage had never been dissolved. That is all that the appellant testified to.

The 1<sup>st</sup> respondent testified that himself and the appellant were friends in 1966. Though he took her to his home, he had no intentions of marrying her. They only stayed together for 4 years or thereabouts. They parted ways in 1970. Her father summoned him and 2 elders namely, **Samson Kariuki** and **Benard Ngugi** both deceased. On the appellant's side were the following elders – **Njuguna Gitau** and **Jonathan Muchui**, both deceased as well. The appellant's father then told them that from that day his relationship with his daughter, the appellant had come to an end. During the period that they were in the relationship they had 2 children. However, the 3<sup>rd</sup> child was not his. If the 3<sup>rd</sup> born child had been his, he would have been named **M**. Under Kikuyu Custom, a woman who is married cannot name the children the way the appellant had done. No customary rites were performed to legalize the marriage in any event. He had married legally the 2<sup>nd</sup> respondent and had stayed with her for over 30 years. He had taken beer to the 2<sup>nd</sup> respondent's home as well as 6 cows. He had however not performed Ngurario in the 2<sup>nd</sup> respondent's homestead because her elder sister's husband had not performed the same.

The 2<sup>nd</sup> respondent too testified that she did not know the appellant. He knew the 1<sup>st</sup> respondent as her husband with whom she had sired 5 children. 1<sup>st</sup> respondent went to her home and persuaded her to marry him. He brought along 2 gourds of beer. Later 6 cows were taken to her home by the 1<sup>st</sup> respondent and bananas too. Finally the 1<sup>st</sup> respondent paid Ksh.6,000/= as dowry. She never knew of the purported marriage between the appellant and 1<sup>st</sup> respondent. She did not even know where the appellant came from as she has never seen her in the homestead. She was therefore the only wife of the 1<sup>st</sup> respondent under Kikuyu Customary Law.

The respondents then closed their case.

Parties made oral submission in support of their respective positions. In a reserved judgment delivered on 8<sup>th</sup> October, 2004, the learned magistrate did not find favour with the appellant's case. Accordingly she dismissed the same holding that;

**“.....The plaintiff has failed to prove that indeed a Kikuyu Customary Marriage did occur and that she was married to the 1<sup>st</sup> defendant under the Kikuyu Customary Marriage and I dismiss her suit with costs....”**

This holding triggered the instant appeal. In a five point memorandum of appeal, the appellant complained that:

- a) **“The learned magistrate erred in law and fact by failing to recognize an existing Kikuyu Customary Marriage between the appellant and the 1<sup>st</sup> respondent which had not been dissolved therefore arriving at the wrong decision.**
- b) **The learned magistrate erred in law and fact in failing to apprehend and take judicial notice of the doctrine of presumption of marriage between the appellant and the 1<sup>st</sup> respondent who had stayed for a period of 6 ½ together, had sired children and named them according to Kikuyu**

## Customs.

- c) **The learned magistrate erred in law and fact in failing to make a declaration that the first marriage between the appellant and the 1<sup>st</sup> respondent was still valid and the 1<sup>st</sup> respondent could not purport to undergo a church wedding with the 2<sup>nd</sup> respondent whilst the first one submit.**
- d) **The learned magistrate erred in law in failing to note that the 1<sup>st</sup> respondent and the 2<sup>nd</sup> respondent were planning to commit a criminal offence called bigamy under our penal system.**
- e) **The learned magistrate erred in law and fact in delivering a judgment which was against the weight of evidence adduced by the appellant.”**

When the appeal came up for directions before me on 13<sup>th</sup> July, 2009 parties agreed that the appeal be argued by way of written submissions. I was not averse to the idea. Consequently I made an order to that effect. Such written submissions were subsequently filed and exchanged. I have carefully read and considered them alongside cited authorities.

This is a first appeal and that being the position my duty is to re-evaluate and re-consider the evidence tendered during the trial in order to come to my own independent conclusion, of course, bearing in mind that I had no advantage of seeing and or hearing the witnesses testify as the trial court did and or to judge their demeanour and giving due allowance for that, see **Selle V Associated Motor Boat company Ltd (1968) EA 123**. The case of the appellant in the trial court was for a declaration that the appellant having contracted a valid Kikuyu Customary Law marriage with the 1<sup>st</sup> respondent, the 1<sup>st</sup> respondent lacked capacity to contract another marriage in church which is monogamous as opposed to customary marriage that is potentially polygamous and which the appellant and 1<sup>st</sup> respondent went through. Indeed in her evidence she was categorical that she would have had no objection if the 1<sup>st</sup> respondent contracted another marriage with 2<sup>nd</sup> respondent on customary law basis. For the appellant to sustain her argument, she had to prove to the trial court that her marriage to the respondent was indeed a valid and legal Kikuyu Customary Law Marriage. The trial magistrate had no difficulties at all in coming to the conclusion based on the evidence presented before her that no such Kikuyu Customary Law marriage was ever contracted in the circumstances of this case. I totally and entirely agree with her on this point.

In the Restatement of African Law Kenya, Volume 1, the Law of Marriage and Divorce authored by **Eugene Cotran**, the essentials of a valid Kikuyu Customary Law Marriage are set out. These are; parties involved must have capacity to marry, the said parties and their respective families must consent to the intended union, Ngurario ceremony must be performed followed by Ruracio ceremony and finally commencement of cohabitation. A careful reading and evaluation of the evidence tendered by the appellant clearly shows that none of the above conditions were met in the circumstances of this case. The appellant's evidence was merely that she got married to the 1<sup>st</sup> respondent in 1965 and by 1972 there were 3 children of the marriage. That beer and bananas were taken to her home by the 1<sup>st</sup> respondent. Thereafter nothing else followed. As correctly submitted by **Mr. Mbuthia**, learned counsel for the respondents, the appellant was all along aware that her marriage to the 1<sup>st</sup> respondent was denied in the statements of defence and there was thus need for her to Marshall credible and cogent evidence to sustain her claim. No such evidence was brought to the fore. The learned magistrate, I must say, crafted a well reasoned judgment on this issue. Starting with the issue of Njorio beer, the learned magistrate after appreciating that such beer was drunk nonetheless wanted to know for what purpose was it availed. According to her Njorio beer is drunk where the bride has to signify her consent to the intended marriage. She does so by taking a sip of the beer first and thereafter passing it to her father who in turn sips it, alternatively when she gives consent that the beer may be taken. There was no evidence tendered by the appellant that, indeed this is what happened on that occasion. The appellant, I must say, was extremely casual in her evidence on this issue such that she left the court with no evidence at all by which it could have arrived at the significance of that Njorio ceremony. In the case of **Mwagiru V Mumbi (1967) EA 639** it was held that the signifying of consent by the pride is necessary at two stages of the ceremonies which are vital to a regular Kikuyu customary Marriage. Much as the appellant claimed that

Njorio beer was drunk, she did not bother to show how the ceremony was carried on; whether she gave the consent by sipping the beer and or consenting to the beer being taken. It has been held severally that whoever wants to rely on a customary marriage he must specifically prove the same by credible evidence. It was so held in the case of **Njoki V Mutheru (1985) KLR 874** in the words that existence of a custom must be established by the person who intends to rely on it.

The appellant has argued that dowry is not paid in a day or once. That payment of dowry is not a one day affair. It has no specific period when it is supposed to be paid as it can even be paid when one of the parties is already dead. That may well be so. However it is the appellant who has claimed that she was married to the 1<sup>st</sup> respondent under Kikuyu customary Law. That customary law requires for a party to proclaim herself as having been so married must prove by credible evidence on the issue of capacity, consent, ngurario, ruracio and commencement of cohabitation. Even if dowry is not a one day affair, there must be some evidence that the 1<sup>st</sup> respondent had already taken the 1<sup>st</sup> step on the road towards the fulfillment of that obligation. There must be evidence of partial payment of the same or at least an agreement having been reached as to the amount of dowry and how it will be paid. The appellant regrettably failed to bring forth an iota of evidence to prove that fact.

The appellant has also submitted that she consented to the marriage by her act of moving in with the 1<sup>st</sup> respondent and residing with him for well over 4 years. The consent envisaged is at two levels; the consent of the parties to the proposed marriage and the consent of their families. There is no evidence at all on record to support the said consents. If the appellant thinks that by moving in with the 1<sup>st</sup> respondent, consent should thereby be presumed, such submission can only advance the cause of come – we stay relationships that are so common nowadays.

Ngurario is by far the most important ceremony in a Kikuyu customary Marriage. **Miller J** as he then was stated in the case **Mwagiru** (supra) that;

**“.....The court is particularly concerned with the witness own admission that the Ngurario was never performed. It is enough to say that as there can be no valid marriage under kikuyu customary law if among other things this vital ceremony has not been performed, the funds that on the evidence a marriage between the plaintiff and the defendant never took place....”**

The same situation obtains here.

The appellant perhaps in recognition of the paucity of her evidence towards proving a customary marriage made a hasty turn around and now invited the court to make a presumption of marriage. However and as correctly submitted by **Mr. Mbuthia**, this is an aspect of the appellant's case that was never pleaded in the plaint. It is trite law that a party is bound by his pleadings. The plaint as filed did not invite the court to presume such a marriage between the two due to long cohabitation as a man and wife. Nor did the appellant in her evidence allude to that fact. She called no evidence from her friends who would have testified as to have they looked upon the two as husband and wife for the period that they were together. As it is therefore there is no evidence by any person known to them who ever considered them as married couple. There was therefore no evidence upon which the trial could have presumed a marriage between the two.

Then the appellant fell on the fact that she had had 3 children with the 1<sup>st</sup> respondent as prove of marriage between them. Kikuyu customary marriage cannot be proved by mere fact that parties are shown to have had children. Parties do have children outside wedlock all the time without necessarily proclaiming themselves as married to each other. Further even the naming of the children born out of their relationship casts doubt as to whether really the appellant considered herself married to the 1<sup>st</sup> respondent. For instance the 3<sup>rd</sup> child who should ideally have been named after the 1<sup>st</sup> respondents' brother was actually named after the appellant's brother.

The upshot of the foregoing is that I find no merit in this appeal which is accordingly dismissed with costs to the respondents.

*Dated and delivered at Nyeri this 22<sup>nd</sup> day of October, 2009.*

**M.S.A. MAKHANDIA**

**JUDGE**