



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

Civil Case 14 of 2004

B N PLAINTIFF

VERSUS

L N K DEFENDANT

JUDGMENT

By a plaint filed in court on 29th April, 2004, the plaintiff B N sued her husband L N K, seeking a declaration that,

“there exists a presumption to marriage between the plaintiff and defendant”, and secondly, that “that marriage be dissolved”, and further still, “that the defendant do provide the plaintiff with reasonable maintenance, as shall be assessed by this court”. There was also a prayer for costs.

Counsel for the plaintiff withdrew prayers (c) and (d) in the plaint, just before the hearing of the suit started.

The defendant filed a statement of defence in which he denied ever residing with the plaintiff from 1983 to 2002 as husband and wife, or at all. The defendant went further to state that he is married to one “B W N”, with whom he has had 7 children.

He further alleged that the plaintiff is married to “another man and that marriage still subsists” and it is not possible under any law for a woman to be married to two husbands. The defendant denied all particulars of cruelty in the plaint.

In court during the hearing, the plaintiff testified that the defendant L N is her husband. She identified him in court and explained that they started living together here in Eastleigh Nairobi in 1983 upto 2002. That they had 3 children, and prior to that, the plaintiff had 3 children of her own. She claimed that she had the 3 children on her own, not in a marriage.

That she had all the 6 children as she lived with N, and they both looked after the children. Later the two moved to live in Lunga Lunga, with the 6 children, but from October 22nd 2002, the defendant chased her from their residence in Lunga Lunga which is a slum area in Industrial Area, Nairobi.

She produced in court, a photograph taken of her and the defendant sometime in 1988 with some of their children. Another photographs just showed her and the defendant. The plaintiff complained that they had many problems in their marriage, that they fought and the defendant beat her up a lot.

The plaintiff explained further that during their marriage, she bought and sold vegetables whilst her husband the defendant worked as a driver with three different companies – i.e. Tiger Shoe Company Ltd, Car Packaging and later, Chatu Electronics. The plaintiff produced as an exhibit a business card given to

her in 1999 by Sten & Company Ltd, who had given her a contract to sell tea for them. The plaintiff lamented that she is jobless since the defendant chased her from their matrimonial house. She lives in a neighbour's house in the same Lunga Lunga village, whilst the defendant still occupies the house they used to live in together which they built.

The defendant does not help her financially, though he still works as a driver and earns a salary of Kshs.15,000/= p.m., and also earns rent from the 20 houses they built for rental. That he nets a total of Kshs.15,500/= p.m. The plaintiff used to collect rent when the 2 lived together as husband and wife.

The plaintiff's parents used to visit them at Lunga Lunga. Her parents knew the defendant as her husband. Her father stayed with them in 2001 when he was sick until he died and the defendant made all the burial arrangements and even collected the deceased's body for burial. He was issued with a permit which the plaintiff produced as an exhibit in court. Also produced was another permit allowing the defendant to hold funeral function. The plaintiff again produced another photograph taken on the day of the burial.

She recalled that last year, 2004, on 18th July, the defendant broke the door to her house at 2.00 a.m. demanding food, particularly meat. She did not have any to give him, so he pulled a panga from his waistband intending to cut her up but she ran away from the house, and reported the matter to the police who came and arrested the defendant and charged him, but the case is still pending. She produced a court-bond from Makadara Law courts to that effect.

The plaintiff also reported the matter to FIDA Kenya, the Chief of Lunga Lunga, and her lawyer, but to date. She has not been assisted in getting money from the defendant for supporting the children.

The plaintiff produced a letter dated 14.4.2003 from FIDA Kenya to the defendant as well as a letter from her advocates to the defendant, and one she wrote to the police Commissioner complaining about death threats.

She asked the court to find that she is the defendant's wife, then dissolve that marriage, and pay her maintenance, as they lived for 20 years as husband and wife. She complained that the defendant drinks heavily and is capable of killing her, as he once threatened. She prayed the court to order Njenga to pay her Kshs.8,000/= p.m. to enable her to rent a house of her own, a sum of Kshs.10,000/= p.m. for food, Kshs.2,000/= for water and Kshs.4,000/= for transport, and a Miscellaneous sum of Kshs.500/= and finally Kshs.8,000/= for clothing and Kshs.20,000/= for medicals, per annum.

To questions by the court, the plaintiff answered that he does not know the defendant's home because he never took her there, but she knows his home is in Kiambu. She has never met his parents either, only his brothers who lived as her neighbours in Lunga Lunga estate.

The plaintiff explained that when, the defendant's mother died in August 2002, the defendant told her not to go for the funeral, though her children went. Further questions were put to the plaintiff and her replies revealed that she did not use the defendant's name in any of her documents, not even the identity card.

The plaintiff answered further that her first 3 children have different fathers, but the defendant accepted them when he married her. That she did not find the defendant with any children or wife. She particularly denied knowledge of a woman called B W N and her 7 children.

The plaintiff conceded that she did not have any traditional ceremony to show the marriage between him and N, the defendant. She denied living with a man called W.

The case was adjourned at this point. The plaintiff's counsel took dates in the Registry, as the record shows. The same were served on counsel for the defendant who failed to turn up on the day of the hearing. The defendant was also absent.

I allowed the plaintiff to proceed with her suit when I was satisfied that the defendant's counsel had been served. The plaintiff called 2 witnesses, one T W who identified the plaintiff as the wife of the defendant L N K, who were living in the same village as himself from 1997 upto 2003, when the 2 disagreed and the plaintiff left. That they had 6 children. That today, the plaintiff lives in a different house in the same village.

The plaintiff's second witness M N I, too lived in the same village as the plaintiff and the defendant whom she knew as husband and wife who had 6 children. She was aware that this couple have not lived together for the past 2 years because they disagreed and went to the chief where they had a case.

Counsel for the plaintiff made submission in writing at her request. This now forms part of the court's record. The submissions maintained that the plaintiff and defendant cohabited as husband and wife for more than 20 years until the defendant chased away the plaintiff. That their association was "open" and those who lived near them, such as the 2 witnesses called by the plaintiff, knew them as husband and wife. That the defendant took part in family affairs and functions concerning the plaintiff, in his capacity as the plaintiff's husband.

I considered that the evidence of the 2 witnesses called by the plaintiff corroborated her evidence to the effect that she lived with the defendant as husband and wife and they had 6 children. There was also the evidence by way of an official letter dated 1st April, 2004 by the Chief of Viwandani location, Makadara Division, Nairobi, who arbitrated over the dispute between the plaintiff and defendant, in the presence of elders and arrived at a verdict concerning the rental income from the 20 rooms the 2 had built. The chief's letter is addressed, "**to whom it may concern,**" and shows clearly that he knew them and their circumstances.

There is an earlier letter, dated 5th November, 2002, from the same chief who had arbitrated over the dispute of the plaintiff and defendant over the rental income of their 20 rooms.

There is also the letter from the D.O. Makadara, dated 23.6.2001 authorizing the defendant to collect funds for the burial of the plaintiff's father, the late D N. The defendant was further authorized by Industrial Area police station in a letter 28th June, 2001, to "hold a funeral function at Lunga Lunga," for the late D N, the petitioner's father.

From all this evidence, I find that the plaintiff and defendant lived together, and hold themselves out as husband and wife to "the world at large", so to speak, that is why even their chief in Lunga Lunga village knew and referred to them as husband and wife, apart from their neighbours who were witnesses. I have considered the relevant legal authorities in this respect, and have come to the conclusion that there is sufficient evidence from which to **PRESUME A MARRIAGE BETWEEN THE 2**, and proceed to do so, in these circumstances.

The plaintiff's evidence as to her "marriage" to the defendant was not challenged because both the defendant and his lawyer failed to appear in court at the resumed hearing though they were both present in court the day the plaintiff gave her evidence.

The plaintiff lamented that the "marriage" between her and the defendant broke down due to the defendant's cruelty, whose details, she gave in court, and also explained the number of times she has had to report incidents of cruelty to the police. I considered that that evidence was corroborated by the "**Bond to Attend**" court given to her by the police, who required her to give evidence against her "**husband**" in a case where he was charged of the offence of "**Creating a Disturbance, contrary to Section 95(i)(h) of the Penal Code.**"

By this time, the "couple" were now living separately, and according to the plaintiff, the defendant went to attack her at night demanding food. Because of this, the plaintiff prayed the court to "**dissolve their marriage**", as she can no longer live with it defendant who has threatened to kill her. On that evidence which was again not challenged, I proceed to dissolve the marriage between the plaintiff and defendant.

Finally is the question of maintenance of the plaintiff and her children.

Whereas no evidence was tendered by the plaintiff to show that the defendant who is a driver earns Kshs.15,000/= p.m., there is, nevertheless further evidence of the income from the rental of 20 rooms. This is rental income which the plaintiff used to collect before, but when the defendant chased her from the matrimonial home, she stopped collecting. This is put at Kshs.20,000/=. Here again, the defendant did not adduce evidence to rebut this.

The defendant is said to have a monthly income of Kshs.45,000/= from which he can pay maintenance to the plaintiff, however, part of the income, as I have said, is not known though working as a driver he is definitely paid a salary. When I consider the evidence pertaining to the issue of maintenance, I have decided to order the defendant to pay the plaintiff a sum of Kshs.15,000/= p.m. with effect from 31st July, 2005 and thereafter a similar amount every succeeding month, until further orders of the court. In default, execution to issue. I do hereby grant liberty to either party to come back to court, should circumstances warrant it.

A decree nisi to the marriage between the 2 which I presumed and subsequently dissolved, should issue straightaway, and the same will be made **absolute** within a period of one month from today.

Dated at Nairobi this 7th day of July 2005.

JOYCE ALUOCH

JUDGE