REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
Divorce Suit 18 of 2001

A W M ……..PETITIONER

-VERSUS

R M …….....……RESPONDENT

JUDGMENT

A W M (hereinafter referred to as the Plaintiff) initially filed a Divorce Case No. 17 of 2001 before the Chief Magistrate's Court in Thika against R M (hereinafter referred to as the Defendant). The said suit was struck off on the technicalities. When the present plaint was filed the Defence counsel raised a Preliminary Objection on the grounds that the matter in controversy was res-judicata. However, by a ruling of Justice Waweru dated 2nd December 2003 the Preliminary point was overruled and hence this matter which was filed by way of a Plaint proceeded for trial.

The Plaintiff has sought for the following orders:-

> **a) A declaration that the cohabitation between the Plaintiff and the Defendant leads to presumption of marriage between the Plaintiff and Defendant.**
>
> **b) Dissolution of the marriage between the Plaintiff and the Defendant.**
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> **c) An order that the Defendant do pay a reasonably monthly maintenance of Kshs. 68,000/- to the Plaintiff**
>
> **d) Costs of the suit.**

The Plaintiff relied on her own evidence and called two other witnesses among them was Dr. J. K. Nyansera the proprietor of Chania Maternity & Nursing Home and who treated the Plaintiff on various occasions of problems related to infertility anxiety and Assault.

According to this witness, the Plaintiff was admitted in his clinic on the various dates on 27/8/95. 2/10/98 and 3/12/98 whereby she had suffered a miscarriage and the last admission she had undergone an operation to correct the hormonal imbalance that was causing infertility. This witness produced the Admission Forms that indicated that the Defendant was the next of kin. He also maintained that the medical costs were all settled by the Defendant who used to accompany the Plaintiff.

Since the Plaintiff continued to be seen also as an out patient, due to stress related problems, this witness had occasion to attend to both the Plaintiff and the Defendant and offered to them counseling services. The Plaintiff complained of having been assaulted and she was severely depressed due to the fact that the

Defendant was mistreating her and she attributed his mistreatment to her inability to get children. The hostility perpetuated by the Defendant at home coupled with her anxiety due to infertility was causing her stress and this witness therefore advised the parties to be torelent and understanding. This witness stated in his examination in chief and I quote:

> **"I had no doubt in my mind that the Defendant was the husband to the Plaintiff. I have no personal interest in this matter. I have come to court to discharge my professional duties".**

The Plaintiff also relied on the evidence of PW2 Masiu Mwoki who was employed by both the Plaintiff and Defendant from 1997 as a workman. He was subsequently promoted as a cook and generally used to assist in a grocery shop that was ran by the parties at Matuu market. According to this witness he regarded both the Plaintiff and Defendant as man and wife, they were working together in the shop and were keeping a small farm where they did some farming activities. The Plaintiff used to give him instructions and sometimes she would pay his salaries. He regarded her as the wife of the Defendant.

Similarly they were residing in one room which was adjacent to the shop. This witness testified that he witnessed a few incidents whereby the Plaintiff was assaulted by the Defendant and she eventually left the Defendant. I now turn to the evidence by the Plaintiff who gave a detailed account of how she met the Defendant in 1992 and they became friends. They agreed to settle down and live together as man and wife from 1st January 1994. At the time the Plaintiff was working as a nurse at Kabaa Mission Hospital. They lived together until January 2001 when she was forced to leave the matrimonial home due to constant cruelty and assaults that characterized their relationship.

According to the Plaintiff both her parents and those of the Defendant knew of their relationship although there were no ceremonies conducted under the Kikuyu customary law to which both parties belonged, they intended to hold a Christian wedding. They had however not agreed when as in the course of their cohabitation the Defendant had became cruel and subjected the Plaintiff to physical assault which according to the Plaintiff contributed to a miscarriage in 1996. When the Plaintiff suffered a second miscarriage in 1997, the Defendant became more hostile which hostility continued as Plaintiff could not conceive a child again. The Plaintiff stated –

> **" I started looking for help from doctors, I carried out tests and I was diagnosed to have growths in the uterus and I needed to undergo an operation. The Defendant was very supportive as long he knew there was a problem that could be solved. The Defendant took me to the hospital whereby I was operated, after the operation I stayed for a year and he was very cruel to me. I was hospitalized for depression as the doctor testified".**

According to the Plaintiff, her cohabitation should be presumed as a marriage as in the course of their living together they acquired properties. The Plaintiff resigned from her nursing work to join the Defendant and they were running a shop together. They were able to buy a motor vehicle, a pick up registration No. KAC 092L which they were using for public transport and it used to bring in an income of Kshs. 60,000/- per month. They also had commercial plots at Kithendu Market, one was developed and another undeveloped and both used to bring an income of Kshs. 10,000/- and 5,000/- per month respectively. They also had other pieces of land at Matuu being Machakos Matuu/4941 which they regarded as the matrimonial home. They used to keep livestock and cultivate the rest of the land and those activities brought an income of about 60,000/- per month. All this was in addition to the income from the retail shop which used to average between Kshs. 100,000/- to Kshs. 160,000/- per month. The Plaintiff sought for an order of maintenance and claimed that when she was forced out of their cohabitation, the Defendant did not even allow her to collect the personal effects including her certificates.

She tried to resolve their dispute through the local chief whereby the Defendant is alleged to have agreed before the Chief to transfer one of the properties to the Plaintiff in full and final settlement but the Defendant refused to co-operate and hence she instructed an advocate to file a suit in Thika which was subsequently struck off and hence this suit whereby the Plaintiff seeks for an order of Resumption marriage and an order of maintenance.

During cross-examination the Plaintiff admitted that she changed her name on the identity card to reflect her marital status. Her original identity card had been impounded by the Defendant but when she reported the matter to the police, he changed his mind and accompanied the Plaintiff to the Registrar of Persons where he gave his consent.

On the other hand the Defendant denied any responsibility over the Plaintiff. In furtherance of his defence, the Defendant relied on the evidence of two witnesses who are also members of his clan as follows:-

Ferdinard Mwaniki Nganga (DW1)

This is the Assistant Chief of Gatitu Sub-location, Muruka Location of Kandara Division. He testified that he was always knew the defendant since his childhood, they are members of the same clan. He denied that he had ever seen the Plaintiff nor did he know that the Defendant had another wife apart from L W K who is married to the Defendant under the Kikuyu customary laws of marriage. He produced a extract copy of a Form they use in his office to issue to persons who are married under the customary law in order to introduce them for the issuance of identity cards. He was never consulted by the Plaintiff or Defendant to give such a letter although the Defendant resides in Matuu Town which is over 50 kilometers from his Location.

The testimony of Robert Mucai Nganga, a cousin of the Plaintiff went further to state how he participated in the ceremonies of customary marriage between the Defendant and Lilian Wanjiru. According to him he has never been introduced to the Plaintiff whom he only met in court. He denied that he was the one who wrote a letter to the chief of Matuu on behalf of the Defendant when the Plaintiff lodged a complaint with the Chief of Matuu.

Turning to the Defendant's evidence, he is a businessman in Matuu Town of Yatta Division of Machakos District since 1980 where he carries on the business of a grocery shop. He said that he is married to one L W under the Kikuyu customary law and he has been so married since 1989. According to the Defendant he met the Plaintiff in 1994 and they had an affair for a short time although he was reluctant to state the duration of this affair, during cross-examination he reluctantly said this affair only lasted for a few days. He denied that he had any knowledge of the Plaintiff's parents nor does the Plaintiff know his parents. The Defendant also gave a detailed account of his properties which he claims he acquired in 1993 even before he met the Plaintiff. He denied that he earns the third of income alleged by the Plaintiff and during the cross-examination he said that he did not keep any records of his income and expenditure nor does he operate a bank account. He denied that he ever accompanied the Plaintiff to the hospital nor did he pay any hospital bill or sign any admission form during the time the Plaintiff was hospitalized.

During cross-examination he however admitted that a cousin of his known as Mucai Nganga wrote a letter to the Chief of Matuu on behalf of his parents. He said this is the only time his parents knew about the Plaintiff through this dispute that the Plaintiff filed before the Chief of Matuu. He however refused to participate in the proceedings which he dismissed as having been written by the Plaintiff, he stated as follows and I quote:

> **"I said I would not attend before the Chief's office as I did not know A W. It is Alice who took the complaint before the Chief. It is A who wrote these proceedings. M N is still my brother he gave evidence on my behalf. I refer a letter written by M N to the Chief of Matuu. We had a small friendship that caused A to report the dispute to the Chief of Matuu which was also taken to our parents. Our parents knew of this relationship because of the written letters".**

Thus the Defendant dismissed the Plaintiff's claim as a mere attempt to extort money from him.

I have given considerable thought to all the evidence adduced by all the parties and their witnesses as well as the submissions by both counsel for the Plaintiff and the Defendant.

The principal issue for consideration is whether there was cohabitation between the Plaintiff and

Defendant that would lead to a presumption of a marriage. If there is a presumption of marriage whether the Plaintiff should be entitled to an order of dissolution due to cruelty; and whether the Plaintiff should be awarded maintenance as prayed.

Mr. Kamiro Counsel for the Defendant submitted that the Plaintiff miserably failed to prove her case on a balance of probability, she failed to produce necessary and credible witnesses such as her parents or respected members of the society such as a teacher or a neighbour but instead brought a "Shamba boy" whose credibility and evidence should not be regarded. He argued that it is settled law in the celebrated Court of Appeal authority in the case of **Hotensia Wanjiru Yaw vs. Public Trustee C. A. No. 13 of 1976** that cohabitation is only recognized to lead to a presumption of marriage if there are children between the parties who are named after the man's parents in accordance with the Kikuyu customary law.

I have carefully considered the above decision which is a binding decision, although the issues involved the inheritance of an estate of a deceased person - I find the Judgment of Justice Madan very inspiring and relevant in the determination of the principal issue of presumption of marriage.

> **" The concept of Presumption of marriage is an appreciation of the needs of the parties in life when a man and a woman cohabit for a long period without solemnizing their union by going through a recognized form of marriage. That if a woman is left stranded either by being cast away by her husband or because he dies, occurrences which do happen, the law, subject to the requisite proof, bestow, the status of wife upon the woman to enable her to qualify for maintenance or share in the estate of her deceased husband".**

The Defendant however, denied having cohabited with the Plaintiff between 1994 to 2001. He said he had a very short affair with the Plaintiff and therefore he has no responsibility over her. In seeking the solution to this problem I have asked myself this question -What is the period of cohabitation that should give rise to a presumption of a marriage? Certainly, not a one night stand off or even a couple of months especially where there are no issues. A period between 1994 – 2001 is in my view a long period and a marriage can be presumed by reputation.

I have looked at a leading Text book Bromley's Family Law 9th Edition page 52 which passage I find of much assistance as a comparative too in finding the solution to this very complex dispute, the test reads:

" It has long been established 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. Consequently, if the marriage is challenged, the burden lies upon those challenging it to prove that it has been solemnized…"

This passage abeit of persuasive nature is important because the Defendant claimed it was the responsibility of the Plaintiff to bring the relevant witnesses such as his mother, the Chief of Matuu and others like a school teacher who he said would be credible witnesses. His defence all along was a mere denial and certain facts and occurrences have clearly dented the consistency of the Defendant's case.

> **1. If the parties had a mere stand off kind of an affair in January 1994 as alleged by the Defendant, why did it take the Plaintiff 6 years that is until the year 2000 to report the dispute of their matrimonial disharmony before the Chief of Matuu Area. Why did the Defendant respond through a letter by his brother on behalf of his parent?**
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> **2. It is the Defendant who has been a businessman at Matuu Market since 1980. It is in Matuu Market where the alleged cohabitation is said to have taken place, would it not have been prudent for him to call the evidence of a neighbour, a Teacher or a Chief to of Matuu area discredit the evidence of a "Shamba boy" on the issue of marriage by reputation?. The Chief and the teacher from Kandara were not of much assistance to the Defence case.**
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> **3. Thirdly why would the hospital Admission Forms which were been issued as early as 1996, 1998 indicate that the Defendant was the Plaintiff's next of kin, these are mere gaps that were**

left out in the Plaintiff's case thereby shifting the burden to the defence which in my humble view, the Defendant failed to offer an explanation.

In this regard therefore, I am satisfied that the Plaintiff has established a prima facie case and on a balance of probability, she proved that she cohabited with the Defendant between 1994 – 2001. She was regarded by the family doctor who treated her as a wife of the Defendant. He considered both parties as a man and wife. Her worker also regarded her as a spouse of the Defendant. The fact that the Plaintiff was unable to bear children cannot be used against her. She tried to conceive but failed and this aggravated her position and was the cause of the breakdown of the relationship.

Accordingly the Plaintiff and the Defendant are hereby presumed as married in law.

However, due to the cruelty, hostility and total breakdown of the relationship the said marriage is hereby dissolved.

The Plaintiff sought for an order of maintenance and I am of the view that she should be entitled to maintenance. The Defendant admitted that the properties enumerated by the Plaintiff did exist but he failed to provide the accounts. Due to the acrimony between the parties and in order for both parties to completely saver this relationship it is convenient to order that the Defendant do provide a lumpsum or a secured maintenance instead of a monthly sum. In this regard and taking all the circumstances of this case I order that the Defendant do pay a sum of Ksh. 350,000/- being the secured once and for all maintenance for the Plaintiff. The Plaintiff shall also be entitled to the costs of this litigation.

For the avoidance of doubt the following are the orders.

a. That the Plaintiff and Defendant be presumed married in law between 1994 to February 2001

b. That the marriage between the Plaintiff and Defendant be and is hereby dissolved

c. That the Defendant do pay a sum of Kshs. 350,000/- being a secured maintenance.

d. Plaintiff shall have the costs of this suit. It is so ordered.

Judgment read and signed on 30/9/05.

MARTHA KOOME

JUDGE