



REPUBLIC OF KENYA



GTM v JMK (Civil Appeal E003 of 2021) [2024] KEHC 4522 (KLR) (12 April 2024) (Judgment)

Neutral citation: [2024] KEHC 4522 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI**

CIVIL APPEAL E003 OF 2021

MA ODERO, J

APRIL 12, 2024

BETWEEN

GTM APPELLANT

AND

JMK RESPONDENT

JUDGMENT

1. Before this court for determination is the appeal dated 19th January, 2021 by which the Appellant GTM seeks the following orders;-
 - “ a. An order for dissolution of the Marriage between the Appellant and the Respondent.
 - b. A declaration that all the properties listed under paragraph 8 of the Petition which are registered in the names of the Respondent are held in trust for the Appellant.
 - b. A declaration that the Appellant is entitled to all properties, moveable or immovable acquired during the subsistence of the marriage between the Appellant and the Respondent.
 - b. A declaration that the Respondent is accountable to the Appellant in respect of all income derived from the Properties listed in paragraph 8 of the Petition.
 - b. An order that the Appellant is entitled to 50% of all the Properties registered in the Respondent’s name and those acquired during the subsistence of the marriage between the Appellant and the Respondent.
 - b. An order for maintenance of the Appellant in the amount of Kshs. 50,000 per month or as may be reviewed from time to time.



- b. The cost of this Appeal be provided for.”
2. The Respondent JMK opposed the appeal. The appeal was canvassed by way of written submission. The Appellant filed the written submissions dated 26th May, 2023 whilst the Respondent relied upon his submissions dated 22nd June, 2023.

Background

3. The Appellant in her evidence stated that she got married to the Respondent under Kikuyu Customary Law in the year 1989. That following the marriage the couple cohabited as man and wife in [Particulars Withheld] village in Nyeri County. The Appellant stated that the couple’s union was blessed with two (2) children namely;-
- i. KG born in 1991
 - ii. LM born in 1995
4. The Appellants stated that she was a school teacher and resided in the school premises in Kamatura Sub-County Nyeri County. She accuses the Respondent of having been involved in numerous adulterous affairs during the course of the marriage, that he has been cruel, hostile and reluctant towards her. That the Respondent introduced a lady known as EN to the extended family as his wife and that the Respondent chased the Appellant out of the matrimonial home forcing her to seek refuge in the school quarters. The Appellant stated that the marriage has irretrievably broken down and prayed that the same be dissolved.
5. The Appellant stated that during the subsistence of the marriage she invested greatly in matrimonial home by planting coffee and contributed towards the construction of commercial plots the proceeds of which the Respondent enjoys and benefits from to her exclusion.
6. The Appellant further stated that she contributed financially by taking loans and other financial facilities towards the acquisition of the following matrimonial properties;-
- a. Konyu/Barichu/2xx2
 - b. Konyu/Barichu/9xx
 - c. Konyu/Barichu/7xx
 - d. Konyu/Barichu/7xx
 - e. Konyu/Barichu/2xx4
 - f. Iriaini/Kairia/1xx4
- As well as towards the acquisition of the matrimonial homes constructed on
- a. Konyu/Barichu/2xx
 - b. Iriani/Kairia/1xx4
7. The Appellant further stated that having been chased out of the matrimonial home by the Respondent she has had to incur the following expenses in seeking alternative accommodation for herself.
- Rent - Kshs. 15,000/=
- Food - Kshs. 15,000/=



Medication - Kshs. 15,000/=

Miscellaneous Expenses - Kshs. 5,000/=

TotalKshs. 50,000/=

8. The Appellant then filed in the Chief Magistrates Court at Karatina Petition No. 8 of 2018 seeking the following orders:-
 - “(a) An order for the dissolution of the marriage between the Petitioner and the Respondent forthwith.
 - (b) A declaration that the Petitioner is entitled to all properties moveable or immovable acquired during the subsistence of the marriage in accordance with her contribution more specifically half a share of the matrimonial property listed in paragraph 8 above.
 - c. An order for maintenance of the Petitioner in the amount of Kshs. 50,000/= per month or as may be reviewed from time to time.
 - d. Costs of the petition.”
9. On her part the Respondent opposed the petition through his Answer to Petition dated 7th February, 2019. The Respondent conceded that he did cohabit with the Appellant between the years 1989 and 1995 and concedes that they bore two (2) children together.
10. However the Respondent categorically denies that he ever married the Appellant under customary law or indeed under any other system of law. He states that he has never met the Appellant’s parents and/or relatives and states that he has never paid nor promised to pay any dowry on her behalf.
11. The Respondent further denies that the properties cited by the Appellant constitute matrimonial property and he denies that the Appellant is entitled to any share in the said properties.
12. The petition was heard by way of Vive Voce evidence and on 22nd December, 2020, Hon. V. S. Kosgei, Resident Magistrate delivered a judgment in which she dismissed the Petition in its entirety and ordered that each party would bear its own costs.
13. Being aggrieved by the judgment the Appellant filed the Memorandum of Appeal dated 19th January, 2021 which memorandum was premised upon the following seven (7) grounds of Appeal:-
 - “i. That the learned trial magistrate erred in law and fact by failing to dissolve the marriage between the Appellant and the Respondent despite determining that the Appellant was presumed to have been the wife of the Respondent.
 - ii. That the learned magistrate erred in law and fact by determining the issue of distribution of properties in question in the divorce petition without first dissolving the marriage between the Appellant and Respondent.
 - iii. That the learned magistrate erred in law and in fact in failing to hold that the properties listed in paragraph 8 of the Divorce petition were acquired during the subsistence of marriage between the Appellant and Respondent and failing to hold that these properties were matrimonial properties.



- iv. That the learned trial magistrate erred in law by failing to declare that the properties in question registered under the Respondent's name were held in trust for the Appellant.
- v. That the learned trial magistrate erred in law and in fact by not giving due weight and consideration to the Appellant's documentary, affidavit evidence and oral explanation on how she contributed financially and non-monetarily towards acquisition of the properties listed in question.
- vi. That the learned trial magistrate erred in law by failing to hold that the Appellant was entitled to a portion of all properties moveable and immovable acquired during the subsistence of marriage between the Appellant and the Respondent.
- vii. That the learned trial magistrate erred in law and in fact by failing to take into consideration that the Respondent had neglected and failed to maintain the Appellant during and after their marriage despite the Respondent being a man of great wealth."

14. As stated earlier the Respondent opposed the appeal.

Analysis And Determination

15. This is a first appeal, thus it is the duty of this court to re-evaluate and review the evidence adduced in the lower court and to draw its own conclusions on the same. In *Selle & Another - v- Associated Motor Boat Company Limited & Others* [1968] E. A 123, the court of Appeal held that;-

"An appeal to this court from trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect.

In particular this court is not bound necessarily to follow the trial judge's findings or fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence of if the impression based on the demeanour or a witness is inconsistent with the evidence in the case generally....."

16. Similarly the same court in the case of *Kiruga - v- Kiruga & Another* [1988] KLR 3h 8 observed that;-

"An appeal court cannot properly substitute its own actual finding for that of a trial court unless there is no evidence to support the finding or unless the judge can be said to be plainly wrong."

17. An appellate court has jurisdiction to review the evidence in order to determine whether the conclusion reached upon that evidence should stand.

18. In the Petition which she filed in the sub-ordinate court, the Appellant sought an order of dissolution of her marriage to the Respondent. She equally sought orders for division of properties termed as "matrimonial property". Arising from the evidence adduced at the trial the following are the issues for determination.



1. Did there exist a marriage between the Appellant and the Respondent.
2. Whether the properties cited by the Appellant constituted matrimonial property and if so
3. What share if any of said matrimonial property would the Appellant be entitled to.

1. Existence of a Marriage

19. The Appellant testified that she got married to the Respondent in the year 1989 under Kikuyu customary law. The Respondent on his part vehemently denied ever having married the Appellant either under customary law or under any legally recognized system at all.
20. It is trite law that he who alleges must prove. If the Appellant contends that she and the Respondent got married to each other then the onus is upon her to prove the fact of marriage.
21. It is a fact that in African culture marriages are not conducted secretly or in a clandestine manner. A marriage is a union of two families which is normally celebrated openly. In the case of *Gituanja - v- Gituanja*[1983] KLR it was held that;-

“The existence of a marriage is a matter of fact which is proved with evidence. The evidence at trial proved a valid marriage under Kikuyu customary law as was evidence by the slaughtering of the ‘*Ngurario*’.
22. In this case the Appellant did not cite neither did she prove that day when the Kikuyu cultural marriage that had been conducted between herself and the Respondent. There was no evidence of a *Ngurario* ceremony having been conducted. Likewise the Appellant did not call any witnesses to corroborate her allegation that a customary marriage had taken place.
23. Under cross-examination the Appellant stated;-

“I was married under Kikuyu customary law but there was a proposal he wanted to but we did not. There was no ceremony---People can attest that we were married but they have not recorded a statement”
24. By the Appellant’s own admission no ‘*Ngurario*’ ceremony took place thus there cannot be said to have existed a Kikuyu customary marriage.
25. The allegation that the Respondent intended to perform the ceremony did not suffice. Mere intention is not proof of the act.
26. In the case of *Hottensia Wanjiku Yawe - v- The Public Trustee* Civil Appeal No. 13 of 1976, Justice Kneller set out the principles regarding proof of a customary marriage as follows;-
 - “(a) The onus of proving a customary law marriage is generally on the party who claims it.
 - (b) The standard of proof is the usual one for a civil matter namely one of the balance of probabilities.
 - (c) Evidence as to the formalities required for customary law must be proved to that Indented standard.”
28. The Respondent asserted that no ‘*Ngurario*’ ceremony ever took place and denies that any part of the ‘*uracio*’ was ever paid.



29. The Appellant’s admission that the Respondent’s intention to initiate the formalization of their union under customary law was never actually realized means that her claim of a customary marriage falls flat on its face.
30. The fact of the matter is that there is no evidence at all to prove the existence of a customary marriage between the Appellant and the Respondent. I therefore support the finding of the learned trial magistrate that no such marriage existed between the two.
31. The Appellant later sought to rely on an Affidavit of marriage as proof of the union between herself and the Respondent. However the Respondent challenged that Affidavit alleging that he was illiterate could not have signed the document. That the signature purported to be his on the said document was a forgery. The record indicates that the Appellant’s counsel abandoned the issue of the Affidavit on 29th September, 2020.
32. The next question is whether the evidence was such as would lead to a “presumption of marriage” between the Appellant and the Respondent. In the case of *SWG - v- HMK* [2015] eKLR Hon. Justice William Musyoka stated as follows:-
- “Where a marriage does not comply with the relevant formalities laid down by the *Marriage Act* or under customary law, it may be rescued by presumption of marriage by cohabitation”
33. The parties are in agreement that they cohabited from the year 1989 to 1995 and that they bore two children together. However, mere cohabitation does not lead to a presumption of marriage. A couple may cohabit with no intention of ever getting married.
34. In the *Hottensia Wanjiku Yawe Cate* [*Supra*] the court stated that
- “I agree with the trial judge that the onus of proving that she was married to the deceased was on the Appellant. But in assessing the evidence on the issue the trial judge omitted to take into account a very important factor – Long cohabitation as a man and wife gives rise to presumption of marriage in favour of the Appellant. Only cogent evidence to the contrary can rebut such a presumption [Own emphasis].”
35. Section 2 of the *Marriage Act* 2019 define cohabitation as follows
- “To live in an arrangement in which an unmarried couple lives together in a long term relationship resembling marriage.”
36. That’s the period of cohabitation must be continuous not merely occasional visits and must be long term. The Court of Appeal in *Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & Another* NRB CA Appeal No. 313 of 2001 [2009] eKLR, held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held that;
- Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; 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 safe 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.
37. There is evidence which is not disputed by the Respondent that during this Six (6) year period of cohabitation, the Respondent provided for the Appellant and the children.



38. The couple opened bank accounts jointly and there is evidence that one of the children born out of their union was named after the Respondent's mother in keeping with Kikuyu cultural naming rites.
39. Finally on this point in Karatina Chief Magistrate's case No. 687 of 2007 in which the Respondent was charged with having assaulted the Appellant the Respondent himself referred to the Appellant as his wife. In the proceeding of that case at Page 11 line 16 the Respondent whilst being cross-examined stated as follows:-
- “ Complainant (the Appellant herein) is my wife but she left my home 13 years ago-----[own emphasis].
40. Based on the above I do agree with the finding of the learned trial magistrate that the evidence on record is sufficient to lead to a presumption of marriage between the Appellant and the Respondent.
41. The Appellant prayed that this marriage be dissolved due to adultery and cruelty.
42. The Appellant cited an instance when the Respondent took one EN to their rural home and introduced her as his wife. The Respondent does not deny this.
43. Moreover it is a fact that the Respondent was charged in the Karatina Magistrate Court with an offence of having assaulted the Appellant vide Criminal Case No. 687 OF 2007, vide a judgment delivered on 17th July, 2008 the court convicted the Respondent for the offence of Assault causing Actual Bodily Harm. This conviction is evidence of physical cruelty by the Respondent towards the Appellant.
44. Finally it is not in dispute that the couple separated in the year 1995 and have never resumed cohabitation.
45. They have been separated for a period of over thirteen (13) years. It is clear that the marriage has irretrievably broken down. The Respondent did not oppose the prayer for dissolution of the marriage. I therefore concur with decision of the learned trial magistrate to dissolve the marriage.
46. The final prayer was for division of matrimonial property. Ordinarily the question of division of matrimonial property ought not be combined with a petition for divorce. Such a suit ought to be heard separately after a divorce has been granted.
47. Be that as it may in the case the learned trial magistrate proceeded to hear and determine the question of division of matrimonial property.
48. Section 6 (1) of the Matrimonial Property Act 2013 provides as follows:-
- “ 6 for the purpose of this Act, matrimonial property means.
- (1) a. The matrimonial home.
- b. Household goods and effects in the matrimonial home or homes.
- c. Any other unmovable and movable property, jointly owned and acquired during the subsistence of the marriage. [Own emphasis].
49. The Appellant claimed a share in properties which she alleged were acquired during the period of her marriage/cohabitation with the Respondent. The Appellant did not give concrete evidence regarding when the properties she claims were actually acquired. No sale Agreements and/or receipts or invoices



were annexed. In the circumstance it is difficult to make a clear determination that the said properties were acquired during the subsistence of the marriage.

50. The Appellant lays claim to eight (8) parcels of land as listed in the petition. She concedes that all the parcels of land are Registered in the name of the Respondent but insists that she made contribution towards the acquisition of the same.
51. In the case of *Njoroge - v- Ngari*[1985] KLR 480 the court stated that
“where a property is registered in the name of one spouse only the other spouse is required to prove contribution towards the acquisition of the said property in order to establish a beneficial interest thereto.”
52. In *PWK - v- JKG* [2015] eKLR the court stated as follows;-
“where the disputed property is not so registered in the joint names of the spouses but is registered in the name of one of the spouses, the beneficial share of each spouse would ultimately depend on their proven respective properties of financial contribution either direct or indirect towards the acquisition of the property.....”[own emphasis]
53. Therefore in order to prove her claim to a share of the properties the Appellant must prove direct financial or indirect contribution towards the acquisition of the same.
54. The Appellant states that the couple opened a joint bank account into which she would contribute money used to purchase the disputed properties. However the account in question being an Account held at National Bank Karatina Branch was in the sole name of the Respondent. It was not in their Joint names.
55. Further the Appellant though claiming to have contributed 50% of the prices for the properties did not tender evidence to prove this financial contribution into the said account. In addition the Appellant admitted that she did not know how much the properties were purchased for.
56. The Appellant claims that Plot xxxx Iriaini cost Kshs. 2.5 million having been purchased in 1992. She states that she contributed Kshs. 5,400/= per month for two years 1990 – 1992. That her net salary at the time was Kshs. 5,400/=.
57. It is not conceivable that the Appellant would contribute her entire salary towards the purchase of land. What would she be left with to cater for her own and the domestic needs.
58. The Appellant stated that the seller of plot 1334 was one WB. She admits that she has no evidence to show that she paid the said WB any money.
59. The Appellant under cross-examination says she relies on her pay slip and bank withdrawals to prove her contribution. There is no evidence of any deposit made into the account by the Appellant. Surprisingly the banks statements upon which the Appellant seeks to rely relate to the year 1998 (after the marriage had ended) and not 1989 - 1995 which is the period in question.
60. The Appellant claims that she made indirect contribution by growing coffee and selling milk to supplement family income. However she admits she has nothing to show that she was engaged in any kind of income generating activity. All there are allegations which the Appellant failed to prove.
61. All in all I find that the Appellant has failed to prove on a balance of probability her direct and/or indirect contribution towards the acquisition of the assets. In the circumstances her claim for division of matrimonial property has no basis and cannot stand.



62. Finally I find no merit in this appeal the same is dismissed in its entirety. Each party to meet its own costs.

DATED IN NYERI THIS 12TH DAY OF APRIL, 2024.

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MAUREEN A. ODERO

JUDGE

