VAO v KAKN (Civil Appeal E059 of 2023)
[2024] KEHC 16812 (KLR) (Family) (18 September 2024) (Judgment)

Neutral citation: [2024] KEHC 16812 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E059 OF 2023

BM MUSYOKI, J

SEPTEMBER 18, 2024

BETWEEN

VAO ..... APPELLANT

AND

KAKN ..... RESPONDENT

(Being an appeal from judgment and decree of Honourable Aduke Jeal Praxades Atieno (SRM) in Chief Magistrate's Court at Milimani Commercial Courts Divorce Cause number E1270 of 2022 dated 14-06-2023)

JUDGMENT

1. The appellant has brought this appeal challenging judgment and decree of the Honourable Senior Resident Magistrate in the Chief Magistrate's Court at Milimani Commercial Courts divorce cause number E1270 of 2022 in which she was the petitioner seeking to have her marriage to the respondent dissolved. This was in terms of petition for divorce dated 21-10-2022. In response to the petition, the respondent filed an answer to petition and cross petition dated 2-12-2022.

2. The parties appeared before the trial magistrate on 4-04-2023 and adopted their pleadings as drawn and were cross examined respectively. Upon evaluation of the parties' evidence and pleadings, the Honourable Magistrate on 14-06-2024 delivered judgment in which she made the following orders;

    1. Petition dated 21-10-2022 is dismissed.

    2. Each party to bear their own costs.

    3. Either party is at liberty to apply for registration as under section 3, 44 and 55 of the *Marriage Act*.

4. These are the orders of this court.

3. The appellant was aggrieved by the decision of the Magistrate and filed this appeal vide memorandum of appeal dated 10-07-2023 which lists the following grounds;

    1. The learned trial magistrate erred in law and fact by framing issues outside of those arising from the pleadings and evidence of the parties.

    2. The learned trial magistrate erred in law and fact in assuming that there was need to prove the marriage between the parties.

    3. The learned trial magistrate erred in law and in fact in finding that there was need to have expert witness on the issue of traditional customary marriages.

    4. The learned trial magistrate erred in law and in fact in finding that in the absence of a certificate of registration of customary marriage expert witnesses must testify.

    5. The learned trial magistrate erred in law and in fact in applying section 55 of the *Marriage Act* number 4 of 2014 retrospectively.

    6. The learned trial magistrate erred in law and in fact in failing to appreciate the law and the facts of the case.

    7. The learned trial magistrate erred in law and fact by adopting a technical approach thereby failing to consider the substance of the matter.

    8. The learned trial magistrate erred in law and in fact by disregarding the petitioner's and respondent's wishes to dissolve the marriage as set forth in their pleadings.

    9. The learned magistrate misdirected herself and relied on the wrong principles in reaching her decision.

    10. The learned trial magistrate erred in law and in fact by failing to consider the totality of the evidence tendered.

4. When this appeal came for mention to confirm filing of submissions, the respondent had not filed his submissions and indicated to this court through his counsel that he was not intending to file any. He left the matter to the court's discretion and decision. The appellant had filed her submissions dated 2nd July 2024 in which she argued grounds 1, 2 and 3 together and also combined grounds 4, 5, 7, 8, 9 and 10. She did not address the court on ground 6.

5. I have read the judgment of the lower court and in my considered view, her reason for dismissing the petition was that the parties did not prove existence of marriage either by calling an expert witness or by production of any of the documents enumerated under Section 59 of the *Marriage Act* (hereinafter referred to as 'the Act'). This being a first appeal, it is my duty to analyse the evidence produced before the lower court and come to my own independent conclusion. I should however remind myself that I did not take the evidence first hand neither did I have the advantage of observing the demeanour of the witnesses. I will analyse the evidence produced before the subordinate court in comparison to the reasons given by the trial court and the submissions of the appellant and of course the relevant applicable laws.

6. In divorce matters, the parties have the onus of proving existence of the marriage and at least one ground of divorce. In S.M.N. vs A.O.B (2010) eKLR it was held that;

> 'For dissolution of the marriage, all that the petitioner is required to do is to demonstrate existence of any of the following; adultery, cruelty, desertion and insanity. There is no requirement that all these be demonstrated in any one proceeding. It is sufficient to establish any of them'

7. The main point for consideration in this appeal is whether the material produced before the lower court was sufficient to prove these two ingredients. The appellant has in her first ground of appeal claimed that the subordinate court framed issues which did to emanate from the pleadings. I have looked at the judgment and note that the court framed only two issues. The first issue was whether or not a marriage properly called existed between the parties and how the parties can part ways from this cohabitation. The other issue framed by the Honourable Magistrate was, who should pay the costs of the suit.

8. I find the appellant's claim that the lower court framed issues which were outside those arising from the pleadings unmeritorious. The parties were before a court of law and the fact that the court made reference to provisions of the laws that were not in the pleadings or evidence cannot invalidate the court's judgment. A court has an obligation to interrogate the evidence and pleadings in relation to existing laws. Reading the judgment of the court, she made reference to several sections of the Act in finding on whether the petition before her was competent and in the circumstances, she was entitled to frame the issues as she did. If I were to allow this appeal, it would not be on the basis of this ground of appeal.

9. Ground 2 and 3 of the memorandum of appeal fault the Magistrate for finding that there was need to prove existence of marriage and there was need to call an expert witness to prove the marriage. Paragraph 2 of the petition for divorce pleaded that the parties celebrated and solemnised their marriage on 28th day of August 2010 through a customary marriage. It was pleaded at paragraph *3* that out of the marriage, the parties had been blessed with four children born between 7th July 2007 and 26th April 2014. The petitioner also pleaded at paragraph *4* that during the period, they had lived in four residences in Nairobi and London up to 2022.

10. In answer to the petition, the respondent admitted paragraphs 1, 2, 3 and 4 of the petition. These are the paragraphs which bespoke of the marriage, issues of marriage and the several matrimonial homes of the parties. The question that comes out in the 2nd and 3rd ground of appeal is whether it was necessary for the appellant or the respondent to prove existence of marriage. It is also worthy to note at this point that the respondent had in addition to the aforesaid admissions pleaded cross petition. Obviously by the cross petitioning, the respondent was confirming that there existed customary marriage between the parties.

11. The appellant has referred me to Order 15(1) of the Civil Procedure Rules which provides that an issue arises when a material proposition of fact or law is affirmed by the one party and denied by the other. In view of this, the appellant submits that existence of marriage was not an issue for determination since it had been admitted. The appellant also sought reliance on Section 61 of the *Evidence Act*.

12. In my view, divorce and other matrimonial proceedings are civil in nature and the rules of evidence applicable in them should be those applicable to ordinary civil proceedings. In that regard, where there

are admissions in the pleadings, the parties are not bound to prove the same. Section 61 of the *Evidence Act* provides that;

> 'No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted on their pleadings.'

12. The respondent clearly gave a notice of admission by way of pleading pursuant to Order 13 Rule 1 of the Civil Procedure Rules which provides that;

> 'Any party to a suit may give notice by his pleadings or otherwise in writing, that he admits the truth of the whole or part of the case of any other party.'

13. The purpose of pleadings is to give parties notice of what they expect from their opponents. Where a pleading in answer to another admits a proposition, the proposing party does not have an obligation to prove the same. In these circumstances, I am of the opinion that the appellant or the respondent had no evidential duty to prove that the respondent and herself contracted a customary marriage on 28-08-2010. I therefore hold that the Honourable Magistrate erred when she held that the appellant should have called an expert witness. What would the expert witness have proved? That a customary marriage existed? This was an admitted fact which did not need proof. I am alive to the fact that our country's legal system does not allow divorce by consent but that does not mean that the standard of proof in divorce matters is different from other civil proceedings or that the parties should go beyond the rules of evidence to prove any material fact.

14. I now turn to the issue of lack of registration of the parties' marriage which is covered by grounds 4, 5, 7, 8 and 9 of the memorandum of appeal. The Honourable Magistrate held the view that failure to register the customary marriage violated section 3 of the *Marriage Act* and as such the marriage did not exist. The Magistrate also observed that a marriage could be presumed from a long period of cohabitation and repute but the same can only be recognised after it was registered under the Act. She went on to state that having not seen any evidence of a marriage as contemplated under Section 59 of the Act, the cohabitation arrangements between the parties was not a marriage.

15. I have already held that the Honourable Magistrate was wrong in requiring proof of the marriage. It follows therefore that there having been admission from the parties that the marriage was conducted and subsisted, the only issue I have to handle in that respect is the effect of non-registration of the marriage. Should the parties be denied divorce on the basis that their marriage had not been registered as per the statute?

16. The parties herein were married in 2010 before the Act was enacted in 2014. The appellant has argued that the Magistrate applied the Act retrospectively. I do not think so. It is clear to me that the Magistrate applied Sections 96(2) and (3) which require that customary marriages contracted before the enactment of the *Marriage Act* be registered within three years upon commencement of the Act. That in my view, does not translate to applying the Act retrospectively.

17. Section 96(4) gives the Cabinet Secretary powers to extend the period of registration by notice in the Gazette. The Attorney General by Gazette Notice number 5345 dated 2-06-2017 and published on 9-06-2017 appointed 1st August 2017 as the date of commencement of registration of customary marriages pursuant to Section 96 which meant that the customary marriages contracted prior to the enactment of the Act should have been registered by 31-07-2020. It is admitted that the parties did not register the marriage within this period. So, what should I make of their union? This takes me to

Section 12 of the Act which provides five instances where a marriage is deemed voidable. The Section provides that;

> 'Subject to section 11, a marriage is voidable if;
>
> a. At the date of the marriage;
>
> i. Either party was and has ever since remained incapable of consummating it;
>
> ii. Either party was and has ever since remained subject to recurrent attacks of insanity;
>
> b. There was a failure to give notice of intention to marry under section 25;
>
> c. Notice of objection to the intended marriage having been given was not withdrawn or dismissed;
>
> d. The fact that a person officiating the marriage was not lawfully entitled to officiate;
>
> e. There was a failure to register the marriage.

18. This matter falls under section 12(e). The Magistrate held that there was no proof of marriage between the parties herein as contemplated under Section 59 of the Act. That Section gives five ways by which marriage in Kenya may be proved. According to the Honourable Magistrate, proof of marriage is restricted to those five methods. I hold a contrary view. The section does not restrict proof to the documents enumerated therein as the word used in it is not mandatory in nature. In JTO vs AP (2024) KEHC 10464 (KLR) Honourable Justice Helene R. Namisi held the same view which I am in total agreement with, when she found that an admission by the Respondent of existence of the marriage would have been enough to proof of the same. The Judge held that;

> 'In summary, to prove the existence of the customary marriage, the appellant ought to have produced the documents enumerated at Section 59 of the *Marriage Act*, or called evidence to prove that the formalities of customary marriage were conducted, or an admission of the existence of the marriage by the Respondent.'

19. It is clear to me that the marriage between the parties herein was rendered voidable by failure to register the same by 1st August 2020. It is my considered view that the rendering of the union voidable did not make it invalid or a nullity. There is a difference between the two scenarios. An invalid or void union is that which should not have happened in the first place and cannot be sanitized or regularized. These are covered under section 11 of the Act. The Legislature in classifying unregistered marriages as voidable must have known that in law, such marriage would remain valid until one of the parties or an interested person opted to invalidate it. This position is given credence by Section 98 of the Act which provides that;

> A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.'

20. In my view, the Honourable Magistrate read Section 59 in isolation or exclusion of the other provisions in the Act. I believe that had she considered the provisions of section 98 and reconciled it with the meaning of 'voidable' as opposed to 'void', she would have not constrained herself to the methods

of proof of marriage as enumerated in section 59. A statute must be read as a whole and its sections interpreted in one spirit and purpose with the courts and other actors reconciling the purpose of all of them supplementarily and collectively rather than separately and selectively.

21. While making a distinction between 'void' and 'voidable', Honourable Justice P.J.O Otieno cited Jowiit's Dictionary of English Law in Rift Valley Products Limited vs Plexus Cotton Limited (2020) eJKLR thus;

> 'jowitt's Dictionary Of English Law explains the difference between the two words 'void and voidable' as follows;
>
> 'Void': Thus if a contract is made without the true consent of the parties or for any immoral consideration it is void ab initio.
>
> 'Voidable': An agreement or other act is said to be voidable when one of the parties is entitled to rescind it, while until that happens it has the legal effect which it was intended to have.'

22. My understanding of the above citation in relation to the proceedings before me is that the customary marriage between the parties herein remains legal for all purposes until one of them rescinds it. It is not illegal or a nullity. So, if none of them has taken the option of rescinding the marriage which to me is different from divorce, then the court cannot interfere with the relationship except by the choice of the parties. The parties have chosen the path of divorce and they are entitled to reliefs through that path.

23. By giving directions that the parties were at liberty to apply for registration of the marriage, the Honourable Magistrate was alive to the fact that there existed a marriage between the parties but for the registration. She seemed to be telling the parties 'go and register your marriage before you consider prosecuting divorce proceedings.' In my view, this was a wrong approach to take. It is against the spirit of *the Constitution* particularly Articles 45(2) and (3) to confine parties to a union they have no interest in or where their pursuit of happiness is restricted against their will. While discussing the constitutionality of Section 73(2) of the *Marriage Act*, Honourable Justice R.N. Nyakundi in SBM & Another vs Attorney General (2022) KEHC 13920 (KLR) held as follows;

> 'Through the language in section 73(2) of the *Marriage Act*, the drafters acknowledged that the parties to a marriage union had fundamental rights that pre-existed the formation of the marriage. The letter and spirit of the marriage contract was the right to personal autonomy on reproductive and sexual rights which precluded the other spouse from subjecting another to torture, mental anguish, emotional stress, cruelty, servitude, false misrepresentation and non-disclosure of material facts of a very decisive character for one to make an informed decision affecting his or her fundamental rights. Those decisions included whether to continue to consummate and sustain a void or voidable celebrated marriage union.'

24. Applying the above persuasive holding to the current appeal, I hold the opinion that in entering into a marriage, one does not surrender their constitutional rights as envisaged in the cited passage safe to the extent of an obligation to adjust oneself to allow a partner to enjoy the rights and privileges compatible with the union. That is the purport of Article 45(3) of *the Constitution* which provides that parties to a marriage are entitled equal rights before, during and after the dissolution of the marriage. When the marriage ceases to give or allow a person the opportunity to enjoy their inherent constitutional rights and freedoms, one has inalienable right to exit.

25. I take position that an unregistered customary marriage remains valid and stands a risk of being voided at the option of either of the party to the contract of marriage. None of the parties in this appeal has sought declaration that the marriage be voided and as such in my view, it remains a marriage for which

either or both parties can seek divorce. This is not to say that parties to marriage should not comply with the law. The law has made provisions for the consequences of failure to register a marriage. Divorce and voiding of marriage may be different in description and process but the end result of the fate of the union remains that parties are legally and judicially declared separated with no matrimonial obligation to each other.

26. A marriage is under Section 3 of the Act defined as voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. When the element of voluntary act is removed, the union ceases to be a marriage. Section 98 of the Act cited above which was a transitional provision dealt with the aspect of registration by providing for continuity of marriages which were contracted before the enactment of the Act. In the circumstances, it is my holding that a party cannot be denied a decree for divorce due to lack of registration of the marriage. For registration of a marriage to be complete, there will be need of both parties to sign documents and cooperate throughout the process. In the circumstances of this matter and in many divorce causes, parties' relationship has completely broken down to the extent that they have been living separately and it seems that they could not agree on the way forward. Denying such parties freedom to go separate ways is tantamount to violating their right of freedom to associate and forcing them to remain captives of unions they have no regard to or interest in.

27. I do believe that the intention of the Parliament in passing the Act was not to indefinitely tie parties together when the union was irretrievable or to make unregistered customary marriages void. I have read the memorandum attached in the Marriage Bill which was later passed to the *Marriage Act*. The memorandum states;

> 'This Bill, which has been submitted to the Committee by the Attorney General, seeks to consolidate the various existing marriage laws applicable in Kenya into one Act of Parliament. The Bill proposes to repeal seven pieces of legislation namely, The *Marriage Act*, (Cap 150), The African Christian Marriage and Divorce Act, (Cap 151), The Matrimonial Causes Act (Cap 152), The *Subordinate Courts (Separation and Maintenance) Act* (Cap 153), The Mohammedan Marriage and Divorce Registration Act (Cap155), The Mohammedan Marriage, Divorce and Succession Act, (Cap 156), The Hindu Marriage and Divorce Act, (Cap 157). The amendment and consolidation of the marriage laws is important in order to minimize the complexity, unpredictability and inefficiency occasioned by the current multiplicity of laws on the subject.'

28. It is clear to me that the intention of the Act was to consolidate the many regimes of marriage laws we had in the country including the customary marriage into one statute. It was not an intention of Legislature that the customary marriages be outlawed unless registered or abandoned. It would not have been practical to codify all the customary rites we have in the country and that is why the registration was to come after the customary rites are carried out.

29. The office of the Registrar of Marriages, the concerned government departments and agencies should come up with ways and modalities of ensuring that the requirement of registration of customary marriages are complied with. A court of law should not be seen to be impeding people's rights and freedoms especially in issues which *the Constitution* and the people consider dear to their lives.

30. Marriage in our dispensation and realities of life in this country is an important aspect of culture and family relations and is key to maintaining the cohesion and the fulcrum of the society. It is key to preservation of culture which is one of our constitutional epithets. Denying parties right to seek divorce on grounds of non-registration would open a pandora's box considering the current realities of

Kenya society as it has a potential of escalating to join the many matrimonial disputes which obviously translate to unending web of conflicts.

31. In conclusion, I hold that this appeal is merited and consequently I allow it by granting the appellant's petition dated 21-10-2022 as well as the respondent's cross petition dated 2-10-2022 in the following terms;

    1. The judgement and decree in the Chief Magistrate's Court at Milimani Commercial Court divorce cause number E1270 of 2022 dated 14-06-2022 is hereby set aside.

    2. The customary marriage between the appellant and the respondent celebrated on 28-08-2010 is hereby dissolved.

    3. Each party shall bear their own costs in this appeal and in the subordinate court.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF SEPTEMBER 2024.

B.M. MUSYOKI

JUDGE OF THE HIGH COURT.

Judgement delivered in presence of Miss Judy Thogori SC for the appellant and Miss Chebet for the respondent