



FCR v CAL (Civil Suit 18 of 2013) [2023] KEHC 1245 (KLR) (16 February 2023) (Judgment)

Neutral citation: [2023] KEHC 1245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL SUIT 18 OF 2013
AN ONGERI, J
FEBRUARY 16, 2023**

BETWEEN

FCR APPLICANT

AND

CAL ALIAS JCL RESPONDENT

JUDGMENT

1. The Applicant (FCR) filed this Originating summons against the Respondent (CAL). The Originating summons is dated 09/09/2013 seeking the following prayers;
 - a. That it be declared that the applicant and the respondent by virtue of cohabitation for a period of over 20 years, were married.
 - b. That a declaration be issued declaring that the following properties were acquired during the subsistence of their union, and that the applicant's beneficial interests in them be recognized in light of her contribution towards their acquisition :
 - i. Five (5) Acres of Land comprised in LR. No. Kericho/Boito/XXXX.
 - ii. Ten (10) Acres of Land at Burgei, within Bomet County.
 - iii. Eighteen (18) Acres of Land comprised in Ngata in Nakuru.
 - c. Such further relief that this Honourable Court may deem fit and just to grant.
 - d. Costs of this application be provided for.
2. The Originating summons is supported by the affidavit of the Applicant.
3. The Applicant avers that she and the Respondent cohabited as husband and wife at the Respondent's home in Boito from 1970 to 1990 and were blessed with five (5) children.



4. The Applicant avers that in or about the year 1990 the Respondent forcefully and without justifiable cause chased her away from their matrimonial home and neglected and /or reneged his parental responsibility.
5. The Applicant avers that thereafter the Respondent demolished their matrimonial home, subsequently married and lived in parcel land L.R. No. Kericho/Boito/542 which was acquired during the subsistence of their cohabitation.
6. The Applicant avers that during the subsistence of the cohabitation, they acquired several other properties, which were all registered in the name of the Respondent and are in his possession and control.
7. The Applicant avers that during the subsistence of the cohabitation she made substantial indirect contribution towards the acquisition of the aforementioned properties.
8. The Respondent filed a Replying Affidavit to the Originating Summons dated 8/8/2014.
9. The Respondent avers that he has never cohabited with the Applicant as husband and wife at his paternal home in Boito, there was not marriage contracted between the parties under the Kipsigis Customary Law and had no bore no children with the Applicant.
10. The Respondent avers that he is not the registered owner of the aforesaid land parcel Kericho/Boito/XXXX and that he is not in possession of ten (10) acres of land in Burgei within Boito in Bomet County.
11. The Respondent avers that there are no properties or premises that he holds in trust for the Applicant and her children.
12. The Applicant's (Pw. 1) evidence in summary is that she cohabited with the Respondent for a period of 20 years and they were blessed with five (5) children and that they acquired several properties during the subsistence of their union.
13. Pw. 2 stated that both the Applicant and Respondent stayed together until she was unceremoniously chased away.
14. Pw. 3 stated that she knew both parties, and further that the Respondent took the Applicant as his wife and that she bore him five (5) children.
15. Pw. 4 a village elder at [particulars withheld] Village testified that knew both parties and that on the occasion when the Respondent chased away the Applicant, his father had tried to intervene.
16. The Respondent opposed the Originating summons. He also called witnesses.
17. The Respondent testified that he never cohabited/lived/stayed with the Applicant and rather that he was married to Isabella Cherono Langatand there were blessed with seven (7) issues and further that he did not have any properties in the areas mentioned.
18. Reuben Kipgнено Chepkwony was a neighbor to both parties, he further stated that he was aware that the Respondent got married to one ICL and the assertion that the Applicant FCR cohabited with the Respondent and sired five children was a falsehood.
19. EC sister -in -law to the Respondent testified that the Respondent was married to ICL and that they have seven children. She further stated that she has never met the Applicant herein.



20. Solomom Kibey Chebole testified that he was a neighbor to both parties, and that the Respondent was married to ICL and that the allegation that the Applicant cohabited with the Respondent was false and that the Applicant got children while living in her parents' home.
21. The parties filed written submissions which I have duly considered.
22. The Applicant submitted that that she and the Respondent cohabited as husband and wife at the Respondent's home in Boito from 1970 - 1990 and were blessed with five (5) children.
23. The Applicant further submitted that the Respondent forcefully and without justifiable cause chased her away from their matrimonial home and proceeded to demolish the matrimonial house which they had lived in on land parcel known as L.R. No. Kericho/Boito/XXXX which property amongst others they had acquired during the subsistence of their marriage, he subsequently remarried rendering her and her children homeless and destitute.
24. The Applicant submitted that during the subsistence of the cohabitation, they acquired several other properties, which were all registered in the name of the Respondent and are in his possession and control.
25. The Applicant submitted that she made substantial contribution to the improvement of the properties by cultivating, tilling, weeding and tending to the tea bushes on those land parcels when the Respondent was away working and she was therefore, entitled to an ascertainable interest in the properties.
26. The Applicant contended that there existed long cohabitation and acts of general repute between the Applicant and the Respondent thus resulting in a presumption of marriage and cited a myriad of cases including the celebrated cases of *Hortensiah Wanjiku Yawe v Public Trustee* (CA Civil Appeal No. 13 of 1976 (UR) & *Phylis Njoki Karanja & 2 Others v. Rosemary Mueni Karanja & Another* [2009] eKLR.
27. The Applicant contended that whereas she had presented cogent evidence that she stayed with the Respondent for over twenty years, there was no evidence placed to persuade the court of the non-existence of a long cohabitation which bore five (5) children.
28. The Applicant reiterated that the court having made a determination in favour of the presumption of marriage should also make a finding that the aforementioned properties were acquired in the subsistence of the union and were therefore matrimonial property.
29. The Applicant contended that she had beneficial interest in the property, given the fact that she had made non-monetary contribution towards the acquisition of the said properties, she was therefore entitled to half of the properties registered in the name of the Respondent.
30. The Respondents did not file written submissions.
31. I have considered the evidence adduced in this case. The issues for determination are as follows;
 - i. Whether the applicant and the Respondent should be declared married by virtue of long cohabitation.
 - ii. Whether the following properties were acquired during the subsistence of the marriage.
 - a. Five (5) Acres of Land comprising LR. No.Kericho/Boito/XXX.
 - b. Ten (10) Acres of Land at Burgei within Boito Bomet County.



c. Eighteen (18) Acres of Land comprised in Ngata in Nakuru.

32. On the issue as to whether this court should issue a declaration that the applicant was married to the Respondent, the law requires that he or she who alleges a fact must prove the same exists.
33. In the case of *Evans Otieno Nyakwana v Cleophas Bwana Ongaro* [2015] eKLR Majanja J. stated as follows;
- “...As a general proposition the legal burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmative of the issue”.
34. That is the purport of section 107 (1) of the *Evidence Act* CAP 80 Laws of Kenya, which provides as follows;
- “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist...”
35. The Applicant submitted that she cohabited with the Respondent for twenty years and therefore the court should make a determination in favor of the presumption of marriage.
36. The Respondent denied the said allegations and said he has never cohabited with the Applicant as husband and wife at his paternal home in Boito, he further said there was no marriage contracted between them under the Kipsigis Customary Law and that he bore no children with the Applicant.
37. The Supreme Court in the case of *MNK v POM; Initiative for Strategic Litigation in Africa [ISLA] [Amicus Curiae]* [Petition 9 of 2021] [2023] KESC 2 [KLR] [Family] [27 January 2023] [Judgment] laid out strict parameters within which a presumption of marriage can be made as follows;
- “
- “ (i) The parties must have lived together for a long period of time. (ii) The parties must have the legal right or capacity to marry.
- (iii)) The parties must have intended to marry.
- (iv) There must be consent by both parties.
- (v) The parties must have held themselves out to the outside world as being a married couple.
- (vi) The onus of proving the presumption is on the party who alleges it.
- (vii) The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.
- (viii) The standard of proof is on a balance of probabilities.” (Emphasis added)
38. The Supreme Court also said that the above notwithstanding, the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.
39. I find that in the current case, there is no evidence that the parties intended to marry and neither was the consent by both parties demonstrated.



40. I find that there is no evidence that supports a finding in favor of the presumption of marriage in the instant case.
41. I concur with the sentiments of Ngaah J., in *CWN v DK* [2021] eKLR who was of the view that; “as far as presumption of marriage is concerned, it is a status of relationship that turns much on evidence as much as it is a presumption of law.” (emphasis mine)
42. On the issue as to whether the properties listed in the Originating Summons were acquired during the subsistence of their union, and whether the applicant’s beneficial interests in them should be recognized in light of her contribution towards their acquisition, I find that the answer is in the negative.
43. I find that there is no basis for making a finding that the properties listed on the Originating Summons are matrimonial properties when there was no marriage in the first place.
44. The Applicant applied to the court seeking DNA tests to be conducted to prove the paternity of her five children. I find that prove of paternity is not evidence of a marriage. The fact that a man and a woman sire children does not prove existence of a marriage.
45. The evidence on paternity is relevant only in maintenance and succession cases but not in matrimonial property disputes.
46. I find that the Applicant has failed to prove that she was married to the Respondent.
47. In *MNK v POM* (supra) the Supreme Court held that increasingly owing to changes of matrimonial law, the circumstances in which the presumption of marriage could be upheld were limited. A presumption of marriage should be the exception rather than the rule.
48. The Supreme Court also held in the said case that the legislation that enabled courts to allocate or reallocate beneficial interests in the assets following a divorce did not apply to cohabiting couples.
49. It was the Applicant’s evidence that she merely cohabited with the Respondent and therefore the legislation that enables courts to allocate or reallocate beneficial interests in matrimonial properties does not apply to her.
50. I therefore find that the Originating Summons dated 09/09/2013 lacks in merit and the same is dismissed.
51. I order that each party to bear its own costs of the Originating Summons.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 16TH DAY OF FEBRUARY, 2023.

A. N. ONGERI

JUDGE

