SWM v PM & another (Civil Appeal 11 of 2017)
[2023] KEHC 20623 (KLR) (19 July 2023) (Judgment)

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REPUBLIC OF KENYA

IN THE HIGH COURT AT KERUGOYA

CIVIL APPEAL 11 OF 2017

FR OLEL, J

JULY 19, 2023

BETWEEN

SWM ..... APPELLANT

AND

PM ..... 1ST RESPONDENT

JW ..... 2ND RESPONDENT

(Being an appeal arising from the judgement of the Honourable Y. M. Barasa – Resident Magistrate delivered on 17th March, 2017 at Kerugoya CMCC NO 215 OF 2016)

JUDGMENT

Introduction

1. The suit upon which this Appeal is grounded was filed by the Appellant on December 23, 2016 and the plaint amended on January 3, 2017. The appellant sought for restraining orders against the father-in-charge Karima Catholic church and the Registrar of marriages from solemnizing the marriage between the two Respondents on grounds that there already existed another marriage between the Appellant and the 1st Respondent. The Appellant also sought a declaration by the court that the customary marriage between herself and the 1st Respondent was still in subsistence and maintenance orders be granted directing the 1st Respondent to give her monthly maintenance.

2. The Appellant had simultaneously moved the court, for interim orders vide a Notice of Notion Application dated December 22, 2016, where she sought for temporary orders of injunction to restrain the respondent's from getting married on December 31, 2016 at Kirima catholic church or at any other place as may be planned. The registrar of marriages Embu too was to be restrained from issuing a marriage certificate to the respondents until the said application was heard. The same was canvassed by oral evidence and by her ruling dated December 28, 2016 the trial magistrate did find that the said

application had merit and granted the same on condition that the applicant do file an undertaking as to damages in court.

3. In response to the suit filed, the Respondents did file a joint amended statement of Defence dated January 10, 2017 wherein they denied the existence of any customary marriage between the Appellant and the 1st Respondent and all other allegations raised in the Amended plaint. The respondents also averred that the proceedings filed were not divorce proceedings and the appellant could not claim maintenance from the 1st Respondent.

4. The matter proceeded by way of viva voce evidence and after considering the evidence called and submissions filed by both parties, the trial Magistrate in her determination dismissed the appellant's suit and held that the union between the Appellant and the 1st Respondent was disrupted by Appellant's act of desertion. There was no valid marriage between the Appellant and the 1st Respondent whether by Kikuyu customary law or through cohabitation and thus there was no basis upon which the appellant could prevent the respondent's from exercising their constitutional right of getting married. The appellant suit was thus dismissed with no orders as to costs, but she was condemned to pay the respondents a sum of Ksh.150,000/= being costs incurred for wedding preparations.

5. The Appellant, being dissatisfied by the whole judgement of the trial court appealed to this court on the following grounds;

    a. That the learned magistrate erred in law and in fact: in holding that the plaintiff did not prove a customary law marriage existed between her and the first defendant.

    b. That the learned trial magistrate erred in law and in fact In disregarding clear provisions of the law that is to say 43 (2) of the *Marriage Act, 2014*, which gave clear directions of payment of a token amount of dowry being sufficient where it is required to prove marriage under customary law.

    c. That the learned trial magistrate erred in law and in fact in holding that a Kikuyu customary law marriage is only complete after "ngurario" has been performed.

    d. That the learned trial magistrate erred in law and in fact in holding and finding that the ceremony by the name "ngurario" is actually the covenant that signifies that the two parties, that is the man and the woman have been joined together.

    e. That the learned magistrate erred in law and in fact in not finding that the long and uninterrupted cohabitation between the plaintiff and the 1st defendant amounted to a valid marriage.

    f. That the learned magistrate erred in law and in fact in that he made contradictory findings.

    g. That the learned trial magistrate erred in law and in fact in holding that the plaintiff should compensate the defendants for stopping their wedding when no evidence was adduced to prove the expenses had in fact been incurred.

    h. That the learned magistrate erred in law and in fact in not finding that the appellant had taken necessary steps to stop the wedding by going to the father in charge of the church and the registrar in Embu to have the intended marriage stopped.

    i. That the learned trial magistrate erred in law and in fact by failing to find that a valid marriage existed between the appellant and the first respondent.

Background

6. The Appellant, SWM testified as PW1. She averred that she was married to the 1st Respondent in 1992 under the Kikuyu customary law. Her evidence was that there were witnesses, including her father during the ceremony and that photographs were taken. During the visit, the 1st respondent had come with 24 crates of soda and was told to bring Ksh 5,000/= for opener. The 1st respondent paid Kshs 3,000/= for the same. Further he was told to pay Kshs 40,000/= (presumably for dowry). It was her further evidence that there was a written agreement, which she produced as Exhibit 1 and the photograph as Exhibit 2.

7. There marriage had been blessed with two children, but they separated because the 1st respondent used to beat her and eventually chased her away. She reported to the sub chief, who summoned the 1st respondent but he did not attend the sub chiefs meeting. She also sought assistance from the local priest but he told her he could not assist her. To her knowledge their marriage was never dissolved and that is why she stopped the planned wedding.

8. In cross-examination, PW1 acknowledged the birth notifications of her children shown to her in court. She stated that she was married to the 1st respondent but could not remember the date, when the ceremony was held. They had been married under the Kikuyu customary marriage and the 1st respondent had brought gifts to their home. The gifts were usually in the form of soda or Goat. The 1st respondent had brought soda's which symbolized that there was a kikuyu customary marriage and the photograph was evidence of the same, though he did not pay the Kshs 40,000/= (dowry) he was told to pay.

9. That the process of dissolving a customary marriage involved going to court. She further acknowledged that the 1st Respondent did not take the KSh. 40,000 that he had been asked to take. It was also her testimony that the 1st Respondent used to beat her, and eventually chased her away from their matrimonial home. She confirmed that she used to visit the children in school but that she never paid their school fees.

10. PW1 further testified that, when the registrar of marriage issued a notice for the intended marriage, she objected to the same and they were summoned to the registrar's office. They were given a hearing and the registrar's finding was that she did not have any valid ground of stopping the marriage, but could proceed to court if so desired. She reiterated that her reason for leaving the marriage was due to the physical assaults melted out on her by the 1st respondent and by the time she left her last born was 11 months old. She never paid school fees for the children, but visited them in school.

11. After PW1 had completed her testimony, the court tried to encourage the parties to agree so that the stopped wedding would go on, but they were unable to agree. The appellant was granted leave to amend her plaint and further proceeding took place, where she was recalled to testify further. She stated that she wanted the 1st respondent's proposed marriage to be stopped so that they can continue to stay together. she also urged the court to declare their marriage valid. The respondent had a small parcel of land, where they had cultivated and planted tea bushes. She urged the court to look into that and she be awarded a portion of the same. She also prayed to be paid maintenance for her upkeep and costs of the suit.

12. During further cross-examination PW1 confirmed that she had earlier said that they only had one cow while she resided with the 1st respondent, but now had changed her evidence, that they also had tea plantation, which she planted. The 1st respondent had used proceeds from the said tea plantation to

buy other parcels of land, but she did not have proof of the same. She had also pleaded that she be paid money for maintenance, but did not know of the procedure for seeking maintenance.

13. As regards the dowry ceremony PW1 testified that she had produced before court an agreement which was not signed between the two parties, and the writings therein were made by her late father (But had no evidence to prove the same). During the ceremony neighbours were present including the 1st respondent's mother, though she too did not sign the said dowry agreement. The photographs produced did not show other parties present during the ceremony and the 12 crates of soda was for ruracio, which to her knowledge involved going to parents of the bride and paying what you have. There had to be a slaughter of a lamb before a bride can be given. That was not done. As regards Ngurario, she did not know what the ceremony entails.

14. On the issue of maintenance, PW1 stated that the 1st respondent was still her husband. Though he had not maintained her for 25 years, she hoped that he would take her in. On re-examination, she stated that their parents were present during the Ruracio ceremony but that they did not appear in the photographs she presented to court. She also had other photograph's which she did not have before court.

15. PW2 was James Muchiri Gachoki, stated that he was a process server and a law student at Kenya school of law. He understood English and kikuyu language and confirmed that he was the one, who translated the note written (Exhibit 1). The same was written by the Appellant's father. The transaction was that there had been a meeting on February 8, 1992 at the plaintiff's father homestead. The plaintiff father had indicated that it was an agreement between him (Kihuria Migwe) and his son in law PM . The son in law had brought 12 crates of soda and Kshs 3000/= for opener. Balance was Kshs.2,000/= as he had been asked for Ksh.5,000/=. Further the 1st respondent had agreed to bring Ksh.40,000/= and other crates of soda in the cause of the year-1992. The agreement was witnessed by Kinyua Ngari, Mary, Beth Ruguro and signed of as written by me Kihuria Migwe.

16. In cross examination PW2 stated that he did not carry his academic certificate to court and had no proof that what he translated was true. He knew some of the witnesses, like Simon Wachira was his former chief, while the others were his in law. Be that as it may, there was no bias in his translation. The agreement was not signed. In his interpretation, the parties did the note/agreement then orally agreed. In re-examination the witness stated that his translation was correct.

17. Pw3 was a retired senior Assistant chief, Simon Gitari Munene Wachira, who confirmed to have known the Appellant and the 1st Respondent as husband and wife and were blessed with two children but did not know if they got married. He confirmed that sometimes in 1997, the Appellant had approached him claiming to have had a quarrel with the 1st Respondent and she had left him with the children. The appellant wanted help. He summoned the 1st Respondent to his office for a reconciliation meeting, but the 1st respondent did not attend. It was his testimony that the parties were his neighbours and that he does know of any divorce between them. As far as he was concerned, they were still husband and wife.

18. In cross examination, PW3 confirmed that he knew the parties and was from the same clan with the 1st respondent. He knew they were not living together and never saw the appellant go see her children. As far as he was concern, their marriage was valid, though he never participated in any marriage ceremony.

19. PW4 was JKR . He was an elder brother to the Appellant. He confirmed to have attended the ceremony where they drank sodas brought by PM and one Kamwira. He confirmed that the sodas were for the 1st Respondent to introduce himself. He was asked to bring Ksh.5000/= and the 1st respondent gave Ksh.3,000 for sheep and a goat. Nothing else was brought and Ngurario would later follow for a lamb to be slaughtered so as to consider the marriage sealed. It was his testimony that the Appellant and the

1st Respondent lived together as husband and wife and that they were blessed with two children but that the appellant had gone back home after a quarrel. He took her in and their differences was never resolved despite the appellant going to the chief to try and mediate upon the dispute.

20. In cross-examination, PW4 confirmed that the sodas were for introductions and that nguranio and ruracio never happened. Further it was his evidence that no agreement was written and/or if one was written, he was not present. He ended by stating that after the introduction ceremony, the 1st Respondent and the Appellant went together.

21. PW5 was EGN, a cousin to the Appellant. He further testified that he knew the 1st respondent as the appellants husband. He was 67 years old and well conversant with kikuyu traditional customary law. When the appellant and 1st respondent started their relationship, they came home and the 1st respondent was introduced. The appellants father told the 1st respondent to go and bring his father. The 1st respondent came back with his father and 12 crates of soda. He was told to bring a lamb and a goat, but gave cash instead. The 1st respondent was asked for Kshs 5,000/= but paid Kshs 3,000/=. According to PW5, that showed that they had been allowed to stay as husband and wife. After the ceremony, they went and stayed together and were blessed with two children. He had not heard that the parties had divorced.

22. In cross-examination, PW5, confirmed that the negotiations come first then dowry later. The 1st respondent was told to go and come back with Ksh.40,000/=, but he never brought it. He also confirmed that Mwai's parents were present during the negotiations ceremony but that they do not appear in the photograph produced as an Exhibit. In re-examination, he confirmed that whoever brings someone for negotiations is considered as the father. He confirmed that payment of dowry never ends and that it's an ongoing process.

23. The appellant closed her case at this point and the respondents were allowed to present their evidence. DW1, PM adopted his witness statement as his testimony and produced all documents in his list of documents as his exbibits. His evidence was that he had a love affair with the appellant which lasted for 5 years and were blessed with two children ANM (aged 23 years) and MWM (aged 20 years). The relationship ended in 1997 when the appellant deserted their home, and that by then, they had not celebrated any marriage ceremony with her. He also stated that he had not heard from the Plaintiff since her desertion until the Registrar of marriages Embu notified him about the objection, she filed to his proposed marriage to the 2nd respondent.

24. DW1 further stated that he had met the 2nd Respondent in June 1997 and that she had assisted him to raise the children with love up to their current age. He averred that they had conducted a Kikuyu customary marriage in 2000 with the 2nd Respondent and they too had been blessed with two more children. They had raised the four children without any interference or objection from the appellant, whose whereabouts he had not known. He was surprised when the appellant appeared and objected to his marriage. The Registrar of marriages at Embu had listened to the parties and held that the objection was not merited, allowing him to proceed with the wedding preparations but they were served with the court summons on 23rd December 2016 before the wedding took place.

25. In cross-examination, he confirmed that they did not have a marriage with the Appellant but had a relationship which was come-we stay. He also confirmed to have taken gifts to the Appellant's home severally, but that they never formalized the marriage. They had stopped leaving together on 24.03.1997 and did not know if his children visited the appellant. On re-examination, he stated that he used to take gifts to the appellants home but not dowry.

26. DW2 was JW, the 2nd Respondent. She also adopted her witness statement earlier filed, wherein she had stated that she had met that 1st Respondent in 1997 and that he was a single father at that time. She also stated that DW1 had informed her that the mother of the children had deserted him. After they started their relationship, they have never had any dispute or encounter with the Appellant until the objection to their wedding was filed. She expressed her displeasure with the Appellant for enjoining her to the suit without disclosing any cause of action against to her. In cross-examination, she confirmed that when she was married, she was informed of the other wife who had ran away and she had not interfered with and/or broken DW1 first marriage. She also stated that DW1 had told her that he had visited the appellant's home.

27. DW3 was ANM , the first daughter to the Appellant and the 1st Respondent. She confirmed that their mother had deserted them when she was three years old and that their father and step-mother had taken care of all their needs. She stated that she did not object to the wedding and wished that the same proceeded as planned. On cross examination, she averred that she started visiting her mother after finishing school (form 4).

28. DW4 was MWM , the second daughter to the Appellant and the 1st Respondent. She also confirmed to have been brought up by her father and the step-mother. She confirmed that she did not experience any difficulties while growing up and that she did not object to the wedding and wanted the same to proceed as planned. On cross-examination, she stated that she started visiting her mother once she was in form two, so that she could seek her forgiveness.

29. DW4 was CM , an older brother to the 1st Respondent, confirmed that he has been playing the role of a father to him since the demise of their father. It was his testimony that the Appellant had an affair with his brother for about five years and that the Appellant had deserted the 1st Respondent, leaving him with two children. He confirmed that they did not at any time celebrate or participate in any customary marriage between the Appellant and the 1st Respondent. Upon cross-examination, he stated that he resided on the same shamba with the 1st respondent and further that the appellant and the 1st respondent were just friends, who stayed together and were blessed with two children. Personally, he was never visited the appellants home.

30. The last Defence witness was Bernard Nyamu Chomba, a 69-year old Kikuyu customs expert. He explained the three steps involved in a Kikuyu customary marriage. He stated that the first stage of the process involves the man reporting himself to the girl's parents wherein he takes liquor and if welcomed, they are invited of the second visit with the man's parents. The second stage then entails the two families of the girl and the man meeting, with the family of the man taking liquor to the girl's home and if they are welcomed, they are told what to bring on the third visit. He explained that the third stage is when the man's family bring what they are requested to bring and is the ruracio ceremony. He further stated that if all the items are brought, the families can agree that the man's family does bring two sheep for slaughter, which marks the ngurario where the girl is considered to have been officially married off to the man.

31. Upon cross-examination, he confirmed that he was an expert due to experience and that he was not related to the 1st respondent. He stated that he did not know if the 1st respondent had visited the appellant's home and that dowry is not paid in one visit. He also confirmed that dowry can be converted to cash. On re-examination, he stated that 'kitu kidogo' cannot be dowry and that the most important was ngurario, which could not be converted to cash. The defence case was closed at this point.

32. The Appeal was canvassed by way of written submissions.

Appellant's submissions

33. Counsel for the Appellant filed submissions in support of the Appellant's case on January 21, 2021, and structured their submissions in three dimensions to assist the court in its determination. The first limb was on validity of Kikuyu customary marriage. On this, they submitted that the visit to the Appellant's home with sodas was not denied by the 1st Respondent hence a Kikuyu customary marriage could be inferred by the steps taken. To support this, they cited Section 43(2) of the *Marriage Act* which provides that where payment of dowry is required to prove a customary marriage, payment of a token amount of dowry shall be sufficient to prove that there was a customary marriage. It was the appellant's contention that the gifts awarded were token dowry.

34. The appellant's second limb in her submissions was that she had proved long cohabitation of five years and they were blessed with two children. This period (5 years) was long enough to infer a marriage. Further, they contended that the Appellant used to do all the work expected of a wife and even bore children with the Respondent.

35. Their third limb was on compensation for the expenses incurred on the stopped wedding. On this, the appellant did submit that the learned Magistrate erred in awarding Ksh. 150,000 as compensation since the Respondents did not produce any documentary evidence in support of expenses incurred. Further, it was their argument that items for a wedding are normally bought on the eve of the wedding and since the wedding was stopped way before the due date, it was erroneous for the learned Magistrate to award the same.

36. The appellants parting short was to support their case with a quote from the book of Dr. Eugene Cotran-*Restatement of African Law; Kenya-The Law of Marriage and Divorce* wherein it is stated;

> There cannot be valid marriage under Kikuyu Law unless part of ruracio has been paid."

37. They further cited with approval the case of Hortensia Wanjiku Yawe v Public Trustee where the court was of the view that presumption of marriage was nothing more than the general repute that the parties must be married irrespective of the nature of the marriage actually contracted. Reliance was placed on the matter of the *estate of James Njenga Kinuthia*, Succession No.148 of 2017 (Kiambu) by Justice Meoli where the above cited book and the authority were quoted.

Respondents Submissions

38. The Respondents filed their joint submissions in response to this appeal on April 14, 2021. They set out one issue for the determination by the court, on whether the learned Magistrate properly applied the law and the facts in finding that, the Appellant failed to prove her case on a balance of probability as required by law. They placed reliance on the court of Appeal case of *Eliud Maina Mwangi vs Margaret Wanjiru Gachangi* [2013)] eKLR where the court in quoting the work of Eugene Cotran, laid emphasis on the importance of the ngurario ceremony in that there cannot be a valid Kikuyu customary marriage without the slaughtering of the ngurario ram.

39. Further counsel relied on the case of *M W K versus A M K* [2017] eKLR where the court listed a number of case law providing for the elements necessary for a Kikuyu customary marriage and summarised the elements as follows;

    a. Capacity, including age, physical/mental conditions and marital status;

    b. Consent of the family of the couple, or first wife where applicable;

c. The ceremonial slaughtering of a ram in nguranio ceremony

d. Ruracio (bride price)

e. Commencement of cohabitation

In the same case, the court was keen to note that as guided in the aforementioned *Eliud Maina Mwangi* case (*supra*), customary law was not static and that it evolves with time.

40. The respondent's Counsel further cited with approval the case of Re estate of James Njenga Kinuthia where the court agreed with the view that the existence of a Kikuyu customary marriage was a matter of fact to be proved by evidence, relying on Section 107 of the *Evidence Act* which requires whoever desires the court to give judgement to any legal right or liability to prove the facts so asserted. Counsel also placed reliance on the matter of *MNM v DNMK & Others* (2017)eKLR where the court of Appeal reiterated its decision in *Gituanja Vs Gituanja* (1983) KLR 575 and in the case of *Kimani Vs Gikanga* (1965) EA 735 , where it was held that existence of a customary marriage is a matter of fact, to be proved by evidence. The onus was on the person alleging to adduce evidence showing on a balance of probabilities that the essential rites and ceremonies which validate a Kikuyu customary marriage were performed.

41. It was the Respondents' opinion that the Appellant had not proved by way of evidence any of the above cited elements save for capacity. They challenged the allegations by the Appellant, that dowry had been paid, in that it was not clear who were the participants during the alleged ceremony were, given that not everyone can take part in such negotiations. They also countered the token taken as dowry by arguing that the amount is not stated thus it cannot be assumed that the same was dowry. It was also their contention that the nguranio ceremony especially was emphasized as a mandatory requirement by J.A Makhandia, court of Appeal judge in *HNN v MN & another* [2009] eKLR & *Mwagiru Vs Mumbi* (1967) EA 639where the court held that if among other things this vital ceremony(ngurario) was not performed, there cannot be a valid Kikuyu marriage.

Analysis and Determination

42. A first appeal is a valuable right of the parties and unless restricted by law, the whole case therein is open for rehearing both on the question of fact and law. The judgment of the appellate court must therefore reflect its conscious application of mind and record the findings supported by reasons, on all issues arising along with the contentions put forth and pressed by the parties for decision of the appellate court. While reversing a finding of fact the appellate court must come into close quarters with the reasoning assigned by the trial court and then assign its own reasons for arriving at a different finding. This would satisfy the court hearing a further appeal that the appellate court had discharged the duty expected of it. See *Santosh Hazari Vs Purushottam Tiwari (Deceased)* by L.Rs (2001) 3 SCC 179.

43. In *Coghlan vs. Cumberland* (1898) 1 Ch. 704, the Court of Appeal (of England) stated as follows -

> " Even where, as in this case, the appeal turns on a question of fact, the Court of Appeal has to bear in mind that its duty is to rehear the case, and the court must reconsider the materials before the judge with such other materials as it may have decided to admit. The court must then make up its own mind, not disregarding the judgment appealed from, but carefully weighing and considering it; and not shrinking from overruling it if on full consideration the court comes to the conclusion that the judgment is wrong...When the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of Appeal always is, and must be, guided by the impression made on the judge who saw the witnesses. But there may obviously be other circumstances, quite

apart from manner and demeanour, which may show whether a statement is credible or not; and these circumstances may warrant the court in differing from the judge, even on a question of fact turning on the credibility of witnesses whom the court has not seen."

44. The Court also in *Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates* [2013] e KLR as;

> " ...we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way..."

45. The issues that this court deems key for its determination in this appeal are three-fold;

a. Whether the learned Magistrate erred in law and in fact by finding that the Appellant and the 1st Respondent were not married under a Kikuyu customary marriage.

b. Whether the learned Magistrate erred in law and in fact by finding that presumption of marriage cannot apply between the 1st Respondent and the Appellant.

c. Whether the learned Magistrate rightfully condemned the Appellant to pay compensation to the Respondents of Kenya shillings One hundred and fifty, thousand Only(Ksh 150,000/=).

Whether the learned Magistrate erred in law and in fact by finding that the Appellant and the 1st Respondent were not married under a Kikuyu customary marriage

46. Section 107(1) of the *Evidence Act* provides that;

> " 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."

Section 108 of the *Evidence Act* further provides that ;

> " The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given by the other side."

47. I also refer to The *Halsbury's laws of England*, 4th Edition, Volume 17 at para 13 and 14 where it states that;

> " The legal burden is the burden of proof which remains constant through a trial; it is the burden of establishing the facts and contentions which will support the parties case. If at the conclusion of the trial he has failed to establish these to the appropriate standard, he will lose. The legal burden of proof normally rests upon the party desiring the court to take action; thus a claimant must satisfy the court or tribunal that the conditions which entitle him to an award have been satisfied in respect of a particular allegation, the burden lies upon the party for whom substantiation of that particular allegation is essential to his case. There may therefore be separate burdens in a case with separate issues.
>
> {16} The legal burden is discharged by way of evidence, with the opposing party having a corresponding duty of adducing evidence in rebuttal. This constitutions evidential burden. Therefore, while both legal and evidential burden initially rests upon the appellant, the evidential burden may shift in the course of trial depending on the evidence adduced. As to

weight of evidence given, by either side during the trial varies; so will the evidential burden shift to the party who would fail without further evidence."

48. In the case of *Evans Nyakwana Vs Cleophas Rwana ongaro* (2015) eKLR it was held that;

> "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. That is the purpose of section 107(i) of the *Evidence Act*, Chapter 80 laws of Kenya. Furthermore, the evidential burden..... is cast upon any party, the burden of proving any particular fact which he desired the court to believe in its existence. That is captured in section 109 and 112 of the law that proof of that fact shall lie on any particular person..... The appellant discharged that burden and as section 108 of the *Evidence Act* provides the burden lies in that person who would fail if no evidence at all were given as either side."

49. The general accepted facts in this appeal was that the Appellant and the 1st respondent at one point between the period 1992 to 1997 resided together (as friends and/or man and wife) and were blessed with two children ANM and Milllicent Wangui Mwai. In 2007, they parted ways and the 1st respondent married the 2nd Respondent, with whom they were also blessed with two more children. It was the respondents who took care of the children of the appellant until they became of Age.

50. While still co habiting the 1st respondent admitted that he visited the Appellant's home several times and took gifts, but was categorical that he never contracted a traditional kikuyu customary marriage with the Appellant. On the other hand, the Appellant was categorical that the 1st respondent visited her home with his parents and brought 12 crates of soda. He was asked to pay Ksh.5,000/= for introduction out of which he paid Ksh.3,000/=. Further dowry was negotiated and the 1st respondent agreed to pay Ksh.40,000/=. But this amount was never paid by the time the couple parted ways. The appellant produced a written agreement to prove the same, but which agreement was not signed by the parties.

51. It was the appellants contention, that despite not staying together for 25 years, she was still the 1st respondent's wife, and was entitled to maintenance and therefore rightfully stopped the 1st respondent's proposed Christian marriage ceremony to the 2nd respondent. On the other hand, the 1st respondent was clear that the appellant was his friend and he never performed Kikuyu traditional marriage ceremony with her. She was thus not justified in stopping his Christian wedding ceremony with the 2nd respondent, with whom he had also contracted a traditional marriage with in the year 2000. The marriage registrar had also after hearing both parties formed the opinion that the appellant did not have any valid grounds to stop his proposed wedding.

52. On what qualifies as a valid Kikuyu customary marriage, this court stands guided by the approved and scholarly works of Eugene Cotran's "*Casebook on Kenya Customary Law*" at page 30 sets out the essentials of a Kikuyu Customary marriage. These are stipulated as;

    1. Capacity; the parties must have capacity to marry and also the capacity to marry each other.
    2. Consent; the parties to the marriage and their respective families must consent to the union
    3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.
    4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid.

5. Commencement of cohabitation; the moment at which a man and a woman legally become husband and wife is when the man and woman commence cohabitation i.e. under the capture procedure when the marriage is consummated after the eight days' seclusion, and nowadays when the bride comes to the bride grooms home".

53. Further, as described by Jomo Kenyatta's *Facing Mount Kenya*, Heinemann Books, 1988, Chapter VII, ngoima ya ngurario is a rather elaborate ceremony involving the slaughter, roasting and sharing of particular parts of the ram between specific members of the two families.

54. Whatever system of marriage the appellant alleged, it was incumbent upon her to prove it on a balance of probabilities. In *Gituanja v Gituanja* (1983) KLR 575, the Court of Appeal held that the existence of a customary marriage is a matter of fact which must be proved with evidence. In that case, the Court found that the evidence adduced had proved a valid marriage under Kikuyu customary law as was evidenced by the slaughter of the "ngurario".

55. Our case law and various writings evidencing Kikuyu customary law have established some of the elements necessary to prove a valid marriage under Kikuyu Customary Law. Cases which have judicially enumerated the essentials of a valid marriage under Kikuyu Customary Law include: *Eliud Maina Mwangi v Margaret Wanjiru Gachangi* [2013] eKLR – a decision by the Court of Appeal as well as two High Court Cases cited to me by the Respondent's lawyer to wit *In the Matter of the Estate of Karanja Kigo* [2015 eKLR and Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo [2004] eKLR.

56. However, in the *Eliud Maina Mwang*i Case, the Court of Appeal reminded us that customary law evolves with time. The Court stated thus:

> " Customary law is certainly not static. Like all other human inventions, it is dynamic and keeps evolving from generation to generation. Customary ceremonies cannot therefore be expected to be conducted in 2013 in exactly the same way that they were conducted in, say, 1930. To insist on rigid customary ceremonies at all times is the surest way of rendering customary law obsolete. For example, essential steps like payment of dowry may be satisfied by payment of the monetary equivalent of such items as goats and cows instead of delivery to the prospective in-laws every item in kind, such as beer, honey, live goats and cows. The bottom line appears to be that the essential steps and ceremonies must be performed, irrespective of the form in which they are performed."

57. The court of Appeal in Nairobi in *Eva Naima Kaaka & another v Tabitha Waithera Mararo* [2018] eKLR was of a similar view, that the ngurario ceremony was key for a Kikuyu customary marriage. The three-judge bench stated as follows;

> For instance, the ngurario is an integral part of the ceremony that signifies the existence of a Kikuyu customary marriage. But our re-evaluation of the evidence, does not point to a ngurario having taken place. This is because a fundamental component of a ngurario is the slaughtering of a ram or goat.'

58. From the evidence adduced before the trial court, it is clear that, though the appellant and the 1st respondent did have an introduction ceremony (ruracio,), their union was not formalized as envisaged under kikuyu customary law by payment of dowry and slaughter a ram or goat. The "ngurario" ceremony never took place and thus I do find and hold that the trial magistrate did not err in so holding and her finding that there was no kikuyu customary marriage between the appellant and the 1st respondent was correct.

Whether the learned Magistrate erred in law and in fact by finding that presumption of marriage cannot apply between the 1st Respondent and the Appellant?

59. The appellant in ground five of the grounds of appeal faulted the trial magistrate for not finding that the long and uninterrupted cohabitation between the appellant and the 1st respondent amounted to a valid marriage.

60. In *Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja & another* [2009] eKLR, the court of Appeal in held that the presumption of marriage could be drawn from two conjoined factors, namely, long cohabitation and acts of general repute. It stated 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."

61. In *Mary Njoki vs John Kinyanjui Mutheru* [1985] eKLR, Njarangi JA underscored factors that would rebut a presumption of marriage when he stated that;

> "...The fact that the appellant and the deceased together visited the deceased father's home or that she attended the funeral of the deceased's father is not material. The appellant was a friend of the deceased and she accompanied him to the funeral in that capacity. That is how friends treat one another. And on account of the cohabitation the appellant could not help meeting and knowing and even assisting the relatives of the deceased including the respondents. The appellant's own evidence proved that there had been no meeting between her family members and those of the deceased, and that there had been no marriage ceremony of any kind or form and that there was no meeting of mind between the father and the deceased and the appellant's father. This evidence and that of the respondents clearly proves that the appellant could not be presumed to be married, that was the cogent evidence that an essential element required for a valid Kikuyu marriage had not been satisfied. The effect of all this is to rebut a presumption of marriage".

62. This position was also stated in*Hortensia Wanjiku Yawe v The Public Trustees*, Civil Appeal 13 of August 6, 1976. Mustafa J who 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 this issue, the trial judge omitted to take into consideration a very important factor, long cohabitation as man and wife gives rise to a presumption of a marriage in favour of appellant. Only cogent evidence to the contrary can rebut such a presumption.....i can find nothing in the restatement of African law to suggest that kikuyu customary law is opposed to the concept of presumption of marriage arising from long cohabitation..... it is a concept which is beneficial to the institution of marriage to the status of the parties involved and to the issue of their union and in my view is applicable to all marriage's and howsoever celebrated."

63. Having re-evaluated the evidence on record, this court is of the view that even if the court would be gracious to the Appellant and presume a marriage between the parties, the learned Magistrates' view that the act of desertion by the Appellant for over twenty-five years nullifies any possible existence of a marriage between the parties still holds true. Effluxion of such a long time is equally sufficient to rebut any presumption of the parties ever intending to exist in marriage together.

c. Whether the learned Magistrate rightfully condemned the Appellant to pay compensation to the Respondents.

64. The final issue for determination before court was raised by the appellant on ground 7 and 8 of the grounds of appeal. The appellant submitted that it was wrong for the trial magistrate to order her to pay damages to the tune of Kshs 150,000/=, when the respondents did not produce any receipt to support the said expense. While it is ordinarily true that special damages must be pleaded and specifically proved, in the primary case, as a condition for granting the injunction, the appellant was told to provide a personal undertaking of Ksh.150,000/= as a condition of stopping the marriage until the case was finalized. The undertaking was filed in court on December 29, 2016 and therein she undertook to pay the said sum should the case not succeed.

65. It is obvious by a long shot, that the appellant case was week. After she initially testified, the trial court gave her a chance to reconsider her case and reach a compromise with the 1st respondent, but she spurned the said chance. The consequence of the same is that she has to fulfil and pay the amount she undertook to pay for her action resulted in the respondents suffering financial loss and damage attendant to organising a wedding, which was stopped by court at the appellants instant.

Disposition

66. Without doubt, this appeal was absolutely devoid of merit and ought not to have been filed in the first instance. The same should have been dismissed with full costs. But considering the background of this appeal I urge the respondents (who undoubtedly are Christian's), to forgive the appellant for disrupting their wedding. As stated in the Good book at Colossians 3:13

> "Bear with each other and forgive one another if any of you has a grievance against someone. Forgive as the lord forgave you."

Her mission was ill-fated but was blindly driven by past embers of love and/or selfish interest, which blocked her vision.

67. Each party therefore will bear their own costs of this appeal.

68. It is so ordered.

JUDGEMENT WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 19TH DAY OF JULY, 2023.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the virtual platform, Teams this 19th day of July, 2023.

In the presence of;

.....for Appellant

.....for Respondent

.....Court Assistant