



**EGK v JMM (Matrimonial Cause 7 of 2020)
[2023] KEHC 23847 (KLR) (17 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23847 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT EMBU
MATRIMONIAL CAUSE 7 OF 2020
LM NJUGUNA, J
OCTOBER 17, 2023**

BETWEEN

EGK PETITIONER

AND

JMM APPLICANT

RULING

1. The applicant filed the notice of motion dated 24th March 2023 seeking orders that:
 - a. This honourable court be pleased to strike out/dismiss the suit with costs for lack of jurisdiction;
 - b. The costs of this application be borne by the petitioner.
2. The application is premised on the grounds on its face and in the supporting affidavit thereof. The applicant avers that the cause is improperly before this court as there is no valid marriage between himself and the petitioner and that he is in fact married to a different person. He produced a copy of the marriage certificate as evidence that he is married to one Pennina Kirugu. He termed the suit as the petitioner’s bid to reap his hard-earned money through the backdoor and urged the court not to entertain it any further.
3. The application is unopposed.
4. The court directed that the parties file their written submissions but none of them complied.
5. The issue for determination is whether the suit is properly before this court in the absence of proof of marriage between the applicant and the petitioner.
6. In her petition, the petitioner alleges that she was married to the applicant under Kiambu Customary Laws in September 2016 and they began cohabiting as husband and wife. At this point, it is important



to note that the Marriage Act No. 4 of 2014 commenced on 20th May 2014. This law did away with the presumption of marriage and required that all marriages, including those conducted under customary law, be registered. In the present case, the parties ought to have registered their alleged marriage under Part V of the Marriage Act No. 4 of 2014 but the court cannot at this stage make a conclusive finding on whether parties were married or not.

7. The applicant has produced a copy of a marriage certificate serial number 429166 as proof of his marriage to one PN. A certificate of marriage is bona fide proof of marriage under the Kenyan laws. Ideally, without proof of marriage through a certificate of marriage, the court should find that the parties herein were not legally married and cannot be presumed so. However, the matter should be subjected to the trial for the respondent to prove her allegations.

8. I have noted that the copy of certificate of marriage that is annexed to the application is dated 24th July 2020 and states that the parties were married under customary law. The respondent herein claims to have been married to the applicant in 2016. It seems to me that they conducted a customary marriage in 2016, before the applicant took out a marriage certificate with his current wife. A marriage under Customary law is presumed to be potentially polygamous as provided for under section 6 of the Marriage Act as follows:

“A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.”

9. The parties to a marriage may convert the form of a marriage from one to another in light of section 8(1) and (2) of the Marriage Act but this may be done only between the parties to the existing marriage and by consent. These provision states thus:

- (1) A marriage may be converted from being a potentially polygamous marriage to a monogamous marriage if each spouse voluntarily declares the intent to make such a conversion.
- (2) A polygamous marriage may not be converted to a monogamous marriage unless at the time of the conversion the husband has only one wife.

10. That is to say that if the applicant and respondent would have agreed to convert their marriage from customary to any other law that does not presume potential polygamy, then the applicant would have been barred from getting into a second marriage under customary law under section 9 of the Marriage Act. In this case, the applicant proceeded to marry his current wife under customary law and then procure a marriage certificate. The fact that the respondent has not annexed a marriage certificate does not mean that she was not married to the applicant. In any event, the onus is on the respondent to prove that she was married to the applicant and such can only be done at trial.

11. The applicant herein has asked this court to strike out or dismiss the suit for lack of jurisdiction. Striking out of a suit is not a trivial matter and the court will not hurriedly engage in such unless in exceptional circumstances. Each party has the constitutional right to be heard in court. In the case of *Co-Operative Merchant Bank Ltd. Vs George Fredrick Wekesa* (Civil Appeal No. 54 of 1999) the Court of Appeal stated:

“Striking out a pleading is a draconian act, which may only be resorted to, in plain cases...Whether or not a case is plain is a matter of fact...Since oral evidence would be necessary to disprove what either of the parties says, the appellant’s defence cannot be said to present a plain case of a frivolous, scandalous, vexatious defence, or one likely to prejudice,



embarrass or delay the expeditious disposal of the respondent’s action or which is otherwise an abuse of the process of the court.”

12. Similarly, in the case of *Yaya Towers Limited Vs Trade Bank Limited (In Liquidation)* (Civil Appeal No. 35 of 2000) the Court of Appeal held the same view and stated thus:

“A plaintiff (defendant) is entitled to pursue a claim in our courts however implausible and however improbable his chances of success. Unless the defendant (plaintiff) can demonstrate shortly and conclusively that the plaintiff’s claim is bound to fail or is otherwise objectionable as an abuse of the process of the Court, it must be allowed to proceed to trial...It cannot be doubted that the Court has inherent jurisdiction to dismiss that, which is an abuse of the process of the Court. It is a jurisdiction, which ought to be sparingly exercised and only in exceptional cases, and its exercise would not be justified merely because the story told in the pleadings was highly improbable, and one, which was difficult to believe, could be proved.”

13. Without further ado, I find that the application is devoid of merit and is hereby dismissed with costs to the respondent.

14. It is so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 17TH DAY OF OCTOBER, 2023.

L. NJUGUNA

JUDGE

.....for the Petitioner

.....for the Applicant

