CWN v DK (Civil Suit 17 of 2017) [2021] KEHC 12535 (KLR) (9 April 2021) (Judgment)

Neutral citation: [2021] KEHC 12535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT 17 OF 2017

J NGAAH, J

APRIL 9, 2021

FORMERLY NYERI ELC NO.35 OF 2017

BETWEEN

CWN ..... PLAINTIFF

AND

DK ..... DEFENDANT

JUDGMENT

1. Introduction:

1. This case concerns a dispute over property known as Title No. Aguthi/Gatitu/xxxx ("the suit property") which the plaintiff wants this Honorable Court to declare a matrimonial property. The property is registered in the name of the defendant and perhaps because of the declaration sought on the suit property's legal status, in particular, its ownership, this suit was initially filed in the Environment and Land Court before it was eventually transferred to this court.

2. No doubt, the transfer of the suit to this Honourable Court was informed by the inescapable acknowledgment that a declaration of whether any property is a matrimonial property is informed by the answer to the question whether those contending for its ownership were or are married in the first place. Put differently, the issue of marriage turns out to be the predicate question whose resolution should automatically resolve the question whether the plaintiff has any proprietary rights over the property as a consequence of her relationship, if any, to the defendant.

2. Pleadings, parties' cases:

3. In her plaint amended on 18 December 2017 and filed on 19 December 2017, the plaintiff averred that she married the defendant in the year 2012 and that their marriage was solemnised under Kikuyu customary law. They lived at different places in Nyeri town before they moved to the suit property, on the outskirts of Nyeri town. The property was purchased in 2011 and registered in the defendant's

name. It is mortgaged to National Bank of Kenya and as at the time of the hearing of this suit, the defendant was still servicing the loan which he obtained from the bank to purchase the property.

4. It is also the plaintiff's case that her marriage to the defendant was blessed with one issue who was born in the year 2013.

5. In 2015, the defendant is alleged to have left the matrimonial home after the plaintiff's relationship with him soured to the extent that they could not continue living together. The plaintiff contends that the defendant moved in with another woman whom she identified as one PW.

6. Since his departure, the defendant has persistently harassed the plaintiff with the sole purpose of driving her out of the matrimonial home which, by virtue of their relationship, the plaintiff regards as her legal and lawful home.

7. She has enumerated several instances in her plaint when the defendant is said to have harassed her and, on one occasion, made a threat on her life. Fearing for her life, she has on two separate occasions reported the defendant's conduct to the police.

8. It is against this background that she has sued and asked for a raft of declarations, amongst other prayers. At this juncture, I can do no better than reproduce them as they appear in the plaint. They have been framed as follows:

> "a. A declaration that there is presumption of marriage as the plaintiff and the defendant were married in 2010 and cohabited together since then.
>
> b. A declaration that the property on Land Title Number Aguthi/Gatitu/4129 situate in Nyeri is the matrimonial home of the parties within the meaning of the *Matrimonial Property Act*, 2013.
>
> c. A declaration that the property on Land Title Number Aguthi/Gatitu/4129, household goods and effects thereon are the matrimonial property of the plaintiff and the defendant within the meaning of the *Matrimonial Property Act*, 2013.
>
> d. A declaration that the threatened eviction of the plaintiff by the defendant from the matrimonial property situate in Nyeri Aguthi/Gatitu/4129 is unlawful and void within the meaning of the *Matrimonial Property Act*, 2013.
>
> e. An injunction against the defendant, his authorized servant and/or agents deterring the defendant from intimidating and/or threatening harassing the plaintiff in any manner or at all.
>
> f. A declaration that the plaintiff is legally and lawfully entitled to live in the matrimonial home peacefully and quietly.
>
> g. General damages for loss and suffering experienced in the hands of the defendant.
>
> h. Costs of the suit.
>
> i. Any other relief that may deem fit for the court to grant."

9. The defendant has denied the plaintiff's claim and filed a statement of defence to that effect. In particular, he has denied that he is the plaintiff's husband or that the suit property is a matrimonial property. The plaintiff, according to him, has only been a licencee in the property and her occupation

has been determined by effluxion of time. Being the sole proprietor of the property, the defendant has contended, he reserves all the rights of ownership including the right to access and possess the property.

10. At the hearing of her case, the plaintiff testified that she had been living with the defendant since 2010, more particularly at Majengo, [Partculars withheld] Quarters and ultimately at Thuguma where the suit property is located. She testified that she was instrumental in getting this property because she introduced the seller to the defendant. After acquisition of the property, she renovated it and fenced it also. It was initially leased to a tenant but he left in 2013 when the plaintiff and the defendant moved in. However, the defendant left in March 2015. Later in her testimony, the plaintiff changed to say that the defendant left in October 2015.

11. The plaintiff also testified that although she got married to the defendant in 2010, it is only in 2012 that they informed their respective parents of the marriage. To demonstrate that indeed the defendant was her husband, the plaintiff testified that he attended the plaintiff's uncle's funeral and when their child was due for delivery, he assumed the responsibility of taking her to the hospital and also consented to her surgery.

12. In answer to questions during cross-examination, the plaintiff testified that she met the defendant much earlier, in 2006, in a church at Nyamachake, in Nyeri, where they were both members. They lived in different places but in the same neighbourhood. The defendant lived in [Particulars withheld] while the plaintiff lived at [Particulars withheld] estate.

13. The plaintiff changed her testimony to say that she moved in with the defendant in 2006 and together they moved to the [Particulars withheld] Quarters in March 2011. She could not, however, tell who the owners of the houses in which they lived were.

14. She understood their marriage to have been formalised in 2012 when their parents were informed that they living together as husband and wife. The defendant was introduced to the family on 17 June 2012 when he visited her relatives together with his friend whom she identified as one Maina Hadad. She, however, admitted that apart from this visit no other step was taken towards formalising the marriage.

15. While still on this particular meeting of 17 June 2012, the plaintiff testified that, in fact, she together with the defendant drove to Hadad's house on the material day. The house was at Mathari Mission Hospital where Hadad worked. They left in the defendant's vehicle to the plaintiff's grandmother's home at Ihururu. After sitting at their grandmother's home for about two hours or so, they left and went back to [Particulars withheld] Quarters where they used to live.

16. The plaintiff's uncle, FK (PW2), testified that he recorded the proceedings of the meeting of 17 June 2012 when the defendant visited the plaintiff's home. Though he testified that he was aged 68 and that he himself married under the Kikuyu customary law, he had no knowledge of what 'ngurario' entailed. He confirmed that the defendant visited the plaintiff's home on 17 June 2012. He came with a friend and stayed for less than two hours. He had been informed of this meeting by the plaintiff's mother. The defendant never gave the plaintiff's family any gift; neither did he ever come back.

17. The plaintiff's mother ANM (PW3) testified that she lived at [Particulars withheld] Quarters and that she had been living there since 2001. She testified that she had been living with the plaintiff but that the plaintiff left in 2010 and went to live with the defendant in 2010. It is the plaintiff who told her that she was living with the defendant. She also testified that the plaintiff and the defendant moved to Thuguma in 2013 but that the defendant came back to live at [Particulars withheld] Quarters. She was also aware of the meeting of 17 June 2012 when her daughter, the defendant and one Maina visited the plaintiff's grandmother's home. She, however, admitted that there has never been any meeting between the defendant's and the plaintiff's respective parents.

18. The other person who testified as having been in this meeting was DGN (PW6); he stated that the plaintiff's mother is his cousin. He denied having met the defendant either before or after the meeting of 17 June 2012. It was his evidence that on this particular date, the defendant and the plaintiff only came to report that they were living together.

19. Mary Nyambura (PW4) testified that she knew both the plaintiff and her mother as she attended the same church with them. As far as the defendant is concerned, she only saw him during what she called 'district prayers' meeting at Thuguma in 2010. It was her evidence that both the plaintiff and the defendant were living at Thuguma, apparently in the suit property, in 2010.

20. David Muchemi Waweru (PW5) testified that he met the defendant at his house when he went there for a fellowship on 14 June 2016. The defendant, according to his evidence, was a member of a fellowship group comprising forty households but that he had never seen him in any other fellowship meetings. As a matter of fact, he met him for the first time at his house at Thuguma when he and other members of the fellowship group went there in 2016.

21. The plaintiff's final witness was Peninah Wangechi (PW7) who stated that that she knew the plaintiff not only as her neighbour at Thuguma but the plaintiff's mother was also her friend. She also came to know the defendant in 2013. It was her testimony that the plaintiff went to live in Thuguma in 2013. She knew the plaintiff as the occupier of the house at Thuguma. Although she testified that the defendant lived in the same house, she stated that she only saw him there in 2013.

22. On his part, the defendant testified that he came to Nyeri in 2006. Prior to this, he had been living in Eldoret. Initially he lived in a single-roomed house next to the Nyeri Provincial General Hospital until March 2011 when he moved to a different house but close to where he had been living. In 2016, he moved to a two-bedroomed house but in the same compound as his previous residence. He was staying alone for all this while. He produced either lease agreements or receipts for payment of rent showing that he had been a tenant in Nyeri town all along. On 28 July 2012, he married PWK. He produced birth certificates of his children with W. According to these certificate their children were respectively born on 13 December 2012 and 10 February 2015.

23. He denied that the plaintiff was his wife or that he ever lived with her at Thuguma or at any other place.

24. It was his evidence that the plaintiff went to his house, alone, on 28 November 2013 when it was being renovated. The defendant was then out of town when one of his workers called him and told him that the plaintiff had arrived with her belongings in a pick-up. The plaintiff told him that she had not found any other house to settle in and that was why she had resorted to occupying the defendant's house. He allowed her in the house on the understanding that she would leave in February 2014. She did not leave in February 2014 but asked for four more months to leave. Even after the expiry of this time, she still refused to leave. In 2016 she wrote to the defendant through her advocates saying that she was willing to move but only on certain conditions.

25. The defendant admitted that he had been in a romantic relationship with the plaintiff between 2007 and 2008 but that he never lived with her. He also admitted that a child was born between them on 6 December 2013. The child was conceived in February 2013 when he spent the night at the plaintiff's house where he had gone to collect some money that the plaintiff owed him. He also admitted catering for the hospital expenses when the plaintiff went for delivery at Tumutumu hospital.

26. On the meeting of 17 June 2012, the defendant testified that he had gone to Mathari hospital when he met the plaintiff there. She invited him and his friend to her place. They went there but did not spent more than twenty minutes at her home. He testified that the correct date was either 1 June 2012 or 2

June 2012 and not 17 June 2012. It was his evidence that there was no ceremony of any sort that was conducted on this particular day.

28. He admitted having given money to the plaintiff in 2013, 2016 and 2017 but that this money was only meant for the maintenance and upkeep of his daughter.

29. He concluded his testimony by stating that he has filed a suit against the defendant in Environment and Land Court being Nyeri ELCC No. 154 of 2014 where he is seeking eviction of the plaintiff from his house and also mesne profits.

3. Submissions:

30. In the submissions filed on the plaintiff's behalf, Ms. Gathaara, the learned counsel for the plaintiff urged that marriage between the plaintiff and the defendant should be presumed based on the principle of presumption of marriage. In this regard she relied on this court's decision in Civil Case No. 14 of 2004, BN vs LNK and the Court of Appeal's decision in Civil Appeal No. 343 of 2017, POM Vs. MNK alias MNP where presumption of marriage has been upheld. I did not get my hand on any of these decisions; they were not filed in court and as their citations would suggest, they were redacted and are, apparently, unreported.

31. Again, the Court of Appeal decision in Mary Njoki vs John Kinyanjui, Civil appeal No. 71 of 1984 was cited for the proposition that qualitative and the quantitative elements are the determinate points upon which proof of such presumption by cohabitation is grounded. Quantitative would involve such consequential factors as the amount of time of cohabitation, the acquisition of property or even joint borrowing or payment of loan and the number of children borne out of such cohabitation. Qualitative, on the other hand, would include such factors as parties leading a happy life together, or were even being regarded as man and wife by the members of the society. These two elements make a strong basis for proof of presumption of marriage.

32. Counsel also cited Phylis Njoki Karanja & 2 Others vs. Rosemary Mueni Karanja & Another (2009) eKLR where it was held that marriage could be inferred from long cohabitation and acts of general repute. Other cases cited on the same point are PKA vs MSA (2014) eKLR and Hortensiah Wanjiku Yawe vs Public Trustees, No. 13 of 1976.

33. The learned counsel for the plaintiff also asked this court to find that there was a customary marriage between her client and the defendant. She submitted that although all the formalities of the Kikuyu customary marriage were not concluded, that does not preclude the court from finding that the parties had been in cohabitation for six years. On this point, counsel relied on the decision in MWK vs. AMW (2017) eKLR.

34. On the status of the suit property, counsel urged that under section 2 of *Matrimonial Property Act*, 2013, the suit property is a matrimonial property and according to section 14 of the same Act, the property having been acquired in the course of the marriage is assumed to have been registered in the name of the defendant in trust for the plaintiff.

35. In response to the plaintiff's submissions, Mr. Nderi, the learned counsel for the defendant submitted that the plaintiff was not certain whether her alleged marriage to the defendant was marriage by cohabitation and repute or whether it was a customary marriage, solemnised under the Kikuyu customary law. If it was the latter, counsel submitted that it was not proved that the essentials of a Kikuyu customary law marriage had been undertaken. In this regard, counsel relied on the decision of Nyamu, J.A. (as he then was) in Mary Wanjiru Githatu vs Esther Wanjiru Kiarie, in Civil Appeal No. 20 of 2009.

36. As far as cohabitation is concerned, counsel urged that this principle applies in only succession causes and it is unheard of that it is applied in cases where both spouses are alive.

4. Analysis, determination:

37. Two major questions arise in this suit: the first question is whether the plaintiff and the defendant were married and the second one is whether the suit property is a matrimonial property. They are, in a way related, to the extent that the plaintiff's case is that she was not only married to the defendant but that they both dwelt in this property in their capacity as a married couple and, for this reason, she wants the court to declare the property a matrimonial property.

38. The link between marriage and matrimonial property is certainly section 6(1)(a) as read with section 2 of the *Matrimonial Property Act*, 2013. According to section 6(1)(a) 'matrimonial property' means, inter alia, matrimonial home or homes; a 'matrimonial home' is itself defined in section 2 of this Act to mean 'any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property.' In the same section, a spouse is defined to mean 'a husband or a wife'.

39. Thus, one cannot talk about a matrimonial property without reference to a marriage. Logically, therefore, if the court was to find that the plaintiff was married to the defendant irrespective of whether the marriage was solemnised under the Kikuyu customs or was a marriage by presumption, then the next question for determination would be whether the suit property should be declared a matrimonial property. Conversely, this latter question would be moot if the court was to find that there was no marriage of any sort between the disputants.

40. The plaintiff's approach to the first question of her alleged marriage to the defendant is two-pronged; on the one hand, she posits that her marriage was solemnised under Kikuyu customs though she admits that these customs were never concluded. On the other hand, she puts forth the argument that having cohabited with the defendant for some time, a presumption of marriage between her and the defendant ought to be inferred.

41. The question of whether the plaintiff was married to the applicant in accordance with the Agikuyu customs can be disposed of relatively easily. By her own admission, the plaintiff has stated that nothing more happened apart from the defendant meeting her relatives once. In any event, doubts were raised whether the meeting qualified as one of those meetings that would be considered or recognised as mandatory or necessary towards arrangement and conclusion of marriage rites under Kikuyu customs. My own assessment of that meeting was that it was a casual meeting and as far as Kikuyu customs are concerned, it was inconsequential. No evidence was led to the contrary view.

42. But even assuming that the necessary customary rites were performed to the extent that the plaintiff would consider herself as having been married under these customs, the applicant is caught out by section 96(2) and (3) of the *Marriage Act*, 2014 which require that customary marriages contracted before the commencement of the Act to be registered within three years of the date of commencement of the Act; that section reads as follows:

> 96
>
> (1) ...
>
> (2) Parties to a marriage contracted under customary law, the Hindu Marriage and Divorce Act (Cap. 157) (now repealed) or the Islamic Marriage and Divorce Registration Act (now repealed) before commencement of this Act, which is not registered shall apply

to the Registrar or County Registrar to assistant Registrar for the registration of that marriage under this Act within three years of the coming to force of this Act.

(3) The parties to a customary marriage shall register such a marriage within three years of the coming to force of this Act.

(4) ...

43. The commencement date of this Act is indicated in the Act itself to be 20 May 2014. As at the time the plaintiff testified on 8 May 2018, there was no evidence that the alleged marriage had been registered in accordance with this Act. Section 96 (4) provides that the Cabinet Secretary may extend the registration period by notice in the Gazette. However, if there was such an extension, no evidence was provided that the plaintiff was still within time to register the marriage.

44. If the marriage had been registered in accordance with the Act, the plaintiff and, of course, the defendant, would have been issued with a certificate under section 55(1) thereof and, according to section 59 of this Act, this certificate would have been conclusive proof that indeed the plaintiff and the defendant are married under customary law. As far as they are relevant to this judgment, the pertinent parts of this section provide as follows:

59. Evidence of marriage

(1) A marriage may be proven in Kenya by—

(a) a certificate of marriage issued under this Act or any other written law;

(b) a certified copy of a certificate of marriage issued under this Act or any other written law;

(c) ... an entry in a register of marriages maintained under this Act or any other written law;

(d) a certified copy of an entry in a register of marriages maintained under this Act or any other written law; or

(e) ...

45. In the absence of proof of a customary marriage through any of the means prescribed in this section, the plaintiff's claim that she was married to the defendant under Kikuyu customary law is wanting both in fact and in law.

46. 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. According to Halsbury's Laws of England/MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72 (2009) 5TH EDITION, PARA 6, where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place. It is ordinarily referred to as 'common law marriage' though this characterization is a misnomer. It is a misnomer because in English law it is not a term that connotes marriage as known in law but it is used to refer to unmarried, cohabiting heterosexual couples. It is a term that does not confer on cohabiting parties any of the rights or obligations enjoyed by spouses or civil partners.

47. In Scotland, it was until recently considered an 'irregular marriage' created by cohabitation. The Family Law (Scotland) Act, 2006 which is the law that now regulates marriages in Scotland has abolished it altogether; Section 3 of that Act states as follows:

1. Abolition of marriage by cohabitation with habit and repute

(1) The rule of law by which marriage may be constituted by cohabitation with habit and repute shall cease to have effect.

(2) Nothing in subsection (1) shall affect the application of the rule in relation to cohabitation with habit and repute where the cohabitation with habit and repute-

(a) ended before the commencement of this section ("commencement");

(b) began before, but ended after, commencement; or

(c) began before, and continues after, commencement.

(3) Nothing in subsection (1) shall affect the application of the rule in relation to cohabitation with habit and repute where-

(a) the cohabitation with habit and repute began after commencement; and

(b) the conditions in subsection (4) are met.

(4) Those conditions are-

(a) that the cohabitation with habit and repute was between two persons, one of whom, ("A"), is domiciled in Scotland;

(b) that the person with whom A was cohabiting, ("B"), died domiciled in Scotland;

(c) that, before the cohabitation with habit and repute began, A and B purported to enter into a marriage ("the purported marriage") outwith the United Kingdom;

(d) that, in consequence of the purported marriage, A and B believed themselves to be married to each other and continued in that belief until B's death;

(e) that the purported marriage was invalid under the law of the place where the purported marriage was entered into; and

(f) that A became aware of the invalidity of the purported marriage only after B's death.

48. This development of the law in Scotland demonstrates that even in countries where this concept has previously been embraced, deliberate efforts have been made to shed it from their marriage law.

49. In the United States, about nine or so states recognise 'common law marriage'. It is recognised as a form of marriage in which a couple lives together for a period of time and holds out to friends, family and the community as 'being married' but without ever going through a formal ceremony or getting a marriage license or certificate which is a requirement that is common to all the 50 states. Even then, the couple must have lived together for some time the amount of which varies from one state to another. The couple must have the legal right or capacity to marry; they must have intended to marry; and, they must have held themselves out to the outside world as being a married couple.

50. And back home, though it does not out rightly outlaw it, the *Marriage Act*, 2014 does not recognise this kind of marriage. Section 2 of that Act defines the word cohabit, in its technical term, as follows:

> "cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage."

51. Three things that stand out of this definition are, one, regardless of what the intentions of a cohabiting couple may be, they do not acquire any other status than that of being unmarried and, two, perhaps to drive the point home, the relationship of the cohabiting couple only 'resembles' a marriage. In other words, it is not a marriage. The third aspect of this definition is, regardless of how long the couple lives together, the status of its legal relationship will not change.

52. When this section is read alongside sections 6 and 59 of the *Marriage Act*, it is reasonable to conclude that presumption of marriage by cohabitation no longer stands on a solid foundation in our marriage law infrastructure.

53. Section 6 lists the kinds of marriage that are recognised under the law; it states as follows:

> 6. Kinds of marriages
>
> (1) A marriage may be registered under this Act if it is celebrated—
>
> (a) in accordance with the rites of a Christian denomination;
>
> (b) as a civil marriage;
>
> (c) in accordance with the customary rites relating to any of the communities in Kenya;
>
> (d) in accordance with the Hindu rites and ceremonies; and
>
> (e) in accordance with Islamic law.
>
> (2) A Christian, Hindu or civil marriage is monogamous.
>
> (3) A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.

54. It is clear that presumption of marriage by cohabitation has been left out. One may argue that this provision of the law particularly section 6(1) thereof only refers to marriages registrable under the *Marriage Act*; however, there is no suggestion anywhere else in this Act or any other law, for that matter, that there are other forms of marriage that may be given the force of law other than those recognised in the Act.

55. Section 59 would buttress this point in that it specifies how a marriage may be proved in this country. This section reads as follows:

> 59.
>
> (1) A marriage may be proven in Kenya by—
>
> (a) a certificate of marriage issued under this Act or any other written law;
>
> (b) a certified copy of a certificate of marriage issued under this Act or any other written law;

(c) an entry in a register of marriages maintained under this Act or any other written law;

(d) a certified copy of an entry in a register of marriages, maintained under this Act or any other written law; or

(e) an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam, Ismaili or Bohra' communities, or a certified copy of such an entry.

(2) Despite subsection (1), a marriage may be proven in Kenya if it was celebrated in a public place of worship but its registration was not required, by an entry in any register maintained at that public place of worship or a certified copy of such an entry.

56. Once again, no provision has been made for proof marriage by cohabitation. It has been noted that as much as much as it is a presumption, certain facts must be demonstrated to exist before such a presumption of marriage by cohabitation can be inferred. Our *Marriage Act* neither makes reference to the presumption nor the facts which, like in certain States in the United States, ought to be proved for the marriage to be presumed to exist.

57. It is worth noting that the *Marriage Act* itself is anchored on Article 45 (4) of *the Constitution*; that Article reads as follows:

45.

(4) Parliament shall enact legislation that recognises—

(a) marriages concluded under any tradition, or system of religious, personal or family law; and

(b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution.

58. When these provisions of the law are considered in their entirety, it is easy to see that while Kenya may not have expressly forbidden the concept of presumption of marriage by cohabitation as Scotland did, it has, for all intents and purposes, taken similar path, albeit impliedly.

59. I suppose that, of the many reasons that may have informed the need for registration of marriages, protection of the marriage union that has since time immemorial been considered as sacrosanct is one of the mischiefs sought to be cured in the *Marriage Act*, 2014. Owing to its sanctity as the foundation of the society, it is not a union whose existence should not be left to speculation or conjecture. This must have been what Articles 45 (1) and (2) of *the Constitution* alludes to; that Article states as follows:

45.

(1) The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition.

(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

60. I am minded that under section 3 of the *Judicature Act* cap. 8, the jurisdiction of this Court, as that of the Court of Appeal, is to be exercised in conformity with, inter alia, the substance of the common law. But it goes without saying that common law is subject to our written laws and that it can only

apply to where our written laws do not extend or apply, and where it applies, it is only applicable 'so far as the circumstances of Kenya and its inhabitants permit and subject to such qualifications as those circumstances render necessary'.

61. This concept of presumption of marriage by cohabitation or, as the Scotch call it, 'cohabitation with habit and repute', would be viewed and applied in those limited circumstances, if there was any valid basis for the assumption that it is common law or it is a common law phenomenon.

62. In three of the cases decided by the English courts that I have come across in my little research, marriage was presumed only because the couple had mistakenly missed out on some essential step or steps towards formalising their marriage but cohabited thereafter believing that their marriage was formal or, rather, was in accordance with the law.

63. One such case is that of Toplin Watson vs Tate (1937) 3 ALL ER 105. The circumstances here were that the man lived in Rockhampton, in Australia, from 1860 to 1870 with a certain lady; they held themselves out to be husband and wife, and they and their children were received in local society, which would not have been the case had there been any suggestion of irregularity. The birth certificates of the children recorded the marriage of the parents as having taken place at Ballan, Victoria, on 10 January 1860, but no such marriage was registered there, although registration had there been compulsory for some years. In 1873, the man's father, who lived in England, executed a deed covenanting to make certain payments to the children or their mother and this deed contained these words: "the following reputed children of his deceased son," T B, "which children are now in England with their mother EM, otherwise E B."

64. It was held that the absence of any entry in the register of marriages was not sufficient to rebut the presumption of marriage of the couple and that the words in the deed of 1873 were insufficient to rebut the presumption. That the presumption of marriage can be rebutted only by evidence of the most cogent kind, and the children in question ought to be declared to be the lawful children of the man and his wife.

65. This case, besides dealing with the strong presumption in favour of marriage, decided that such presumption is not rebutted by reason of there being no entry in the register of marriages in respect of a marriage of known date and place celebrated in an area where registration of marriages was compulsory.

66. It had been argued that this was not a case of establishing a marriage by repute. The parties to the alleged marriage, having referred to a date and place, were pinned down to that date and place, and failure to establish the marriage from the records at that place, or in respect of that place, was necessarily fatal, in view of the compulsory nature of the registration administration. Even then, it was acknowledged that a ceremony of some sort was undoubtedly performed, although possibly imperfectly before the couple started cohabiting.

67. The words of Simonds J. in upholding the marriage are worth repeating here; the learned judge noted:

> "The evidence before me is not cogent; but it is adequate to satisfy me that the man and woman lived together at Rockhampton for ten years as man and wife in the sight of that small community. They were there received into society, which was not a society of loose and uncertain morals, but with proper views as to marital relations, and were at all times regarded as man and wife. This being so, the presumption of our law is that they were man and wife. This presumption is not to be disturbed except by evidence of the most cogent kind. Here it is sought to displace the presumption in two ways. First of all, because the parties pinned themselves to a marriage at a certain date and place, and the records contain no entry of such a marriage. Whatever the compulsory nature of the administration, this

cannot, in my view, displace the presumption of marriage. The absence of a record is always a possibility. The presumption rests mainly upon the notorious fact of their living together, which has been fully proved.

"The other ground upon which the presumption is sought to be displaced is that, in 1873, the deed of trust was executed; but I cannot draw from that deed any inference contrary to the presumption that I would otherwise draw. I cannot guess the motive which induced the grandparent to put into that deed those words of stigma on his son, and I find no sufficient reason in the deed for saying that the children were illegitimate."

68. The other case is that of Piers versus Piers (1849) 3 HLC 331. Here, a question arose as to the validity of marriage celebrated in the Isle of Man by a clergyman whose status was not a matter in dispute, he having been a regularly ordained clergyman, doing duty in a church there, and as to whose capacity to celebrate marriage there was no dispute. The question was whether the marriage so celebrated was valid according to the law of the Isle of Man, requiring the special license of the bishop in cases where the marriage was celebrated, as the marriage in issue was, in a private house, and not in a church.

69. Arguing in support of the validity of the marriage, the appellants' counsel urged that the marriage was valid on the ground of legal presumption. He argued further that there are three presumptions of law all which were in favour of the marriage; the first was semper praesumitur pro matrimonio: that there is a presumption of law. The next presumption is that every intendment shall be made in favour of a marriage de facto and therefore if there was a clergyman present performing the marriage ceremony, the law would presume that he was a clergyman properly authorised. The third is, where an act appears to have been performed by proper persons, the law will intend that everything was done in a proper manner. The burden of impeaching the marriage would be on the party against it.

70. The learned counsel for the appellants urged that these presumptions had not been considered in the court below. He further urged that the force of a legal presumption, especially in the case of marriage, and legitimacy of children, is complete, unless it is absolutely rebutted by proof.

71. The appeal was allowed; The Lord Chancellor who read the leading judgment held as follows:

"My Lords, I have not found that the rule of law is anywhere laid down more to my satisfaction that it is by Lord Lyndhurst in the case of Morris v. Davies (5Cl. And F. 167) as determined in this House (5Clarke and Fin. 163). It is not precisely the same presumption as exists in the present case; but the principle is strictly applicable to the presumption which we are considering. He says (see p.265), "The presumption of law is not lightly to be repelled. It is not to be broken in upon or shaken by a mere balance of probability. The evidence for the purpose of repelling it must be strong, distinct, satisfactory and conclusive." No doubt, every case must vary as to how far the evidence may be considered as "satisfactory and conclusive;" but he lays down this rule that the presumption must prevail unless it is most satisfactorily repelled by the evidence in the cause appearing conclusive to those who have to decide upon that question."

72. Turning back to the case before the House, His Lordship continued:

"We therefore have it for certain, that all the parties must have intended that a valid marriage should be celebrated; at that at least one of the parties understood the law relating to the marriage which he was celebrating.

73. Then we have subsequent conduct of the parties, proving beyond all question that they supposed that a valid marriage had been celebrated. The children are treated as legitimate children; the wife treated

as lawful wife; and the conduct of the parties from the very beginning to the end, shows that they believed a valid marriage to have been solemnised. This is not at shaken by the fact of a subsequent marriage having taken place in Ireland. We know that that does frequently happen without the slightest imputation on the validity of the first marriage." (Emphasis added).

74. In his concurring opinion Lord Broughman noted as follows:

> "I am altogether of the same opinion, and for the same reasons. I consider the rule of law to have been clearly laid down in Morris v. Davies (5 Clark and Finnelly, 163,265), by my noble and learned friend, Lord Lyndhurst. My noble and learned friend there laid down that rule in very plain terms; and if I had any doubt as to any one of the four descriptions which he gave of the evidence required to rebut the legal presumption of legitimacy, it is as to the last. I should say, "clear, distinct, and satisfactory evidence." I am not quite prepared to use the word "conclusive." I think some doubt may arise upon that, which it is unnecessary to raise, because if the evidence required be clear and satisfactory, that is quite sufficient for me. I do not like ever to lay down the rule that the evidence must be "conclusive, "because that gives occasion very frequently to needless and inconvenient doubt."

75. But even as he acknowledged the presumption of law, the learned judge did not suppress his feelings about the sort of marriages that are only presumed in law to exist; he expressed his view about these marriages as follows:

> It is a constant course with persons who solemnize irregular marriages, which, though irregular, are perfectly valid and perfectly legal, and against which nothing either of presumption or of law can be alleged; it is a constant course for them afterwards, needlessly, superfluously, and, in my opinion, irregularly, to solemnize what is termed a regular marriage, in facie ecclesiae. I say "irregularly", for an obvious reason; because if the first marriage is valid, the second marriage becomes an irregular marriage. The first marriage was irregular for want of certain ecclesiastical or legal solemnities; but in law it was valid. The second marriage is a mockery; because, for two persons who are single to marry is intelligible, but for two persons who are already married to marry is a mockery, and I may almost say a profanation of a very solemn rite of the church. Therefore, though I do not consider that that acting of theirs is at all to be commended, yet it is constantly had recourse to. It is a constant course for persons in a certain station in life, who make what is commonly called a runaway or irregular marriage, afterwards to marry in facie ecclesiae, for the purpose of quieting the scruples of persons of nice conscience, but also for the purpose of putting down any public clamour that may have arisen."

76. This case goes to show that the law will presume in favour of marriage; there is a strong presumption in favour of marriage, particularly after the lapse of a great length of time, and this presumption must be met by strong, distinct, and satisfactory disproof.

77. Therefore, where two persons had shown distinct intention to marry, and a marriage had been, in form, celebrated between them, by a regularly ordained clergyman, in a private house, as if by a special licence, and the parties, by their acts at the time, showed that they believed such marriage to be a real and valid marriage, the rule of presumption is applied in favour of its validity, though no licence could be found, nor of any entry of the granting of it, or of the marriage itself, could be discovered; and though the Bishop of the diocese, when examined many years afterwards on the subject, deposed to his belief that he had never granted any licence for such marriage.

78. The last English decision I will refer to is the case of Mahadervan v Mahadervan [1962] 3 All ER 1108. The facts in this case were that on 16 July 1951, the husband and the wife, who were both born and domiciled in Malaya, went through a civil ceremony of marriage. On the evidence of the husband and the wife this took place at the wife's house in Ceylon before a registrar, who signed the marriage certificate subsequently in his office. The Ceylon marriage ordinance required the ceremony to take place at the registrar's office, although it could take place elsewhere by special licence. There was no evidence that a special licence had been granted in the present case. The Ceylon marriage ordinance also required the registrar to address the parties emphasising the monogamous nature of the union. There was no evidence that in the present case the registrar had fulfilled this requirement. However, the entry in the marriage register and the marriage certificate purported to show that the ceremony had been performed at the registrar's office. After the ceremony, the parties returned to Malaya where they lived together until February, 1952, when the husband went to Bombay; and in 1953 he came to England, where he had since resided. Between 1952 and 1954, the husband wrote affectionate letters to the wife signing himself "Your loving husband", and he signed a letter to his mother-in-law "Your affectionate son-in-law". In 1958 the husband went through a ceremony of marriage in England. In 1960 the wife came to England where she applied for a matrimonial order before a magistrate's court on her complaint that the husband had committed adultery. The husband contended that the ceremony in July, 1951, had not constituted a valid marriage because the proper formalities had not been observed. Section 39 of the Ceylon marriage ordinance provided: "After any marriage shall have been registered under this ordinance it shall not be necessary, in support of such marriage, to give any proof ... that the place ... of marriage was the place ... prescribed by this ordinance nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage". The magistrates' court made an order in the wife's favour and the husband now appealed, contending that the performance of the civil ceremony at the wife's house instead of the registrar's office, and the failure by the registrar to address the parties, invalidated the marriage.

79. On appeal to the Probate, Divorce and Admiralty division, it was held that where a ceremony of marriage is proved and is followed by cohabitation as man and wife, a presumption is raised which cannot be rebutted by evidence that merely goes to show on a balance of probabilities that there was no valid marriage; the evidence must be such as proves beyond reasonable doubt that there was no valid marriage.

Sir Jocelyn Simon P. held as follows:

> "In my view, where a ceremony of marriage is proved, followed by cohabitation as man and wife, a presumption is raised which cannot be rebutted by evidence which merely goes to show on a balance of probabilities that there was no valid marriage: it must be evidence which satisfied beyond reasonable doubt that there was no valid marriage. In other words, the presumption in favour of marriage in such circumstances is of the same weight as the presumption of innocence in criminal and matrimonial causes. A jury would have to be directed that to displace the presumption, the husband must prove his case in such a way that they can feel sure that there was no marriage. (see page 1108)."

80. He also adopted the words of Sir Barnes Peacock in Sastry Velaider Aronegary v Sembecutty Vaigalie ((1881), 6 App Cas at p 371) where he noted as follows:

> It does not, therefore, appear to their Lordships that the law of Ceylon is different from that which prevails in this country; namely, that where a man and woman are proved to have lived together as man and wife, the law will presume, unless the contrary be clearly

proved, that they were living together in consequence of a valid marriage, and not in a state of concubinage."

82. All these decisions and the comparative law in Scotland and the United States show that the presumption of marriage is preceded by some overt act or acts by a couple or couples who, based on such acts, cohabit on the common understanding that they are married and legally so.

83. The path our courts have taken on this subject is, more or less, that which has been trodden by the courts in England. A few decisions of our Court of Appeal show that the concept of presumption of marriage has hitherto been embraced though, unlike in the present dispute, it is a concept that is more pronounced in succession causes whenever an issue arises on whether the surviving spouse was married to the deceased. In most cases it is the wife or one of the deceased's wives who will be out to demonstrate that she was legally married to the deceased and therefore, in her capacity as the deceased's surviving widow or one of his surviving widows, she is entitled to her rightful share of the deceased's estate.

84. In Eva Naima Kaaka & Another vs. Tabitha Waithera Mararo (2018) eKLR the respondent applied for revocation of grant of letters of administration intestate to the deceased's estate mainly on the ground that although she was the deceased's second wife, she was not incorporated in the succession proceedings and, ultimately she was apprehensive that she would be disinherited. Her case was that she had not only cohabited with the deceased since the year 2008 till his death in 2014 but also that their marriage had been blessed with one issue. She also, contended that she had been married to the deceased under Kikuyu customary law.

85. It was established as a fact that indeed the respondent lived in the deceased's house though not as the deceased's wife but as a tenant.

86. The court (Nyakundi, J.), held that the respondent was the deceased's wife and that a child had been born out of their union. Accordingly, he revoked the grant of letters of administration made to the appellants and directed that a fresh application for the grant of letters of administration in which the respondent would be a joint administratrix be made.

87. On appeal, the Court of Appeal (Nambuye, Kiage, Murgor, JJA) held that contrary to the respondent's contentions, there was no evidence that the respondent had been married to the deceased under Kikuyu or Maasai customary law. The Court made reference to Eugene Cotran's book, Casebook on Kenya Customary Law, where, at page 30, the essentials of a Kikuyu customary marriage are spelt out; these essentials are as follows:

    1. Capacity; the parties must have capacity to marry and also 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 bridegroom's home"

89. In coming to the conclusion that there was no valid marriage between the respondent and the deceased, the learned judges of appeal held:

> "From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the deceased."

90. On the question of whether there was a valid basis for a presumption of marriage, the court cited with approval its own decision in Phylis Njoki Karanja & 2 Others vs. Rosemary Mueni Karanja & Another (2009) eKLR where it was held that a presumption of marriage could be drawn from two factors; long cohabitation and acts of general repute. The court is quoted to have said in that case as follows:

> Before 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 crystallised into a marriage and it is safe to presume the existence of a marriage. (Emphasis ours).

91. On the same point, the Court cited the case of Mary Njoki vs. John Kinyanjui Mutheru (1985) eKLR where a presumption of marriage was rebutted on the ground that there was no evidence that 'an essential element of a valid kikuyu marriage' had not been satisfied.

92. The court held as a fact that the deceased had only one matrimonial home where he had at all times material to the suit lived with his wife and that there was no evidence of prolonged cohabitation between the deceased and the respondent and neither were there any acts of general repute that would give rise to a presumption of marriage. The house in which the respondent lived though it belonged to the deceased, was leased to the respondent and therefore she was the deceased's tenant and not his wife.

The court further held:

> "Acts of general repute, are synonymous with the impression, or assessment of the couple as perceived by the general public, including relatives and friends. By their very nature they are a determinant of whether a presumption of marriage can be found to exist."

93. The court revaluated the evidence and came to the conclusion that there was nothing to show long cohabitation or acts of general repute giving rise to a presumption of marriage. Rather, 'the evidence pointed to a casual affair between the deceased and Waithera that culminated in the birth of TNK, and which relationship was to end rather abruptly upon his untimely demise."

94. In allowing the appeal, the court held that the respondent was not deceased's wife either through a customary marriage or by presumption of marriage.

95. I have dwelt on this case relatively at length because it is, in so many ways, on all fours with the case before court.

96. In Joseis Wanjiru alias Joseis Wairimu vs. Kabui Ndegwa Kabui & Another (2014) eKLR the court (Visram, Koome and Odek, JJ. A) held that the doctrine of presumption of marriage is based on section 119 of the *Evidence Act*, cap. 80 which states as follows:

> 119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.

97. The learned judges held that a presumption of marriage is basically a presumption of fact. To quote them, the learned judges were emphatic that:

> "The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded."

98. Just as it was in Eva Naima Kaaka & Another vs. Tabitha Waithera Mararo (supra), this case was also a succession dispute in which the appellant's claim to the deceased's estate was dismissed on the ground that she was not married to the deceased. The Court of Appeal overturned the judgment of this Court and found as a fact that the appellant had lived with the deceased from 1960 to 1975 and that the period of fifteen years was long enough to give rise to a presumption of marriage. The court cited its own decision in Hortensiah Wanjiku Yawe vs. The Public Tustee Civil Appeal No. 13 of 1976 (1976) eKLR where it was held that. 'the presumption (of marriage) does not depend on the law or system of marriage. The presumption is simply an assumption based on very long cohabitation and repute that the parties are husband and wife..."

99. The facts in Hortensiah Wanjiku Yawe case were thatPaul Makumbi Yawe, a Ugandan by birth, and resident in Nairobi, was killed in a motor vehicle accident in Uganda on 2 May, 1972. He was employed as a pilot by the East Africa Airways Corporation at the time of his death. He died intestate. The Public Trustee of Kenya was granted letters of Administration to his estate in Kenya on 4 July, 1972.The report of death of the deceased to the Public Trustee was made by Hortensia, the appellant, who claimed that she was the deceased's widow and that she had four children by him.

100. The appellant had appealed to the Court of Appeal after her quest to be recognised as the deceased's wife had been dismissed by this court. Her case was that she met the deceased in 1962 and that they married in March, the following year. The marriage was solemnised under Kikuyu customary law and since then the couple had lived as husband and wife until his death. During the period of cohabitation, she had had four children with the deceased. They all had a matrimonial home in Nairobi West. The facts of having lived with the deceased for over 9 years and having had four children together during that period were not disputed or controverted.

101. In allowing the appeal, the Court held, inter alia, that the onus of proving that the appellant was married to the deceased was on the appellant herself. However, while referring to the Taplin-Watson vs. Tate (supra), the court held that long cohabitation as man and wife gave rise to the presumption of marriage in favour of appellant. And even if the proper ceremonial rituals were not carried out, that would not invalidate the marriage and on this point the court relied on the decision in Sastry Velaider Aronegary v Sembecutty Vaigalie (supra).

A. Mustafa, A.J. stated thus:

> "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. In my view all marriages in whatever form they take, civil or customary or religious, are basically similar, with the usual attributes and incidents attaching to them. I do not see why the concept of presumption of marriage in favour of the appellant in this case should not apply just because she was married according to Kikuyu customary law. It is a concept which is beneficial to the institution of marriage, to the status of the parties involved and to issue of their union, and in my view, is applicable to all marriages howsoever celebrated."

102. Talking about this concept vis-à-vis customary law marriages Wambuzi, J.A. noted in the same case as follows:

> Evidence was led which was not disputed that the appellant lived with the deceased for over 9 years and had 4 children by him. To his employers, the deceased had declared the appellant as his wife and some friends of the deceased knew him as married to the appellant. On this evidence which was accepted by the learned trial judge, the appellant had shown long cohabitation and repute so as to give rise to a presumption in her favour that she was married to the deceased. Mr. Oluoch, for the respondent, supported by Mr. Kithyoma, for the Public Trustee, submitted in effect that as the marriage claimed was under customary law, the presumption would not apply. I do not agree. In the first place, no authority was cited to us that the presumption does not apply to customary law marriages and secondly, the presumption has nothing to do with the law of marriage as such, whether this be ecclesiastical, statutory or customary; this must be proved. The presumption is nothing more than an assumption arising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted. It may be shown that the parties are not married after all but then the burden is on the party who asserts that there was no marriage. It is at this stage that the nature of the marriage becomes relevant and the incidents thereof examined."

The learned judge continued:

> "I accept Mr. Oluoch's contention that section 3(2) of *Judicature Act* (Cap. 8) provides for the application of customary law in certain circumstances. However, the same section in sub-section (1) thereof provides for the application of the common law to Kenya. I would not say in the circumstances of this case that there is any conflict between the common law and the Kikuyu customary law of marriage as the presumption relates only to proof. In my view once the appellant proved that she was living with the deceased as man and wife for over 9 years she was in law presumed to be married to the deceased unless the contrary be clearly proved. In other words, the burden is thrown on the respondent to show that she was not so married. (Emphasis added).

103. There is clear indication from this statement that presumption of marriage is a presumption of law rather than of fact. As noted earlier, the Court of Appeal in Joseis Wanjiru alias Joseis Wairimu vs. Kabui Ndegwa Kabui & Another was of the firm view that a presumption of marriage is not only a presumption of fact but also that it is a concept that has its roots in section 119 of the *Evidence Act*.

104. Perhaps it is worthwhile to digress a bit at this point to shed some light on what 'presumptions' generally entail in law if only that will help to clear the air on the particular category of presumptions under which the presumption of marriage falls.

105. According to Halsbury's Laws of England/CRIMINAL LAW, EVIDENCE AND PROCEDURE VOLUME 11(4) (2006 REISSUE) PARA 1374 there are three kinds of presumptions classified as follows:

(1) conclusive and irrebuttable presumptions of law (which are really rules of law, rather than of evidence);

(2) rebuttable presumptions of law, by which if a basic fact is proved or admitted, a further fact must then be presumed, either until the contrary is proved, or (in the case of 'evidential' presumptions) until some admissible evidence to the contrary is adduced; and,

(3) so-called presumptions of fact, which are merely permissible circumstantial inferences of fact, having no special significance in law.

106. Conclusive or irrebuttable presumptions of law are absolute inferences established by law; no evidence is admissible to contradict them and hence they are properly called rules of law rather than evidence.

107. A rebuttable presumption of law is one which leads to a decision on a particular issue in favour of the party who establishes it or relies upon it, unless it is rebutted. Rebuttable presumptions of law may be created by statute, or may exist at common law, and may cast either a persuasive or an evidential burden on the party seeking to rebut the presumption, except that it is a rule of the common law that (save in the case of a defence of insanity) the defendant cannot be required to discharge a persuasive burden of proof. See Halsbury's Laws of England (supra) para 1375.

108. Presumptions of fact involve nothing more than the drawing of a reasonable inference from circumstantial evidence. (See R v Lumley (1869) LR 1 CCR 196).

109. Sections 4 of the *Evidence Act* refers to some of these presumptions; although it is under the head note 'presumptions of fact' it is also makes reference to presumptions of law; that section reads as follows:

4. Presumptions of fact:

(1) Whenever it is provided by law that the court may presume a fact, it may either regard such fact as proved, unless and until it is disproved, or may call for proof of it.

(2) Whenever it is directed by law that the court shall presume a fact, it shall regard such fact as proved, unless and until it is disproved.

(3) When one fact is declared by law to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it. (Emphasis added).

110. According to Philip Durand's manuscript, Evidence for Magistrates, published by Kenya Institute of Administration, at page 64 subsection (1) deals with rebuttable presumptions of fact as does section 119 of the *Evidence Act*. Subsection (2) deals rebuttable presumptions of law which, as earlier noted, are the inferences which the law requires to be drawn from a given fact and which are conclusive until disproved by evidence to the contrary. Subsection (3), on the other hand, is on irrebuttable presumptions of law.

111. Going by Wambuzi, J.A.'s judgment in the Hortensiah case (supra) the relevant excerpt of which I have reproduced above, a presumption of marriage would appear to fall under subsection (2); it is a rebuttable presumption of law and not necessarily of fact. And this would appear to be consistent with the English decisions on the nature of this sort of marriages; the decisions from that jurisdiction show that they are more of presumptions of law than presumptions of fact. It has also been noted that until it was abolished in 2006, the Scotch law adopted the same position; and, similarly those states in in the United States that embrace this concept.

112. Section 119 of would therefore appear to be more of a rule of evidence that is employed to establish the existence of this sort of marriage and not necessarily the substantive law from which the doctrine or concept of the presumption of marriage is derived. In other words, the essence of this section is that there has to be evidence that cumulatively forms the basis or the material from which an inference of marriage is made. The inference or presumption may only be drawn from a set of facts that have been proved to exist. Thus, as far as marriage by presumption is concerned, the court will, in considering the evidence before it, presume its existence after taking into account, inter alia, 'the common course

of natural events, human conduct and public'; the 'events' or 'conduct' will, of course, include such conduct as the prolonged period of cohabitation of a couple; how they have held themselves to the society at large and how such society perceives them; and, generally, the acts of their general repute.

113. It is also worth remembering that the application of this provision of the law is not restricted to marriages only; it is applicable to every case in which the court is called upon to presume "the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case." (Emphasis added).

114. Of all the local cases I have discussed in this judgment, only the Eva Naima Kaaka case (supra) was decided post the *Marriage Act*, 2014; the deceased in that case died in September 2014, three months after the commencement of the Act. Nevertheless, the issue whether the respondent's alleged marriage to the deceased could considered from the perspective of the new Marriage law was not addressed perhaps because that issue was not addressed in the High Court and neither was the Court of Appeal invited to address it. However, having concluded that there was no evidence of a customary marriage and that there was no material upon which to presume a marriage by cohabitation, I doubt there is any provision in the Act that would probably have influenced the Court to reach any different conclusion.

115. One other thing worth of note in all these decisions, irrespective of whether they are foreign or local, is that a common thread that weaves through them is that the question of the validity of marriage is an issue that only emerged after the death of one of the spouses-in most, if not all, of the cases, it was the death of the man that sparked the dispute on the validity of the marriage of the surviving spouse. The underlying dispute was, and more often than not, is the succession to his estate. Whenever ones claim on the deceased's estate is based on her marriage to the deceased yet the marriage is disputed, the question of marriage must, as a matter of necessity, be determined in succession proceedings. This explains why, and as these decisions show, the phenomenon of marriage by presumption comes to the fore more in death than in life.

116. Turning back to the plaintiff's case, it is centered around paragraphs 3, 4 and 7 of the plaintiff's amended plaint filed on 19 December 2017; in those two paragraphs, the plaintiff has averred as follows:

> 3. The plaintiff entered into a Kikuyu matrimonial union with the defendant in the year 2012 and the two lived as husband and wife since then. The plaintiff has diligently and faithfully fulfilled her marital obligations as a loving/caring and a lovable wife to the defendant and their child.
>
> 4. The plaintiff and the defendant after the marriage lived in different places in Nyeri. When the parties wanted to get a matrimonial home, the defendant allowed the plaintiff to look for a property when the plaintiff found and liked hence discussed this with the defendant who after viewing the land in Nyeri title Aguthi/Gatitu/4129 agreed they could purchase it and it became their matrimonial home."

117. The plaintiff herself admitted that the essentials of what constitutes a marriage under Kikuyu customary law were never undertaken; her testimony on this question was as follows:

> I am aware of the Kikuyu customary marriage. Both of us are from that community. There is introduction as part of the process. It was done on 17.6.2012. The defendant and a friend of his called Hadad Maina attended from his side. No one else attended from his side. No other step was taken. No gifts were exchanged. There has never been any follow up meeting.

My husband's people have never come to my home. My people have also never gone to my husband's home."

119. From the plaintiff's own testimony, it is clear that apart from the assumption that she and the defendant had capacity to marry, none of the other essentials of the Kikuyu customary law marriage were undertaken. It has been noted that these essentials are consent to the intended marriage by both the parties and their respective parents; the slaughter of ngurario; payment of ruracio or part of the dowry; and commencement of cohabitation. (See page 30 of Casebook on Kenya Customary Law, By Eugene Cotran, Nairobi University Press).

120. There is simply no proof of customary marriage between the plaintiff and the defendant.

121. And even if such marriage existed, it would not be recognised in law until it has been registered. I have already alluded to this requirement of registration of marriages including marriages solemnised under customary law. I need not say anything more save to reiterate that under section 96 (2) and (3) of the *Marriage Act*, 2014, parties to a marriage contracted under customary law, among other laws specified in that section, ought to have registered their union within three years of the commencement of the Act. To this extent, the Act is retrospective in its effect.

122. The Act does not, however, prescribe the fate of marriages in which parties thereto have not complied with this provision of the law but I would suppose that owing to the mandatory terms in which this section is couched and, by necessary implication, such marriages would be voidable if not void altogether.

123. It is assumed that once a marriage has been registered a certificate of some sort will be issued and this why the only means though which a marriage may be proved in Kenya under the current legal regime is by production of a certificate issued under the *Marriage Act*, 2014 or under any other written law or by an entry in a register of marriages maintained under this Act or any other written law. (See section 59 of the Act).

124. This leads me to the next limb of the plaintiff's case which is whether there is a basis to infer a marriage between herself and the defendant. I need not belabour the point that marriage by presumption is not recognised under the *Marriage Act*, 2014. The argument that being only a 'presumption' the concept of presumption of marriage need not be expressly stated in the law appears attractive but in my humble view it is fallacious. It is fallacious because section 2 of the Act acknowledges that indeed there are relationships where couples of heterogeneous sexes may cohabit for as long as they wish in circumstances that have hitherto given rise to a presumption of marriage. This provision of the law is clear that such an arrangement is not marriage but only resembles a marriage. That section defines "cohabit" which is the linchpin upon which this marriage revolves as living "in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage."

125. In the face of this clear provision of the law, it would take considerable courage to insist that besides marriages recognised under section 6 of the Act, marriage by presumption is still valid in this country; this section of the Law reads as follows:

> 6. Kinds of marriages
>
> (1) A marriage may be registered under this Act if it is celebrated—
>
> (a) in accordance with the rites of a Christian denomination;
>
> (b) as a civil marriage;

(c) in accordance with the customary rites relating to any of the communities in Kenya;

(d) in accordance with the Hindu rites and ceremonies; and

(e) in accordance with Islamic law.

(2) A Christian, Hindu or civil marriage is monogamous.

(3) A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.

126. I am of the humble view that the marriages enumerated in this section are the only marriages recognised in law in this country; and, when this provision of the law is read alongside section 2 of the Act and Article 45 of *the Constitution*, the concept of presumption of marriage is rendered otiose and of historical importance only.

127. I certainly cannot think of a situation where a presumption, whether of law or fact, would be applied to effectively oust clear and express provisions of the law.

128. Assuming I am wrong on the extent to which this concept applies in Kenya generally, and to its application to the applicant's circumstances, in particular, I am not satisfied that the plaintiff has provided evidence on a balance of probabilities that she cohabited with the defendant and if she did the cohabitation was of such prolonged period in circumstances that would have led an objective observer to the conclusion that she was married to the plaintiff.

129. Although she pleaded that she had lived with the defendant since the year 2012, she testified that she had been living with him since the year 2010. This contradiction was not explained noting that the plaint was not amended to correct the apparent inconsistency. It must be remembered the period of cohabitation is material to a presumed marriage and therefore it behoves the party seeking to prove its existence to be certain about the period when the alleged cohabitation took place. Any prevarication on when cohabitation took place would justify the conclusion that either there was no cohabitation or that it was not of such a period that is necessary to presume the parties as a married couple.

130. Again, the plaintiff's evidence that she lived with the defendant at Majengo and at Asian Quarters in Nyeri town before they moved to their own property Title No. Aguthi/Gatitu/4129 at Thuguma in 2013 was not supported by any independent evidence apart from her own testimony. Her own mother testified that it was the plaintiff herself who told her that she was living with the defendant. This implies that she could not tell for a fact or out of her own knowledge that the plaintiff and the defendant were living together. Their evidence was also contradictory; while the plaintiff testified that she left in 2006, her own mother testified that she lived with the plaintiff until 2010 when she left. David Muchemi (PW5), a deacon who testified that he visited the couple's house in Thuguma for a fellowship testified that he only met the defendant for the first time in April 2016. He had never seen him in any fellowships and that he only knew the defendant as the plaintiff's husband after the defendant introduced the plaintiff as his wife. The defendant denied having attended any fellowship in his house or even introducing the plaintiff as his wife to this particular witness or any other person. It was the plaintiff's own testimony that by 2015 the defendant had already left and their relationship was acrimonious; how then could the defendant have been in at Thuguma in a fellowship in 2016? Muchemi's testimony was compounded even further by Peninah Wangechi (PW7) who also testified for the plaintiff. She said that she was the plaintiff's neighbour at Thuguma but that the last time she saw the defendant at Thuguma was in 2013. This would contradict the plaintiff's evidence that she lived with the defendant in that house from 2013 to 2015 or the allegation that he was still in the same

house in 2016. The defendant, on the other hand, provided evidence that he had all this while been living at Asian Quarters with his wife and two children. This evidence was never controverted.

131. Mary Chorio (PW4), another of the plaintiff's witnesses testified that both the plaintiff and the defendant were living at Thuguma in 2010 yet the suit property had not even been purchased at this time.

132. Looking at the evidence presented by the plaintiff, there is no doubt that indeed there was some relationship between the plaintiff and the defendant; but this relationship was at best, sporadic if not fleeting. At Any rate, there is nothing to suggest that the two of them cohabited or cohabited for a prolonged period to lead to a conclusion that they were a married couple. I find it difficult to presume marriage by cohabitation and repute in these circumstances.

133. There is also sufficient evidence to demonstrate that the plaintiff herself was clear in her mind from the very beginning that her relationship with the defendant had not culminated in a marriage or there was any intention of such a marriage. This is clear from a letter dated 21 April, 2016 written by her advocates to the defendant notifying him of the plaintiff's intention to sue unless he complied with the plaintiff's demands in that letter; part of that letter read as follows:

> "Our client who is well known to you has come to our chambers and states that she has been in cohabitation with you for more than ten (10) years. In the cause of the cohabitation you placed her in your mortgaged house. Out of the said union, you were blessed with BT who is nearing school age. Recently you went to the house where our client lives and assaulted her and the daughter. The abuses, the harassments and the assault leaves our client with no other choice but to say your actions speak volumes of your character. Full particulars of your actions are well within your knowledge.
>
> We have instructions to demand from you BT certificate of birth. In the same certificate of birth, the surname being your name should for record purposes be removed. Further send to me a copy of an affidavit duly commissioned stating that you have no rights now or in the future over the issues (sic) welfare.

134. Take further notice that the law provides that a girl of tender age should be with the mother. The threats you keep giving do not have any legal backing. You gave our client seven (7) clear days to vacate from the premises. She has not declined your offer to vacate but before she does kindly supply T birth certificate minus your name and the stated affidavit to our offices within working days. On fulfilling the conditions given our client vacate the premises."

135. Of the several points one may pick from this letter, those that stand out for my present purposes are that the plaintiff did not want anything to do with the defendant. The demand that the defendant removes his name from the child's birth certificate is suggestive of this fact. Secondly, it is clear that the plaintiff does not lay any claim on Title Number Aguthi/Gathuti/xxxx on the basis that it is a matrimonial property or on any other basis for that matter. She is ready to vacate the house as long as the defendant surrenders her daughter's birth certificate and without the defendant's name as the child's father. Certainly, this does not depict the plaintiff as someone who is staying in the defendant's house even on the mistaken impression that she is his wife. Her counsel's letter shows that she was under no illusion that she was not the defendant's wife and in fact she did not want to be associated with him or her daughter.

136. I also note that one of the documents she presented as an exhibit in support of her case was a certificate of official search for Title No. Aguthi/Gatitu/xxxx in which it was stated that the plaintiff had lodged a caution against the property claiming a licencee's interest. The caution was registered as late as February

2017. If the plaintiff firmly believed that she was the defendant's wife and, in that capacity, she was entitled to the property as much as the defendant, there is no reason why she described in the caution herself as mere licencee.

137. When I consider this evidence I am inclined to come to the conclusion that the alleged marriage falls far below the qualitative and quantitative thresholds for marriages by presumption as set forth in Mary Njoki vs John Kinyanjui (supra).

138. In the ultimate, I am not persuaded that the plaintiff was married to the defendant either under Kikuyu customary law or on the basis of the concept of presumption of marriage. The plaintiff's suit does not have any merit and it is thus hereby dismissed with costs.

SIGNED, DATED AND DELIVERED ON 9 APRIL 2021

Ngaah Jairus

JUDGE