



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO.60 OF 2010

POC.....PLAINTIFF

VERSUS

JB.....1ST DEFENDANT

LM.....2ND DEFENDANT

JUDGMENT

INTRODUCTION AND PLEADINGS

1. The suit before me is as a result of **Plaint** dated **5th February, 2010** and filed in court on **8th March, 2010**. The case bears its roots from a broken relationship between the Plaintiff and the 1st Defendant who allegedly lived together for 10 years, a result of the which they sired two children namely, **SB** born in **1994** and **MCB** born in **2000**.

2. At the time of filing the suit, the Plaintiff and the 1st Defendant were not living together and her main claim is for him to be ordered by this court to take up his responsibilities as the father of the two Children.

3. By the said **Plaint**, the Plaintiff has sought for the following reliefs:-

a. That the Plaintiff be given Custody of the Children.

b. That the 1st Defendant be ordered to pay Kshs.100,000/= per month for maintenance costs and the court determines the arrears thereof.

c. That the 1st Defendant be ordered to transfer the house standing on Plot No. xxxx, English Point, Nyali, Mombasa in favour of the Plaintiff.

d. That an order be given for the release of motor Vehicle registration No. Kxx xxxW L Touring to the Plaintiff.

e. An order be made that the 1st Defendant continues to pay the Children's School fees as and when they become due and payable.

f. That determination be made of the net worth of the 1st Defendant and determination of the Plaintiff's share thereof and the 1st Defendant be ordered to pay the Plaintiff her share.

g. That an order be made for the general damages .

h. That the costs of this suit be provided for.

i. That the Honourable court be pleased to grant such other or further relief as may be just and expedient.

4. At first, both Defendants entered appearance through the firm of **M/S. Mogaka, Omwenga & Mabeya, Advocates** but later the case against the 2nd Defendant was dropped and the 1st Defendant later changed his advocates.

5. The Defence to the Plaintiff's claim is dated the **17th March, 2010**. He admitted being the father to the Plaintiff's two children but asserted that he has never withheld his provisions to them. He pleaded that he had been paying all expenses but the Plaintiff was becoming extraneous and over spending. He further denied having urged the Plaintiff to leave her employment but averred that it is the Plaintiff who was never willing to find any gainful employment.

6. As regards the house standing on **Plot No.xxxx at English Point**, it is pleaded that the same is owned by a different entity, to wit, **M/S Paping Company Ltd**. He stated that the 1st Defendant had already developed a two-bedroom house for the Plaintiff in Bamburi and that the Plaintiff only wanted to unjustly enrich herself. As for the Motor vehicle, it was pleaded that the Plaintiff had left the motor vehicle in the 1st Defendant's business premises where she was unwelcomed.

7. The 1st Defendant also challenged this court's jurisdiction and averred that by virtue of **Section 73** of the **Children's Act**, this case ought to have been filed in the Children's Court.

8. Further, the 1st Defendant filed a **Notice of Preliminary Objection** on **26th February, 2019** and challenged the suit herein on grounds that:-

a. Custody and maintenance of Children is a preserve of the Children's court.

b. The alleged minors have since attained the age of majority and this suit cannot be continued without their written consent

c. The dispute on ownership, occupation and use of the suit property is a preserve of the ELC Court.

d. The suit does not disclose any reasonable cause of action against the 1st Defendant.

e. The suit is frivolous, vexatious and abuse of the court process.

EVIDENCE OF THE PARTIES

PLAINTIFF'S CASE

9. The Plaintiff testified as **PW1** on **26th February, 2019**. She told the court that she is a community nurse by profession and currently resides in Berlin, German where she works as an assistant nurse in an old peoples' home. She attached certificates to confirm her qualifications in the list of her documents. She adopted her statement dated **26th February, 2019** and filed on even date as her evidence in chief.

10. Her case was that she had sued the 1st Defendant as her husband having met him in the year **1987** when she was working in Diani as an in-charge in a family planning health clinic. She stated that then, the 1st Defendant was working at **[particulars withheld] Hotel** and she used to treat his workers at the said clinic but they were not in a relationship then. The Plaintiff stated that the 1st Defendant tried to court her but she turned down the proposals.

11. In **1990**, the Plaintiff left Diani having secured another job in **[particulars withheld] Clinic** in Nyali. She started dating the 1st Defendant in the year **1992**. The 1st Defendant then asked the Plaintiff to get her daughter - **AA** from her mother (the Plaintiff's) so that the three of them could live together as a family. And to confirm this, the 1st Defendant undertook the recognized Luo tradition to adopt A. According to the Plaintiff, the 1st Defendant had promised to take care of her daughter and take over further responsibilities towards her. In addition, the Plaintiff alleged that at the request of the 1st Defendant, she resigned from her job at **[particulars withheld] Clinic** so she could assist in the running of the 1st Defendant's restaurant.

12. The Plaintiff further stated that the 1st Defendant had promised to buy her a house and they subsequently found a two bedroomed house standing on **plot No. xxxx, at English Point-Nyali**. She avers that it is the 1st Defendant who participated in the active purchase and documentation of that house without her involvement and in **1997** they moved to the said house. She stated that they started living together as husband and wife in the year **1994** and thereafter gave birth to two children namely, **SB** in **1994** and **MCB** in **2000**.

13. The Plaintiff went on to testify that the 1st Defendant provided school fees, food and medical cover for the three children and even bought the Plaintiff a motor car registration **No. Kxx xxxW – Toyota L. Touring** to facilitate the transportation of the children to school. On the other hand, among the contributions which the Plaintiff avers to have effected towards the 1st Defendant is participating in the purchase of a Hotel in Lamu wherein she drafted the initial agreements for purchase. Subsequently, she assisted in sewing the cushions and cushion covers on the understanding that it was a family business.

14. It is the Plaintiff's testimony that they lived happily with the 1st Defendant until the year **2004** when she realized that the 1st Defendant had a series of affairs with other women including his 1st wife, **N**, whom the 1st Defendant had deceitfully introduced to her as a fellow business partner. Thereafter, the 1st Defendant abdicated his duties to provide for the family by failing to pay school fees and other bills including water bills and electricity. The reality of this was when, according to the Plaintiff, the first daughter, **A** finished her "A" Levels and the 1st Defendant refused to pay her further fees.

15. She avers that the 1st Defendant's attitude towards the family became more negative and at some point he threatened to throw out the

Plaintiff and sell the house in which she was living. The Plaintiff avers that on **24th February, 2010**, at the request of the 1st Defendant, she went with her last born daughter, **M** to collect some money for use only to be accosted by the 2nd Defendant who was then having an affair with the 1st Defendant and was eventually maliciously arrested by police.

16. The Plaintiff then testified that she filed this suit to prevent the 1st Defendant from taking away her children and/or throwing her out of the house she has been living in. She explained that in the month of April, the court granted an injunction and directed the 1st Defendant to pay school fees, medical cover, food and maintenance sum but the 1st Defendant only complied with those orders until the year **2013**. She stated that due to the hardship she faced, she had to sell her motor vehicle so as to take her first born daughter, **A** to school in **Bangkok** while the 2nd born daughter, **S**, secured a scholarship in an Australian school and later in the UK.

17. She added that she even had to leave the country in **July, 2013** in search of better opportunities for the children and ended up staying in German with her last born daughter, **M**. She enrolled **M** into **[Particulars withheld] School** where she schools to date and has been paying the fees to an aggregate of Euros 230 per month without the assistance of the 1st Defendant until **2018** when the 1st Defendant again showed concerns by partial support.

18. In conclusion, the Plaintiff reiterated that she had lived with the 1st Defendant as husband and wife for a period of more than 10 years and in her case, she invested heavily in the family business which is thriving to-date.

17. She pleads with the court to award her what she describes as a share of the business she had heavily invested in. She has also asked the court to award her the house which she says is the only place she stays whenever she comes back with her children. She has explained to the court that that is their home and the 1st Defendant should not be allowed to sell it.

20. Further, the Plaintiff has asked the court to award her the arrears for the school fees from 2013 to-date, general damages for pain and suffering, costs of the suit and any other order that the court would deem fit to grant in the circumstances.

21. On cross-examination, the Plaintiff reiterated that she was the wife of **JB**, the 1st Defendant herein, but when asked whether she had evidence to buttress those assertions, she said that the evidence was the children they had sired in the 10 years they lived together and the fact that people, including newspaper reporters described them as husband and wife. She also denied ever knowing about the 1st Defendant's marital status before they began courtship and her response in that regard was that the 1st Defendant told her that he once was married on paper but only for purposes of purchasing property.

22. The Plaintiff was then asked whether she knew **NK** and referred to the marriage certificate between **N** and the 1st Defendant. (The certificate shows that **NK** and the 1st Defendant were married on the **12th March, 1987**). She responded that she used to see **N** at Ukunda and the 1st Defendant had referred to her (**N**) as a business partner. She however conceded that she used to work at a clinic owned by the Khan Family in Ukunda but denied knowing **NK** as having been a part of the Khan Family.

23. The Plaintiff also conceded that the 1st Defendant had rented a house where they were living before they moved to the house at English Point. And that before then, the 1st Defendant had promised to buy her a house and eventually they found the house standing on **Plot No. xxxx at English Point, Nyali, Mombasa**. However, she stated that she did not know the person who bought the house and how much it had cost. All she knew was that they were moving into their own house which now the 1st Defendant has wanted to kick them out of.

24. To restrict the sale, the Plaintiff testified that her lawyer filed a caveat in respect of the house standing on **Plot No. xxxx at English Point**. The Plaintiff was then shown the title deed of **Plot No. xxxx at English Point** and she confirmed that it is registered in the name of **[Particulars withheld] Company Ltd**. In her own words, she said that she has never been bothered to find out who owns the house but reiterated that the 1st Defendant had promised to buy her a house. The Plaintiff averred that although her children are not currently in the country, it is in that house that they live whenever they come on vacation.

25. According to the Plaintiff, she contributed to the building of the house by designing the building of the pool although she conceded that she never contributed to its construction. She however denied that the 1st Defendant has ever bought her a house in Bamburi but stated that she had bought a house at Bamburi in **1997** – from her own savings and later sold it.

26. The Plaintiff also reiterated that she left employment at the request of the 1st Defendant to assist in the running of the restaurants he owned and also look after the children. With regard to the restaurant in Lamu, called **[Particulars withheld] Hotel**, the Plaintiff stated that she had drafted the purchase agreement but on further cross-examination stated that she used to draft stock purchases and send the same to the secretary at Diani. She believes that for her input in these two hotels she is entitled to a share which the court should determine and award her.

27. As regards the payment of school, the Plaintiff conceded that the 1st Defendant had been paying school fees for the children but she paid for the maintenance for the five years she had been in German, while the 1st Defendant paid fees for only one year. As I understood, she seeks to be compensated for fees arrears for years the 1st Defendant did not contribute for the same. Lastly, when she was asked about the 2nd Defendant, the Plaintiff stated that she had dropped the case against her.

28. On further cross-examination, the Plaintiff stated that she was present in the meeting when the 1st Defendant was buying the **[Particulars withheld] Hotel** and her contribution was counted on. She conceded that she was not

involved in the sale agreement of the house at English Point and she hence could not tell in whose name the house was registered. However,

she maintained that that was the house the 1st Defendant had promised to buy for them in 1992 even before it was transferred to [Particulars withheld] Company Ltd in 1993. She also faulted the search on membership and shareholding for [Particulars withheld] Company Ltd which was done in 2017 claiming that it did not depict the state of affairs in the year 1993 when the property was transferred.

DEFENDANT'S CASE

29. For the Defence, **JB** testified as the sole defence witness on **14th October, 2019** and adopted his witness statement filed on **26th February, 2019** as his evidence in-chief.

30. His evidence is that he is married to one **NKB**, the union having been celebrated on **12th March, 1987**. He produced the marriage certificate as proof of their marriage as **"D-Exhibit 1"**. He adds that the union was blessed with two children; **JB** and **NB**, whose birth certificates were produced as **"D-Exhibit 2(a)&(b)"** respectively.

31. He further testified that on **9th March, 1993**, together with his wife **Narriman**, they registered a Company in the name of [Particulars withheld] Company Limited. That later, on **10th December, 1993** through that Company they purchased a property titled number **xxxx**, at **English Point** which the Plaintiff is now seeking to be transferred to her. He stated that at the time of purchasing the property, the shareholding was in the ratio of 50:50 and thus he only purchased 50% of the house while 50% was purchased by his wife **NK**. He however stated that, in **2014** his son **JB** purchased **998 shares** from **M/S [Particulars withheld] Company Ltd** and became the Managing Director since then.

32. With regard to the Plaintiff, **DW1** stated that he met her when she was working as nurse in a dispensary owned by **Dr. Okanga** which was based at a property that belonged to his (**DW1**'s) wife's family in **Ukunda** but at no time did they get married. He said that the Plaintiff was then a friend and an acquaintance of his wife and they first met at a house party organized by his wife at their home. He testified that it was the Plaintiff who first approached him having known that he (the 1st Defendant) was a qualified architect and sought him to assist sketch a design for a small hospital they had intended to build. The Plaintiff then introduced him to her boss.

33. The 1st Defendant went on to state that with time, their relationship got intimate and the Plaintiff ended up being his "side-chic". He testified that the Plaintiff misled him to believe that she was "protected" but ended up getting pregnant despite knowing that he was married to **NK**.

34. He added that when the property title **No. xxxx**, at **English Point** was offered for sale by [Particulars withheld] Ltd, he bought and developed it for himself and not for the Plaintiff. He however agreed for the Plaintiff to come in that house because he was still building a house for her in **Bamburi**. However, the Plaintiff refused to move from that house even after the house in **Bamburi** was completed.

35. It is the Defendant's evidence that he has been taking care of the two daughters he sired with the Plaintiff that he leased the suit property for them and even bought a car registration number **Kxx xxxL** for ease of their movement. He said that in 2014, he got them German citizenship and they moved to Germany. He testified that he has been paying for their maintenance at an average sum of **Kshs.300,000/=**, notwithstanding that the children have now attained an age of majority. He produced a bundle of receipts marked as **"D-Exhibit 5"** to show that he has been paying bills for these children.

36. In the 1st Defendant's view, this court cannot presume a marriage under common law based on cohabitation because having been statutorily married, he lacked the capacity to marry and more so he never consented to marry the Plaintiff. Nonetheless, he stated that both children have attained the age of majority such that most of the prayers sought by the Plaintiff have been overtaken by events and cannot issue without the consent of the children. Finally, he stated that he was a stranger to all the other allegations that have been made by the Plaintiff.

37. In cross examination, the 1st Defendant confirmed that the Plaintiff was working as a nurse in **Ukunda** before moving to [particulars withheld] Clinic. Although he admitted having sired two children with the Plaintiff, he stated that the two pregnancies were a mistake.

PLAINTIFF'S SUBMISSIONS

38. **M/S Omulama E.M & Company Advocates**, Counsel for the Plaintiff submitted that the Plaintiff abandoned the suit against the 2nd Defendant on **25th February, 2019** but seeks against the 1st Defendant *inter alia* orders that;

a. She be granted custody of the (then) minors;

b. The 1st Defendant be ordered to pay Kshs.100,000/= per month for maintenance costs and the court to determine the arrears thereof;

c. That the 1st Defendant be ordered to transfer the house standing on Plot No.xxxx, English Point Nyalii Mombasa in favour of the Plaintiff;

d. An order for release of motor vehicle registration number Kxx xxxW make L Touring to the Plaintiff;

e. An order that the 1st Defendant continue paying school fees for the Children as and when it is due;

f. That a determination be made of the net-worth of the 1st Defendant and Determination of the Plaintiff's share thereof and the 1st Defendant be order to pay the Plaintiff her share;

g. General damages and costs of the suit.

39. It is conceded that **prayers (a) and (d)** were granted in the interim by this court but have since been overtaken by events. It is her case that even after the court order that the 1st Defendant pays maintenance for the kids, he was not supportive that the Plaintiff had to sell her vehicle to take care of the minors and pay for their school fees. The counsel submitted that the Plaintiff and the 1st Defendant started courting in the year **1991** and cohabited as wife and husband for ten year wherein they sired 2 children from the relationship. It is reiterated that the 1st Defendant had also assumed custody of the Plaintiff's first born daughter, **A**.

40. The Counsel appreciated the objection that had been raised in the suit that this Court lacks jurisdiction to hear matters of custody and maintenance of children or the use and ownership of land. However, it was submitted that the suit was filed long before the promulgation of the **Constitution, 2010** and therefore the law could not apply retrospectively. That position was supported by excerpts from the Court of Appeal case of **PNN –vs- ZWN [2017] eKLR** and a Supreme Court Decision in the case of **Samuel Kamau Macharia & Another –vs- Kenya Commercial Bank Ltd & 2 Others**.

41. The court was then invited to consider the equality of responsibilities posited on parents of any child in Kenya and consider the Plaintiff's case that the 1st Defendant had neglected his responsibilities leaving her with the entire burden, despite the court having ordered him to pay for maintenance. It is submitted that the 1st Defendant has not given any proof of supporting the children prior to the year **2016** and therefore this court should allow **prayers (b) and (e)** of the **Plaint** in terms of the arrears not paid for the period between **2010** and **2016**.

42. As regards **prayers (c) and (f)**, the Counsel reiterated that the Plaintiff helped the 1st Defendant to source the house at **English Point** and even developed the swimming pool and the surrounding environment. The court was also urged to take notice of the timing of all the happenings like when the property was bought by the **[Particulars withheld] Company Ltd** as the same will shed light to the fact that the 1st Defendant only used the Company to cheat the Plaintiff out of the property. The Company was incorporated in **1992** when the 1st Defendant's son was only one year old but in **2017** a **CR12** showed that the said son had **998 shares** with the 1st Defendant holding only one share. According to the Plaintiff, those were deliberate moves by the 1st Defendant to ensure that the property is out of the Plaintiff's hands and the court should lift the corporate veil to satisfy itself that the 1st Defendant was shielding fraud and/or improper conduct.

43. It is averred that the Plaintiff has retired and the said house is her only investment as well as her home. That it has not been denied that the Plaintiff has been living in the subject house and the 1st Defendant has not produced any lease agreement to justify that the house was indeed leased.

44. It is further reiterated that the Plaintiff left her employment to assist the 1st Defendant in running his businesses both in Mombasa and Lamu and is therefore entitled to shares thereof.

45. Lastly, the Plaintiff submitted that the Plaintiff has suffered financial strain, emotional loss and loss of her maiden years hence is entitled to general damages for the suffering and distress she has encountered.

1ST DEFENDANT'S SUBMISSIONS

46. **M/S Bwire & Company, Advocates** filed submissions on behalf of the 1st Defendant on **15th September, 2020**. The introductory part reiterates the evidence in the pleading and then majored on the **Preliminary Objection** filed on **26th February, 2019**. The **Preliminary objection** challenged this court's jurisdiction on two grounds, namely; *that the question of custody and maintenance of children is now a preserve of the Children's Court and that the dispute regarding the ownership, use, title and occupation of Land is a preserve of the Environment and Land Court*.

47. On maintenance of the children, although during the hearing the Plaintiff had opted to drop those prayers, she only abandoned prayers (a) and (d) in her submissions. Ideally, she is seeking the court to order for the payment of monthly maintenance of Kshs.100,000/= but the 1st Defendant submits that Plaintiff is trying to invite the court to extend an order of maintenance beyond the age of 18 years which remedy is only available under **Section 28** of the **Children's Act**. Nonetheless, **Section 91** of the said Act vests the Children's Court with the power to make maintenance orders on an application by a person beyond their 18th Birthday. Simply put, the 1st Defendant submits that the children the Plaintiff seeks maintenance for are now beyond the age of 18 years and the court cannot extend the maintenance orders unless the subjects seek, those orders by themselves before the **Children's Court** in line with **Section 91** of the **Children Act**. In support of this line of argument, the Counsel relies on the case of **JNT –vs- JWO & Another [2019] eKLR**.

48. On the second ground of **Preliminary Objection** which is in relation to the dispute on ownership of the property at **English Point**, it is submitted that the dispute entirely vests on the jurisdiction of the **Environment and Land Court** and ought to be transferred to that court pursuant to the **Practice Directions** issued vide **Gazette Notice Number 5178**. That this Court can only proceed on that issue if it is satisfied that the property was a matrimonial property which is not the case here.

49. On the merit of the case, **Mr. Bwire** listed out three issues he deemed fit for determination by this Court. These are:-

a. Whether marriage can be presumed between the Plaintiff and the 1st Defendant;

b. Whether the court can grant the orders sought by the Plaintiff;

c. Who should bear the costs of the suit.

50. As for whether a marriage can be presumed between the Plaintiff and the 1st Defendant, the Counsel relies on the Court of Appeal case of **Phylis Njoki Karanja & 2 Others –vs- Rosemary Mueni Karanja & Another [2009]eKLR**, where it set out the essentials for cohabitation to include long-term continuous living together of a couple holding themselves out as husband and wife but in the absence of any formal marriage. Further, that the cohabitation should be long enough as opposed to casual visits as the 1st Defendant herein did and the court cannot presume marriage in such circumstances.

51. Be that as it may, the 1st Defendant submitted that the burden of proving cohabitation rests with the Plaintiff but this burden was never discharged. He invited the court to consider the cases of **Hellen Cherono Kimurgor –vs- Esther Jelagat Kosgei [2008]eKLR**, wherein the court held that;

“She produced no concrete evidence of cohabitation between her and the deceased. Production of a photograph of the deceased with images of applicant and some children was not adequate to prove cohabitation especially in the circumstances where her claims were strongly denied by the Respondent and her family members”

52. He also relied on the case of **K.O & Another -vs- J.O [2018]eKLR**, where it was stated that;

“Marriage must be distinguished from a sexual relationship which results into siring of Children. Whereas such sexual relationship raises fundamental legal issues, the presumption of Marriage transcends such boundaries”

53. The second reason which the 1st Defendant submits is the reason why the court cannot presume a marriage between him and the Plaintiff by virtue of cohabitation is because he had no capacity to marry pursuant to **Section 37** of the **Marriage Act**. Since the 1st Defendant had produced a marriage certificate showing he had statutorily married NK, he could not contract any other marriage. Reliance was placed on the case of **M.W.G –vs- E.W.K [2010]eKLR**.

54. Lastly, on whether the prayers sought by the Plaintiff can issue, it is the 1st Defendant’s submissions that without proof of a valid marriage, the Plaintiff has no claim against him. Further, the property she seeks to be transferred to her name is held in the name of a distinct entity whose right to ownership of property is protected under **Article 40** of the **Constitution**. Therefore, this Court cannot deprive the said entity of its property arbitrarily. In the absence of a valid marriage, the 1st Defendant submits that the intimate relationship he had with the Plaintiff does not entitle her to any share in the property he owns.

55. In the end, the 1st Defendant opines that the Plaintiff has not proved her case on balance of probabilities and neither is the claim for general damages proved. He seeks for the suit to be dismissed with costs.

ANALYSIS AND DETERMINATION

56. I have taken time to appreciate the respective parties’ positions as elucidated in their verbal testimonies, the affidavit evidence as well as their submissions. I have also taken note of the 1st Defendant’s **Preliminary Objection** filed on **26th February, 2019**. In my view, the two grounds that have been raised on jurisdiction have also been pleaded in the statement of defence and their sole purpose is to oppose the entire suit.

57. Therefore, in those circumstances, I will not consider the **Preliminary Objection** separately but together with the other issues that have arisen for determination in the suit on merit. In my mind, the substantial issues brought to bear by the parties’ arguments are as follows;

a. Whether there is prove of a valid marriage between the parties and whether in the circumstances of this case, the court can infer the existence of marriage?

b. Whether the 1st Defendant should be ordered to transfer the house standing on Plot No. xxxx, English Point to the Plaintiff herein.

c. Whether the Plaintiff is entitled to any share on the net worth of the 1st Defendant.

d. Whether the 1st Defendant should be ordered to continue paying maintenance for Kshs.100,000/=

e. Whether the Plaintiff is entitle to fees arears for the years between 2010 and 2016.

f. Whether the claim for general damages is merited.

58. Just to put everything into context, it is common ground that at an interlocutory stage, this Court granted interim orders so that the state of affairs is safeguarded. To be more precise, an order was issued restraining the 1st Defendant from interfering with the house on **Plot No. xxxx at English Point, Nyali – Mombasa** so as to accord shelter for the then minors. The 1st Defendant was also ordered to pay maintenance in the sum of Kshs.100,000/= as well as school fees and cater for other expenses which I find no need to enumerate here. However, in the meantime the Plaintiff is also seeking for an order directing the 1st Defendant to pay a monthly maintenance of Kshs.100,000/=, which issue I will get back to later in this Judgment.

a) Whether there was valid proof of Marriage

59. I agree with the 1st Defendant's submission that whether or not there is a valid proof of marriage between the Plaintiff and 1st Defendant is a question of fact. For the court to be justified to presume a marriage between the two will depend on the facts presented before it subject to proof on a balance of probabilities. **The Black's Law Dictionary 9th edition** has defined '**marriage**' as the "**legal union of a couple as husband and wife**" It also elaborates the essentials of a valid marriage as: (1) *parties legally capable of contracting to marry, (2) mutual consent or agreement, and (3) an actual contracting in the form prescribed by law.*

60. **Section 3(1)** of the **Marriage Act, 2014** is in tandem with the **Black's Law Dictionary** save for the aspect of compulsory registration and it provides that "*a marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Marriage Act*".

Similarly, **Article 45(2)** of the **Constitution** provides for the right to marry a person of the opposite sex based on the free consent of the parties.

61. In the instant case, the Plaintiff testified that she is the wife of the 1st Defendant by virtue of the two having lived together for a period of more than ten years and as a result of that union, they sired two children. She went on to testify that most people referred to the two of them as husband and wife and produced newspaper publications which had referred to them as **Mr. & Mrs. JB.**

62. The 1st Defendant on the other hand, denied the allegations by the Plaintiff and testified that he is married to **NK since 12th March, 1987** (as I had earlier stated in this Judgment the marriage certificate between the two was produced in evidence as exhibit-2). He said that his relationship with the Plaintiff was casual but had resulted in the two of them siring two children. In his testimony before this court, the 1st Defendant told the court that the Plaintiff was nothing more than a "side chic." He denied the claim that he had lived with the Plaintiff for a period of ten years.

63. Clearly, the evidence of the Plaintiff is inviting the court to presume the existence of marriage by cohabitation between herself and the 1st Defendant since her theory has failed the test accorded under **Section 3** of the **Marriage Act**. In my view, **Section 119** of the **Evidence Act, Cap 80 Laws of Kenya** forms the basis upon which this court can make such a presumption. It provides 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."

64. Further, **Section 2** of the **Marriage Act, 2014**, defines the word "**Cohabit**" as *to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.* I do appreciate that there are a number of authorities wherein our courts in Kenya have presumed the existence of a marriage due to long cohabitation in circumstances where although the parties had not formally married, they lived and acted as husband and wife. I will first consider some of such authorities.

65. To begin with, the Court of Appeal in the case of **Phylis Njoki Karanja & 2 Others –vs- Rosemary Mueni Karanja & Another [2009]eKLR**, held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. That court held as follows:-

"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. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed" (own emphasis)

66. The same court in the case of **P K A –vs- M S A [2014], eKLR** adopted the decision in the case of **Hortensiah Wanjiku Yawe –vs- Public Trustees Eaca C.A. No.13 Of 1976**, where the court expressed itself thus:-

"...long cohabitation as man and wife gives rise to a presumption of marriage ...only cogent evidence to the contrary can rebut such a presumption"

67. Retired Justice **A.I Hayanga** in the case of **Christopher Nderi Gathambo & Samuel Muthui Munene –vs- Samuel Muthui Munene [2003] eKLR**, elaborated on the burden of proof where cohabitation is pleaded as follows:-

"If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married and when it is challenged, the burden lies on those challenging it to prove that there was in fact no marriage, and not upon those who rely on it to prove that it was solemnized." (Own emphasis)

68. Lastly, the Court of Appeal set some of the hurdles to be considered before a presumption of marriage is made in the case of **M.W.G – vs- E.W.K [2010]eKLR**. The court stated that;

"a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by long cohabitation or other circumstances evinced an intention of living together as husband and wife." (emphasis mine)

69. From the line of authorities cited herein-above, there are requirements to be made before a presumption of marriage is made but I do not wish to highlight them because in my view they serve no purpose in this Judgment. I say so with reference to the last decision cited, which is the case of **M.W.G –vs- E.W.K (supra)**. I agree with the court of Appeal in that case to the extent that a marriage cannot be presumed in favour of any party in a relationship in which one of them is married under statute. In this case, the 1st Defendant has shown on a balance of probabilities that he was married to **NK** in the year **1987**, which is well before the inception of his relationship with the Plaintiff in **1991** and a marriage certificate was produced as **“D-Exhibit-1”** as sufficient proof of the said marriage, and I have no reason to doubt that. In any event, the Plaintiff did not raise any objection or otherwise challenge the said marriage certificate.

70. It then follows from the discussion above, that this court cannot in the circumstances implore a presumption of marriage between the Plaintiff and the 1st Defendant herein. The 1st Defendant was married under statute law, a system which permits only monogamous marriage and no presumption of marriage can be made.

71. The other reason for arriving at the conclusion I have in the above paragraph is by virtue of **Section 6** of the **Marriage Act**, which provides on the types of marriages that the Act recognizes. Cohabitation is none of them and in my view **Section 6** of the **Marriage Act** as read with **Section 96(2)** of the same Act has rendered cohabitation redundant. The said **Section 96(2)** requires that all the marriages contracted prior to the commencement of the Marriage Act be registered within 3 years of its coming into force.

b) Whether the Defendant should be ordered to transfer the house standing on Plot No. xxxx, English Point to the Plaintiff herein.

72. As I understand it, the Plaintiff’s case is that the 1st Defendant had promised to buy her a house so that they could settle as a family. That she then assisted the 1st Defendant to find a house standing on **Plot No. xxxx** at **English Point, Nyali Mombasa**. And after it was purchased and renovated, they moved to the said house where she has been living to date. When cross-examined, the Plaintiff stated that she did not know who had paid for the house or in whose name the property was registered. All she knew was that the 1st Defendant had promised to buy her a house and she had contributed in its renovation by designing the swimming pool.

73. At some point, the Plaintiff submitted that the house was the family’s home and the 1st Defendant should not be let to interfere with her occupation of that house. However, in my view, it would be an academic exercise to consider the house otherwise as a matrimonial home since a matrimonial property only arises where there is a marriage. Having found that no presumption of marriage can arise from the relationship between the Plaintiff and 1st Defendant, the subject house cannot be considered as a matrimonial home. **Section 2** of the **Matrimonial Property Act** defines a **‘matrimonial home’** as *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 brings out this clearly.*

74. I now proceed to consider the aspect on whether the house should be transferred to the Plaintiff based on the alleged promise by the 1st Defendant to buy the subject house for her. However, I first wish to reiterate that the 1st Defendant denied those allegations and submitted that the house was purchased by **Messrs. [Particulars withheld] Company Limited** where he is a co-director and he developed the house for himself and not for the Plaintiff. He added that he had allowed the Plaintiff to live in the subject house as he was in the process of building her a house in Bamburi but to his surprise, when the house in Bamburi was completed, the Plaintiff refused to vacate the subject house.

75. Indeed, there is no substantive evidence with regard to the issue at hand. What there is, is the Plaintiff’s word as against that of the 1st Defendant. The Plaintiff has not adduced any evidence to show that she designed the swimming pool or assisted in the search for the house as she alleged. Nonetheless, I take the view that where a gift rests merely on a promise, whether written or oral, or on an unfulfilled intention, it is incomplete and imperfect and the court cannot compel the intended donor or any person claiming under him, to perfect or complete the gift or the promise. Consequently, it is my conclusion that this court cannot compel the 1st Defendant herein to fulfil or complete his promises to the Plaintiff. Therefore the alleged promise by the 1st Defendant to buy the Plaintiff a house remains so imperfect that the court cannot act on it to direct the 1st Defendant to transfer the house standing on **Plot No. xxxx**, at **English Point, Nyali, Mombasa** to the Plaintiff.

76. There is also irrefutable evidence on record that the **Plot No. xxxx**, at **English Point, Nyali, Mombasa** is registered in the name of **Messrs. [Particulars withheld] Company Limited**. The certificate of title by **M/S [Particulars withheld] Company Ltd** was produced as **“D-Exhibit No. 3(b)”**. While on the same point, I must appreciate that our land registration regime recognizes the principle of sanctity of title, which in turn connotes a presumption that a certificate of title is *prima facie* evidence that the person named as the proprietor of the land in question is the absolute and indefeasible owner thereof.

77. The Plaintiff therefore was required to prove that she was entitled to the subject house on **Plot No. xxxx** by virtue of some contribution or other arrangement that would *per se* entitle her to the suit property. She too had the burden of proving fraud on the part of the 1st Defendant to warrant the piercing of the corporate veil for **M/S [Particulars withheld] Company Ltd**. I have not seen any particulars of fraud that the Plaintiff accuses the 1st Defendant of on the court record, and if any, the same was not proved to the required standard of proof which is obviously higher than that required in ordinary civil cases, (namely, proof upon a balance of probabilities;), but certainly not one beyond a reasonable doubt as in criminal cases.

78. That having been said, it is my view that the Plaintiff has not proved to the satisfaction of the court, on what grounds the subject house should be transferred to her and that prayer fails. I do hold that the suit property belongs to **[Particulars withheld] Company Ltd** exclusively as the Plaintiff has not shown any proprietary interest therein.

c) Whether the Plaintiff is entitled to any share on the net worth of the 1st Defendant.

79. The Plaintiff’s case is that she left her employment and career so as to assist

the 1st Defendant in taking care of their children as well as the 1st Defendant's businesses both in Mombasa and in Lamu. She told the court that she believed the 1st Defendant's Hotels in Lamu and the others in Mombasa were family businesses and she had invested her time in building the said businesses. As a matter of fact, she testified that she was present when the 1st Defendant was purchasing the hotel in Lamu and for some time she supervised the operations in the said hotel. The Plaintiff submitted that as a spouse to the 1st Defendant, she is entitled to a share in the 1st Defendant's net worth and the same should be determined by this court.

80. I am of a different opinion and unable to agree with the Plaintiff in the circumstances. It would be unnecessary to harp on this issue, firstly, because no presumption of marriage has arisen in this case and therefore the issue of family business does not arise. Secondly, the allegation that she had left employment to help the 1st Defendant in his hotel business is neither here nor there. There is nothing that has been put forth to buttress this assertion. Thirdly, the alleged contribution has not also been proved and this prayer cannot stand.

d) Whether the 1st Defendant should be ordered to continue paying maintenance for Kshs.100,000/=

81. It is worth noting that this prayer had been granted at the interlocutory stage of this case wherein the 1st Defendant was directed to pay maintenance for the two daughters at a monthly rate of Kshs.100,000/=. It is common ground that the children have now attained the age of majority and are currently living in Germany. The 1st Defendant produced a bundle of documents which show that he is supporting his two daughters to-date.. To be precise, his testimony was that he now sends money directly to their account as he is apprehensive that if he supports them through their mother, the money might end up not serving the intended purpose.

82. I would first reiterate that this court has unlimited Jurisdiction in all civil matters and the assertion that this court cannot deliberate on the issue of maintenance for children is therefore misplaced. That being said, **Section 23(1)** of the **Children Act** defines '**parental responsibility**' to mean "*all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child. The 'child' envisaged under the Children Act is "any human being who is under the age of eighteen (18) years".*

83. It is noteworthy however that parental responsibility in respect of a child who has attained the age of majority can be extended if the court is satisfied that special circumstances exist with regard to the welfare of the child. The special circumstances are provided under **Section 28(1)** of the **Children Act** which stipulates thus:-

"Parental responsibility in respect of a child may be extended by the court beyond the date of the child's eighteenth birthday if the court is satisfied upon application or of its own motion, that special circumstances exist with regard to the welfare of the child that would necessitate such extension being made:

Provided that the order may be applied for after the child's eighteenth birthday."

84. **Section 91(b)** on its part provides the circumstances under which a person who is not a child can apply to court for a maintenance order. I have read through the section in light of the circumstances of this case and I have not found any special circumstances in this case which benefit the ones provided for under **Section 91(b)**.

85. The court has also been informed that the two daughters are currently qualified swimmers in Germany and I believe that they are making some income for themselves through that. There is also no evidence that after the attainment of the majority of age, the 1st Defendant has been supporting them through the Plaintiff and he has shown to the satisfaction of the court through the bank slips and money transfer receipts that he has been a supportive father. Furthermore, his assertion that he is paying a tune of Kshs.300,000/= to the children has not been rebutted. In the end, I find no special circumstances to otherwise extend the maintenance order.

e) Whether the Plaintiff is entitled to fees arrears for the years between 2010 and 2016.

86. It is the Plaintiff's submissions that the 1st Defendant was unable to produce evidence that he ever supported the children between the period of 2010 and 2016 and claims that she should be reimbursed in the ratio that was expected of the 1st Defendant. She added that she was forced to do odd jobs to raise the upkeep for the Children because even after being directed to pay maintenance, the 1st Defendant never complied.

87. Interestingly, in her testimony before the court, she conceded that the 1st Defendant has always provided for them. She has also not produced any slip to show that she has been paying school fees from the year 2010-2016 by herself as she alleges. The slips attached to her bundle of documents were the basis of granting the interim order for maintenance but no other slips beyond those one have been produced.

88. With such evidence, it is on a flimsy line of argument for the Plaintiff to seek to be reimbursed what she had not in the first place proved. The onus of proof squarely rested on her to prove that she paid school fees without any assistance from the 1st Defendant but not attempting to shift the burden of proof to him.

89. **Section 107(1)** of the **Evidence Act, Cap 80 Laws of Kenya** 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".

90. This is called the legal burden of proof. There is however the evidential burden of proof which is captured in **Sections 109** and **112** of the same Act as follows:

[109]. The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

[112]. In civil proceedings, when any fact is especially within the knowledge of any party to those proceedings, the burden of proving or disproving that fact is upon him.

The Plaintiff has not met that evidentiary threshold and the prayers sought cannot issue.

f) Whether the Claim for Damages is merited

91. On the issue of damages, the Plaintiff submitted that she went through physical and mental anguish trying to bring up the children by herself with a lot of frustration from the 1st Defendant. She also submitted that she lost her maiden years and should be rewarded damages for that.

92. In my view, those assertions do not prove that general damages accrued to her. She needed to do more than merely pleading distress. Just to mention, **Article 53** of the **Constitution** imposes equal parental responsibility on both parents of a child and in my view she cannot claim damages on what she was equally obligated to do by the Constitution.

93. The upshot of this is that the Plaintiff has not proved any of her claims against the 1st Defendant. No marriage can be presumed as between them. In the end, the Plaintiff's suit is hereby dismissed.

94. The circumstances of the case do not call for an award of costs. Each party shall meet his/her own costs.

It is hereby so ordered.-

SIGNED, DATED and DELIVERED VIRTUALLY at MOMBASA this 13th day of MAY, 2021.

D. CHEPKWONY

JUDGE.

In the presence of:

No appearance by and for Plaintiff

Mr. Odunga Counsel holding brief for Mr. Bwire Counsel for the 1st Defendant

Winnie – Court Assistant