REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

CIVIL SUIT NO 58 OF 2014 (OS)

AKN……..…...APPLICANT/PLAINTIFF

VERSUS

JMN……DEFENDANT/RESPONDENT

RULING

1. The suit herein commenced by way of Originating Summons dated 3rd September 2014 seeking declarations that the respondent held certain properties in trust for the applicant, that the applicant was entitled to equal share either in cash or kind to proceeds of sale or transfer of any property sold, that the respondent accounts for all the income derived from the said properties, that an injunction issues to restrain the respondent from evicting the applicant from a property at Mua, Machakos County, among others.

2. Contemporaneously filed with the Originating Summons was a Motion dated 3rd September 2014, seeking several injunctive orders – against eviction from the property at Mua, wasting the properties that are the subject of the suit, among others.

3. The Motion was supported by an affidavit sworn on 3rd September 2014 by the applicant. She averred that she had married the respondent under customary law in 1975, and they got three children. The marriage was subsequently dissolved through judicial decree in Divorce Cause No. 5 of 1983. Thereafter the parties came back together in January 1995, remarried and cohabited at a property at Runda. She left her employment at the request of the respondent to take care of the family farm. They got a fourth child in January 1996 during the course of the resumed cohabitation. In November 1996 she was moved from the Runda residence and relocated to the residence at Mua. She averred to have had extensively developed the farm, the home compound and the matrimonial home itself. She averred that the respondent turned cruel to her and was not even talking to her. She said that he no longer supported her financially and was sending household provisions to her through domestic workers, which had had the effect of isolating her to a corner of the house. On 2nd March 2014 the respondent was said to have come in with his relatives, and informed her that he wanted her to move to a residence occupied by her son. She reported the matter, which she terms as a threat to evict her from her matrimonial home, to the police. She also made efforts to talk him out of it through family members to no avail. She averred that she campaigned for him during the 2013 general elections, and that they attended several functions together as a married couple. She averred that she had been under a medical cover of the respondent but since 2013 he refused to renew it. She averred that the respondent acquired several assets during the period of their marriage, and some of the assets acquired before then increased in value during the marriage. She averred that her contribution was through domestic work and management of the matrimonial home. She further stated that she had had four children with the respondent, which he took care of. She averred that she provided companionship to the respondent, including during the campaigns before he alienated her. She pointed to the restrictions that the respondent was placing against her, including access to cars, denial of access to the premises by taxis dropping her into the compound, among others.

4. The respondent responded by an affidavit sworn on 10th September 2014. He accused her of non-disclosure. He said for one they got married in 1975, by which time the applicant had had one child, RN. Thereafter they got two children together, being J and M. He confirmed that their marriage was dissolved by judicial decree in in DC No. 5 of 1983. He subsequently obtained a custody order for the three children in 1991. After the divorce, he married JM, with whom he got five children. He then divorced J and in 2008 married JMM. While she had custody of the children the applicant would keep dropping in to see them. He stated that he had a brief affair with her in 1995 which produced another child, L. He denied cohabiting with her at Lavington. He denied that he lived with her during the pregnancy. After delivery, she forced her way into the Lavington home, and after living there for a while he moved her to another house that he had at Mua. He asserted that her occupation of the house was not as a wife but as mother of his children. He stated that the house was already in place and the applicant did not contribute in any way to the acquisition and development of the property. He denied the remarriage and asserted that the birth of the daughter did not have the effect of reviving the dissolved marriage. He asserted that the status of his relationship with the applicant remained that after the divorce decree of 1983, stating that dowry was even refunded. He stated that the process of acquiring the Mua property commenced after divorce and was concluded in 1994. He denied any role in having the appellant resign her job in 1995. He stated that he employed workers to take care of the Mua property and that he bought food for consumption by the workers and not for the appellant. He stated that in 2014 he decided to settle his three families on the Mua property, and that it was in that context that the applicant was being asked to move out of the house. She occupied the part of the farm that was being allocated to her family to live with her son. He denied that the applicant was involved in his campaigns. He conceded that she attended some of his meetings, but only as a pastor, not as a

wife. He conceded that she attended the funeral of his father, not as a wife but as a guest, and posed for photographs as such. He denied bringing her under his medical cover saying that she took advantage of being the mother of L to be named as a principal. He complained that she continued to use the name M despite the divorce without his volition. He asserted that her name got into his parliamentary medical cards without his consent. He said that he signed the forms but the details were filled by an assistant. To support his assertion that she was not his wife, he pointed to the applicant's passport which bears only her name. He denied that the applicant in any way contributed to the acquisition of the assets the subject of the proceedings. There were several other affidavits sworn by diverse persons to support the respondent's contentions.

5. Contemporaneously filed with the replying affidavit was a Motion dated 10th September 2014. In the Motion he sought, in the main, an order for striking out of the suit. The grounds upon which the application was brought being that there was no jurisdiction to hear the matter as the marriage between the parties had been dissolved on 12th August 1983 in DC No. 5 of 1983, the parties were no longer husband and wife, the Constitution 2010, the Matrimonial Property Act No. 49 of 2013 and the Land Registration Act No. 3 of 2012 were not of retrospective effect, and especially with respect to a marriage dissolved in 1983, and that the suit was time-barred by virtue of section 6 of the Limitation of Actions Act Cap 22 Laws of Kenya. The respondent also filed a notice of preliminary objection as to jurisdiction, dated 10th September 2014, founded on the same grounds as the Motion. The preliminary objection was argued on 26th September 2014, and was dismissed through a ruling that I delivered on 26th October 2014.

6. To that reply in the affidavit of the respondent of 10th September 2014, the applicant swore an affidavit on 19th September 2014. She stated that after the divorce she was granted custody of the children, but the respondent failed to provide maintenance for them, making life very difficult for them. One of the children reached out to the respondent and eventually the children moved in with him. At a later stage at a meal with them and the respondent, the children stated that they preferred to live with the applicant, and it was on that basis that she found herself in the Lavington home. It was after she moved back into the Lavington home that she conceived and bore L. It was also after she moved back in with the respondent that the respondent caused his parents to meet his parents to reconcile the marriage. She stated that the respondent got her parents to convince her to move to Mua, even though she feared that he would bring in another woman into the house, which he did, a woman known as NM. The respondent removed L from her at three years of age, against her will, and enrolled her in a school in Nairobi. She said that the house the respondent was intent on her to relocating to was not meant for her but for her son. She asserted that she could not live with her son according to culture. She stated that the respondent had given four houses to his former wife, JN, and wondered why she could not be treated similarly. There were various other affidavits sworn by diverse persons in support of the applicant's contentions.

7. The rejoinder by the applicant elicited a response from the respondent through an affidavit sworn on 24th September 2014. The said affidavit also responded to the affidavits sworn by other persons in support of the applicant's position. He averred that after the divorce in 1983, he never considered remarriage with the applicant. He stated that customary law marriage negotiations and ceremonies could not have been conducted in the absence of the parties. He asserted that he never reconciled with the applicant as alleged. He reiterated that the house where he wanted her to relocate to was being put up for the children of her marriage with the applicant and not just for the son. He asserted that his humane acts towards the applicant were being erroneously construed as affirmation of a marriage. He said that he took custody of L following her neglect by the applicant.

8. The applicant lodged another application in the cause, dated 16th October 2016, seeking orders to restrain the respondent from harassing her or interfering with her quiet occupation of the Mua property pending the hearing and determination of the suit, restoration of water and electricity, return of household goods removed from the premises, among others.

9. Both sides filed notices of intention to cross-examine the deponents of some of the affidavits placed on record. On 28th October 2014 I directed that the two applications dated 3rd September 2014 and 16th October 2014 be disposed of simultaneously by way of cross-examination of the deponents of the various affidavits on record. The object of the mini-trial was essentially to determine whether or not the applicant became a spouse of the respondent after 12th August 1983, and whether she occupied the respondent's premises as a spouse or as a licensee at the will of the respondent.

10. For the purpose of addressing the issues identified above, the applicant testified and called seven witnesses. The applicant took the stand on 4th December 2014. She stated that her national identity card bore only two names, being AK, and did not bear the surname M. She gave the background that they married under customary law in 1975, separated in 1978 and divorced in 1983. She lived alone with the children until 1995 when she resumed cohabitation with the respondent. She conceded that she had not put the date in any of her affidavits, but asserted that it was sometime in January 1995. She testified that she remarried the respondent under Kamba customary law. He sent his parents to her parents in March 1995, for reconciliation. The *mbui sya ntheo* or the goats given out as dowry on customary marriage occasions were not given as that was not the first time the parties were getting married, and such goats were not given out twice. She stated that after the 1983 divorce her father was sued for refund of dowry, but the dowry was not refunded in full on account of the reconciliation. She stated that she was aware that there was recovery of the dowry through auctioneers, and that no appeal was lodged against the order issued by the court for refund of dowry. She was not present at the ceremony of remarriage, neither would she recall the exact date when it took place. She stated that when the respondent took the children away from her she never used to visit them at Lavington where they lived with him, but they would visit her. Later she began to visit them at Lavington, but she never slept there until after the remarriage, and in any event she visited only on two occasions. When confronted with affidavits of some of the persons who were allegedly party to the remarriage ceremony, she conceded that while they talked about reconciliation, they made no reference at all to customary law. She said that the Mua property was bought after the separation and before the remarriage, but insisted that she contributed to the purchase to the extent that it was bought with money raised from sale of a property at Yatta which had been acquired before 1978 when they separated, She conceded though that she had not talked about the Yatta property in her affidavit. She added that she did not contribute financially to the acquisition but she was taking care of the children of the marriage at California, Nairobi. She said she did not move to live with the respondent at the instigation of the children, but he had already agreed on the matter with the respondent. She said that the children preferred to be with her rather than JN. She insisted that L was conceived and born while she and respondent were living as husband and wife. The conception was said to have happened six months after she moved in with the respondent. She said that she was in his property because they had remarried. She said she participated in the respondent's campaigns as his wife. She said that the respondent had bought her cars, hired drivers for her and provided her with food. Things only changed in September 2014. She stated that there was no spousal intimacy as the respondent had moved to

another woman, but said that there was intimacy before he married the current wife. She stated that it was not true that she was not intimate with the respondent, even when she was moved to Mua, the respondent would still visit her there even though he was then living with NMG.

11. The second witness on the applicant's side was WMK. He was the applicant's paternal uncle, and the chairman of their clan. He said he was not literate in English. When shown his affidavit he said that it was brought to him by the applicant's brother called N, at his home at Ngonda, and he was told to sign it. He said that he did not know the advocate who commissioned it nor the one who drew it. He said that he did not know Mrs. Thongori and that he had only seen and met her in court, and had never visited her office. He asserted that it was not true that he had signed his affidavit in Nairobi. He said that he had never visited a lawyer's office at Tala. He said that he was not aware how the affidavit was prepared and typed. He said it was read out to him by N. He stated that he was the one who gave out the names of the person listed in his affidavit as having been present at the reconciliation meeting. He said that the applicant and the respondent were not at the reconciliation meeting. He said that the respondent's family brought a bull and a goat to their family sometime in February 1995 and asked for forgiveness and reconciliation for having sought refund of dowry. The applicant was said to have been at Nairobi on that day, and her home was said to be at Mua. The clan chairman was then said to have said that he would sent someone to confirm what the respondent's people were saying.

12. Next came LNM, a relative of the applicant by marriage. She said that her affidavit was brought to her by N to sign. She said that the affidavit was signed at Ngonda and then it was taken to Nairobi. She said that she did not go to Nairobi to sign the affidavit. Then again she said that she might have gone to Nairobi to sign it, and forgot. She was asked to sign her usual signature on a piece of paper in court, which she did. When she compared her signature with that in her affidavit, she conceded that the two signatures were different, but then said that she had two sets of signatures. She said that she had never seen Mrs. Thongori before they met in court, had never been to her office in Nairobi. She also could not recall visiting an advocate in Machakos over the affidavit. She said she did not go to Machakos over the affidavit, and stated that she has never been in an advocate's office. She said that the person who took her statement which was reduced into an affidavit came to her home. She mentioned that there was a function at Ngonda in 1995. The respondent's father had sent someone she did not know to their family. He came with a bull. The applicant and the respondent were not present, it was their people who were present. She said 1995 was about the two coming together and reconciling. The respondent was to give them a balance of the dowry, and to restore friendship. She said it was remarriage because they brought property.

13. FNM came next. She said that she signed her affidavit at Ngonda. She said that she had not visited a lawyer in Nairobi over the case. She said she and others signed the affidavits at a lawyer's office in Tala. She said she was a niece of the applicant. She was at the celebrations of 1995. She saw the respondent and was told that he was the one getting married to the applicant. Then she said that he was not present. She said she was not party to what was discussed at the function, for she did not attend the meeting in the house. She said that she had been invited to eat. Those in the house came out and said that they had reached agreement, and that they could now be served the food. She was not aware that the two had previously divorced or separated. .

14. NNN followed. She said that she raised the applicant as her mother had died while she was still small. Her husband was a clan chairman. She said that the applicant and the respondent got married, then in 1995 his parents brought the applicant's family food for celebration, but the two were not present. She said that she was aware that there had been a divorce. She said the second ceremony was for reconciliation. The respondent was coming to take away his wife from whom he had been separated. The party was to celebrate the reconciliation. Money was given to seal the reconciliation. She said that she was at the meeting in the house. She said that she did not know what her affidavit said, as she did not read it. She said they had gone to a government office to have their statements recorded, but she could not tell whether that was in Nairobi or at Kangundo. She said they were altogether when they signed the affidavits. The chairman had brought all of them together.

15. MNM was the next on the stand. He was a brother of the applicant. He said he was aware of the divorce decree. He said that the same was not set aside by a court, but it was set aside at home using customary law. He said that he took the witnesses to a lawyer at Tala. He said he did not take them to Nairobi, neither did he himself sign any of his affidavits in Nairobi. He conceded that some affidavits indicated that they were sworn at Machakos and some at Nairobi. He said that all the affidavits were sworn in Nairobi. He conceded that all the affidavits made similar averments. He said that he was party to the reconciliation. He said that it was the respondent who called him first. Regarding the events of 1996, he said that the discussions were between the respondent and his father. He conceded that he did not indicate the dates when the events took place. He said that he was aware that the applicant was remarried. He said that he was not present at the meeting at Ngonda. He denied being the source of the information put in the witnesses' affidavits.

16. JMK was the next witness for the applicant. He was the applicant's uncle. He conceded that his affidavit did not mention any dates on the event of refund of dowry. After auctioneers had attached the applicant's father's property, he was the one who mobilized his clansmen to help the applicant's father pay the money that was being demanded. He said that he later heard that what had been paid as refund of dowry was to be paid back after the applicant and the respondent were said to have had reconciled. He was not party to those proceedings and therefore he could not confirm whether or not the money was paid.

17. The last witness for the applicant was Joseph Muange Mutiso. She worked for the respondent as housekeeper and cook at Runda, when he lived with NM. He said that he knew and perceived the applicant to be a wife of the respondent. He did not witness them getting married. He lived at the servant's quarters at Mua. He was not party to the respondent's political activities and election campaigns. He said while he worked at Runda, the respondent lived there with NM while the applicant was at Mua. She would visit Runda for birthdays and go back to Mua. When NM was removing her things from Runda after obtaining a court order, it was the applicant who supervised the exercise. He knew the applicant as the respondent's wife. The respondent would visit Mua on weekends, come in one Friday evening and leave on Sunday. He would cook for him while he was at Mua.

18. The case for the respondent opened on 25th September 2015 when he took the stand. He confirmed that their first marriage was terminated by judicial decree in 1983. He then married JN under customary law and later in church. The marriage was also terminated by judicial decree. He married JM next in 2009 under customary law and later under the Marriage Act, Cap 150, Laws of Kenya, now repealed. He stated that he never married NM, although she had sued him over other issues. He denied ever assigning the applicant the duty of supervising the exercise of NM removing her items from the house. He described NM as having a good close friend, who never lived with him. He denied ever living with VM. After divorcing J he settled her by giving her property at Jambo Estate and Woodley. He denied that it was after he ceased to cohabit with JN that he invited the applicant to join him, saying that she used the excuse of their children to squeeze

her way back. He asserted that she has never existed in his life since the divorce of 1983, saying that if he there was any interaction, then the same had nothing to do with her being a wife. She began to come to his home whenever he was away in the guise of visiting the children. He stated that she never moved back to his house nor to his life. She only moved in after L was born, and he could not chase her away because of the child. She stayed on for two or so months before he moved her to Mua. After three or so years he took away L from her and she remained at Mua. He asserted that there was no reconciliation with her, and no sitting took place between them for reconciliation purposes, in the presence of witnesses. He stated that they were together for one night, not two, and she went away, he only later heard that she had had a baby. He said that after the divorce they were not together for more than that one night. At the time he was not married. He did not dispute paternity, and he allowed her to stay on because of the child, as he did not want her in the streets. He stated that he held a meeting with her, their son and elders, where he made it clear that she was not his wife, and informed them that he wanted to settle his family on the Mua land, where the son was to get forty-five (45) acres and could house her if he wanted. She later changed her mind. He stated that he had homes at Mua, Kangundo and Maanzoni. He was to settle his wife, J at the Maanzoni home, and J's children at Kangundo. He said that the issue of the applicant being evicted did not arise as she was non-existent to his life. He explained the issue of the medical cards. One, he said it was assistants who included the applicant's details, while in the other he said the card was rendered useless when it turned out that the details of her name in her national identity card did not match those in the medical card. He stated that he and the applicant never used to live as husband and wife at Mua. She never used to access his bedroom and he never used to visit hers, saying that it was like one being in London and the other in Nairobi. He asserted that he neither remarried the applicant nor reconciled with her, for if there was such an event it would have involved both of them. He asserted that L was not born in matrimony.

19. The respondent's first witness was JPN. He was a relative of the respondent. He confirmed that the applicant was living at Mua with two of her children. He said that he was aware that the parties had divorced in1983. He said that their side of the family never held any meetings to talk about remarriage. He said that he was not aware that there had been a reunion of the applicant with the respondent as no one from their family went to the family of the applicant about a remarriage. He said if there was such a thing he would have been among those who would have gone to her parents' home.

20. DMM followed. He was a brother of the respondent. He said he was aware that the applicant and the respondent had divorced, after which they ceased living together. He said he was also aware that the applicant lived at the respondent's house at Mua, although he could not say when she moved in there. He said that he would visit the Mua house with the respondent, the applicant would be available in the house but not in their presence, she would be not be visible to them. He said he did not know the circumstances under she moved into the house, nor that she considered herself to be a wife of the respondent. He also said that he did not know the circumstances of L's birth. He said that there was no function where a remarriage of the applicant and the respondent was celebrated, saying that the same could not happen without his knowledge. He said that he also never asked the respondent the circumstances under which the applicant came to live at Mua. He said that the respondent had said that he lived in a separate bedroom from the applicant, and he used to see it whenever he visited. He said that there was no remarriage for had there been one he would have been at the frontline organizing it. He asserted that there was no customary law remarriage between the applicant and the respondent, neither was there reconciliation nor reunion. He stated that as a brother of the respondent he would have known of a reunion or remarriage.

21. The next witness for the respondent was Daniel Mutua Maluu. He was chairman of the Aiini clan, and he introduced himself as an expert on Kamba customary law. He stated he never interacted with the parties prior to 1995. He talked about the customs that relate to marriage and divorce. Jackson Munuve Muithya came next. He once worked for the respondent, doing fittings at the Mua Home. He did the works in 1995-1996. He did not see the applicant at the home then, but he did meet her in 2006 when he visited the Mua home, and it was in 2009 that he got to know that she was living there. He talked of the applicant and the respondent each having a bedroom, but he said that he himself slept in the servant's quarters and was not in a position to know about the parties sleeping arrangements, although he still stated that he worked there long enough to see who slept where and who went into whose bedroom.

22. At the close of the oral hearing, the parties were directed to file and exchange written submissions. There has been compliance with the directions, and the parties have filed detailed written submissions with the authorities that they relied on. I have read through the said written submissions and noted the arguments that they have made.

23. As stated elsewhere, the principal issue for determination is whether after the divorce of 1983, the parties hereto remarried, and whether the applicant lives at the respondent's Mua property as a spouse of the respondent or as a licensee at the will of the respondent. The evidence adduced herein was intended to resolve those two issues. The applicant asserted that there was remarriage and that she was in the Mua house in her capacity as the spouse of the respondent, while the respondent's position was that there was no such remarriage, and that the applicant's presence was not as wife but that she had been allowed in there as mother of the children of the respondent. The matter proceeded by way of cross-examination of deponents of some of the affidavits lodged in the cause in support or opposition to the applications the subject of the ruling. I shall only consider the affidavits of the person who were availed and subjected to cross-examination. The affidavits of the persons who were not availed for cross-examination shall be disregarded on the basis that the decision not to avail them for cross-examination meant that there was no intention that the said affidavits be relied on and had been abandoned.

24. It is a cardinal principle of civil law that he who alleges must prove. It was the applicant alleging that there was a remarriage, and it was therefore incumbent upon her to marshal evidence to establish that allegation. She did marshal evidence. Her approach was two-pronged. Firstly, it was her case that there was a customary law function that was held at her parents' home whose effect was to reconcile her and the respondent, resulting in a remarriage between them. Secondly, it was also her case that even though the evidence of the customary law remarriage might fall short of establishing such a remarriage there were circumstances from which a court could presume remarriage between them. I shall proceed to consider the two positions in turn.

25. On the customary law function of 1995, several affidavits were sworn and filed by relatives of the applicant who were present. All of them did not identify the particular or exact date when the event happened save to say that it was in 1995. The said affidavits were nearly in all fours similar. They talked about the family of the respondent seeking forgiveness over the refund of dowry suit, and there being reconciliation between the parties and revival of the marriage between them. At the oral hearing, the deponents of the affidavits essentially stuck to their story that the event was about reconciliation. The respondent's side took the position that there was no such event, the parties never reconciled and there was no remarriage.

26. A number of issues have been raised regarding the affidavits. The first issue was on the propriety of the affidavits of the various deponents. The affidavits were said to have been sworn in Nairobi, before a Commissioner for Oaths whose date stamp bore a Machakos address, yet all the witnesses stated that they did not appear before an advocate in Nairobi or that they did not sign the affidavits in Nairobi. Some said their affidavits were taken to them at their homes at Ngonda for signature by one of the other witnesses, while others said they were taken to an advocate's office at Tala, where they executed the affidavits. The bottom-line, the affidavits were not sworn at Nairobi as purported on their face, and that they were not executed before the commissioner for oaths purported on face of the date stamp.

27. The law on commissioning of affidavits is the Oaths and Statutory Declarations Act, Cap 15, Laws of Kenya, which at section 5 states as follows –

> *'Every Commissioner for Oaths before whom any oath or affidavit is taken or made under this Act shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.'*

28. It was submitted that the affidavits were not valid as they do not comply with the Oaths and Statutory Declarations Act. My attention was drawn to a decision in *Regina Munyiva Ndunge vs. Kenya Commercial Bank Limited* (2005) eKLR, where the court addressed itself to compliance with section 5 of the Oaths and Statutory Declarations Act. The court said –

> *'The second issue raised by the Applicant is that the application should be treated as unopposed because the replying affidavit is defective since it is not properly commissioned. Section 5 of the Oaths and Statutory Declarations Act provides that:*
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> > *'Every Commissioner for Oaths before whom any oath or affidavit is taken or made … shall state truly in the jurat or attestation at what place and on what date the oath or affidavit is taken or made.'*
> >
> > *' … The affidavit is shown as having been sworn at Machakos in the presence of Leah Mbuthia, Commissioner for Oaths, on 13th October 2003 but whose stamp reads Nairobi. If the affidavit was sworn at Machakos, it should have been before a Commissioner for Oaths in Machakos and the stamp should show likewise. The only conclusion one can reach on looking at this affidavit is that the place the affidavit was sworn and where it was commissioned are two different places. That is irregular and unacceptable and that affidavit is, therefore, fatally defective as it was not sworn in the presence of a Commissioner for Oaths. It is likely that the stamp was just affixed. This court should have no alternative but strike off the replying affidavit as it is not properly commissioned and that the application would stand unopposed.'*

29. Then there was the decision in *CMC Motors Group Limited vs. Bengeria arap Korir trading as Marben School & Another* (2013) eKLR, where the court, in striking out an affidavit said –

> *'The merit as I find it in respect of Waudo's affidavit is that the affidavit does not seem to have been sworn before a Commissioner for Oaths. For avoidance of doubt the Black's Law Dictionary defines an oath as follows –*
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> > *'Oath is a solemn declaration accompanied by a swearing to God or a revered person or thing that ones's statement is true or that one will be bound to a promise … The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.'*
> >
> > *' … Bearing that definition the question that needs to be answered is whether Waudo took an oath before a Commissioner for Oaths. Looking at her affidavit it would seem that she signed the affidavit in Nairobi and the Commissioner for Oaths signed it in Mombasa. It will therefore seem that her affidavit fails to conform to the requirements of Section 5 of Cap 15. It is not an affidavit which is under oath. That being so the same is hereby struck out.'*

30. I need not say more. The affidavits on record purportedly sworn by FNM, NNN, LM, MNM, WMK and JMK on 19th September 2014 were not properly commissioned. They are not on oath. They are in fact not affidavits at all. They are accordingly struck out. The affidavits were drawn in support of the interlocutory application dated 3rd September 2014. The application was heard by way of cross-examination of the deponents of the affidavits drawn in support or in opposition to it. FNM, NNN, LM, MNM, WMK and JMK were cross-examined on the basis of the affidavits that I have struck out. The effect of that would be that their oral evidence is now without foundation, and it is also hereby struck out. It shall be disregarded.

31. The striking out of the affidavits of FNM, NNN, LM, MNM, WMK and JMK; and the striking out of their oral testimonies would mean that the applicant has no other evidence to support her claim that there was a customary law ceremony whose effect was to revive the marriage between the applicant and the respondent. That ought to lay to rest the claim that there was a customary law remarriage or reconciliation or revival of the said marriage. The applicant was not present at the alleged ceremony and therefore whatever she said in her affidavits and oral testimony on the same was of no probative value.

32. Before I leave the subject, I should perhaps state that a party who intends to rely on a custom is obliged to lead evidence to establish that such a custom existed. That can be done by the adducing of oral evidence by persons who are familiar with that custom. There is wealth of case law on this. It was stated in such cases as *Ernest Kinyanjui Kimani vs. Muiru Gikanga and another* (1965) EA 735, *Sakina Sote Kaittany and another vs. Mary Wamaitha* Civil Appeal No. 108 of 1995 Court of Appeal (unreported), *Atemo vs. Imujaro* (2003) KLR 435, among others, that he who seeks to rely on customary law as basis of his claim must prove by evidence the existence of such custom. It can also be established by reliance on treatises on the subject, or by reliance on judicial precedence.

33. I have carefully gone through the material placed before me, both the affidavits, the oral evidence and the submissions, and noted that

none of the parties made any effort to establish whether there was any custom that governed cases of remarriage by parties whose previous customary law marriage between themselves had been dissolved and dowry returned. There is no material before me that would suggest that such a custom existed. The content of such a custom, if it existed, was not brought forth for me to assess whether or not the parties hereto complied with the same so that at the end of the day it could be said that the two had remarried under Kamba customary law.

34. The conclusion that I have to draw in the circumstances is that there is no proof that the parties hereto went through a ceremony of marriage that amounted to their remarriage or that reconciled them and in the process revived the marriage that had been dissolved by court decree in 1983 and the dowry refunded.

35. On the question as to whether there existed circumstances from which the court could presume that a marriage existed between them, I have to examine the common law principle relating to presumption of marriage. The principle is applied in Kenya through the Judicature Act, Cap 8, Laws of Kenya. The presumption arises in cases where a man and a woman have cohabited for a length of time and in circumstances that that give rise to a reputation that they were man and wife. Such presumption can only be rebutted by strong and weighty evidence to the contrary. In *Breadalbane* (1867) LR 1 HL, it was held that the presumption would arise where a *prima facie* case is established showing that the two passed in society as husband and wife. It was emphasized that there ought to be mutual agreement. The principles were restated in *Hortensia Wanjiku Yawe vs. The Public Trustee* Nairobi CACA No. 13 of 1976, which has been followed in a long line of other local decisions that I need not cite here.

36. The applicant's case was that sometime in 1995 she and the applicant agreed to resume cohabitation, and she moved in with him at his home at Lavington, that cohabitation produced the child L, and continued at Runda and Mua. The respondent denied the alleged cohabitation. He said that they had a brief encounter, he put it as a one day or a night liaison, which left the applicant pregnant, a pregnancy that he was not aware of until after the applicant delivered as after that she did not live with him, only coming in after delivery and he admitting her for the sake of the child. He further said that she stayed on in Nairobi only briefly for he relocated her and the infant to his house at Mua, where she remained to date not as a wife, but as a licensee.

37. To support a case for presumption of marriage, the applicant put in evidence a bundle of photographs, medical cards, a funeral programme, among other documents. The photographs could be classified into three general categories. The first being of her at the respondent's property at Mua with the respondent's children. The second category would be of her together with the respondent at funerals of close family members. The third would be of her and the respondent in election campaign meetings where she allegedly campaigned for him. The funeral programme was in respect of the burial of the respondent's father, and showed the name of the applicant as a daughter in law of the deceased. The medical cards were meant to depict the applicant as a spouse of the respondent.

38. I will deal first with the photographs. Photographs are good at painting a portrait that words that are not able to conjure. They breathe life to oral narratives and testimonies. They are said to speak more loudly than words. They are therefore useful evidence in matters such as the one at hand. It was not disputed that the applicant was in occupation of the Mua house, what was in contention was the circumstances under which she came to be in such occupation. The pictures placing her in the property might therefore not be critical evidence as the respondent was not present in them. The ones that spoke volumes were those that put the applicant and the respondent together as they suggested that the two were in a relationship and were therefore cohabitating.

39. Before I can address the question as to whether the bundle of photographs put in evidence was of any probative value, I should first address the technical issue raised by the respondent, that the pictorial or photographic material had not been properly placed on record and was therefore not admissible. Its authenticity and admissibility was challenged on the basis that they were not accompanied by the requisite certificates as required by sections 65, 106A and 106B of the Evidence Act, Cap 80, Laws of Kenya. The said provisions deal with production of electronic materials and their derivatives, which include photographs.

40. Section 106B states the procedures through which electronic records can be made admissible in evidence. The said provision says as follows –

> *'106B (1). Notwithstanding anything contained in this Act, any information contained in an electronic record which is printed on a paper, stored, recorded or copied on optical or electronic-magnetic media produced by a computer (herein referred to as computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and shall be admissible in any proceedings, without further proof or production of the original, as evidence of any contents of the original, or of any fact stated therein where direct evidence would be admissible.*
>
> *(2) …*
>
> *(3) …*
>
> *(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following –*
>
> *(a) Identifying the electronic record containing the statement and describing the manner in which it was produced;*
>
> *(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;*
>
> *(c) dealing with any matters to which conditions mentioned in subsection (2) relate;*
>
> *(d) purporting to be signed by a person occupying a responsible position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate and for the*

purpose of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge of the person stating it.'

41. The question that arises is whether these provisions apply to pictorial or photographic evidence. The court addressed the same in *Moses Wanjala Lukoye vs. Benard Alfred Wekesa Sambu & 2 others* EP No. 2 of 2013, where it was said –

> *' ... Now, the law requires that where the document under consideration for admission is an electronic one or has been produced by way of electronic systems and gadgets, a certificate by the person who produced the document must be provided. Indeed, the Evidence Act requires the certificate should accompany the documents in order to:*
>
> *(a) Identify the document;*
>
> *(b) Give such particulars of the device used in the production;*
>
> *(c) Give such other material information on the person doing it, when, how, and where …*
>
> *... Are photographs covered under section 65 of the Evidence Act? I believe they are covered under films or reproduction of image of a film or images embodied in film which brings them squarely under the scrutiny of the law under section 65 of the Evidence Act. A certificate in accordance with that section will then be required. Section 65 of the Evidence Act should be understood to be a statutory framework that expresses the contemporary best practices in admission of electronic evidence …*
>
> *... The purpose of the elaborate requirement on how electronic evidence is processed for it to be admissible in evidence is to guard against the easy interference with electronic evidence given the modern technology …*
>
> *... Certainly the integrity of the process of production of electronic evidence is the only way of ensuring proper electronic evidence is produced in court. That is the purport of section 65 of the Evidence Act. This integral rule in admission of electronic evidence cannot be dwindled by arguments that a witness would speak to the contents of the photographs.'*

42. What then would be the fate of photographic evidence whose authenticity is not verified by a certificate? The answer was provided in *Justus Gesito Mugali M'Mbaya vs. Anami Silverse Lisamula* HCCC No. 6 of 2013, where the court said –

> *' ... It is indeed a requirement of the law of evidence that there be a certificate to verify the authenticity of electronic evidence, I have taken note from perusing the said affidavit of Alexander Khamasi Mulimi that the certificate has not been annexed thereto … I hereby make the following orders: annextures marked 'JGMM 2' and 'JGMM 3' and paragraph 8(s) of the Petitioner's affidavit in support of the Petition sworn on 9th April 2013 are hereby expunged.'*

43. In view of the above, I am persuaded that the photographs were not properly placed on record, and therefore the same are of no probative value.

44. Five medical cards were exhibited as evidence that the respondent had taken them out for the applicant in her capacity as his spouse. Three were issued by Bupa International to a person known as AM under M Gemstones (K) Limited and Rockland Kenya Limited. The other two were issued by AONhealth and AAR Health Services. The AAR card was issued to AKN, while the AON card was issued to AKM in her capacity as spouse of the respondent.

45. I note that in four of the cards the applicant was not described as a spouse of the respondent. I note that in all four she used the respondent's names as her surname, that is N and M. The use of the respondent's name as surname was not in itself sufficient indication that she was his spouse. It is not uncommon, and it is indeed acceptable, for former wives after dissolution of marriage to continue being identified with the name or names of their former spouse. That of itself would not make them spouses of their former spouse. Secondly, in the three cards issued under the auspices of M Gemstones (K) Limited and Rockland Kenya Limited there might be a suggestion inherent in there that there was a special relationship between the card holder and the principal owner of the company. It could be taken as evidence that that relationship was suggestive of a marriage. However, that would be stretching matters a little beyond the limits. There was nothing in those three cards that suggested that the applicant was a spouse of the respondent. The circumstances under which those cards were issued could only be explained by the makers of the cards, who would have provided applications forms which would have shed light on the description of the applicant in the said forms. I do not think much should turn on these three cards.

46. The card that should be critical is the AON card in respect of which the principal holder was the respondent as it was in respect of a cover which accrued to him as Member of Parliament, and in which the applicant appears in the card as a beneficiary in her capacity as a spouse of the respondent. The respondent explained that although he signed the relevant forms for the card, he was not the one who filled in the details, an assistant did. The assistant swore an affidavit in which she explained that the respondent signed the form in blank as he was in a hurry to go somewhere, with details of the beneficiary children to be filled in later. When she started to fill in the details she was not certain as to the birth date of L and so she called the applicant to get the same, whereupon the applicant asked her to include her name too, which the assitant did without consulting the respondent. She said that she did so innocently without intending to insinuate that she was a spouse of the respondent. I note that that assistant, Sarah Nehondo Aloyo, was not availed for cross-examination, and her affidavit should be among those that I have held should be disregarded. The respondent urged me to take the contents of that affidavit as uncontroverted and cited a letter that counsel for the applicant wrote to his lawyers on 14th July 2015 indicating that they did not wish to cross-examine Sarah Nehondo Aloyo, among others. I have carefully perused through my file of papers, and I have not come across a copy of the said letter, I cannot therefore take at face value what the respondent submitted so far as the contents of that letter were concerned. I recall that issues surrounding the calling of the deponent of that affidavit, and others was raised on 19th May 2016, with counsel for the applicant indicating that she had sent an email to counsel for the respondent stating that she wished to cross-examine Ms. Aloyo, although that email was not made available to the court.

Counsel for the respondent took the position that the persons that they had not called for cross-examination they were dropping their affidavits. He stated that the position in law was that where a deponent of an affidavit was not called for cross-examination then that person's affidavit was not relied on. Consequently, I do not think there would be basis for me to consider the averments in that affidavit.

47. The question then that I should seek to answer is whether the reference in that card to the applicant as a spouse of the respondent was adequate material for me to presume that she was indeed such a spouse. I do not think so. It is material that should be considered alongside other evidence. Indeed, in *X vs. Y (Maintenance Arrears – Cohabitation)* (2012) EWCC 1 (fam), it was said -

> ' … *Determining the question of cohabitation requires the court to assemble as many pieces of the evidential jigsaw as possible in order to see whether a clear picture emerges* …

48. On the funeral programme, like the AON card, the fact that the name of the applicant was indicated as a daughter in law did not settle the matter. It was material that ought to be considered alongside other evidence in assessing whether or not there was material that suggested a marriage. It was noted in *Dolly Wanja Ngiti vs. Irene Gakii Mbijiwe* (2014) eKLR that photographs *per se* could not be taken to connote existence of a marriage, and I may add that a mention in the funeral programme as a daughter-in-law similarly would not connote marriage. My attention was also drawn to the decision in *The Estate of Stephen Kimuyu Ngeki vs. Agnes Muthoki Stephen & another* Probate and Administration Cause No. 267 of 1995, where the court held that the mere fact that the petitioner had been indicated to be a wife of the deceased in a radio announcement and burial announcement, attended the funeral and laid a wreath on his grave did not make her a wife of the deceased.

49. Presumption of marriage rides essentially on the fact of cohabitation, for cohabitation is at the heart of a marriage. It is the crux of the matter. A break in cohabitation is a ground for divorce for it amounts to desertion. Consummation of marriage and enjoyment of conjugal rights happens in the context of cohabitation. Therefore, before the court can presume marriage there must be evidence of cohabitation over a period of time. The applicant's case was that she and the respondent cohabited from January 1995 to date, initially in Nairobi and later at Mua. The respondent asserted that there was no such cohabitation. In 1995 they had spent a night together which produced a child, and then in 1996, after delivery of the child, the appellant and the child were accommodated at the respondent's Nairobi property where the respondent lived with the other children, before he relocated her and the child to Mua. He asserted that there was no cohabitation at Mua.

50. I have before me these two competing versions or stories on the question of cohabitation. The applicant in one breath appeared to say that the two of them sat and agreed to remarry and it was on that basis that cohabitation began. On another occasion she talked of a meeting at Hilton with the children and the respondent, where the children were apparently given an option of choosing between two former wives of the respondent, the applicant herein and JN, as to who it was that they would have preferred to stay with. They picked the applicant over JN, and it would appear from that bit of testimony that that was the background to her moving into the house at Lavington. It would appear that the intention was not remarriage, but an arrangement to have one of the former wives, or mothers of the children, being available to the children as at that stage in his life the respondent did not have a wife and was living with about seven children. She testified that initially the children used to visit her wherever she was, but then she began to visit them at Lavington, but without spending the night there. It would appear, if one goes by the version by the applicant, that it was during such period of being available to the children that things happened and L was conceived and born.

51. After L was born the applicant was relocated to Mua, not so long after the child was born. She testified that she was initially reluctant to move for she knew the respondent intended to bring in another woman to his residence at Nairobi. She stated that it was after that that NM and VM, and later JM, came into the picture. It would appear that she was completely kept out of the Nairobi residence, only visiting when there were functions. The applicant painted the picture that the respondent lived at Runda with NM, and later with other women, suggesting that it was the latter and the other women that he cohabited with, and only infrequently interacting with her, saying that 'even when he was with N, he would still come to me at Machakos.' She did not call any witness to testify on the element of cohabitation. The respondent called two witnesses who testified on the fact that although the applicant was resident at the Mua property she never cohabited with the respondent there and whenever the latter visited he slept in a separate bedroom from her.

52. From the material on record it comes out that the respondent's principal residence was at Nairobi, initially at Lavington, and later at Runda. The applicant was in the picture fleetingly in 1995/1996 at Nairobi before being relocated to Mua where she remained to date. She moved with her infant daughter who was later removed from her after three or so years. That picture appeared to tally with the respondent's evidence that he never remarried the applicant but merely accommodated her after she conceived L after his brief liaison with her. The confinement or restriction within Mua appeared to confirm that. The picture that emerged was not that of a spouse, but of a person accommodated initially as mother of the respondent's daughter.

53. In view of everything that I have said above, it is my conclusion that the applicant was not remarried by the respondent after the judicial dissolution of their marriage in 1983. Her occupation of the Mua property thereafter was not therefore in her capacity as spouse of the respondent, but as a licensee at the will of the respondent. In view of these findings, I am unable to grant the orders sought in the applications dated 3rd September 2014 and 16th October 2014, which I shall, and which I hereby do, dismiss with costs to the respondent.

PREPARED, DATED AND SIGNED AT KAKAMEGA THIS 31st DAY OF JANUARY 2019

W. MUSYOKA

JUDGE

DATED, SIGNED and DELIVERED at NAIROBI this 15th DAY OF FEBRUARY, 2019

ASENATH ONGERI

JUDGE