REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KIAMBU

CIVIL APPEAL NO. 94 OF 2016

PMK.....APPELLANT

VERSUS

G N.....1ST RESPONDENT

W G.....2ND RESPONDENT

N G.....3RD RESPONDENT

M G.....4TH RESPONDENT

N G.....5TH RESPONDENT

M G.....6TH RESPONDENT

(Being an appeal from the Judgment of Hon. B. J. Bartoo (Mr.), Resident Magistrate Delivered on 07/05/2015 in Thika CMCC No. 190 of 2015)

JUDGMENT

1. The singular issue presented in this appeal is whether the Appellant, PMK was married to MNG ("Deceased") before her demise. There is no doubt that a declaration that a marriage existed between the Appellant and the Deceased will have several other consequences – including the possibility of consequential claims on matrimonial property as well as the right to bury the Deceased.

2. Here are the brief facts of the case.

3. The Deceased died on 16/02/2015 after a short illness. After her death, the Appellant started preparations for her burial but was met with stiff opposition from the Respondents, who are, father, mother and brothers to the Deceased. While the Appellant lay claim to the right to bury the Deceased by virtue of being a husband, the Respondents denied that there was a marriage between the Appellant and the Deceased and insisted that the 1st and 2nd Respondents had a right to bury the Deceased as her parents. Just underneath the surface there were not-too-veiled claims to the parcel known as Plot No. [particulars withheld] of all that land known as Title Number Ruiru West/[particulars withheld] (Githunguri)("Subject Property"). The Subject Property is registered in the name of the Deceased at the Githunguri Constituency [particulars withheld] and Share Certificate No. [particulars withheld]. Title to the Subject Property is yet to be processed but the Share Certificate is in the Deceased's name.

4. The Appellant claimed the land is matrimonial property on which he has heavily contributed including construction of houses for the matrimonial home and for renting. The Respondents claim that the subject property belonged to the Deceased solely who, they insist, was unmarried.

5. This set the stage for a court battle. After the parties initially entered into a Memorandum of Agreement following a mediation on the question of both burial and marriage (dowry payments), the Respondents allegedly reneged on the Agreement and insisted on the right to solely bury the Deceased. They also went back to their original position that the Appellant was not recognized as a husband.

6. Consequently, the Appellant approached the Court vide a Plaint dated 25/02/2015. In it he sought a declaration that he and the Deceased were married; and that he is entitled to the ownership, use and occupation of the Subject Property. The Plaint also sought for a declaration that he is entitled to bury or inter the remains of the Deceased. The Appellant also sought for an order of injunction restraining the Respondents from blocking him from removing the remains of the Deceased from Nazareth hospital for interment.

7. The Respondents filed their defence denying the existence of a marriage between the Deceased and the Appellant. They also asserted that the Deceased was the sole owner of the Subject Property.

8. Although the Appellant had filed an application for interlocutory relief under Certificate of Urgency, parties agreed to compromise the application and, instead, expedite the hearing of the suit.

9. The matter, then proceeded to a full hearing. The Appellant testified on his own behalf and called two other witnesses while the 1st and 2nd Respondents testified. At the conclusion of the trial, the Learned Trial Magistrate dismissed the Appellant's case and declared that the 1st and 2nd Respondents were the right persons to bury/inter the remains of Deceased. On the issue of ownership of the Subject Property, the Learned Trial Magistrate concluded that the determination will need to be done in a succession cause; and that, therefore, the suit before him was not the correct one to pronounce herself on that question.

10. The Appellant is dissatisfied with the lower Court's judgment and has preferred the present Appeal. In his Memorandum of Appeal, he has listed nine grounds of appeal as follows:

> *a) THAT the Honourable Magistrate erred in law and fact by failing to find that there was marriage between the Appellant and MNG (deceased) during her lifetime.*
>
> *b) THAT the Honourable Magistrate erred in law and fact in failure to find that marriage by cohabitation is a valid marriage under the law.*
>
> *c) THAT the Honourable Magistrate erred in law and fact in holding that there was no marriage despite admission by the father in law of having received goats from the Appellant.*
>
> *d) THAT the Learned Trial Magistrate erred in law and fact in holding that a father's rights supersedes a husbands right by allowing the father right to burry while denying the husband right to to do so.*
>
> *e) THAT the Learned Trial Magistrate misdirected himself in law and fact by basing his decision on assumption that were not supported by evidence whatsoever and in particular to consider the union between the Appellant and the deceased and the children born out of the said union.*
>
> *f) THAT the Learned Trial Magistrate erred in Law and in fact in failing to consider all the evidence before him thereby reaching an erroneous decision.*
>
> *g) THAT the Trial Magistrate erred in Law and in fact by laying emphasis on traditional way of marriage and/or dowry payment as a precondition to marriage thereby reaching a wrong decision.*
>
> *h) THAT the Honourable Magistrate erred in Law and fact in failing to address himself to the pleadings and evidence in the matter.*
>
> *i) THAT the Honourable Magistrate erred in Law and fact by delivering a judgment that was against the weight of the evidence, submission and Marriage Laws.*

11. The court directed the parties to canvass the appeal by way of written submissions.

12. I have read and considered the respective arguments in those submissions.

13. As a first appellate court, it is my duty to subject the whole of the evidence to a fresh and exhaustive scrutiny and make my own conclusions about it, bearing in mind that I did not have the opportunity of seeing and hearing the witnesses first hand. The duty of the court in a first appeal such as this one was stated in ***Selle & another –vs- Associated Motor Boat Co. Ltd.& others (1968) EA 123*** in the following terms:

> *I accept counsel for the respondent's proposition that this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court from a trial by the High Court is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (**Abdul Hammed Saif –vs-Ali Mohamed Sholan (1955), 22 E.A.C.A. 270**).*

14. The appropriate standard of review established for first appeals in our case law can be stated in three complementary principles:

a. First, on first appeal, the Court is under a duty to reconsider and re-evaluate the evidence on record and draw its own conclusions;

b. In reconsidering and re-evaluating the evidence, the first appellate court must bear in mind and give due allowance to the fact that the trial court had the advantage of seeing and hearing the witnesses testify before her; and

c. It is not open to the first appellate court to review the findings of a trial court simply because it would have reached different

results if it were hearing the matter for the first time.

15. These three principles are well settled and are derived from various binding and persuasive authorities including ***Mary Wanjiku Gachigi v Ruth Muthoni Kamau (Civil Appeal No. 172 of 2000***: Tunoi, Bosire and Owuor JJA); ***Anne Wambui Ndiritu v Joseph Kiprono Ropkoi & Another*** (Civil Appeal No. 345 of 2000: O'Kubasu, Githinji and Waki JJA); ***Virani T/A Kisumu Beach Resort v Phoenix of East Africa Assurance Co. Ltd*** (Kisumu High Court CC No. 88 of 2002).

16. I have reviewed the Trial Court record with these principles in mind.

17. The evidence that emerged from the Trial is as follows.

18. The Appellant testified as PW1. His testimony was that he married the Deceased in 2004. At first, the lived in a rental house for two years and later moved to Ruiru where, he says, they bought the Subject Property. The Deceased had 2 children from a previous relationship namely: CW and MN. In 2014 the Appellant and the Deceased were blessed with twins – two boys. The twins are: SKM and SKM. The Appellant produced their birth certificates which indicate that the Appellant is the father and the Deceased as the mother. The Appellant testified that SKM is named after his father; while SKM is named after his father. This, he said, is in keeping with Kikuyu customs on naming of children in a marriage. The Appellant also produced the Mother & Child Health Booklet which names him as the "husband" to the Deceased. Lastly, in this regard, the Appellant also produced two Church Certificates of Dedication one each for CW and MN. They were issued on 21/12/2008 by the Jesus Healing Christian Church and they indicate parent's names as the Appellant and the Deceased.

19. The Appellant stated that he contributed towards the purchase of the Subject Property but the Deceased was registered as the owner: He said while the Deceased contributed Kshs. 150,000/- from the proceeds of a case involving her late husband, he contributed Kshs. 50,000/- towards the purchase.

20. The Appellant further testified that he and the Deceased had also developed the Subject Property by putting up rental single rooms with him doing most of the contribution. He testified that his wife's health deteriorated after the birth of their twins. He was taking care of all their four children and even bought school items for the elder child who is not his biological child. He claimed to know all the relatives of the Deceased; and he named them in Court in his testimony.

21. Regarding marriage formalities, the Appellant claimed that he had given his mother in-law Ksh. 20,000/= and two goats to begin the process of customary marriage. He testified that he had borrowed the cash from his then employer, Mary Wanjiru Ngugi. Ms. Ngugi testified as PW3 and corroborated this story. It was his testimony that he had intended to finish the customary formalities but that he could not do so because the 1st Respondent had asked to wait for him (the 1st Respondent) to finish his betrothal rights for his wife (the 2nd Respondent) so that he can customarily be permitted to accept *mahari* for his daughter (the Deceased).

22. The Appellant testified that upon the Deceased's death his 1st Respondent stormed into the matrimonial home he shared with the Deceased on the Subject Property and took all their documents. The incident was reported to the Administration Policy and the Area Chief who called both parties for a meeting. He testified that at the meeting it was agreed that the Appellant should burry the Deceased and pay dowry later. However, the Deceased's family changed their mind and prevented the plaintiff from interring the deceased. He produced the agreement as an exhibit.

23. JMK PW2, testified that he was the Appellant's brother. He knew the Deceased as his brother's wife. He testified that the Appellant was referred to as "Baba S" while the Deceased was referred to as "Mama S". "S" refers to CW – the first born daughter of the Deceased. He further testified that friends and relatives identified the Appellant and the Deceased as husband and wife. That when the Deceased died, an argument ensued with her family and upon discussion they agreed that the Appellant would bury the Deceased at Ruiru Cemetery and then pay dowry thereafter. According to him the agreement recognized the Appellant as the Deceased's husband.

24. PW2 also testified that his brother had taken two goats plus Ksh. 20,000/= to the Deceased's family and that he was present when this happened.

25. Mary Wanjiru Ngugi was the final witness to testify on behalf of the Appellant. She testified that she knew the Appellant and the Deceased as she had employed them. She knew them as husband and wife as "Baba and Mama S". That she had given the plaintiff ksh. 20,000/= to pay dowry in 2013. That since 2008, as far as she knew, the Appellant and the Deceased had been living together at their Ruiru plot. Before then, PW3 testified, they lived in one of her rental houses.

26. JGN (DW1) is the Deceased's father. He testified that he knew the Appellant as the Deceased's friend; that the Deceased's husband died and she was compensated with Ksh. 300,000/= and she used the money to buy the Subject Property in Ruiru where she was living until her demise. He stated that the Appellant had not paid them dowry and he did not receive any goats. He conceded that they had a meeting where they agreed that the Deceased should be buried at the cemetery and the plaintiff would pay dowry later. As far as he is concerned, however, the Appellant was not the husband to his daughter. DW1, however, conceded that he knew that the Appellant lived with his daughter as a "friend".

27. Veronicah Wanjiru Gicharu (DW2), stated that she only got to know the Appellant when she met him at the hospital. She said that she had never met him before. She termed as untrue the claims by the Appellant that she received two goats and Ksh. 20,000/= from him. She testified that the Deceased had given her ownership documents for the Subject Property. She conceded that she had "heard" that the Appellant and the Deceased lived together "as boyfriend and girlfriend" although she did not know how many years they had lived together.

28. CWG testified as DW3. She is the Deceased's first born daughter. She stated that she was in Form one and living in a Children's Home. She stated that the Deceased told her that the Appellant was a colleague; not her husband. She added that she once asked for pocket money from the Appellant as he was his mother's friend.

29. After considering all the evidence adduced and the submissions of the parties' lawyers, the Learned Trial Magistrate held that-:

> *The Court notes that the [Appellant] did not inform [the] Court through independent witnesses their repute was known to all and sundry. Despite the [Appellant] stating that he had visited the Deceased's home on about three occasions, he did not specifically give the actual dates…. DW1 and DW2 are parents of the Deceased [yet] they denied knowledge [of the marriage] in their testimony of PW1's (sic). If he had (PW1)(sic) lived and cohabited with the Deceased for long and had created such reputes, then DW1 and DW2 could have known him to be living with their daughter. There was no evidence at all to show that the Deceased and the [Appellant] were in long cohabitation with such repute to warrant this court to declare them having been married.*

30. The Court also makes a finding that Kikuyu Customary Law was neither pleaded nor proved.

31. The Appellants argue that the Learned Trial Magistrate erred in failing to hold that there was a marriage by presumption through cohabitation between the Appellant and the Deceased; that although there was no formal ceremony to confirm the marriage, it was in evidence that they met and lived together since 2004.

32. The Respondents' argued that there was no ceremony to confirm the marriage between him and the Deceased; and that there was no evidence upon which a valid presumption of marriage can be based.

33. Through his evidence and arguments, the Appellant attempted to prove two different kinds of marriages: a customary one and marriage by presumption through cohabitation. Perhaps the Appellant was no cocksure of establishing the formalities of a Kikuyu Customary marriage and hence hedged on proving the latter – Common Law marriage by presumption.

34. On the question of Kikuyu Customary Law, I would agree with the Learned Trial Magistrate that none was proved. *Hortensia Wanjiku Yawe v The Public Trustees***, Civil Appeal 13 of August 6, 1976** (Wambuzi, P Mustafa V-P and Musoke, JA) stands for the proposition that a customary marriage must be proved through evidence to the required standard. In that case, Justice Kneller laid down three important and salutary principles regarding proof of customary marriages in Court. These are:

i. The onus of proving customary law marriage is generally on the party who claims it;

ii. The standard of proof is the usual one for a civil action, namely, one the balance of probabilities;

iii. Evidence as to the formalities required for a customary law marriage must be proved to that evidential standard.

35. Our case law and various writings evidencing Kikuyu customary law have established some of the elements necessary to prove a valid marriage under Kikuyu Customary Law. Some of the cases that have established the essentials of a Kikuyu Customary Law include: ***Eliud Maina Mwangi v Margaret Wanjiru Gachangi [2013] eKLR*** – a decision by the Court of Appeal – as well as the following decisions of the High Court: ***In the Matter of the Estate of Karanja Kigo [2015 eKLR*** and ***Priscilla Waruguru Gathigo v Virginia Kanugu Gathigo [2004] eKLR***. These cases mention at least five elements:

a. Capacity which includes age, physical and mental conditions and marital status;

b. Consents of the family of the couple and, if the intended bride is a second or subsequent wife, the consent of the senior wife;

c. The ceremonial slaughtering of a ram in a rite called *Ngurario*;

d. *Ruracio* (bride price) partly paid;

e. Commencement of cohabitation.

36. It is important to remember the caution sounded by the Court of Appeal in the ***Eliud Maina Mwangi Case*** that customary law evolves with time. The Court stated thus:

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

37. In ***MWK v AMW [2017] eKLR***, I interpreted this caution thus:

> *The progressive tone by the Court of Appeal is well taken. As customs are surely organic, the exact procedures for a valid customary marriage cannot be said to be codified. Even then, there is no denying that certain pre-requisites must be present. However, the failure of certain formalities does not per se invalidate a customary marriage if there is enough evidence to show that a customary marriage was intended and certain substantive pre-requisites performed*.

38. In the present case, the Appellant did not place much material to demonstrate existence of a Kikuyu Customary Marriage: he claimed he gave some Kshs. 20,000/- to the mother of the Deceased – but this is quite contrary to custom since such payment is usually done only by

elders who speak on behalf of the person marrying. Further, there is no evidence of any negotiations by the families; no evidence of bride price negotiations; and no demonstration of any other customary formalities.

39. If the Appellant had attempted to contract a Kikuyu Customary marriage, those attempts were surely incomplete and imperfect.

40. That takes to the question whether marriage by presumption through cohabitation can rescue the Appellant's case.

41. I should point out that although there is a live jurisprudential debate whether marriage by presumption has survived the Marriage Act, 2014, neither parties addressed the question whether before me or in the Lower Court. Both proceeded from the assumption that marriage by presumption through cohabitation is still possible post-Marriage Act, 2014.

42. On my part, without the benefit of arguments on the question, I join our emerging jurisprudence in holding that there is nothing in the Marriage Act, 2014 that expressly outlaws the Common Law doctrine of marriage by presumption. Indeed, as Musyoka J. held in *S.W.G v H.M.K* ***[2015] eKLR***: *"where a marriage does not comply with the relevant formalities laid down by the Marriage Act or under customary law, it may be rescued by presumption of marriage by cohabitation*."

43. Musyoka J. observed that the doctrine of presumption of marriage has a statutory foundation in Section 119 of the Evidence Act. That section stipulates that:

> *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*.

44. One may also point out that under Section 2 of the Marriage Act, to *"cohabit"* is defined to mean "to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage."

45. The Court of Appeal in ***Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another [2009] eKLR*** held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It 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*.

46. Nyarangi JA in his typical eloquence and clarity of thought provided, perhaps, the most useful guide to marriage by presumption. In ***Mary Njoki v John Kinyanjui Mutheru & 3 Others 1985 eKLR*** the Learned Judge of Appeal stated:

> *The concept of presumption of marriage is with us, having been recognized and approved by this court's predecessor in* ***Hortensia Wanjiku Yawe v Public Trustee***.
>
> *This court did not although not expressly recognize and accept the concept of presumption of marriage in* ***Mbiti Mulu and Another v Miwa Mutunga, Civil Application No NAI 17 of 1983.***
>
> *In* ***Yawe,*** *the deceased had declared to another that the appellant was his wife by general repute, there had been long cohabitation as man and wife, there was evidence of performance of marriage ceremonies and during the period of cohabitation the appellant bore the deceased man four children. In* ***Mbiti*** *the deceased woman had borne the respondent one child and there had been a marriage ceremony.*
>
> *The presumption does not depend on the law of systems of marriage.*
>
> *The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife.*
>
> *In my judgment, before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage. To my mind, these features are all too apparent in the* ***Yawe*** *and in* ***Mbiti****. To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law*.

47. From this exposition, a party establishes a presumption of marriage when the party proves two factual predicates:

a. Quantitative element – namely the length of time the two people have cohabited with each other; and

b. Qualitative element – namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative element include whether the parties had children together; whether the community

considered the two as husband and wife; whether the two carried on business jointly or whether they took a loan jointly; whether the two held a joint bank account – and so forth.

48. What evidence did the Appellant present to enable the Court to make the presumption?

49. The Appellants' witnesses were consistent that the appellant and the deceased met in 2004 and started living together. Later, in 2008, they moved to the Subject Property in Ruiru. They lived together until the demise of the Deceased. All this evidence is not seriously controverted by the Respondents. Their only answer to it is that the two were merely "friends". They may have started so – but the law tells us that what may start as a romantic relationship can mature to marriage with passage of time and deepening of the qualitative factors pointing to a marriage. The evidence establishes that the Appellant and the Deceased lived together for more than ten years.

50. Second, it is not disputed that the Appellant and the Respondent had two children together. Their Birth Certificates and Child and Mother Health Cards were produced as conclusive evidence of this.

51. Third, further evidence was produced, despite the protestations of CW, that the Appellant and the Deceased viewed and treated the Deceased's children from her earlier marriage as theirs. The Appellant testified, and CW confirmed that he at least once did shopping for her and gave her pocket money. Additionally, the Church Certificates produced are further evidence that the Appellant was treated and saw himself as the father of these two children.

52. Fourth, while there is a live dispute about the ownership of the Subject Property, the Respondents do not deny that the Appellant contributed to constructing the houses on the Subject Property. Such a joint venture is a good indication that the Appellant and the Deceased viewed themselves as husband and wife.

53. As for general repute, the evidence of PW3 and PW2 established that people viewed the Appellant and the Deceased as husband and wife and treated them as such. They both testified that the Appellant was known in the community and in church as "Baba S" while the Deceased was known as "Mama S." The Church Certificates produced as well as the Child and Mother Health Card add to this repute. Indeed, the 1st Respondent accepts that other people knew the Appellant and Deceased were living together.

54. It is, also, not contested that the twins were named after the Appellant's father and brother. Under Kikuyu Customary norms, this is an indication that the father of the children is married to the mother of the children even though the customary formalities are yet to be completed. If, indeed, the 1st and 2nd Respondents did not treat the Deceased as married, they would have raised this issue with her when the children were born.

55. However, it is, perhaps, the Agreement the Appellant entered into with the Respondents after the death of the Deceased that provides the clearest indication that even the Respondents viewed the Appellant as the husband of the Deceased. The Agreement grants the Appellant right to bury the Deceased with the only issue being the payment of dowry; and the parties agree that the dowry would be taken after the burial. In its opening line the Agreement dated 18/02/2015 announces: *Agreement between the family of N's father (G) and the family of M (husband).* That, in my view, speaks for itself!

56. **From this review, it is obvious that there was enough evidence on record for the Learned Trial Magistrate to make a finding that there was marriage by presumption in the circumstances of this case. It was an error for her not to do so. Consequently, the appeal is allowed to some extent: the finding by the Learned Trial Magistrate that there was no marriage by presumption is set aside. In its place, there will be a finding that there is a declaration that there is a marriage by presumption between the Appellant and the Deceased.**

57. **However, in view of the passage of time and the dictates of due administration, this Court will not make any orders regarding the burial of the Deceased. The parties did not make any arguments on this issue but the Court must assume that the Deceased was already buried. There will be no order to dis-inter the body.**

58. **There, also, will be no order as to costs this being a family matter – and in the spirit of urging reconciliation among the family members**.

59. Orders accordingly.

Dated and delivered at Kiambu this 7th day of June, 2018.

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JOEL NGUGI

JUDGE