



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL SUIT NO. 6 OF 2012 (OS)

P O M.....PLAINTIFF

VERSUS

M N K

alias M N P.....DEFENDANT

JUDGMENT

1. The plaintiff herein commenced the Originating Summons herein dated 5th November 2013, against the defendant herein, whom he claims to be his wife. He seeks two (2) declarations with respect to a property known as Plot No. [.....], within Dagoretti/Riruta/[.....], to wit:-

(a) That the said property, inclusive of buildings and developments within it, was acquired with the joint funds and efforts of the parties during their marriage and was thus jointly owned by them; and

(b) That the joint ownership of the said property be severed and the property be subdivided equally and the subdivisions be transferred to each of the two parties.

2. To support his case, the plaintiff swore an affidavit on 5th November 2013. He states that he and the defendant began to cohabit as husband and wife sometime in 1986, adding that they did not go through any form of ceremony of marriage. He alleges that at the time the two of them cohabited, the defendant was known to his relatives as his wife, and he has listed the persons who he alleges were so known to the defendant. He also states that his late father stayed with them in 1997/1998 when he was sickly, and that it was the defendant who nursed him. When he eventually died, the defendant attended his burial in Kisii in her capacity as the wife of the plaintiff, where she interacted with his close relatives, friends and his other wife. He also alleges that he had visited the defendant's mother at her home at Mpeketoni, Lamu on several occasions, including attending a burial there. He has mentioned several other incidents when he did certain things with relation to the relatives of the defendant. He claims that they had a property at Mombasa, which they sold, claiming that he appeared in the sale documents as one of the sellers thereof. He states that he had commenced proceedings in CMCC No. 454 of 2011, seeking to terminate the alleged marriage but he subsequently withdrew the suit.

3. He claims that he was, at the time he met the defendant, in employment, while the defendant was in small scale business dealing in polythene bags. From their joint savings they bought the subject plot from a woman known as Hellen Wanja Muthiora in 1991. As the seller was not comfortable disposing of the property to a person who was not from her ethnic community, Kikuyu, the parties resolved that the same be registered in the name of the defendant. After the sale they took possession and developed the plot in 1992/1993 by constructing rooms thereon which they let out to tenants. Part of the money utilized for that

purpose allegedly came from his terminal benefits paid to him upon his retirement. The parties then moved into some of the rooms there and continued to cohabit therein, with the plaintiff also operating a bar from the premises. He claims that he was the one who did the legwork relating to the connection of electricity, sewerage and water to the premises. He alleges that he was evicted from the subject property in 2011 by the defendant, by which time the total amount of rent collected from the premises stood at Kshs. 258, 100.00 per month.

4. He has attached several documents to his affidavit in support of his case. I will mention some of those most relevant to the matter at hand. There is an agreement of sale, dated 16th May 1991, in respect of a ¼ acre of Dagoretti/Riruta/ [.....] between the defendant and Hellen Wanja Muthiora. There is also copy of an application for consent of the relevant land control board for transfer thereof. There are proceedings in a succession cause in the estate of the late husband of Hellen Wanja Muthiora relating to the sale of plots out of Dagoretti/Riruta/[.....]. There is too copy of a letter from [Particulars Withheld] Limited indicating that the plaintiff once worked there. There are several copies of receipts issued by the power company to the plaintiff in respect of supply to Dagoretti/Riruta/[.....] /1. There are copies of statements issued by the local water company to the plaintiff in respect of payments that he had made to them for water supplied over time. There are also copies of water bills issued by the water company in the name of the plaintiff in respect of water supplied to LR [.....] Riruta/Dag., Eunika Supermarket. There is also a letter from the relevant city authority relating to liquor licences in respect of Plot No. [.....]/1, copied to the plaintiff. There are also copies of minutes of meetings of persons who had allegedly bought plots to be excised from Dagoretti/Riruta/[.....], indicating the plaintiff as one of the attendees and participants in those meetings. In one of them, the name of the defendant is added in brackets against that of the plaintiff. In another there is reference to a M N M against Plot No.. [.....]There is copy of sale agreement dated 1st August 2006 between the defendant, named as M N P, as buyer and Peter Gathuku Muthiora and Benedict Kirui Muthiora as sellers of Plot No. [.....], referring to the sale of 16th May 1991. The plaintiff is named in the fresh sale agreement as a witness of the buyer. There is copy too of correspondence from the city authorities relating to extension of sewer services to Plot No.[.....], addressed to the plaintiff and another. He has also attached copies of the tenancy agreements signed between him and alleged tenants, and copies of receipts that he had issued to the said tenants. There are photographs too of a ceremony allegedly held at the house of the parties, attended by individuals from both sides of the alleged family. There are also copies of court papers filed in Milimani CMCCC No. 4364 of 2011 by the defendant against the plaintiff in 2011, about the time he alleges he was evicted from the property, seeking injunctive orders against him. There are also copies of pleadings filed in CMCC No. 454 of 2011.

5. The defendant's response to the application takes the form of a replying affidavit sworn on 20th March 2014. She alleges that she had been married to a K M in 1974, which marriage subsisted until 2011 when he died. She asserts that although the two had differed, sometime in the 1980s, they never divorced. She identifies the plaintiff as a friend who pestered her romantically asking for her hand in marriage, but she refused. When she spurned his offers for marriage, he allegedly became hostile and abusive, forcing her to file the suit in Milimani CMCCC No. 4364 of 2011 to have him restrained. She denies having met him in 1986 and cohabiting with him since then, asserting that a presumption of marriage could not possibly be made in view of her marital status. She explains that she sometimes uses the name P as her surname, but the same does not refer to the plaintiff but her father who was also called P. She states that as she was separated from her husband K she did not wish to use his name in the land sale transaction. She states that it was false to allege that the vendor of the land did not wish to sell it to a non-Kikuyu.

6. With regard to the property, she denies ever making any investments arrangements with the plaintiff. She states that she was in business for many years and had sold a property in Mombasa, from which she was able to acquire the property in question. She asserts that the plaintiff never assisted her in the purchase of the property. The only role that she says he played was to manage her property on account of their friendship. She also alleges that she allowed him to operate a bar and butchery on the subject property as consideration for his services as manager of her property. She states that she paid her electricity and water bills, and the documents that the plaintiff relies on with respect thereto must be in relation to his bar and butchery business. She mentions that those bills do not even refer to the property in question. She asserts that anything done by the plaintiff with regard to the property was done in his capacity as her friend or agent, but not as a husband or spouse. She states that the extra portion bought in

2006 was acquired by her alone, and that the plaintiff acted only as a witness. She states that the plaintiff could have misled his relatives to believe that she was his wife, yet the pair never went through any ceremony of marriage and the said relatives did not participate in any.

7. She has attached to her affidavit several documents, some of which have also been attached to the plaintiff's affidavit. There are copies of several affidavits that were launched in the two causes filed at the magistrates' courts at Milimani, copies of entries from police records relating to the reports she made at the police station with regard to alleged threats from the plaintiff, and copies of documents to illustrate that she was in business over the period in question. There is a copy of the alleged sale agreement in respect of the Mombasa property and a copy of an alleged baptismal card for one P W.

8. Directions were given on 27th March 2014 that the matters in dispute were to be resolved by the court by way of *viva voce* evidence.

9. The oral hearing commenced on 24th July 2014. The plaintiff was the first to take the stand. His testimony largely gave vent to the averments made in his affidavit in support of the application. The only fresh detail touched on the events surrounding his alleged eviction from the subject property. In cross-examination, he stated that he was present at the execution of the sale agreement as a witness. He explained that prior to moving in together, the two had been living in separate houses in a property owned by Mzee Kinyanjui.

10. The plaintiff called Joseph Kwinga Muthiora as his first witness. He was a son of the man who owned the property in question, and a stepson of the alleged seller of the property to the parties. He stated that he was co-administrator of the estate of his father with his stepmother, who he accused of selling a portion of the property to the parties without his consent. The sale was allegedly done while he was away in Mombasa and he was informed after the deal was done, and he did take steps to stop it. He claimed that the family later sat and allowed his stepmother to go ahead with the sale. He said that as the plaintiff was Kisii there would have been problems as the property was meant to be sold to persons of Kikuyu ethnicity. He said that he knew that it was the plaintiff buying the property through the defendant. He claimed that the parties lived on the plot as husband and wife. He mentioned that he had differences with the defendant over an access road, she had even taken him to the local Chief and they even had a case in court over the property.

11. The third witness was John Ngaruiya Kamau. He said he had bought a portion of Dagoretti/Riruta/[.....], in 1992. He allegedly met the plaintiff in 1992 when he moved into the property, for he found him in it having been among the first persons to buy the plots. He was allegedly living with the defendant as his wife. He stated that the two even approached him requesting him to allow them have an access through his plot. They allegedly lived together from 1992 when he got to know them until 2012 when they separated. He stated that he used to meet them at their plot where they would load materials for the construction of the sewer. He said that he had had no differences with the defendant, adding that he was not close to her. He referred to a letter from the city authorities relating to the sewer, that was addressed to him and the plaintiff. He said that the parties were not causal friends, but persons who lived together and developed houses on their plot.

12. The next to take the stand for the plaintiff was Z M O, a paternal cousin of his. He said that the parties were living separately before 1986, when in the same year, the plaintiff brought the defendant to him and introduced her as his wife and the two began to cohabit as husband and wife. He claimed to have been a witness when the plaintiff acquired the plot in issue. He said the plaintiff had told him that he was buying the property although he was not given details of how much the latter contributed to the sale price. He said he was not present when the parties to the sale acknowledged receipt of the purchase money. He also stated that when one of the relatives of the defendant fell ill he was requested to ferry him to hospital and when he died he and his family were involved in his burial at Lang'ata. He stated that his nephew had a graduation party at the house of the parties, and he identified himself and others in the photographs attached to the plaintiff's affidavit. The persons he identified as having been at the party included the plaintiff, the defendant, and her child, among others. He also mentioned that when the defendant's mother was ill, he and his relatives contributed money at a fund raiser called for the purpose of her treatment.

13. The defendant's case opened on 22nd October 2015, when she took the witness stand. She said that she had been married to one K M, and they remained so married until the latter died in 2011. She said she knew the plaintiff since 1995, but they began to relate in 1996. She said they had a relationship, but did not live together as she was still married. They would meet frequently but not at his house or hers. She said she bought the property in question. She raised the purchase price from the profits she made from her business and from proceeds of sale of a property in Mombasa. She asserted that she met the plaintiff after she had bought the property, and therefore the surname P used as part of her name in that transaction did not refer to the plaintiff but her father, saying that her father was called P W. She explained that the plaintiff had been her friend, he wanted her to show him a place to be selling water from, she showed her a place at her plot for that purpose, later she gave him a shop from where he operated a bar. She said that he later acted as an agent for her houses. She stated that she did not have children with the plaintiff as he never was her husband.

14. In cross-examination, she stated that she had three children; two of whom died, and one of whom was named W. For the period 1980-1990 she lived at Kawangware with her child. She had been married to K M traditionally, who was from Murang'a, but she was not able to tell exactly where he hailed from in that county, nor the names of his parents. Her children had been sired by him; they were two sons and a daughter. She separated from her husband K in 1987, and that they still retained contact even after that, although he had married another woman with whom he lived with at Kibera. He died in 2011 and was buried somewhere in Nakuru. She said her father was called P, although that name was not reflected in his national identity card where he was only known as M W. She described the plaintiff as her agent, who used to collect rental money from tenants and hand it over to her. On the photographs, she conceded that the event took place attended by the persons indicated by the plaintiff, but added that it did not happen at her house. She said on reexamination that she had attended the function on invitation as a friend of the plaintiff.

15. On the subject property, she stated that many plots were excised out of Dagoretti/Riruta/[.....] and sold to several persons. She conceded that meetings were held several times over the matters of these plots, she said she knew those who attended the meetings, but asserted that the plaintiff did not have a plot there. She denounced the minutes presented by the plaintiff, dismissing them as forgeries contrived by the plaintiff and one of his witnesses. She conceded that the houses on the plot were connected to power, but was not able to say when the connection was done. On the water bills, she said the same related to the water that the plaintiff was selling from her plot.

16. The defendant called as a witness her elder sister, T W A. She said the defendant had been married to K M, who had died four years prior to the time of her testimony. She stated that he had paid dowry sometime in the 1980s in keeping with Kikuyu customary law. She said that she knew K to have had come from Kiambu, and was buried there when he died. She said that the pair begat three children. The two were together for the period running from 1980 to 1990, although she never visited them. She stated further that the defendant had introduced the plaintiff to her as a friend, but the latter had never visited their home. She said she started seeing him recently with the defendant. She said she had not heard of any customary ceremony relating to the two parties. On the property, she stated that her sister had had informed her when she was in the process of buying it, and that she saw the developments coming up.

17. The last person on the witness box for the defendant was Paul Kamuyu Muthiora. He testified that the defendant had bought the subject property from his stepmother in 1988, although he was not at the sittings when the same was sold. He could also not say who else was present at the sale. He described the defendant as a neighbour, adding that he used to hear that she was married to a man called KM. He said that he had known her for about ten years prior to the sale. He stated that the property had not been transferred to the name of the defendant as the same belonged to the estate of his father, and there were unresolved issues thereon. He said he knew the plaintiff as a person who lived within the defendant's plot and operated a business thereon, a bar, although he had been 'selling' water prior to that. He said that he could not tell whether they were married or not, saying that they could have been staying together.

18. At the conclusion of the formal; hearings, it was directed that the parties do file written submissions. There has been compliance, for both sides did file written submissions, which I have had the occasion of

reading through and noting the arguments advanced.

19. This is a suit for division of matrimonial property. The legal regime governing such endeavour is the Matrimonial Property Act, Act No. 49 of 2013. The relevant provisions are to be found in Part III thereof. According to those provisions, in particular section 7, such property is to be divided upon divorce or dissolution of the marriage. The prerequisites are that the parties ought to have been in a marriage, to have had acquired matrimonial property during coverture and for their marriage to have been dissolved as at the point orders on division of matrimonial property are being made. A party, who moves the court for orders relating to division of matrimonial property, or declarations thereon, must strive to bring his case within the prerequisites stated above.

20. Before the court can proceed to make any decision on the property it must be established first that the parties were indeed married at the relevant time. In the matter before me, the plaintiff concedes that he and the defendant did not go through any form of ceremony of marriage, and founds his claim on cohabitation, that is what emerges from his affidavits and the oral testimonies rendered in court. It is disappointing though that his advocate did not advert to the issue at all in his written submissions. Counsel for the defendant has also been equally unhelpful in his submissions with regard to that matter. It is quite clear though that the plaintiff is inviting the court to draw the conclusion, from the circumstances of his relationship with the defendant, that the parties cohabited as husband and wife and proceed to make the presumption that they were indeed married. The defendant on her part vehemently denies the alleged marriage. Indeed, part of her evidence appears to be contrived to paint a picture that the parties did not cohabit at any time over the period in question. She does, however, concede that there was a relationship between them. None of the witnesses said a word on the nature of the relationship, but from the totality of the evidence it would appear to have been of the sexual or romantic kind. The defendant asserted that she had been married to a K M, from whom she separated after some time, but then that marriage had subsisted until the former died in 2011. She appeared to argue that even if the court were to find that she had cohabited with the plaintiff, which she denies, presumption of marriage could not be made in view of her married status.

21. So what do I make of the material that was placed before me with regard to the alleged relationship between the plaintiff and the defendant? From the documents annexed to the affidavits of the parties and the oral testimonies of the witnesses called by both sides, I am satisfied that the plaintiff and the defendant were indeed living together on a plot within Dagoretti/Riruta/[....]. It would appear that some people might have at that time considered them to be husband and wife, going by the oral testimonies and the documents, particularly the minutes of the meetings held with respect to the issues concerning the subdivision and excision of the plots from Dagoretti/Riruta/[....].

22. What should be of concern is whether that cohabitation could lead to a presumption that the two parties had between them a marriage. The law on presumption of marriage was pronounced by the former Court of Appeal for Eastern Africa in *Hortensia Wanjiku Yawe vs. The Public Trustee Nairobi* CACA No. 13 of 1976, where it was emphasized that what is of import in the circumstances is long cohabitation and general repute that the parties were husband and wife. The principle laid therein has been followed with approval since. From the material placed before me, I would be persuaded that there was a long cohabitation of the parties, from 1986 according to the plaintiff and 1992 or thereabout from the other witness, terminating in 2011 or 2012 when the plaintiff was allegedly locked out of the premises by the defendant. There is also material to suggest that there was a general repute within that period that the two were a married couple.

23. The issue, however, that has really exercised my mind is the allegation by the defendant that she was in fact married to another man at that time, and that they had separated but not divorced, and it was on account of the separation that there was opportunity for her to relate romantically, or sexually even, with the plaintiff. The alleged husband of the defendant was named as K M. These allegations were made in the affidavits filed prior to the oral hearing. The union is alleged to have had produced three children.

24. The plaintiff sought to discredit the claim that the defendant had been married to the said K M, in fact suggesting that the said person did not exist. He pointed to the defendant's statement that she did not

know for sure where the said man came from in Murang'a, had never met his relatives, and did not appear to be clear as to where his remains were interred. The testimony of her sister did not help matters. She said that the said man hailed from Kiambu, not Murang'a as indicated by the defendant, and that upon his death his remains were interred at Kiambu and not at Ngarua, Nakuru, as claimed by the defendant. She further said that the man had paid dowry, and the plaintiff wondered how that could have happened without the defendant getting a chance to meet with some of the man's close family members.

25. I need to state at this stage that while at the witness box, the defendant adopted a rather disagreeable attitude during cross-examination. From her demeanour I could sense an element of defiance or a level of arrogance or even hostility to counsel cross-examining. Such attitude tends to always be counterproductive, for it often gives an unfavourable picture of the witness, as someone who is either being evasive or not telling the truth. It is understandable, given the emotions involved in these matters, for a witness who is a party to behave in that manner, but the same is unwise and unnecessary, and ultimately costly to the case for the party concerned. Let me leave it at that.

26. I note that the plaintiff sued the defendant as M N K. Indeed, in all the other suits between the parties hereto, that is to say Milimani CMCCC No. 4364 of 2011 and Milimani CMCCC No. 454 of 2011, she is referred to as such. It would appear to me that that is her official name; it is the one appearing in her national identity card serial number[.....]. There is also material, procured by the plaintiff, indicating that her father was called M W. That then should raise the question as to where she could have gotten the surname K from. I feel inclined to agree with the defendant, and to conclude that she had contracted marriage with the said K M which led to her adopting his name as part of her name.

27. The issue that I have to determine in connection with that is whether the said marriage to K M had terminated, whether by death or dissolution, before the parties hereto began to cohabit. The defendant says that the marriage was not terminated until 2011 when K M died, which coincidentally is also the period when the cohabitation of the parties herein came to an end. The plaintiff did not advert to that issue, sticking to his position that no such man existed. It is a cardinal principle of the civil process that he who alleges must prove. It is the plaintiff who came to court claiming that the defendant was his wife; it was therefore incumbent upon him to prove that assertion. When the defendant countered the claim by asserting that she was a spouse of a K M, the plaintiff ought to have sought to disprove that, especially given that the defendant had the K name as her surname, yet that could not possibly have been her maiden surname. He failed to adduce any evidence to disprove the defendant's assertions that she had no capacity to marry him at the time. I will therefore find that the marriage between the defendant and K M was not terminated until 2011 when he was alleged to have died. That would then mean that the defendant had no capacity at the time to marry the plaintiff. It is a notorious fact that polyandry is not practiced in Kenya, whether under statute or customary law. The relationship between the parties hereto was no doubt adulterous, and the resulting cohabitation could not be deemed to have brought forth a marriage. The principle of presumption of marriage, which I am being invited to invoke, cannot possibly be of application in the circumstances.

28. Having come to the conclusion above, there would be no basis for me to find that the property in question was matrimonial and to proceed to make orders on its subdivision in terms of the Matrimonial Property Act, No. 49 of 2013, or even the repealed Married Women Property Act, 1882. I will not venture to examine whether the property in question was acquired jointly by the plaintiff and the defendant as that may prejudice any future proceedings that the parties may be minded to initiate in view of my findings here above.

29. I shall therefore dismiss the Originating Summons dated 5th November 2013, with costs to the defendant. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 9TH DAY OF JUNE, 2017.

W. MUSYOKA

JUDGE

