



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
MATRIMONIAL CAUSE 73 OF 2014

R N N ALIAS R N S.....APPLICANT /PETITIONER

VERSUS

P S.....RESPONDENT

JUDGMENT

PLEADINGS

By Notice of Motion application filed by the Petitioner/ Applicant brought under **Section 77 of the Marriage Act 2014**; she sought the following orders;

- a) The Respondent to provide monthly maintenance of Kshs.200,000/= pending hearing and determination of the application and petition.

The application is grounded on the following reasons;

- a) The Petitioner and Respondent cohabited for over 15 years or so in Kenya and Netherlands;
- b) They have 2 children aged 10 and 8 years respectively;
- c) In **Children Court Case 1250 of 2014**; the Court granted the Petitioner and Respondent joint legal custody and the Petitioner physical custody of the children and the Respondent visitation rights to the children.
- d) On arrival back from Netherlands to Kenya the Respondent left the home in December 2012 and moved to an apartment. He continued to regularly provide for the Petitioner and their children financially until in July 2014
- e) The Petitioner resides with the children in their marital home **Villa [particulars withheld] Edenville on LR No [particulars withheld] Kiambu Municipality.**
- f) Since then the Respondent has despite demand failed, neglected, defaulted and refused to provide maintenance and upkeep rendering her financially destitute.

g) The Petitioner attached Demand Notice dated 12th March 2015 of arrears of electricity bill Ksh 97,385.55/= and Ksh 107, 752/= service charge for the joint property **Villa [particulars withheld] Edenville on LR No [particulars withheld] Kiambu Municipality.**

By a Replying Affidavit filed on 5th February 2015, the Respondent asserted that;

- a) He has never been married to the Petitioner at all or as alleged and she is put to strict proof thereof;
- b) The Petitioner and Respondent were friends and they have 2 children from the relationship;
- c) The residence **Edenville on LR No [particulars withheld] Kiambu Municipality** is not a matrimonial home but they are co- owners of the property at 50 % of the property to each party.
- d) The Gym business is not flourishing as shown by the attached accounts marked **PS1**
- e) He does not own a computer consultancy or rental houses in Hague Netherlands
- f) He admitted he also owns 2 apartments; one for generating income and the other he lives in it;
- g) The Petitioner's claim for maintenance is not based on law; she was not married to him. It is also exaggerated and she has already made other claims in the Children Court.
- h) The Petitioner ought to share in payment of bills for the joint property and she ought to move out so that they can rent out the property and distribute the rent proceeds in half between them.

HEARING

The hearing commenced on 19th March 2015; the Petitioner relied on her affidavits of 25th November 2014 and 9th February 2015. The Petitioner stated on oath that she and the Respondent met in 1994 and became friends; they lived together and moved to Netherlands in 1997.

They have 2 children of the relationship namely;

- a) C J S born on 16/10/2006
- b) C S S born on 11/12/2008.

They lived together for 21 years according to her and 15 years according to the Respondent. They lived in Netherlands where they had the 2 children; she worked odd jobs but mainly took care of the family. She developed depression and was on medication. In 2012 they came back to Kenya, they bought the said residence jointly as their matrimonial home. The Respondent held her out as part of his family; partner and 2 children as evidenced by the letter to Director of Immigration marked **RNN5**

The Respondent moved out of the home and maintained them up and until 2014 when she became financially destitute. The Petitioner filed **Children Court Case 1250 of 2014** where the Court granted her physical custody of the 2 children. The Respondent pays monthly upkeep for the children at Ksh 40,000/= school fees and expenses and comprehensive medical care for the Children.

The Petitioner and the children have Dutch citizenship. She has not been working and she seeks maintenance, as she was a spouse to the Respondent by virtue of a marriage under Kikuyu customary Law and/or under the common law doctrine of presumption of marriage.

She attributed the presumption of marriage to long cohabitation and residence, they have children of the relationship; they have engaged in financial transactions together; they obtained Dutch citizenship and

residency in Kenya together; They lived in Netherlands; the Respondent provides for the children's upkeep and maintenance. The Respondent paid monies to the Petitioner's father and contributed to construction of the Petitioner's father's house. The Respondent bought her a car and furniture. They jointly own an apartment. Therefore she seeks maintenance for herself arising from their longstanding relationship under the presumption of marriage.

On 15th October 2015, the Respondent told the Court that he was in Kenya on holiday when he met the Petitioner in 1995. He went back to Netherlands and he came in 1996 and left for Netherlands with the Petitioner in 1996 - 1997.

The Petitioner was there illegally and lived with him in his house for 3 months. She got a permit for 2 years and begun to work as a Trainer. After 1 year she left working, they had the 2 children.

The Petitioner was isolated and she fell sick and their relationship was not good. He came back to Kenya with the family and settled here.

The Respondent is a Fitness Trainer and has opened a GYM business, which is currently not doing well financially.

He insists he did not marry the Petitioner and therefore she is not entitled to maintenance. She is a Dutch citizen and she can go to work there or obtain welfare. He helped build a house at Kiambu and supported her brothers.

The Petitioner filed written submissions on 5th November 2015 and the Respondent filed written submissions on 6th November, 2015 respectively.

ISSUES

This Court is called upon to determine the following issues;

1. Is there a marriage solemnized between the Petitioner and Respondent?
2. Is the Petitioner entitled to maintenance from the Respondent and if so how much?
3. Is the suit property **Edenville on LR No [particulars withheld] Kiambu** matrimonial home or property owned by joint tenants/co owners?

DETERMINATION

The Petitioner Applicant claimed that she was married under Kikuyu Customary law. The Petitioner stated that her father received from the Respondent Ksh. 50,000/-, ksh. 20,000/- & Ksh. 30,000/= on different dates.

The Respondent pleaded and stated in Court he did not marry the Petitioner. He also furnished the Court with an official document confirming that he is not married.

A Kikuyu customary marriage as envisaged in **Dr. E. Cotran's Restatement of Kikuyu Customary Law** consists of capacity of the parties to marry, consents of the parties and their families' for the parties to be married, and their presence or elders' presence to the marriage ceremony. There are ceremonies of *ngurario* and *ruracio* that are conducted.

In the instant case these formalities were not complied with and no evidence was adduced to confirm a Kikuyu customary marriage. There was no Kikuyu customary marriage between the Petitioner and

Respondent.

The petitioner brought this application under **Section 77 of the Marriage Act 2014** which now recognizes only marriages that are registered under the Act or the Repealed Acts can this Act apply retrospectively to the facts of the instant case? The Act cannot apply retrospectively except in the repealed Acts as expressly provided for in **Section 98 of the Act**.

The Petitioner pleaded and stated in Court that she invoked the Common Law doctrine of presumption of marriage. Through Counsel in the written submissions she relied on the case of;

HORTENSIA WANJIKU YAWE VS PUBLIC TRUSTEE COURT OF APPEAL NUMBER 13 OF 1976 where the Court held;

“By general repute and in fact the parties had cohabited as man and wife in a matrimonial home for 9 years before the deceased died..... and during that time the Appellant bore the deceased 4 children...long cohabitation as man and wife gives rise to the presumption of marriage in favor of the Appellant only cogent evidence to the contrary can rebut such a presumption.....”

The same position is amplified in the case of;

CHRISTOPHER NDERI GATHAMBO VS SAMUEL MUTHUI MUNENE NAIROBI HIGH COURT CIVIL CASE1372 OF 2001

The Court observed;

“The claim is [presumption of marriage] on the basis of cohabitation and friendship, agreement and love. They lived together in Nairobi and had a daughter together....anyone of those actions cumulatively prove the parties intended to marry and held themselves as married hence presumption.”

In the instant case the pleadings and oral evidence confirm the following;

- a) The Petitioner and Respondent lived together in Kenya and Nether lands for 15 years -21 years; 1994-1996- 2012.
- b) They have 2 children of the relationship and paternity is not contested.
- c) The Respondent bought the Petitioner a car, furniture and the home, suit property **Edenville on LR No [particulars withheld] Kiambu**.
- d) The Respondent admittedly contributed to the construction of the house at the Petitioner’s home, gave the Petitioner’s father monies and supported the Petitioner’s brothers.
- e) The Respondent and Petitioner facilitated each other in obtaining citizenship for the Petitioner in Netherlands and the Respondent obtaining residency in Kenya
- f) The Respondent wrote to Director of Immigration in a letter dated 25th September 2012 and sought an entry permit and confirmed his family made up of the Petitioner as his partner and 2 children.
- g) The Respondent admittedly bought **Edenville on LR No [particulars withheld] Kiambu** jointly and held equally between him and the Petitioner and settled the family in the suit property when they came back in 2012. The Agreement for Sale is attached to the Application with both names of the Petitioner and Respondent as joint owners.
- h) The Respondent even after he moved out to another apartment, in 2012, continued to support the

Petitioner and the children until July 2014.

i) To date, vide the orders of the Children Court of 25th February 2015, the Respondent is responsible for the children upkeep and maintenance.

All these factors cumulatively strongly suggest and point to the long cohabitation between the Petitioner and Respondent. They held themselves out as a married couple in spite of lack of the official ceremony. Having lived together for more than 15 years, have children, engaged in joint financial commitment, the long cohabitation gives rise to the presumption of marriage.

The Respondent's denial that there was no marriage ceremony is true. However, the fact that one can have a partner for many years without formal arrangements in form of marriage maybe proper in the European culture as the Respondent claims but in the African context, 15 years of living together can only lead to one logical and reasonable conclusion, that the Petitioner and Respondent were for all intents and purposes married under the presumption of marriage doctrine.

The second issue is whether, the Petitioner is entitled to maintenance.

Since the Court has found that there was a marriage, the Petitioner can now rely on **Section 77 of the Marriage Act** as she is now deemed to have been a spouse of the Respondent.

The Petitioner claimed the Respondent has a GYM business, a Consulting and Computer Firm, Rental houses in Netherlands and ownership of 3 apartments. The Petitioner demands that a monthly maintenance allowance of 200,000/= be granted.

The Respondent in reply filed annual accounts for the GYM business and stated that the business is not flourishing. He admitted he owns 3 Apartments, one jointly with the Petitioner where she resides with the children; the other he resides in and the last one where he receives rent monthly at Ksh105,000/=. He does not own any Consulting firm or rental houses in Netherlands.

He pays school fees and expenses for the children as per the Children Court order of 25th February 2015. The Petitioner is now sickly and unemployed and has physical custody of the 2 children. She is financially destitute and has incurred electricity arrears and service charge payments. She is entitled to maintenance to pay utility bills, transport to ferry the children and herself and subsistence.

The Petitioner did not provide records of the alleged consulting firm and rental houses in Netherlands. The Court has observed that, the Petitioner shoulders the burden of maintaining the children so the figure of Kshs. 200,000/= as maintenance is exorbitant. The Petitioner is expected later upon recovery to undertake revenue generating activity. Therefore the Court grants a conservative figure as maintenance.

The Court has taken into account that the Petitioner during their stay together took care of the home, cooking and cleaning and taking care of the children. She has made indirect contribution to the matrimonial property purchased by the Respondent during the said period. The matrimonial home was purchased through the Respondent direct contribution and the Petitioner's indirect contribution.

To evict the Petitioner and rent the house and apportion the rent between her and the Respondent is not feasible in the current circumstances. The Petitioner resides with children of tender age who would be rendered destitute. Both Petitioner and Respondent are under an obligation to house the children. In the present circumstances; the Petitioner shall remain in the said property.

In the circumstances, the Court finds she is entitled to maintenance. In the absence of confirmed figures of the Respondent's financial position; the Court shall grant a conservative figure to be adjusted once the affidavits of means are filed by the parties.

COURT ORDERS

1. Edenville on LR No *[particulars withheld]* Kiambu is matrimonial home of the Petitioner and Respondent jointly and equally owned and held for themselves and the 2 children of their relationship.

2. The Respondent shall pay maintenance as follows;

a) Kshs. 97,385.55/- as electricity arrears for the joint property Edenville on LR No *[particulars withheld]* Kiambu in the month of March 2016

b) Kshs. 107, 752/- as service charge payments for the joint property Edenville on LR No *[particulars withheld]* Kiambu in the month of April 2016

c) Thereafter, monthly payments of kshs. 60,000/- to the Petitioner as maintenance for utilities and transport and kshs 40,000/- for the children as per the Court order of 25th February 2015

3. Each party is at liberty to apply

4. Each party to bear its own costs

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 7TH DAY OF MARCH, 2016

M.W. MUIGAI

JUDGE

In the presence

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