



**PMM v RENM (Divorce Cause 112 of 2022)
[2024] KEMC 152 (KLR) (4 January 2024) (Judgment)**

Neutral citation: [2024] KEMC 152 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
DIVORCE CAUSE 112 OF 2022
PA NDEGE, SPM
JANUARY 4, 2024
IN THE MATTER OF THE MARRIAGE ACT NO. 4 OF 2014
AND
IN THE MATTER OF A PETITION FOR DIVORCE**

BETWEEN

PMM PETITIONER

AND

RENM RESPONDENT

JUDGMENT

1. The Petitioner herein filed a Petition dated 14.12.2022 on 15.12.2022 seeking inter alia: -
 - a. That the Court presumes marriage between him and the Respondent.
 - b. That the presumed marriage between the Petitioner and the Respondent be dissolved and the Petitioner be granted a divorce.
 - c. That each party bear their own costs.
 - d. Any further or other relief as this Honorable Court may deem fit and just to grant.

2. The Respondent herein fled a corresponding Cross-Petition dated 09.01.2023 on 15.01.2023 seeking inter alia: -
 - a. That the Petitioner’s Petition be dismissed with costs to the Respondent/ Cross-Petitioner.
 - b. That the marriage between the Respondent and the Petitioner be dismissed as per the Cross-Petition.



- c. That custody of the issues of the marriage be granted to the Respondent.
 - d. That the Respondent be ordered to leave the Cross- Petitioner's house and rent elsewhere.
 - e. That the Petitioner be ordered to compensate the Respondent the expense of KSHS. 8,500/- per month incurred in renting a house while she has her own house that has become uninhabitable due to the acts of the Petitioner.
 - f. That the Respondent be condemned to pay costs of the suit.
3. Briefly, the parties herein cohabited and lived together in Nakuru as from the year 2005. Along the way, problems cropped in between them. They now accuse each other of cruelty. The Respondent is in fact no longer staying with the Petitioner. They however now want to be presumed to be married, and each wants the marriage dissolved as per each parties' Petition. Each of them came to court and testified as witnesses in their respective petitions. They both confirmed that they cohabited as husband and wife and that they want a divorce.
 4. The Petitioner presented an OB report as PEXH NO 2, to prove alleged acts of cruelty on the part of the Respondent herein. In cross-examination, the Petitioner confirmed that he stays in the Respondent's parcel of land in Pipeline estate, Nakuru.
 5. In her evidence, the Respondent also produced an OB extract as REXH. NO. 2, to prove alleged acts of cruelty on the part of the Petitioner. She also produced a Title deed of parcel number KIAMBOGO/ KIAMBOGO BLOCK 2/9693, registered in her name, as REXH. NO. 3. She confirmed that they started cohabiting with the Petitioner herein in the year 2005, in a come-we-stay union. That they were cohabiting in the house that she had developed earlier on in the parcel number whose title deed she produced herein. That the Petitioner has since chased her away from her house and that she therefore now wants to divorce him.
 6. Parties herein filed and exchanged their written submissions herein. The issues for determination are hereby framed as follows: -
 - a. Whether a marriage existed between the parties herein?
 - b. If the answer to the (a) above is in the affirmative, whether the presumed marriage be dissolved either as per the Petition, or as per the Cross-petition.
 - c. Further, if the answer to (a) above is in the affirmative, whether the Respondent is entitled to the other reliefs sought in her Cross-Petition.
 7. I do believe that the first issue herein is sufficient to determine these Cross-Petitions. The parties herein definitely stayed together, or cohabited. They both confirmed that they held themselves as husband and wife. Over time, most people do hold the belief that once such a couple has lived together for an extended period of time, there is an automatic marriage under common law. To this end, there is an erroneous belief that a couple does not need to get into the rigors and formalities of marriage, when they can simply stay together for a long period of time and they will be 'deemed' or 'presumed' to be married under the law. However, what is the legal position in Kenya with regard to the long-established doctrine of 'presumption of marriage', in light of the *Marriage Act* 2014.
 8. Unfortunate, the Petitioner's counsel, WANJIKU WAMAE ADVOCATES, cited and relied on authorities that are pre the *Marriage Act*, 2014, while the learned counsel for the Respondent, MORANDE & CO. ADVOCATES, ignored the issue and went straight to argue the grounds for dissolving a marriage. Let us however start from the point that all marriages in Kenya are currently



governed by the Marriage Act of 2014. Further that the presumption of marriage is a Common Law doctrine.

9. One of the earliest decisions on the presumption of marriage is in the case of HORTENSLAH WANJIKU YAWEH VRS PUBLIC TRUSTEE (CIVIL APPEAL 13 OF 1976) which was cited by the learned counsel for the Petitioner, where the court established the need for long cohabitation before anybody moving the court to establish a presumption of marriage. The court stated as follows: ‘The presumption does not depend on the law or a system of marriage. The presumption is just an assumption based on a very long cohabitation and repute that the parties are husband and wife.’
10. Presumption of marriage is a well-settled common law principle that long cohabitation of a man and woman with a general reputation as husband and wife raises a presumption that the parties have contracted marriage. However, a presumption of marriage is a rebuttable presumption and can disappear in the face of proof that no marriage existed.
11. According to HALSBURY’S LAWS OF ENGLAND, 5TH EDITION 2015, MATRIMONIAL AND CIVIL PARTNERSHIP LAW (VOLUME 72):

‘Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary.’
12. Similarly, BROMLEY FAMILY LAW 5th EDITION provides that: ‘If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married.’ Section 119 of the Evidence Act, cap 80 Laws of Kenya is also instructive. It provides as follows:

‘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.’
13. From the foregoing, courts are permitted to make a prima facie legal inference that certain facts exist without proof, regard being taken to the common course of natural events and human conduct, in relation to the facts of a particular case. Later on, in 2014, in the case of JOSEPH GITAU GITHONGO VRS VICTORIA MWIHAKI (2014) eKLR, the court stated as follows:

‘It (presumption of marriage) is a concept born from an appreciation of the needs of the realities of life when a man and woman cohabit for a long period without solemnizing that union by going through a recognized form of marriage, then a presumption of marriage arises. If the woman is left stranded either by cast away by the “husband”, or otherwise he dies, occurrence which do happen, the law subject to the requisite proof, bestows the status of “wife” upon the woman to enable her to qualify for maintenance or a share in the estate of her deceased ‘husband’
14. There are several other decided cases that speak on the same issue. The principle that ties them all is that a presumption of marriage is often a question of fact and evidence which a person needs to establish. The issue is however whether a presumption of marriage creates a marriage that is so binding that can only be dissolved in case of problems in it as sought for herein. A short direct answer to this question is that it does not. The Marriage Act Number 4 of 2014 recognizes only 4 types of marriages as follows: Civil Marriages, Christian Marriages, Customary Marriages, Islamic Marriages and Hindu marriages.



15. Section 3 of the *Marriage Act* states that ‘Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.’ Thus, any other kind of relationship that is not registered as a marriage under the Act, does not become a marriage.
16. To buttress this, Section 2 of the Act defines ‘cohabitation’ as ‘...to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage.’ On the basis of statute, it is thus clear that a presumption of marriage, does not create a marriage. It only presumes it.
17. One can therefore ask what then is the purpose of a presumption of marriage? In general, a ‘presumption’ usually occurs when a court adopts a particular attitude and treatment, without evidence to the contrary, for purposes of determining a particular question connected to the presumption. For example, one is only ‘presumed innocent’ in the context of a trial to determine whether or not one is actually innocent or not. The fact that a person enjoys the presumption of innocence does not mean that they are innocent. Just as when someone enjoys the presumption of marriage, it does not mean they are married.
18. A presumption of marriage is used by the court to answer a different kind of question presented to it. For example, when a woman is disinherited by her in-laws, she will move to court to determine whether or not she is entitled to inheritance. In making that determination, the court may use the presumption of marriage (if she qualifies), not to declare that she was married to her late husband, but to determine the question of inheritance. In that case, the presumption will be specifically limited to the question of inheritance. It cannot thus be used for purposes of granting a divorce as sought for herein. Interestingly, why should the parties want the court to presume a marriage that both of them are no longer interested in?
19. A presumption of marriage does not create a marriage. It only enables the person who relies on it to make a claim such as on matters to do with the inheritance of the estate of a deceased person. A presumption of marriage does not exist on its own. It only exists in the context of a bigger dispute which the court will be called to adjudicate and determine.
20. It thus follows that I will be engaging in an academic exercise if I go ahead to determine the issue of whether there was a presumption of marriage herein or not. The intention of the parties can be discerned either before, in the course of, or after the cohabitation herein. For all intent and purposes, the cohabitation purported herein was neither qualitative nor harmonious. There might have been some issues or properties involved, but the conduct of the parties herein does not suggest that they carried themselves, or intended to carry themselves, as married couple. The cruelty that has been confirmed herein, and the fact that they are no longer living or staying together all suggest that there was no intention of these parties to stay together as a married couple. Their cohabitation was not qualitative enough to be presumed as a marriage. Both have exhibited evidence of cruelty against each other, even before there were validly married. One of them, the respondent herein, is no longer staying with the Petitioner. I see no sense of presuming a marriage herein. None existed and these Petitions are hereby both dismissed. If there were issues out of their union herein, the same are treated as having been obtained out of wedlock and may be subjected to the usual children cause or causes and not in a matrimonial dispute. Any other property dispute be filed in an appropriate forum and not a matrimonial or family cause. There is no marriage herein and therefore this matrimonial dispute is unnecessary. The upshot is that both suits herein, i.e., the Petition and the Cross-Petition are hereby dismissed with no orders as to costs.

**DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT (IN CAMERA) THIS 04TH
, DAY OF JANUARY, 2024**



ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Petitioner's counsel: n/a

Respondent's counsel: n/a

Petitioner: n/a

Respondent: n/a

