



FWG v JGW (Divorce Cause E070 of 2022) [2024] KEMC 61 (KLR) (30 May 2024) (Judgment)

Neutral citation: [2024] KEMC 61 (KLR)

**REPUBLIC OF KENYA
IN THE NAKURU LAW COURTS
DIVORCE CAUSE E070 OF 2022
PA NDEGE, SPM
MAY 30, 2024**

BETWEEN

FWG PETITIONER

AND

JGW RESPONDENT

JUDGMENT

1. This is a Petition for Divorce by the Petitioner against the Respondent for a decree that the marriage between her and the Respondent be dissolved, and ‘any other just and equitable relief that thus court may deem fit and suitable to grant’. The Respondent filed an Answer to the Petition dated 23rd September, 2022.
2. The Petitioner petitioned this Court for dissolution of the marriage on grounds specified under paragraphs 5 of the Petition that the Respondent has treated her with cruelty, abuse, violent and generally disrespectful. That on several occasions, the Respondent humiliated, abused and threatened her with death or harm, that the marriage has lost love, taste and trust and that they have lived separately since 28/12/2021.
3. In Answer to the Petition, the Respondent contested the allegations or averments in the Petition, mainly stating that he has been married to someone else all along under the African Christian Marriage and Divorce Act cap 151, in which they were issued with a certificate of marriage. He prayed for the dismissal of the Petition with costs.
4. During the hearing of the Petition, both parties herein adduced evidence in their respective petitions/ cases. They basically reiterated the contents of the pleadings and adopted their respective statements as evidence. The Petitioner relies on a presumption of marriage, while the Respondent produced a certificate of marriage as Rexh. No. 2, to prove that he has been married to someone else as from 29.04.1995. The marriage between the parties herein is therefore heavily contested.



Determination

5. From the Petition and Answer the following issues arise for Court's determination.
 - a. Whether there was a valid marriage between the parties herein.
 - b. Whether the other remedies prayed for by both parties are available at this juncture.
6. The petition is based on the idea of presumption of marriage. It is true that over time, some people do hold the belief that once 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' to be married under the law.
7. One of the earliest decisions on the presumption of marriage in the case of *Hortensiah Wanjiku Yaweh Vrs Public Trustee (civil Appeal 13 OF 1976)* where the court established the need for long cohabitation before anybody moving the court, can 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.'
8. 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'
9. 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. However, the issue at hand is whether a Presumption of Marriage create a Marriage?
10. A short answer to this question is that it doesn't. 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.
11. 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. 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. Then what then is the purpose of a presumption of marriage?
12. 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.

13. A presumption of marriage is used by the court to answer a different kind of question presented to it. I will give an 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.
14. Section 119 of the *Evidence Act* states 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

15. Thus, from this provision of the law, we have 2 facts: the presumed fact (such as the presumption of marriage/innocence etc.) and the actual facts in issue in a case (such as the question of inheritance). That was also the position the court stated in Joseph Gitau Githongo Vrs Victoria Mwihaki, supra, which I outlined above.

Conclusion

16. As correctly submitted by the learned counsel for the Respondent, 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. There is thus no marriage to be dissolved. In any case what does it serve to presume a marriage just for purposes of a dissolving it? That dissolution itself is a clear proof that the parties do not intend to be presumed as married. Only a valid marriage can be dissolved. There is no valid marriage between the parties herein and I thus do hereby dismiss this petition with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU IN OPEN COURT THIS 30TH DAY OF MAY 2024

ALOYCE-PETER-NDEGE

SENIOR PRINCIPAL MAGISTRATE

In the presence of;

Respondent's Counsel: N/A

Petitioner: Present

Respondent: Present

Respondent: Praying for certified copy of the judgment

30/05/2024

Court: Same to be supplied upon payment of the necessary costs/ fees

Respondent

