



RK v SWK (Divorce Cause E301 of 2022) [2023] KEMC 97 (KLR) (13 February 2023) (Judgment)

Neutral citation: [2023] KEMC 97 (KLR)

REPUBLIC OF KENYA
IN THE MILIMANI COMMERCIAL CHIEF MAGISTRATE'S COURTS
DIVORCE CAUSE E301 OF 2022
JP ADUKE, SRM
FEBRUARY 13, 2023

BETWEEN

RK PETITIONER

AND

SWK RESPONDENT

JUDGMENT

1. The Petitioner filed the petition dated 9th March 2022 seeking a divorce on the grounds of cruelty and adultery. Return of service on record shows that the respondent was served with the petition and annexures thereto. The respondent entered appearance and filed a reply to the petition. These proceedings proceeded defended.
2. The brief facts of the case are as contained in the petition and reply to petition on record. In summary, RK and SWK began cohabiting sometime in 2010. The petitioner and the respondent are domiciled in Kenya. The petitioner avers that there are three issues from the said cohabitation while the respondent avers that there is only one issue (A.K.W) from the said cohabitation. The respondent avers at para 6 and 7 of the answer to petition on record that the other two issues (A.K.W and E.K.W) were sired out of the petitioner's infidelity with other men before and during the subsistence of the cohabitation herein. There are three issues. The petitioner avers in the petition that she was married to the respondent in January 2017 under Kamba and Kikuyu Customary law and the marriage was not registered with the Registrar of Marriages under section 44 and 55 of the *Marriage Act*. The petitioner prays for an order of dissolution of marriage, legal and actual custody of the minors and the respondent to pay the costs of the petition. The respondent admits to cohabiting intermittently with the petitioner between 2011 and 2014, and again between 2017 and 2021. The respondent also admits having married one M.K. legally sometime in 2015. The parties ceased cohabitation sometime in 2021. These facts are not contested. The parties have no intentions of reuniting in cohabitation. The particulars of the grounds for divorce are outlined in the petition as follows:

1. Cruelty;



2. Adultery;
3. At the hearing thereof, the petitioner relied on the petition and pleadings on record as evidence in support of the petition for divorce. Notably, the petitioner averred that the contents of the petition remained true as at the date of the hearing. The petitioner prayed that the petition be allowed as prayed. The respondent prayed for an order of dismissal of the petition before this court on the ground that no marriage existed between the petitioner and the respondent.

The issues for determination before this court are:

1. whether or not a marriage properly so called existed between the parties and how the parties can part ways from this cohabitation;
2. Who should pay the costs of this suit.

Court's observation on the conduct of parties in court

4. Before I proceed to analyse the issues before me, it is worth noting as part of the background facts the conduct of the parties during the hearing of this case seeing the very acrimonious nature of this matter. The respondent has not made any attempts to contact this court and has not in any way made contact with the court other than during public virtual hearings of the case during the pendency of this suit. The petitioner has made several attempts at harassing the court over the adjudication and delivery of favorable judgment in this matter including but not limited to:
 1. Ambushing the court in person in May 2022 and in July 2022 at an official function despite the court expressly warning the petitioner by invoking the doctrine of sub-judice;
 2. Physically and verbally attacking the court in Naivasha on 8th and 9th February 2023 during the Annual Magistrates and Kadhi's Colloquium 2023 while insisting on delivery of a favourable judgment;
 3. Attempting to intimidate the court by lodging a formal written complaint with the Office of the Judiciary Ombudsman over delivery of judgment in spite of being aware of a notice dated 20th December 2022 published on www.kenyalaw.org regarding delivery of pending decisions while the court is away on annual leave.
5. Be that as it may, I will now proceed and enumerate the issues before me in this case and strictly apply the applicable law without any intimidation or bias. The issues for determination before this court are whether or not a marriage properly so called existed between the parties and how the parties can part ways from this cohabitation. Secondly
6. The applicable law is case law and sections 3, 44, 55 and 59 of the *Marriage Act* 2014.
7. In the case of *CWN v DK* [2021] e KLR the court noted that even though the law does not recognize any form of marriage by presumption, such situations comprise a historical aspect and are a reality in the society. In particular, the court held that "in the absence of proof of a customary marriage through any of the means prescribed in this section, the plaintiff's claim that she was married to the defendant under Kikuyu customary law is wanting both in fact and in law."

Section 2 of the *Marriage Act* defines "cohabit" as follows:

"cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage;



8. I have considered all the pleadings on record. I have also considered all the evidence and submissions on record and note as follows.
9. It is generally accepted that a court may presume the existence of any fact which it thinks is likely to have happened in relation to the facts of the particular case. This is provided under section 119 of the Evidence Act. In this instance, the question before me is whether or not the parties merit an order of divorce. To arrive at this finding, I note that neither the petitioner nor the respondent implores the court to presume the existence of a marriage between the petitioner and the respondent. The petitioner's pleadings seem to suggest this although the same is not outlined expressly in the prayers. This contravenes the provisions of section 3 of the Marriage Act, which requires that all parties should register their unions under the Act. A marriage by long cohabitation and repute as was in the case of *Hotensiah Wanjiku Yahweh vs the Public Trustee can*, therefore, be recognized under the Marriage Act by way of registration of the said union.
10. In the case of *Joseph Gitau Gitbongo v Victoria Mwihaki* [2014] eKLR, the court noted that:

“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”
11. In my considered view, if this petition before me were a claim for disinheritance of the petitioner or her children, then this would be a different issue altogether. That notwithstanding, it is my view that presumption of marriage is a question of fact, subject to the requisite proof.
12. At the hearing thereof, the petitioner relied on her pleadings on record in evidence. The petitioner's statement on file does not make any references to an expert witness testifying and furnishing the court with information on this issue of fact of traditional or customary marriage. From the proceedings available, no expert witness testified on the fact in question. In view of the evidence on record, I find that this fact was not proved on a balance of probabilities.
13. Section 55 of The Marriage Act requires that parties having completed all the necessary customary law rituals apply to the registrar for registration within 6 months of completion of the said rituals. This provision is replicated in section 96(2) and (3) of the Act with respect to cohabitations before 2014 with a variation of 3 years allowance for registration post commencement of the Act. Clearly, neither the petitioner nor the respondent did so in this instance. From the documents available on record, I have not seen any evidence of a marriage as contemplated under section 59 of The Marriage Act. In view of all the above, I find that this fact has not been proved on a balance of probabilities.
14. Having found as above, I proceed to dismiss the petition dated 9th March 2022 before me on the following terms:
 1. Each party to bear own costs;
 2. Either party to apply for registration of customary marriage as under section 3, 44 and 55 of the Marriage Act before a petition for divorce can be filed;
 3. With respect to prayer b) on the face of the petition regarding legal and actual custody of the three issues, I note that there is a pending suit number MCCHCC/E331/2022. To avoid



duplicity of orders, I direct that the petitioner pursue any appropriate reliefs regarding prayer (b) on the face of this petition before the Children Court;

ROA.

Aduke Jeal Praxades Atieno

Senior Resident Magistrate

Judgement signed at Nairobi this 13th February 2023, and uploaded on the judiciary CTS portal in the absence of the parties at 12.44pm.

In the presence of :

- 1. Court Assistant: BENJAMIN KOMBE**
- 2. Counsel for the Petitioner-N/Appearance**
- 3. Counsel for the Respondent: N/Appearance**

