



**VAO v KAKN (Divorce Cause E1270 of 2022)  
[2023] KEMC 208 (KLR) (14 June 2023) (Judgment)**

Neutral citation: [2023] KEMC 208 (KLR)

**REPUBLIC OF KENYA  
IN THE MILIMANI COMMERCIAL CHIEF MAGISTRATE'S COURTS  
DIVORCE CAUSE E1270 OF 2022**

**JP ADUKE, SRM**

**JUNE 14, 2023**

**BETWEEN**

**VAO ..... PETITIONER**

**AND**

**KAKN ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner filed the petition dated 21<sup>st</sup> October 2022 seeking a divorce on the ground of irretrievable breakdown of the marriage. 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. The Petitioner filed a reply to the Answer to 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, VAO and KAKN began cohabiting sometime about 28<sup>th</sup> August 2010. The petitioner and the respondent are domiciled in Kenya. The petitioner avers that there are four issues from the said cohabitation. By admission, the petitioner avers that the customary marriage was celebrated and solemnized on 28<sup>th</sup> August 2010. From the documents on record it appears 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. The respondent admits the solemnization of a customary marriage. These facts are not contested. The parties have no intentions of reuniting in cohabitation from the documents available on record. The particulars of the grounds for divorce are outlined in the petition and answer to petition as follows:
  1. Irretrievable breakdown of the marriage;
  2. Irreconcilable differences;



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 equally prayed for an order of divorce.
4. 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.
5. The applicable law is case law and sections 3, 44, 55 and 59 of the *Marriage Act* 2014.
6. In the case of *CWN vs DK* [2021] eKLR 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, Justice J. Ngaa held that “in the absence of proof of a customary marriage through any of the means prescribed in this section (55 of the *Marriage Act*), the plaintiff’s claim that she was married to the defendant under Kikuyu customary law is wanting both in fact and in law.”
7. 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 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. What is apparent from the record is that the customary marriage that was solemnized and celebrated between the respondent and the petitioner was not registered. 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 Githongo v Victoria Mwibaki* (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, occurrences 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 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, in the absence of a certificate of registration of a customary marriage from the office of the registrar of marriages. Neither the petitioner nor the respondent called expert witnesses in the form of an elder or the local chiefs or elderly relatives to testify and confirm that a traditional ceremony happened and they were either involved or aware of the same according to the respective applicable customary laws in this case. From the proceedings available on file, 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. From the documents available on record, it is apparent that the parties did not pursue or obtain registration as required under s.3, 44 and 55 of the Act. This provision (section 55 of the Act) 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 settled that the cohabitation arrangements between the parties in dispute herein is not a marriage and neither can it be presumed as such under the Laws of Kenya, the consequence is that prayer a) on the face of the petition must fail. It follows that prayer a) on the face of the Answer to Petition must equally fail for the same reasons.
15. With respect to the second issue, it is settled law that costs follow the event. I note however that this is a family matter and as such it would be prudent for parties to bear their own costs.
16. Having found as above, I proceed to dismiss the petition dated 21<sup>st</sup> October 2022 before me on the following terms:
  1. Petition dated 21<sup>st</sup> October 2022 is dismissed.
  2. Each party to bear own costs;
  3. Either party is at liberty to apply for registration as under section 3, 44 and 55 of the Marriage Act;
  4. These are the orders of this court.

ROA 14 days.

**ADUKE JEAL PRAXADES ATIENO**

**SENIOR RESIDENT MAGISTRATE**

**JUDGEMENT SIGNED AT NAIROBI THIS 14<sup>TH</sup> JUNE 2023 AT 12.30 PM.**

In the presence of :

1. Court Assistant: Benjamin Kombe



2. Counsel for the Petitioner-
3. Counsel for the Respondent:

