



**ZOO v PA (Divorce Cause E360 of 2023)  
[2023] KEMC 37 (KLR) (29 November 2023) (Judgment)**

Neutral citation: [2023] KEMC 37 (KLR)

**REPUBLIC OF KENYA  
IN THE MILIMANI COMMERCIAL CHIEF MAGISTRATE'S COURTS  
DIVORCE CAUSE E360 OF 2023  
JP ADUKE, SRM  
NOVEMBER 29, 2023**

**BETWEEN**

**ZOO ..... PETITIONER**

**AND**

**PA ..... RESPONDENT**

**JUDGMENT**

1. The Petitioner filed the petition dated March 17, 2023 seeking a divorce on the grounds of cruelty, desertion and irretrievable breakdown of the cohabitation. Return of service on record shows that the respondent was served with the petition and annexures thereto. The respondent neither entered appearance nor filed a response. The petitioner filed an application seeking to have the DC proceed undefended. Return of service on record shows the petitioner served the respondent with the said application. These proceedings proceeded undefended.
2. The brief facts of the case are as contained in para 1-13 of the petition on record. In summary, ZOO and PA began cohabiting as man and wife sometime in February 2006 and allegedly solemnized their cohabitation on February 12, 2006 through a customary ceremony under Luo Customary law. The Petition does not clarify further particulars of the solemnization. The petitioner and the respondent are domiciled in Kenya. The petitioner admits to having held out themselves to members of the public as husband and wife. They ceased cohabitation sometime in 2019 with an on-off cohabitation pattern. These facts are not contested as the cause is undefended. The petitioner has no intentions of reuniting in cohabitation. The particulars of the grounds for divorce are outlined in the petition as follows:
  1. Cruelty;
  2. Desertion;
  3. Irretrievable breakdown.



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.
4. The issue for determination before this court is whether or not a marriage existed between the parties and how the parties can part ways from this cohabitation.
5. The applicable law is case law and sections 3, 55, 59 and 96(2) and (3) of the Marriage Act, 2014.
6. In the case of CWN vs 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.
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 and oral 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, the petitioner has implored the court to presume the existence of a marriage between the petitioner and the respondent. In essence, the petitioner herein directly asks the court to declare that the respondent and the petitioner were married under Luo Customary Laws for the court to then grant a divorce. This contravenes the provisions of section 3 of the Marriage Act, which requires that all parties should register their unions under the Act. In particular, section 96(2) and (3) of the Act requires that parties who cohabited before the commencement of the Act apply for registration within 3 years of commencement of the Act. A marriage by long cohabitation and reputed 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 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 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. At the hearing thereof, the petitioner relied on his 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 marriage under Luo Customs. 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 has not been proven on a balance of probabilities.

12. 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 was not proven on a balance of probabilities.
13. Having found as above, I proceed to dismiss the petition dated March 17, 2023 before me on the following terms:
  1. No order on costs;
  2. Either party is at liberty to apply for registration as under section 3 and section 96(2) and (3) of the Marriage Act before a petition for divorce can be filed.

**JUDGEMENT SIGNED AT NAIROBI THIS 29<sup>TH</sup> NOVEMBER 2023.**

**ADUKE JEAL PRAXADES ATIENO**

**SENIOR RESIDENT MAGISTRATE**

**In the presence of :**

Court Assistant: Benjamin Kombe

