IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: KARANJA, KOOME & KANTAI, JJ.A.)

CIVIL APPLICATION SUP. NO. 4 OF 2019

BETWEEN

MNK alias MNP.....APPLICANT

AND

POM.....RESPONDENT

(Being an application for leave to appeal and certificate that a matter of General Public Importance is involved in the intended appeal to the Supreme Court against the judgment and order of the Court of Appeal at Nairobi (Waki, Kiage & Sichale, JJ.A.) dated 25th January, 2019

in

Civil Appeal No. 343 of 2017)

****

RULING OF KANTAI, JA

In the Originating Summons filed at the High Court of Kenya at Nairobi in HCCC No. 6 of 2012 the respondent, POM, prayed in the main:

> ***"1. THAT it is declared that the property listed herein with all the buildings and developments being thereon was acquired and developed by the joint funds and efforts of the Applicant and the Respondent during their marriage and thus is owned jointly by the Applicant and Respondent:-***
>
> ***a. Plot No. [..] being within Title No. Dagoretti/Riruta/[..].***
>
> ***2. THAT an order do issue declaring that the joint ownership of Plot No. [..] within Title No. Dagoretti/Riruta/[..] be severed and that the plot together with the buildings being thereon be sub-divided equally and each portion be transferred directly to the Applicant and respondent respectively and individual titles do accordingly issue OR that the plot together with the buildings being thereon be valued, sold and the proceeds therefrom be shared equally amongst the Applicant and the Respondent taking into account the rents that the respondent would have collected on her own."***

The Summons was heard by Musyoka, J. who in a judgment delivered on 9th June, 2017 found that the applicant, MNK (also known as MNP) was at the material time married to another man and had no capacity in law to be married to the respondent. The judge found that the relationship between the applicant and the respondent was an adulterous one and cohabitation could not result in a marriage known to any law.

Those findings were reversed on appeal, this Court (Waki, Kiage and Sichale, JJ.A.) in the judgment delvered on 25th January, 2019 holding:

> ***"Given everything that is on record, the evidence of the parties that was given on oath and tested on cross-examination with documents having been tendered, we are satisfied on a balance of probabilities that Mayaka did prove his case to entitle him to an order that the suit property was acquired and developed during the substance (sic) of marriage through the joint efforts and/or contribution of the parties. This is a case where justice would be served by equal entitlement commensurate with such contribution …."***

The appeal was allowed with the result that the applicant and the respondent were entitled each to a half of Plot No. ***[..]*** within Dagoretti/Riruta/***[..]*** together with the developments made and being thereon.

In the Motion before us the applicant, who is aggrieved by the said findings, seeks leave to appeal to the Supreme Court asking us to issue a certificate that a matter of general public importance is involved in the intended appeal. The Motion is supported by grounds set therein and a supporting affidavit of the applicant divided into 165 paragraphs. I have gone through that affidavit and I am of the respectful opinion that it is verbose, repetitive, argumentative, it is too long. All that is said in those many paragraphs could have been reduced into a few paragraphs where the main issues raised would be taken clearly in a concise way avoiding what looks like a written submission of the case that the applicant is trying to make.

In sum the applicant says that issues to be canvassed in the intended appeal transcend the circumstances of the case and are of general public importance warranting exercise of the appellate jurisdiction of the Supreme Court since they have a bearing on the sanctity of institutions of marriage and family:

> ***"…. which institutions are recognized as the natural and fundamental pillars of social order in Kenya and are protected in our Constitution ….."***

It is also said that issues to be raised in the intended appeal are substantial and broad-based whose determination would have a significant bearing because they transcend the circumstances of the case making them of interest to the general public in that they raise questions touching on the application of the common law doctrine of presumption of marriage in Kenya. Questions are raised – whether that doctrine is unconstitutional; whether the doctrine is an affront to the sanctity of marriage; whether the doctrine overrides African customary law with particular reference to Kikuyu customary law and marriage practices; whether the doctrine can override express provisions of written law; whether the doctrine is repugnant to justice and morality; whether the judgment intended to be appealed is retrogressive against the Marriage Act 2014; whether the case of **Hotensiah Wanjiku Yaweh v Public Trustee (Civil Appeal No. 13 of 1976)** and other related cases are good laws in Kenya; whether this Court exceeded its jurisdiction by awarding a relief that was not specifically pleaded;-

> ***"Whether in the absence of legislation regulating presumption of marriage and considering the high number of unmarried cohabitants, the Supreme Court should provide some clear guidelines and principles for consideration in claims for presumption of marriage…."***

The applicant further states that there is a state of uncertainty in the law relating to whether the common law doctrine of presumption of marriage ought to continue being upheld and applied in Kenya in light of the provisions of the Marriage Act 2014 and that the Supreme Court, which is mandated to develop a rich indigenous jurisprudence that respects Kenya's history and traditions should have an opportunity to develop jurisprudence in this area.

In a replying affidavit the respondent depones that the High Court was right in finding that there had been cohabitation between the applicant and the respondent; that the Court of Appeal reached a correct decision; that the matters being raised in the Motion before us were not matters raised either in the High Court or in the subsequent appeal; that the Marriage Act 2014 did not apply to the case before the High Court or the appeal; that the Judicature Act that imports the doctrine of presumption of marriage into Kenya is good law and, finally, that the matters intended to be raised in the Supreme Court cannot be raised there, they not having been raised in the High Court or in the appeal to this Court.

Learned counsel for the applicant **Mr. Mithega Mugambi**, in submissions before us, was of the view that the applicant was not married to the respondent submitting that the Court of Appeal was wrong in finding that there was marriage through presumption. Counsel further submitted that the Court of Appeal was wrong to award a relief to the respondent which, according to counsel, was not prayed for. Counsel was of the view that the doctrine of presumption of marriage was against Kikuyu customary law on marriage, contending that the applicant was married to another man and could thus not be married to the respondent.

Mr. Moses Siagi, learned counsel for the respondent, did not agree. He posited that there were no matters of general public importance raised to warrant the attention of the Supreme Court. According to counsel the matters raised in the Motion before us were not raised either in the High Court or in this Court and could not be taken in the Supreme Court.

I set out at the onset of this ruling the substantive prayers that were taken by the respondent in the Originating Summons filed at the High Court. He asked for a declaration that Plot No. ***[..]*** being within Title No. Dagoretti/Riruta/***[..]*** with all buildings and developments thereon:

> ***"…. was acquired and developed by the joint funds and efforts of the Applicant and the Respondent during their marriage and thus is owned jointly by the applicant and the Respondent….."***

The applicant further prayed for a declaration that the joint ownership of the said parcel of land be severed and be sub-divided equally between the 2 parties.

The High Court found as fact that the applicant and the respondent had cohabited for a long time that could have led to a presumption of the marriage, a presumption which the High Court declined to make after finding that the applicant was at the material time married to somebody else.

The finding that the applicant was married to another person was reversed on appeal, it being held that the long association or relationship between the applicant and the respondent led to the inescapable conclusion that the two were married as husband and wife. These, to my mind, are findings on factual issues - that the applicant and the respondent had cohabited for a long time and there was a presumption that the two of them were married.

Article 163(4) of the **Constitution of Kenya, 2010** on appeals from this Court to the Supreme Court, provides:

> ***"Appeals shall lie from the Court of Appeal to the Supreme Court:***
>
> **….**
>
> ***(b) In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved, subject to clause (5)."***

This Court and the Supreme Court have had occasion to consider the phrase **"matter of general public importance"** in various cases. In the case of **Greenfield Investments Limited v Baber Alibhai Manji, Civil Application No. Sup 5 of 2012** it was observed:

> ***"It would be a perversion of the law as ….. unambiguously spelt out in the Constitution, were certifications to become fare for ordinary cases no matter how complex that have for ages been concluded with finality in this Court. This is part of the rationale for the requirement that certification be first sought in this Court."***

In the case of **Hermanus Philipus Steyn v Giovanni Gnecchi –Ruscone Civil Application No. Sup 4 of 2012** on the question of certification for an appeal to the Supreme Court this Court stated:

> ***"The importance of the matter must be public in nature and must transcend the circumstances of the particular case so as to have a more general significance. Where the matter involves a point of law, the applicant must demonstrate that there is uncertainty as to the point of law and that it is for the common good that such law should be clarified so as to enable the courts to administer the law, not only in the case at hand, but also in such cases in future. It is not enough to show that a difficult question of law arose. It must be an important question of law."***

The Supreme Court of Kenya in the case of **Hermanus Phillipus Steyn v Giovanni Gnecchi – Ruscone [2013] eKLR** while considering whether a matter merited certification as one of general public importance summarized the applicable principles as follows:

> ***"(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;***
>
> ***(ii) where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;***
>
> ***(iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;***
>
> ***(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;***
>
> ***(v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163 (4)(b) of the Constitution;***
>
> ***(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter for which certification is sought;***
>
> ***(vii) determinations of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."***

The applicant in the Motion before us has raised a multiplicity of issues that she says warrant the attention of the Supreme Court in the intended appeal. These issues range from whether the doctrine of presumption of marriage is good law in Kenya to whether this Court gave a relief not prayed for.

I have perused the whole record and found that the main issue in the matter before the High Court was whether there was cohabitation between the applicant and the respondent and whether they had acquired the property in question during that period of cohabitation. The High Court found as fact that the applicant and the respondent had cohabited together for a long time during which the disputed property was acquired. The High Court declined to presume marriage, holding that the applicant was married to another man. This Court, on appeal, found that there was no evidence on record to show that the applicant was married to that other man. It was held that the applicant and the respondent had cohabited for a long time and there was proper ground to presume them as a married couple. All those were findings of fact.

The issues that the applicant intends to raise at the Supreme Court were not issues before the trial court or on appeal. The matter before the

High Court was a simple one – whether the applicant and the respondent had cohabited and whether, during that cohabitation, they had acquired the property in question. These were straight forward matters of a private nature and findings have been made on those issues. There is no issue raised meeting the standard set by the Supreme Court in **Herman Phillipus Steyn** (supra) on what amounts to a matter of general public importance.

I did not find any merit in the Motion and I would dismiss it accordingly. On the issue of costs it has been found that the parties are husband and wife and it is best that each meet their costs of the Motion.

Dated and delivered at Nairobi this 21st day of February, 2020.

S. ole KANTAI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

RULING OF W. KARANJA, J.A.

I have read in draft the Ruling of Kantai, JA. I agree with the learned Judge that there is nothing novel about the issues raised by the applicant to warrant a reference to the Supreme Court for determination. In my considered view, issues pertaining to presumption of marriage under common law; matters pertaining to cohabitation as relates to African Customary Marriage laws, as important as they undoubtedly are and the impact they have in the family unit, which is protected by the Constitution, do not raise any issues of Constitutional interpretation or application.

I agree with the learned Judge that the application before us fails to meet the established threshold to warrant escalation of this matter to the Supreme Court for its consideration. I would therefore dismiss the notice of motion dated 11th of March, 2019 with costs to the respondent. As Kantai, JA is in concurrence, the majority decision of the Court dictates that the application be and is hereby dismissed with costs to the respondent.

Dated and delivered at Nairobi this 21st day of February, 2020.

W. KARANJA

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR

RULING OF KOOME, JA

1. I have had occasion to read in draft the ruling of **Kantai, JA**. I nonetheless respectfully hold a different opinion for reasons that I will explain in this ruling. The background information is well set out in the said ruling, I will nonetheless give a brief summary so as to place my opinion in perspective. ***POM***(respondent) filed suit before the High Court by way of an originating summons under the defunct ***Section 17*** of the **Married Women's Property Act, (1882) of England (MWPA)**. The suit was against ***MNK alias MNP*** (applicant). The respondent sought in the main an order declaring the property known as Plot No. ***[..]*** being within title **No. Dagoretti/Riruta/*[..]***(suit premises) was a joint property and the same be divided equally between the two parties. I need to mention at the onset that there was no prayer by the respondent seeking a declaration of marriage by presumption.

(2) The respondent's suit in the High Court was dismissed with costs by (Musyoka, J.). In doing so, the learned trial Judge stated that he was not satisfied there was a marriage between the applicant and the respondent. That the respondent had readily conceded there were no marriage ceremonies that were conducted but he was claiming that arising out of long cohabitation between him and the applicant, the Judge was invited to presume there was a marriage. This is what the Judge posited in a pertinent portion of the said judgment in his own words:-

> ***"… None of the witnesses said a word on the nature of the relationship, but from the totality of the evidence it would appear***

to have been of the sexual or romance kind. The defendant asserted that she had been married to a KM, from whom she separated after some time, but then that marriage subsisted until the former died in 2011. She appeared to argue that even if the court were to find that she had cohabited with the plaintiff, which she denies, presumption of marriage could not been (sic) ***made in view of her married status"***

(3) The learned trial Judge appreciated the principles on presumption of marriage that have been propounded by this Court especially in the case of **Hortensia Wanjiku Yawe vs. Public Trustee Civil Appeal No 13 of 1976**. That is where there was long cohabitation and general repute that parties were husband and wife, a marriage can be presumed to exist. In the instant case the respondent claimed that the cohabitation begun in 1986 while other witnesses said it was 1992 terminating in 2011 or 2012 when the applicant locked out the respondent from the suit premises. The Judge's mind was bothered by the fact that the applicant was already married to another man and indeed she was known by his name and found that the respondent failed to discharge the burden of proof that was not the case.

(4) Aggrieved by the said outcome, the respondent appealed before the Court of Appeal, and the appeal was heard and determined by **Waki, Kiage & Sichale, JJ.A** vide a judgement delivered on 25th January, 2019. It is that judgement that the applicant wishes to seek certification to appeal before the Supreme Court. The outcome of the appeal before the Court of Appeal was that the judgement of the High Court was set aside and substituted with the following order:-

"The appellant was, by presumption married to the respondent and that the appellant is entitled to half of plot No 29 within Dagoretti/Riruta/168 together with the developments made and being thereon"

[5] The applicant says she is aggrieved by the said conclusion, she thus filed the notice of motion dated the 11th March, 2019 seeking leave to appeal to the Supreme Court and certification that a matter of general public importance is involved in the intended appeal. The application is supported by the grounds stated in the body thereto and amplified further by the matters deposed to by a very lengthy (165 paragraph) supporting affidavit sworn by the applicant on 11th March, 2019.

[6] In brief the applicant contends that the issues to be canvassed in the intended appeal transcend the circumstances of her case and are of general public importance and warrant consideration by the Supreme Court given the sanctity of the institution of marriage and family which are recognized in the Constitution as the natural and fundamental pillars of social order in Kenya. That the issues to be raised in the intended appeal are broad based and their determination will have a significant bearing on a cross- section of the society thus making them of general public interest.

[7] The following specific questions were framed: -

a) Whether the common law doctrine of presumption of marriage has the effect of overriding African customary law and in particular Kikuyu customary law and marriage practices.

b) Whether the common law doctrine can override express provisions of written law.

c) Whether the application for the common law doctrine of presumption of marriage in Kenya is contrary to Section3 of the Judicature Act and it has the effect of imposing itself against African Customary Law and in particular the elaborate Kikuyu customary law and practices of marriage.

d) Whether the application of the common law doctrine of presumption of marriage in Kenya is repugnant to justice and morality.

e) Whether the common law doctrine of presumption of marriage encourages immorality by recognising cohabitation out of wedlock as good evidence of prove of marriage yet sexual relationships out of wedlock are loathed by various religions including Christians and Muslim faiths as well as various cultures including the Kikuyu community.

f) Whether the common law doctrine of presumption of marriage imposes marriage on parties contrary to the law of contract considering the fact that marriage is a civil contract by competent, intending and consenting parties.

g) Whether the common law doctrine of presumption of marriage is recognized in our written law and in particular our marriage legal regime.

h)Whether the common law doctrine of presumption of marriage is unconstitutional in view of the provisions of Article 45 (2) of the Constitution which guarantees an adult person the right to marry a person of opposite sex, based on the free consent of the parties yet the presumption purports to impose especially in situations whether parties thereto are contesting its application.

i) Whether application of the common law doctrine of presumption of marriage is an affront to the sanctity of marriage which is the foundation of family which is in turn the natural and fundamental unit of society and the necessary basis of social order that enjoys the recognition and protection of the State as per Art. 45 (1) of our constitution.

j) Whether the common law doctrine of presumption of marriage is impugning and attacking the sanctity of the marriage institution as known in the Marriage Act No. 4 of 2014 in Kenya.

k) Whether the decision of the Court of Appeal is retrogressive in the light of the positive steps taken through the enactment of the Marriage Act No. 4 of 2014 which law does not recognise cohabitation as one of the forms of marriage in Kenya.

l) Whether Hotensiah Wanjiku Yaweh vs. Public Trustee Civil Appeal No. 13 of 1976 and all other Court of Appeal controlling precedents in the doctrine of presumption of marriage is still good in law.

m) Whether the Court of Appeal exceeded its jurisdiction by awarding a relief that was not specifically pleaded and prayed for in the pleadings before the trial court.

n) Whether the Court of Appeal has jurisdiction to hear and determine an appeal that raises issues new claims at the appellate level.

o) Whether in the absence of legislation regulating presumption of marriage and considering the high number of unmarried cohabitants, the Supreme Court should provide some clear guidelines and principles for consideration in claims for presumption of marriage.

p) Whether the Court of Appeal was right to make a declaration that the property in question was jointly acquired and ought to be shared equally without prove of contribution thereof.

q) Whether a court has jurisdiction to hear a claim under Section 17 of the repealed Married Women's Property Act of 1882 or under Matrimonial Property Act No. 49 of 2013 without prove of a valid marriage.

r) Whether the judgment of the Court of Appeal ought to be set aside.

s) Whether costs of this Petition should be provided for."

[8] The motion was opposed by the respondent's own replying affidavit sworn on 13th June, 2019. The respondent basically supports the judgement of this Court and states that the law on marriage by presumption was long settled and therefore there is nothing novel to be determined by the Supreme Court; that the issues raised by the applicant were not raised in the Appeal and moreover the **Marriage Act 2014** did not apply to the present case as the suit was filed before the Act was enacted. Further that the **Judicature Act** imports the application of English Common Law and the 1882 MWPA was a statute of general application that was applied in the courts in Kenya in many cases to determine a share of property within a marriage. Finally it was the respondent's position that the issues intended to be raised by the applicant before the Supreme Court cannot be raised as they were not determined by the High Court and this Court.

[9] During the hearing of this motion, **Mr. Mithega Mugambi** learned counsel for the applicant submitted that the law on presumption of marriage is not settled. This is because the respondent is a man who alleged that he was married to the applicant by way of reputation borne out of long cohabitation. The learned trial Judge found that the respondent was not able to prove that the applicant was already married to another person under the Kikuyu customary law at the same time when the respondent was cohabiting with the applicant. What is more significant was the fact that the suit in the High Court was instituted by way of an Originating Summons under the provisions of the MWPA and there was no prayer seeking an order of declaration of a marriage. Thus counsel submitted the Court of Appeal had no jurisdiction to consider matters that were not pleaded. In conclusion counsel stated that unless the issues cited are determined by the Supreme Court, the impugned judgment has the potential of recognizing polyandry as the applicant was married to someone else and the court found she was known by her husband's name.

[10] The appeal was opposed by **Mr. Siagi** learned counsel for the respondent, who relied on the respondent's replying affidavit and emphasised that the applicant failed to demonstrate that there were matters of general public importance so as to invoke the jurisdiction of the Supreme court. Counsel further reiterated the issues intended to be raised were not before the High Court or the Court of Appeal; moreover the issue of cohabitation was not canvassed, therefore in his view there were no grounds of general public importance as set out under

Section 3 of the Supreme Court Act.

[11] I have considered this application with an anxious mind while bringing to bear the provisions of ***Article 163 (4) (b)*** of the Constitution which provides as follows: -

"(4) Appeals shall lie from the Court of Appeal to the Supreme Court;

a) …

(b) In any other case in which the Supreme Court, or the Court of Appeal, certifies that a matter of general public importance is involved subject to clause (5)."

The applicant invokes this foregoing provision of the Constitution and seeks leave to appeal to the Supreme Court. To precisely determine whether the intended appeal to the Supreme Court raises issues of general public importance, the Supreme Court has set out the test for granting certification and leave to appeal in the case of; **Hermanus Phillipus Steyn vs. Giovanni Gnecchi – Ruscone, Supreme Court application No.4 of 2012.**The Court held that the meaning of **"matter of general public importance"** may vary depending on the context, as regards the provisions of **Article 163(4) (b)** of the Constitution the learned Judges stated at paragraph 58 that:

"…a matter of general public importance warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed the burden falls on the

intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern."

[12] The principles set out in ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone***, **(**supra) to determine whether a matter is of general public importance included;

> ***"i. For a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;***
>
> ***ii. where the matter in respect of which certification is sought raises a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest***
>
> ***iii. such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;***
>
> ***iv. where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;***
>
> ***v. mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a final appeal in the Supreme Court, must still fall within the terms of Article 163(4) (b) of the Constitution;***
>
> ***vi. the intending applicant has an obligation to identify and concisely set out the specific elements of general public importance which he or she attributes to the matter for which certification is sought;***
>
> ***vii. determination of facts in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."***

[13] The first question I have considered is whether the applicant has raised a point of law and demonstrated that such point of law is substantial and having a significant bearing on the public interest. The suit before the High Court was instituted by way of an originating summons invoking the provisions *of* ***Section 17*** of the defunct **1882 MWPA** of **England** which provided that: -

> **"In any question between husband and wife as to the title to or possession of property, either of them may apply for an order to the High Court or a County Court and the Judge; may make such order with respect to the property in dispute…as he may think fit**"

What has troubled me, and on my part I am satisfied it bears some public interest significance, is the fact that when the respondent filed the suit he **was not** claiming to be the husband of the applicant. Therefore it is necessary for the Supreme Court to determine whether it was appropriate to resolve the issue of presumption of marriage under the said regime of law. It was in the course of the hearing of the matter that the respondent alluded to a marriage by reputation which was denied by the applicant who claimed that she was already married to somebody else and indeed was known by his name. Moreover as pointed out in the opening paragraph of this ruling, there was no prayer in the suit by the respondent seeking a declaration of presumption of marriage through long cohabitation.

[14] It was argued and the majority ruling seems to agree with that line of submission by counsel for the respondent that the issue of presumption of marriage is now an established one and nothing novel arises in this matter for further consideration by the Supreme Court. I am aware of the principles set out in the case of ***Hotensiah Wanjiku Yawe vs .Public Trustee*** (supra), where it was held that long cohabitation as man and wife gives rise to a presumption of marriage and that only cogent evidence to the contrary can rebut such a presumption. The Court further stated that the presumption of marriage arising from long cohabitation applies even under customary law. The same point was emphasized by this Court in **Mary Wanjiru Githatu vs. Esther Wanjiru Kiarie, CA No 20 of 2009 (Eldoret)** where Bosire, JA stated that:

> ***"in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by a long cohabitation or other circumstances evinced an intention of living together as husband and wife."***

[15] I however differ because the facts in the instant case were starkly different from the ones discussed in the aforesaid cases. The facts in the aforementioned cases were different in this way; those cases were filed by women who sought orders that they be presumed married to the men they had lived with for a long period of time. It is a matter of public knowledge that traditionally women moved to live with men although perhaps times have changed such as in this case and the shoe was on the other side. However this case raises questions which in my humble view are of general public importance; these are, whether, parties who are not in a recognized union of marriage in the first place and where there is even no prayer sought for presumption of marriage can file a case under the **MWPA,** which was a procedural form of determining uncontested matters between husband and wife. Can a court therefore proceed to determine weighty contested issues of presumption of marriage in the same manner? What comes first a suit for presumption and what consideration should be taken into account in determining ownership of property within marriage?

[16] These considerations give this case a twist and takes it from the ordinary suit filed by women under the ***Section 17*** of **MWPA**. The women there claimed that they carried out domestic work and other duties; they conceived and bore children. This case ought to open another line of jurisprudence so that when the claim is by a man, it will be imperative for the court to know the principles to apply as men

and women play different roles in a family. A man who cohabits with a woman in a property held in the woman's name also needs to prove contributions that he made because merely lounging in a woman's house while dominating the remote control for the Television Channels cannot entitle a man a share of the woman's property. Secondly whether consent by the applicant as a party to a marriage as envisaged under ***Article 45 (2)*** of the Constitution can be dispensed with as the applicant claimed she was married to somebody else.

[17] The next issue for consideration is whether the applicant has been able to identify and concisely set out the specific elements of *"general public importance"* which she intends to rely on. The applicant has listed what she terms as pertinent questions for consideration by the Supreme Court. These are issues of general public importance in my view bearing in mind the centrality of the **Bill of Rights** as per the 2010 Constitution such as Right to property and principles of equity and equality which govern sharing of property. In this regard, the issue of whether the Court of Appeal made an actual assessment of the parties' respective contribution to acquisition and development of the suit property is challenged. This matter of property ownership, shares contributed by each party either as a friend, a partner or spouse and what constitutes equal sharing transcends the interests of the parties in this matter to a larger population in this country.

[18] I have analysed the issues identified and I am satisfied that the intending appellant has met the requirement of identifying concisely the specific elements of "general public importance" which she attributes to the matter for which certification is sought. Counsel for the applicant outlined clearly that the decision shall affect the unit of family, the constitutional interpretation of whether there can be a presumption of marriage where there is no consent; capacity of the parties to enter into multiple relationships including women and the principles of equality of ownership of property raise serious constitutional controversies. See **Hassan Ali Joho & Another vs. Suleiman Said Shahbal & 2 Others, Supreme Court Petition No. 10 of 2013 [2014] eKLR at para 52**, where it is stated that an appeal to the Supreme Court within the terms of ***Article 163 (4)*** should be founded on cogent issues of constitutional controversy.

[19] For the foregoing reasons, it is my considered view that the present application has met the test established in the ***Hermanus Steyn*** case by reason that it has demonstrated to the Court's satisfaction the existence of specific elements of general public importance which are attributed to this matter.

Dated and delivered at Nairobi this 21st day of February, 2020

M. K KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR