



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, KIAGE & SICHALE, JJ.A) CIVIL APPEAL NO. 343 OF 2017

BETWEEN

POM..... APPELLANT

AND

MNK alias MNPRESPONDENT

(An appeal from the Judgment/Decree of the High Court of Kenya at Nairobi (Musyoka, J.) dated 9th June 2017 in **HCCC No. 6 of 2012 (O.S)**)

JUDGMENT OF THE COURT

This appeal is yet another rather astonishing example of the deception, greed and heartlessness that rules and chills the human heart as couples coldly contend for property where once love was thought to thrive and thrill. The appeal is brought by **POM** whose complaint against the judgment of the High Court (Musyoka, J.) rendered on 9th June 2017 is that the learned Judge erroneously declared that the respondent **MNK** alias **MNP** was not **POM**'s wife as she was still married to one **KM** (K) and so declined to deal with and divide **Plot No. xx** within **Dagoretti/Riruta/xxx** between the parties herein.

The proceedings at the High Court had been commenced by **POM** vide an originating summons dated 6th November, 2013 in which he alleged that though they did not have a formal wedding, he and **MNP** had cohabited as husband and wife from the year 1986 without interruption until **MNP** obtained court orders against him by use of falsehoods. Those orders, in **CMCC No. 43 of 2011**, terminated the cohabitation by constructive desertion. He alleged further that at the commencement of the cohabitation he was working with [Particulars withheld] earning a total of Kshs. 9,370 per month while **MNP** was a seller of factory rejected polythene bags to farm produce sellers at Kawangware and Ukulima Markets. When they moved in together he shouldered rent payments.

The plot in dispute was purchased in or about the year 1991 and the elderly seller was not keen on selling it to **POM** because he was non-Kikuyu whereupon he and **MNP** agreed to purchase it jointly but in the name "**MNP**", the last name being an acknowledgment of his ownership of it. The couple thereafter commenced developments of the plot culminating in a three storey residential-cum-commercial building. They occupied 3 of the residential units and let the rest out to tenants. **POM** contended that his contribution to the development or improvement of the plot was greater than **MNP**'s and he applied for, and had connected, water and electricity supply thereto in his name **POM** which remained the case until **MNP** unlawfully obtained court orders in **CMCC No. 4364 of 2011** and removed him from the premises where they had lived happily together with their relatives barring "*the usual hiccups in a married couple's life.*"

As at the time of his eviction, rent collected was Kshs. 258,100 per month which then rose to Kshs. 277,100 when **MNP** took over and rented out the premises where he had been running a bar and butchery business. That eviction, with the aid of policemen, rendered him penniless and destitute while she enjoyed rent from the premises and was in the process of disposing of the same to a third party to defeat his rights and had already caused him much loss; mental stress and/or torture, hunger, lack of shelter, embarrassment and/or inconvenience for which he sought damages. He then prayed substantively for;

"1. That it be 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 the respondent:-

a. Plot NO. xx being within Title No. Dagoretti/Riruta/xx

2. That an order do issue declaring that the joint ownership of plot No. xx within Title No. Dagoretti/Riruta/168 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.

3. That pending the determination of prayers Nos. 1 and 2, this honourable court do issue preservation orders in respect of the suit property to the effect that the respondent/her agents/servants and/or anybody claiming under or through the respondent should not sell, charge, transfer and/or in any way whatsoever alienate the suit land namely plot No. xx being within Title No. Dagoretti/Riruta/xx.

4. That pending determination of the matters herein, and in particular prayers 1 and 2 herein, an order do issue appointing a reputable estate management agent/receiver to take charge manage and collect all rents collectable from the buildings being on the suit land and taking account the outgoings deposit the net thereof into court or into a joint interest earning account to be opened as this honourable court may direct.

5. That pending the determination of matters herein as prayed for in prayers Nos. 1 and 2 herein, an order do issue directing that the applicant and the respondent be paid Kshs. 60,000 each for their own monthly upkeep.

6. That the respondent be condemned to provide the costs of this summons,”

MNP opposed the suit by way of a lengthy 80-paragraph replying affidavit sworn on 20th March 2014. She swore that she got married to one **K** in 1974 under Kikuyu customary law but was estranged from him in the 1980's following some differences. They however did not divorce and so she remained **K**'s wife until his death in 2011. **POM** knew that she was married to **K** and was himself married but that did not stop him from persistently pestering [her] romantically but she strongly resisted, telling him it is only friendship she could offer him. After **K**'s death **POM** “intensified his harassments” insisting that **MNP** marry him but she was adamant. Her continuous rejection of his amorous intentions and marital proposals caused him to become abusive and he subjected her “to sexual harassment, embarrassment and threats of actual violence or murder,” which she reported to Muthangari Police Station. She even filed **CMCC No. 4364 of 2011** to permanently injunct **POM** from trespassing on her properties including the suit property or getting near her person. She obtained an injunction on 13th July 2012. **POM** on his part filed **Divorce Cause No. 454 of 2011** at the Chief Magistrate's Court seeking “*dissolution of his alleged marriage with [her] and the sale of the suit property and sharing of the proceeds equally.*”

MNP flatly denied meeting **POM** in 1986 or ever cohabiting with him as husband and wife and swore that no presumption of marriage could arise as she could not be polyandrous, which is unknown to both Gikuyu or Kisii customs. She vowed that the name „P? appearing in the sale agreement for the suit property referred to her father and not to **POM**, and that she used that name instead of **K**'s because she had just differed with the latter. She attached what she called her late father's baptismal card bearing the names **PW** who was baptized at [Particulars withheld] Catholic Church, Kiserian, on 5th February 1979. She went on to state that if **POM** misled his relatives to believe that she was his wife, they were all to blame as they had not participated in any ceremony or other rites of marriage between the parties herein. Regarding the photographs exhibited at his nephew's graduation party, as well as various events he relied on to assert that the two were man and wife, **MNP** did not deny her role in all but was dismissive of the significance **POM** attached to them, swearing as follows;

“56. That indeed the photographs exhibited by the plaintiff mean nothing other than evidence of some social event relating to the graduation of the plaintiff's relative which event can be attended by all and sundry and as such the said photographs add no value to the plaintiff's claim over my property other than to prove his desperation in his misplaced attempts to claim to marry me and own my property.

57. That paragraph 28 of the supporting affidavit and all the historical events described therein are of no value in this case at all in that they do not prove the existence of any marriage between the plaintiff and I and /or joint ownership of the suit property. Such events are of common knowledge to acquaintances that care.”

MNP then devoted much effort in countering **POM**'s claim that the suit property was matrimonial. She stated that it was of little significance that the bar on the suit property operated by **POM**, as a mere licensee, according to her, was referred to as “*Kwa Mkisii.*” She had only allowed him to use the premises but had since revoked that licence. She admitted that **MNP** was known to the tenants on the suit property but explained that it was due to her having used him as her “*agent for rent collection.*” His having been registered for electricity supply to the premises and payment of bills did not make **POM** an owner and “*any activity performed [by him] regarding the suit property was performed on [her] behalf as a friend/agent and not as a husband or a joint owner.*” She dismissed the management agreement exhibited by **POM** as a forgery and annexed one of her own where **POM**'s name did not appear. She maintained that she was the sole owner of the suit property and urged the court not to interfere therewith in the name of a non-existence matrimony and joint ownership.

The High Court directed that the suit be disposed of by way of *viva voce* evidence and both parties testified on their own behalf along the lines of their depositions and called witnesses. In support of his case **POM** called on **Joseph Karinga Muthiori (PW2)**, the co-administrator of the estate of his late father who had been the owner of the suit property. He confirmed that the family had resolved to sell land to Kikuyus only and that it was for that reason **POM**, whom they knew as the buyer, was buying it in the name of **MNP**, who they took to be his wife as the two had cohabited as such from 1991. He recounted how at one point **POM** had referred them to the local chief for delaying to avail title deed to the suit property.

The second witness for **POM** was **John Ngaruiya Kamau (PW3)** a neighbour who bought a plot after the suit property was purchased. He knew **POM** and **MNP** to be husband and wife who lived together as such from 1992 until 2012. They even approached him together to ask for an access road. It is at their plot where she and other neighbours would meet to load materials for construction of a sewer. There was correspondence addressed to him and **POM** regarding the sewer. He stated that the couple developed the houses on the suit property. In cross examination he maintained that “*it was a well known fact that the two lived together*” and referred to the suit property as **POMs**.

The last witness **POM** called was his nephew **Zablon Mose Ombati** (PW4) who testified that he knew the parties since 1986 and they were living separately until 1991 when they bought the suit property and started living together as husband and wife up until **POM** was thrown out. He recounted an incident involving **MNP**'s brother's illness and he was asked by **POM** to drive the couple and some of **MNP**'s relatives to Ruiru to collect the brother to Kenyatta National Hospital. That brother died and the witness together with others of **POM**'s family were involved in the burial that took place at Langata Cemetery. He also spoke about his cousin's graduation party where **MNP** and her sisters were present.

MNP called her elder sister **TWA** who said **MNP** was married to K and that he paid dowry in the 1980s. **POM** on the other hand was a friend and he had never gone to their home. That testimony was subject to cross examination where she is recorded as stating, tellingly, as follows;

“I am TWA. I have come to witness of MN. MN is my sister. I am her elder sister. I have recorded a statement in this court. The said statement may be adopted. She is married to KM. Her husband is not alive. He died about 4 years ago. He paid dowry as per tradition. It was a long time ago. In the 1980's, we are Kikuyu's. I know PM. I was told he was a friend of my sister. She told me he was a friend. He has never come to our home.

When there is a marriage ceremony traditionally all relatives are called. I did not hear of it, and I did not see it. I cannot tell when KM paid dowry. He paid the dowry at Lamu. I was not present. I do not know who came for the function. I could not tell who the parents of KM at the function. If it were a Church marriage, they would have gone to the home of KM. I do not know the tradition in the matter. KM comes from Kiambu. I do not know the exact place in Kiambu where he came from. When he died he was buried at his home at Kiambu.”

(Our emphasis)

The witness also claimed not to know about the bar and butchery on the suit property, notwithstanding that she lived there and also insisted that she did not see **POM** when the house was being built and that he was not responsible for the electricity connection thereto.

The last witness **MNP** called was a neighbour, **Paul Kamunya Muthiora** who testified that *“I hear that she is married. I hear she is married to KM.”* This was from unnamed people and he admitted in cross-examination to never having met K whose funeral he never attended, contradicting what he had recorded in his witness statement. As for **POM**, the witness's testimony was that;

“I know PM, I know him when he had a business on the plot. He lived within the premises. He ran a bar. It was on the plot of MN. The bar belonged to Mr. PM. He was on the plot for a long time. You cannot tell whether P and M were married. They could be staying together, but you cannot tell whether they were married.”

We have endeavoured to capture the cases of the parties as they appear from the pleadings and the record of evidence which we have gone through carefully and exhaustively in keeping with our duty as a first appellate court to reevaluate the evidence, draw our own inferences of fact and arrive at our own conclusions while bearing in mind that we did not hear and observe the witnesses as they testified. We therefore make allowance for that handicap and therefore defer to the learned Judge's findings and observations especially on credibility of witnesses rarely departing therefrom, and then only for good cause. See *SELLE vs. ASSOCIATED MOTOR BOAT CO. [1968] EA 123*; *PETERS vs. SUNDAY POST [1958] EA 424*.

The learned Judge's holding on the central issue of whether there was a presumption of marriage between **MNP** and **POM** by reason of longevity of cohabitation coupled with repute was in the negative. The learned Judge on the basis of that finding chose not to go into the question of division of the suit property as in the absence of a marriage the property could not be dealt with as matrimonial property. That holding aggrieved **POM** whose two grounds of appeal we stated earlier in the judgment.

Arguing the appeal before us, **POM**'s learned counsel **Mr. Siagi** submitted that the judgment was correct until it got to paragraph 26 when the learned Judge reasoned thus;

“26. I note that the plaintiff sued the defendant as MNK. Indeed, in all the other suits between the parties hereto, that is to say Milimani CMCC No. 4364 of 2011 and Milimani CMCC No. 454 of 2011, she is referred to as such. It would appear to me that is her official name; it is the one appearing in her national identity card serial number xxxxxxxx. There is also material, procured by the plaintiff, indicating that her father was called MW. That then should raise the question as to where she could have gotten the surname K from. I feel inclined to agree with the defendant, and to conclude that she had contracted marriage with the said KM which led to her adopting his name as part of her name.”

According to Mr. Siagi, and the record bears him out, the origin of the name K was never raised in the course of the proceedings and that the learned Judge was in error to raise it himself and make it a determinative factor. He maintained that the parties herein cohabited for over 20 years and questioned the existence of MK in view of the fact **MNP** herself and her own sister could not provide a consistent account as to where K came from, who his parents were, where he was buried and such other details, which are contradictions that the learned Judge himself had noted. Counsel noted that it was unclear whether K came from Murang'a as **MNP** said, or Kiambu according to her sister. It could also not be established whether he was buried in Kiambu as **MNP** stated, or *“somewhere in Nakuru”* according to her sister. It did not help matters that the two never attended K's burial.

Counsel criticized the learned Judge for failing to recognize and uphold a valid marriage by presumption between **MNP** and **POM** on the basis only of the alleged existence of **MNP**'s marriage to K which was based on shaky evidence adduced by **POM** who the Judge had correctly found to be either evasive or lying in her testimony. Counsel concluded his submissions by stating that **POM** was **MNP**'s husband and had invested heavily in the suit property which he should not lose on account of **MNP**'s change of tune in calling him an agent.

Those submissions were countered by **Mr. Oronga, MNP**'s learned counsel who defended the learned Judge's findings. When questioned by this Court however, he conceded as he had to, that *"there is no tangible evidence of the marriage of the respondent (MNP) to KM"* and that it appeared only in her testimony which the learned Judge found to be *„evasive"*. Counsel characterized the relationship between **MNP** and **POM** as "a fling" or a "relationship of convenience" notwithstanding that in the Management Agreement between **MNP** and the Management Agent, **POM**'s signature is followed by the word "Husband". He also termed as irrelevant the cases cited by **POM**'s counsel as they applied to division of property between persons who are legally married, which **MNP** and **POM** were not. And he himself cited two decisions of the High Court *N.L.S vs. B.R.P. [2016]eKLR* and *S.W.G. vs. H.M.K. [2015] eKLR*.

The central issue in this appeal is whether the learned Judge was correct to hold that a marriage did not exist between the parties herein. That holding was based entirely on the alleged pre-and continued existence of a marriage between **MNP** and K which meant that **MNP** had no capacity to enter into a marriage with **POM** and that whatever relationship they had which-was indubitably long intimate and couples with a reputation of coupling -was adulterous and not matrimonial. Before making a sudden about-turn based on the alleged marriage between **MNP** and K, the learned Judge had found, and correctly so in our view, given the evidence presented, that there was long cohabitation and reputation of being a couple between the parties in the following terms;

"21. So what do I make of the material that was placed before me with regard to the alleged relationship between the plaintiff and the defendant? From the documents annexed to the affidavits to the parties and the oral testimonies of the witnesses called by both sides, I am satisfied that the plaintiff and the defendant were indeed living together on a plot within Dagoretti/Riruta/xxx. It would appear that some people might have at that time considered them to be husband and wife, going by the oral testimonies and the documents, particularly the minutes of the meetings held with respect to the issues concerning the subdivision and excision of the plots from Dagoretti/Riruta/xxx.

22. What should be of concern is whether that cohabitation could lead to a presumption that the two parties had between them a marriage. The law on presumption of marriage was pronounced by the former Court of Appeal for Eastern Africa in Hortensia Wanjiku Yawe vs. The Public Trustee Nairobi CACA No.13 of 1976, where it was emphasized that what is of import in the circumstances is long cohabitation and general repute that the parties were husband and wife. The principle laid therein has been followed with approval since. From the material placed before me, I would be persuaded that there was a long cohabitation of the parties, from 1986 according to the plaintiff and 1992 or thereabout from the other witness, terminating in 2011 or 2012 when the plaintiff was allegedly locked out of the premises by the defendant. There is also material to suggest that there was a general repute within that period that the two were a married couple."

The question we have to decide is whether, given those correct observations regarding the elements that constitute a presumption of marriage which were in the present case established, the learned Judge was correct to negate all on the basis of **MNP**'s claim that she had in fact been somebody else's wife during the quarter century of cohabitation with **POM**. We think that it sounds ill, and is not particularly edifying, for **MNP** herself to have been the one to claim that she was all along somebody else's wife. It is contradictory and puzzling that she should say so only when the issue of division of property arose while all along she had lived, acted and let the world believe that she was **POM**'s wife. The immediate question that would arise is whether, on the origin and significance of the name of K, she was telling the truth. Now, regarding her credibility or her relationship to the truth, the learned Judge had himself observed of her demeanor as follows;

"I need to state at this stage that while at the witness box, the defendant adopted a rather disagreeable attitude during cross-examination. From her demeanour I could sense an element of defiance or a level of arrogance or even hostility to counsel cross-examining. Such attitude tends to always be counterproductive, for it often gives an unfavourable picture of the witness, as someone who is either being evasive or not telling the truth. It is understandable, given the emotions involved in these matters, for a witness who is a party to behave in that manner, but the same is unwise and unnecessary, and ultimately costly to the case for the party concerned. Let me leave it at that."

Notwithstanding those well-founded observations, the learned Judge nevertheless appears to have accepted the idea of **MNP**'s being married to K as true purely on the basis of her say so. With respect we do not think that the learned Judge approached the highly contested issue of her alleged marriage to K with the circumspection that the situation and the evidence demanded.

The learned Judge placed much weight on the appearance of the name "K" on **MNP**'s identity card and drew the conclusion without evidence being led, that the name appeared because she was married to him. In fact, it would seem that beyond that fact, no other cogent evidence existed as to the said marriage. We are not ourselves prepared to accept as correct a proposition that the appearance of a name on the identity card of a woman, without more, proves that the owner of that name, whoever he be, is the woman's husband. It is also troubling that the issue of the appearance of that name in the identity card did not feature in **MNP**'s testimony so that the determinative conclusion the learned Judge reached was not preceded by any jural testing and was founded on the learned Judge's own untested theorizing or extrapolation.

We note also that the learned judge erred in requiring **POM** to "disprove that **MNP** was K's spouse" when, in light of the overwhelming evidence that the parties had cohabited for a very long period of time and publicly held themselves out a husband and wife, the onus rested on **MNP** to prove that she was, in fact, all along the wife of another, namely K. From the evidence the man K appears not to have existed beyond **MNP**'s assertions and use of that name. She herself only stated that she got married to K under Kikuyu customary law. She did not say when and where that was. What ceremonies, if any, were performed? Who attended? Was dowry paid? How much or in what form? Did she and K ever cohabit? If so where and when? Was there any child born of K? She testified in cross-examination as follows;

"1980-1990: I was living at Kawangware. I was living in a rented house. I was living with my child then. I was married to KM, I know that he was born in Muranga but I do not know the sub-location that he came from. I did not know the names of the parents of my late husband."

She went on to say that she separated from K in 1987 and the question that begs is, how could she separate from him if she never lived with him in the first place? Indeed, her words were;

“Before he (K) died, I used to see him. He lived with his wife at Kibera. I used to go and see him. Whenever I wanted. He never lived with me at Kawangware but he used to visit me there.”

Given that kind of testimony, was there any basis in fact or law for finding as did the Judge, that **MNP** was a woman married when she met and started cohabiting with **POM** ? We most decidedly think not.

The said K is said to have died but, tellingly, **MNP** did not say she attended his burial. She simply said that he was buried in Nakuru but she could not recall the name of the place, before adding that it is called Ng?arua but she did not know the name of the nearest market.

As the learned Judge himself observed, the evidence of **MNP** ?s elder sister T was not helpful and served only to further muddy the waters regarding the alleged marriage to K. She claimed that he paid dowry in the 1980s but, as seen from the excerpt of her testimony we set out earlier, she did not attend nor hear of the ceremony. In fact, nowhere did she mention that she ever met K in person. She never visited him and **MNP**. She did not know exactly where in Kiambu he hailed from. Of course, Kiambu is not where **MNP** claimed her alleged husband came from, but Nakuru. She claimed that when he died he was buried at his home in Kiambu”. The picture that emerges from the evidence is that Kang?ara the husband may well have been a creation of **MNP** ?s fertile imagination for the purpose only of defeating her marriage by presumption to **MNP**. If he ever never existed in flesh and blood, not a single witness called had ever seen him. We find no difficulty concluding on the evidence, that the learned Judge fell into error in holding that **MNP** was married to K as such a finding was really based on no evidence. We are entitled to disturb and dislodge that finding with the result that the learned Judge?s holding that **MNP** had no capacity to marry **POM** is set aside. She had such capacity and she was the wife of **POM** by presumption as at the time he was ejected from the suit property which was the matrimonial home.

Having perused the record and had regard to the evidence presented by **POM** and his witnesses, the picture that emerge clearly is that the purchase of the suit property as well as the putting up of the building thereon was the joint effort of **MNP** and **POM** . Even though the sale agreement was between the seller Hellen Wanja Muthora and **MNP**, the true buyer was **POM** but it was convenient to have it in her name due to the fact that he was not a Kikuyu. **POM** ?s evidence that he and **MNP** had Kshs. 100,000 between them with **POM** bringing in Kshs. 60,000, and they borrowed a like sum from **MNP** ?s sister by the name E, which they later repaid, was uncontroverted. They thereafter put up residential units on the quarter acre suit property starting with single rooms and later 1 bedroom units before the property grew into a three-storey building by utilization of the rents collected. **POM** is the one who applied for and had electricity connected to the suit property in his own name. He also ran a bar and a butchery on the front part of the suit property and people referred to the place as “*Kwa Mkisii*” (the Kisii person?s place). He is the one who, together with one of their neighbours, John Kamau initiated and completed sewerage works in the property. There were minutes of meetings of owners of property in the area which clearly indicated **MNP** and **POM** as owners of the suit property. **POM** appears from the record to have been clear, cogent and consistent in his testimony and firm in cross-examination, and it is not difficult to accept the veracity of his account when juxtaposed with **MNP** ?s evasive and less-than-candid testimony, as the learned Judge found.

We have gone into the question of the property because it was fully pleaded and testified to by the parties and the evidence as well as the supporting documentation is on record. Our view is that the learned Judge ought to have made a finding on the issue of division of the property and failed to do so only because of his erroneous view that it was not matrimonial property.

Given everything that is on record, the evidence of the parties that was given on oath and tested in cross-examination with documents having been tendered, we are satisfied on a balance of probabilities that **POM** did prove his case to entitle him to an order that the suit property was acquired and developed during the substance of the 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 upshot of a consideration of this appeal is that it succeeds. The judgment and decree of the High Court is set aside and substituted with an order that;

“The appellant was, by presumption married to the respondent and that the appellant is entitled to half of plot no. xx within Dagoretti/Riruta/xxx together with the developments made and being thereon.”

The parties shall bear their own costs of the appeal.

Dated and delivered at Nairobi this 25th day of January, 2019.

P. N. WAKI

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

F. SICHALE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR