IN THE COURT OF APPEAL OF KENYA

AT NYERI

(CORAM: VISRAM, KOOME & ODEK, JJ.A.)

CIVIL APPEAL NO. 322 OF 2005

JOSEIS WANJIRU ALIAS JOSEIS WAIRIMU……..…….APPELLANT

VERSUS

KABUI NDEGWA KABUI (Personal representative of

NDEGWA KABUI- DECEASED) ……..1ST RESPONDENT

CATHERINE WAIRIMU BAARU (Personal representative

of JEREMIAH WACHIRA KARUE DECEASED) ……....2ND RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya at Nyeri by (Tunoi, J.) dated 13th February, 1992

in

HCCC NO. 71 OF 1982)

****

JUDGMENT OF THE COURT

[1] It is an understatement to say that this matter has had a checkered history not only for having been in the courts for 32 years, but also for having been a subject of two trials before the High Court and the Court of Appeal. This appeal emanates from an old suit that was filed some 32 years ago before the High Court in Nyeri. Joseis Wanjiru the plaintiff before the High Court, now the appellant *(hereinafter referred as Wanjiru),* filed suit against Ndegwa Kabui *(hereinafter referred as Ndegwa),* claiming that since 1960, she was living on a parcel of land known as ***Plot No 396 Warazo Settlement Scheme*** which was registered in the name of Ndegwa in trust for her.

[2] Wanjiru alleged that in breach of the understanding that Ndegwa would hold the title in trust, he

refused or failed to transfer the plot and she sought for the following orders:

> ***(a) A declaration that the defendant is the allottee of the piece or parcel of land known and referred to as plot No 386, Warazo Settlement Scheme subject to a trust wherein the plaintiff is a beneficiary;***
>
> ***(b) An order that the defendant do transfer to the plaintiff all that piece or parcel of land known as plot Warazo Settlement Scheme;***
>
> ***(c) Costs of the suit with interest;***
>
> ***(d) Such further or better relief as this Honourable Court may deem fit.***

[3] Ndegwa filed a defence and counterclaim. He denied the claim by Wanjiru. He contended that Wanjiru was living on the suit premises gratuitously and as a licensee of the defendant without any color of right. In the counter-claim, Ndegwa sought for an order determining the license he had allegedly granted Wanjiru over the suit premises and prayed for the following specific orders:

(a) The plaintiff's suit be dismissed with costs to the defendant.

(b) A declaration that the plaintiff is a trespasser on the suit premises.

(c) An order for eviction and a perpetual injunction to issue.

(d) Costs of the counter-claim and interests thereof.

[4] The suit was heard by O'Kubasu J., *(as he then was),* and it was allowed while the defence by the Ndegwa was dismissed. Ndegwa appealed against that judgment before this Court in ***Civil Appeal No 52 of 1993***. In the judgment of the Court of Appeal, the appeal was partially successful but for an issue that the Court of appeal ordered be remitted back to the High Court for retrial. This was an issue raised by Wanjiru during the trial that she was a wife of Ndegwa by virtue of long cohabitation; she wanted to be presumed a wife of Ndegwa. This is the order that directed the High Court to retry the matter:

> ***"There was evidence before the High Court on the duration of cohabitation between the parties. Whether or not it arose and assumed a distinct and binding role or whether it was rebutted is a question of fact which the Judge should have considered and determined. It is not appropriate for this Court to decide it, notwithstanding that the respondent, who appeared in person, was allowed to raise it. I would remit the case to the High Court for a decision on this issue and if in favour of the respondent the extent to which it affects her claim to the land".***

[5] When the matter finally came up for re hearing before the High Court, after several adjournments before (Tunoi, J.,) (as he then was) the parties did not adduce any further evidence, the record shows that Mr. Njau learned counsel for Wanjiru merely pointed at the evidence that was adduced during the earlier hearing to demonstrate that it indicated the duration of time that Wanjiru had stayed with Ndegwa as a wife and hence her claim for the portion of land. Mr. Kibira learned counsel for Ndegwa too agreed that there was sufficient evidence to guide the court in making a determination on the duration of cohabitation. Thus counsel for both parties consented not to adduce further evidence and to rely on the evidence on record and the trial Judge acceded to that request. We must state this was quite strange as there was a specific order directing a re-trial on a specific issue of cohabitation.

[6] After considering the evidence that was on record, and decided cases on the principal of presumption of marriage, this is what Tunoi J., concluded:

> ***"The parties are of the religious fanatic sect known as Akorino. The plaintiff/respondent wife had testified that she started cohabiting with defendant/appellant as from 1960 up to 1975. No***

marriage formalities were performed. None at all of the Kikuyu Customary Law rites were undergone. They had no children. The plaintiff had already had eight children before she met the defendant. She had six children with one Gatonye who ejected her after conversion to Akorino. The defendant averred that though he stayed with the plaintiff he did so not as man and wife but as faithful followers of their sect. He has a wife and children elsewhere. From this evidence, scanty as it is, I am unable to say that on a balance of probabilities, the plaintiff has proved that her cohabitation with the defendant gave rise to a presumption of marriage in her favour. The upshot of the entire evidence herein plainly shows that the parties never held and did not intend to treat nor considered each other as husband and wife during the period of cohabitation. For instance, despite the two being elderly they chose to disregard all customary and religious ceremonies and rituals appertaining to them. I am inclined, and do so, to accept the assertion by defendant that they stuck together due to some religious obligation. Whatever cohabitation existed was interrupted and terminated. The cohabitation between the parties did not in any manner assume a distinct and binding role on any role on any of them. Even if it did, it did not confer her any right or interest whatsoever over the defendant's parcel of land. The suit based on this limb is accordingly dismissed*".*

[7] This is the judgment that has provoked the present appeal that is predicated on some seven grounds of appeal, which may be summarized as thus;

The re-trial Judge was faulted for misdirecting himself in law and facts in;

- ***Deciding the case without taking viva voce evidence from the parties.***
- ***In failing to comply with the decision of the Court of Appeal in C.A NO 52 of 1983.***
- ***Failing to appreciate the fact that marriage could be presumed by the time of cohabitation as evidence was led to the effect that the parties lived together for a long time and held themselves out to their brethren (Quakers) and all and sundry as legal husband and wife.***
- ***In arriving at the decision he did in absence of any evidence (viva voce or otherwise) from the parties.***
- ***In failing to evaluate the evidence adduced during the trial in HCCC NO 71 OF 1982 at Nyeri.***
- ***Making findings contrary to evidence and established law as to presumption of marriage under the marriage systems recognized under Kenyan Law.***
- ***Failing to appreciate that the appellant had no other piece of land or place to go and thus the judgment rendered her destitute.***

[8] During the hearing of this appeal, all the seven grounds were argued together. In further elaboration, Mr. Muthoni learned counsel for the appellant submitted that Wanjiru occupied the suit land from 1960 together with Ndegwa. The two started cohabiting in 1960 after Wanjiru was chased away by the father of her children after she converted into Akorino Sect. Both parties were followers of the Akorino Sect and they indeed established a church on the suit land where they were leaders and preachers. They at first settled at Karatina Town with Ndegwa and Wanjiru testified that she was the one who prompted Ndegwa that they should purchase some land and settle down. They went to look for the suit land together and Wanjiru said in her evidence that she contributed the sum of Ksh. 1200/= which she gave to Ndegwa to pay for the land. The entire land was purchased for about Ksh. 1400/=. However the sale agreement as well as the title was registered in the name of Ndegwa. According to Wanjiru, there was an understanding that Ndegwa was to hold the title in her trust. Wanjiru and her children have continued living on the suit land. Although she never sired children with Ndegwa, her children referred to Ndegwa as their father.

[9] Unfortunately Ndegwa passed away before the matter was finalized. He was substituted by his first

son Kabui Ndegwa Kabui who is also the administrator of his estate. During the hearing of this appeal, he supported the appeal and urged this Court to adopt the consent agreement that he entered into with Wanjiru to settle the matter and have the suit land divided between Wanjiru and his mother's house. He submitted that since the death of his father, he has searched his soul and realized that Wanjiru was involved in the acquisition of the suit land. She was living with his father as a wife and was regarded as such by the community. Wanjiru was involved in building and founding the Akorino church at the suit land. She is a leader in that church. Wanjiru has also lived on the suit land with her children since the land was acquired. At first Wanjiru was claiming the entire parcel of land, but since they have been involved in negotiations, she agreed the land be shared according to the consent agreement. According to the 1st respondent his father should be regarded has having been succeeded by two houses and the Court be pleased to adopt the consent agreement as the order of the court.

[10] This appeal was however opposed by the 2nd respondent, Catherine Wairimu Baaru a daughter of the son of Ndegwa the late Jeremiah Karue who also joined in the suit before the Court of Appeal as an interested party in the suit land. By a strange twist of fate, Jeremiah Karue and his wife died after joining as parties in this suit but he is represented by his daughter. Mr. Ng'ang'a, learned counsel for the 2nd respondent, submitted that there was no evidence to support the allegation that Wanjiru cohabited with Ndegwa as a wife. Secondly there was no marriage ceremony that was solemnized between the two. The claim by Wanjiru is not based on adverse possession but a claim based on trust. According to Mr. Ng'ang'a, Wanjiru can only be given a life interest in the suit premises as she has lived in the suit land for many years and her children who belong to different men should not benefit from the suit land.

[11] This is a first appeal, that being so, we are not bound to follow the trial judge's findings of fact or the inferences he made. Rather, we are required to re-appraise the evidence and make our own independent findings of facts and draw our own conclusion but with the usual caveat that it is the trial judge who had the advantage of seeing and hearing the witnesses. See ***SELLE V ASSOCIATED MOTOR BOAT, [1968] EA 123***

> ***"...this Court must consider the evidence, evaluate itself and draw its own conclusions though it should always bear in mind that it has neither seen or heard the witnesses and should make due allowance in that respect…".***

[12] This appeal is unique as we pointed out in the introduction that the matter was tried before the High Court twice and this is the second time it is also before this Court. Also although the Court of Appeal specifically directed there be a re trial to establish from further evidence by Wanjiru the duration of her cohabitation with Ndegwa, all the parties seem to have taken a short cut and decided to go by the evidence on record. This is one of the grounds of appeal, which in our view is a valid concern as the parties were specifically directed by the Court of Appeal to adduce further evidence on the issue of cohabitation. However, the trial Judge sanctioned the request by both counsel and allowed them to rely on the evidence that was earlier adduced, the same evidence that had been considered by the Court of Appeal, and it was found insufficient in that regard. We have to re visit that evidence in this appeal to establish whether there was evidence of cohabitation.

[13] There is a long line of authorities in which Kenyan courts have presumed the existence of a marriage due to long cohabitation and circumstances which show that although there was no formal marriage, the parties intended to live and act together as husband and wife. The doctrine of presumption of marriage is based on ***Section 119*** of the ***Evidence Act, Cap 80 Laws of Kenya***, which provides as follows:-

> ***"119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case***".

[14] The existence or otherwise of a marriage is a question of fact. Likewise, whether a marriage can be presumed is a question of fact. It is not dependent on any system of law except where by reason of a written law it is excluded. For instance a marriage cannot be presumed in favour of any party in a

relationship in which one of them is married under statute. However, in circumstances where parties do not lack capacity to marry, a marriage may be presumed if the facts and circumstances show the parties by along cohabitation or other circumstances evinced an intention of living together as husband and wife. In this case Ndegwa was married and there was no evidence to show that although married he was precluded from contracting another marriage under customary law. The way matters were left, it can be presumed that he was married to the 1st wife under the customary law which allows polygamy. Similarly there was no evidence to show Wanjiru lacked the requisite capacity to marry during the period she cohabited with Ndegwa.

[15] There is undisputed evidence that Wanjiru moved to Karatina in 1960 after she converted into Akorino Sect and started living together with Ndegwa, at first they lived in Karatina Town, and then they moved to the suit premises in 1963 after the land was acquired from the Settlement Trust Fund. Ndegwa did not undertake any ceremony to solemnize the cohabitation. According to Wanjiru, she moved to Ndegwa's home as they were preachers in the same church but after sometimes Ndegwa requested her to be his wife although he did not pay dowry. Wanjiru had eight children from other relationships and she never had any children with Ndegwa.

[16] It is not very clear from the evidence when the cohabitation ceased; the evidence of Amos Mwangi Muturi who testified as PW2, Wanjiru and Ndegwa used to live together and he was called to arbitrate on a dispute regarding ownership of the suit land in July 1982, the same year this suit was filed in court. It is also clear the dispute of ownership of the suit land was arbitrated before the Chief and DO of the area but there was no solution. There is also some indication from the submissions on record by Mr. Mukunya learned counsel for Wanjiru who stated that Wanjiru had cohabited with Ndegwa between 1960 to 1975. This was the period that the trial Judge took as the period of cohabitation.

[17] According to the evidence of Ndegwa, he admitted that he started living with Wanjiru in 1960 at Karatina. This is what he stated:

> ***"I started living with the plaintiff from 1960. When I moved from Karatina to the Settlement area I moved with plaintiff and it was in 1963 or 1964".***

Earlier in his evidence in chief, Ndegwa stated that:-

> ***"I would like the court to separate us because she has given me a lot of trouble".***

In our own appreciation of this evidence, there was undisputed evidence that Wanjiru and Ndegwa cohabited as man and wife for a considerable period of over 15 years. There was no ceremony conducted to formalize this relationship but according to Wanjiru and her witness, Ndegwa was regarded as husband and wife and their disagreement on how to live together on the suit land was subject of arbitration.

[18] It was the duty of the trial Judge to draw the conclusion on whether the evidence of Wanjiru and PW2 was rebutted. Unfortunately this was not done by Tunoi J., who laid so much emphasise on the lack of marriage formalities. This was clearly misdirection on the part of the trial Judge because it is the responsibility of a man to take the initiative of performing the marriage ceremonies. There is no provision for a woman to perform those ceremonies. Ndegwa admitted that he lived with Wanjiru from 1960, and Wanjiru's children even referred to him as their father and used his name even in school. The Judge also placed a lot of emphasise on the fact that Wanjiru had eight children before she met Ndegwa; the fact that she did not have children with Ndegwa, and that she was elderly when they met. This was also a misdirection as Ndegwa accepted Wanjiru in the condition that she was in; a mother of eight and an elderly woman when he started cohabitating with her.

[19] The only requirement that was necessary for the Judge to consider in the circumstances of this case was the duration of the period of cohabitation, and whether it gave rise to a presumption of marriage. The Judge held this period was between 1960 up to 1975. This was a period of 15 years which in our view is sufficient to give rise to a presumption of marriage. We cannot see any evidence to justify the conclusion by the Judge when he stated that;-

"Whatever cohabitation existed was interrupted and terminated".

There is no evidence on record to support this conclusion. Taking the evidence of Ndegwa which was sometimes in 1982, he was pleading with the court to separate him from Wanjiru because she had given him so much trouble. This clearly shows they were together as at 1982.

[20] The former Court of Appeal for East Africa, in the case of ***Hortensiah Wanjiku Yawe vs. The Public Trustee,Civil Appeal No.13 of 1976,*** among other things, held that long cohabitation as a man and wife may give rise to a presumption of marriage in favour of the party asserting it. At page 21 Kneller J.A., stated:-

> ***"The presumption does not depend on the law or system of marriage. The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife…"***.

[21] It is clear from the pleadings that Wanjiru did not plead or seek for an order that she be presumed married to Ndegwa. Her claim in our humble view was based on trust. This notwithstanding, the Court went on a tangient and placed a lot of emphasise on the evidence of cohabitation which was not pleaded. This was probably in line with the opinion of this Court posited several years ago in the case of ***VYAS INDUSTRIES V DIOCESE OF MERU, CA NO 23 OF 1976,*** in which Law, VP, Mustafa & Musoke, JJA expressed themselves thus:

> ***"The court may base its decision on an unpleaded issue if during the course of the trial the issue has been left for the decision of the court. In this instant, the issue was left for the court's decision when the appellant addressed the court and led evidence on the issue".***

Also, see the case of ***ODD JOBS V RUBIA, (1970) EA 476***.

[22] Having concluded as we have that the evidence of Wanjiru proved on a balance of probabilities that her long cohabitation with Ndegwa gave rise to a presumption of marriage, then Wanjiru had a beneficial interest in the suit land that she occupied from 1960. It would be unconscionable to evict Wanjiru from the suit land which she occupied in the assumption that she had an interest over it. It is no wonder that the 2nd respondent's counsel submitted that Wanjiru can be given a life interest over the suit land.

[23] Our attention was drawn to a consent agreement that Wanjiru had entered into with the 1st respondent and was filed in this Court on the 28th July, 2010. The 1st respondent is the personal representative of Ndegwa and in our view he has the capacity to enter into such a consent that binds the estate of his late father. Although the 2nd respondent is opposed to the terms of the consent, we are of the view that her objection is inconsequential. ***Article 159 (c)*** of the ***Constitution*** encourages parties to seek alternative ways of settling disputes, including reconciliation which was the case here. In that agreement, the suit land is to be shared equally between Wanjiru and the estate of Ndegwa. The consent order would render justice in this case for all the parties as the 2nd respondent will share with the 1st the one half portion that will go to the estate of Ndegwa.

[24] In the circumstances, we allow this appeal; set aside the orders of Tunoi, J. dated 13th February, 1992 and substitute it with an order that the suit land be shared equally between Wanjiru and the estate of Ndegwa in the manner proposed in the consent order dated 28th July, 2010, as signed by the appellant and the 1st respondent. This being a family matter, we make no orders as to costs.

Dated and delivered at Nyeri this 13th day of May, 2014.

ALNASHIR VISRAM

JUDGE OF APPEAL

M. K. KOOME

JUDGE OF APPEAL

OTIENO-ODEK

JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR