



**TMG & another v AP (Application E012 of 2024)
[2024] KESC 48 (KLR) (30 August 2024) (Ruling)**

Neutral citation: [2024] KESC 48 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA**

APPLICATION E012 OF 2024

MK KOOME, CJ, PM MWILU, DCJ & VP, MK IBRAHIM, SC WANJALA & W OUKO, SCJJ

AUGUST 30, 2024

BETWEEN

TMG 1ST APPLICANT

QFG (A MINOR SUING THROUGH HIS MOTHER AND NEXT FRIEND

TMG) 2ND APPLICANT

AND

AP RESPONDENT

(Being an application for review of the Ruling of the Court of Appeal (Murgor, Laibuta & Odunga, JJ.A.) dated 23rd February, 2024 in Mombasa Civil Applic. No. E003 of 2022)

New issues cannot be introduced on appeal before the Supreme Court if they were not raised in lower courts.

The applicants sought to establish an equitable interest in property based on cohabitation with the respondent. The High Court ruled the relationship did not constitute a valid marriage due to the 1st applicant’s existing marriage. The Court of Appeal denied certification for a Supreme Court appeal, concluding the case did not raise issues of general public importance. The Supreme Court upheld the decision, finding the issues were fact-specific and did not transcend the parties involved. Each party bore their own costs.

Reported by John Ribia

Family Law – marriage – capacity to marry – doctrine of presumption of marriage – where one entered into a marriage that was voidable due to lack of consummation – whether such a party could enter into another marriage or had capacity to be presumed to be married - whether the doctrine of presumption of marriage applied when one party had an existing, unconsummated marriage - whether the failure to conclude divorce proceedings impacted the legal capacity to one to be presumed as married to another person - Marriage Act (cap 150) sections 3(1) and 9(a).

Family Law – matrimonial property – definition – capacity to have equitable interest in matrimonial property – where one was presumed to be married but cohabited with another - whether cohabitation could create equitable



interests in property, even where a formal marriage did not exist - Marriage Act (cap 150) sections 3(1), and 9(a); Matrimonial Property Act (cap 152) section 2.

Civil Practice and Procedure – appeals – second appeal – nature of issues that could be raised in an appeal - whether new issues could be introduced at the appellate stage if they were not raised in lower courts.

Civil Practice and Procedure – appeals – appeals to the Supreme Court – appeals that raised matters of general public importance - whether disputes involving cohabitation and property rights raised issues of general public importance warranting the Supreme Court's consideration - Constitution of Kenya, articles 163 (4)(b), and (5); Supreme Court Rules (2020) (Cap 9B Sub Leg) rule 33.

Brief facts

The 1st applicant and RAP (P) celebrating a monogamous marriage before the Registrar of Marriages; on March 19, 2003. P left for the United States on the very same day and never returned; the 1st applicant commenced divorce proceedings seeking nullification of the marriage on the ground that the marriage was not consummated, which proceedings were still pending before the Kilifi Chief Magistrate's Court. The 1st applicant was blessed with a minor (2nd applicant) on November 15, 2005 from a different relationship; thereafter, the 1st applicant and the respondent began an intimate relationship in 2008. They lived together in a house in Mtwapa, which was jointly registered in their names. After selling that property and sharing the proceeds, the respondent purchased another property, referred to as the suit property, in Shanzu in 2011 and constructed a residential house on it. The applicants, including QFG (the 2nd applicant, a minor), moved into the suit property in 2014.

In 2016, the relationship ended, and the respondent served the 1st applicant with a notice to vacate the suit property. The 1st applicant filed a suit in the High Court claiming an equitable interest in the property, arguing that they lived as husband and wife and that the respondent had assumed parental responsibility over the 2nd applicant. The respondent denied the claims, stating that he purchased the suit property for resale and allowed the applicants to stay temporarily while the 1st applicant arranged for her own residence. He also argued that the 1st applicant's prior marriage to another man was still legally valid, thereby precluding any presumption of marriage.

The High Court found that no valid marriage existed between the 1st applicant and the respondent due to the 1st applicant's subsisting marriage. Consequently, the court ruled that the suit property was not matrimonial property and dismissed the applicants' claims. The Court of Appeal upheld that decision and refused to certify the case for appeal to the Supreme Court, stating it did not raise issues of general public importance. The applicants then sought a review of the decision in the Supreme Court, arguing that their case raised significant issues regarding evolving societal norms and property rights in cohabitation arrangements.

Issues

- i. Whether the doctrine of presumption of marriage applied when one party had an existing, unconsummated marriage.
- ii. Whether cohabitation could create equitable interests in property, even where a formal marriage did not exist.
- iii. Whether the failure to conclude divorce proceedings impacted the legal capacity to one to be presumed as married to another person.
- iv. Whether new issues could be introduced at the appellate stage if they were not raised in lower courts.
- v. Whether disputes involving cohabitation and property rights raised issues of general public importance warranting the Supreme Court's consideration.

Held

1. A matter of general public importance which would warrant the exercise of the Supreme Court's appellate jurisdiction under article 163(4)(b) of the Constitution should transcend the dispute between the parties, and have a significant bearing upon public interest. The onus lay with the



- applicants to demonstrate that the matter in question carried specific elements of real public interest and concern.
2. The applicants did not concisely set out the issues they deemed were of general public importance in their motion. Rather, they set out the issues in their written submissions. It was a requirement and a necessity for an intended appellant(s) to concisely set out the issues deemed to be of general importance.
 3. The delineated issues formed the basis upon which both the Court of Appeal and the Supreme Court determined whether indeed an intended appeal raised issues of general public importance which warranted the Supreme Court's consideration. For proper order and notice to the other parties, an intended appellant, like the applicants, should concisely delineate the issue(s) of general public importance he/she deemed to have arisen from an impugned decision of the Court of Appeal not only in a motion seeking certification but also in the instant motion seeking review of the decision of the Court of Appeal declining such certification.
 4. The applicants had not demonstrated that there was any *lacuna* or inconsistency with regard to what constituted a valid marriage. The Marriage Act was clear on the issue. In particular section 3 (1) of the Act defined a marriage as a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act. Section 9(a) thereof provided that a married person shall not, while in a monogamous marriage, contract another marriage.
 5. Section 11(1)(c) of the Marriage Act provided that a union was not a marriage if at the time of the making of the union either party was incompetent to marry by reason of a subsisting marriage. Since no marriage could be presumed between the 1st applicant and the respondent, it followed that the suit property was not matrimonial property.
 6. The Matrimonial Property Act was quite explicit on what constituted a matrimonial home. Section 2 thereof defined a matrimonial home as any property that was owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and included any other attached property. The said interpretive section also defined a spouse as a husband or a wife.
 7. Issues relating to violation of the applicants' constitutional rights were never subject of the litigation before the lower courts. Therefore, such issues could not be raised for the first time at the point of seeking certification.
 8. Allegations of the violation of articles 28, 40 and 53(3) of the Constitution were not even raised by the applicants in their motion seeking certification before the Court of Appeal. An intended appellant could not introduce new issues in a motion seeking review of the Court of Appeal's decision declining certification, when such issues had not been raised in the motion for certification before the Court of Appeal.
 9. The motion had fallen short of demonstrating to our satisfaction beyond a mere restatement that the intended appeal raised issues of general public importance. The intended appeal sought to secure an interpretation of the law in the context of the peculiar facts of the case, which was beyond the court's appellate jurisdiction under article 163(4)(b) of the Constitution.

Application dismissed.

Orders

Each party was to bear their own costs.

Citations

Cases

Kenya

1. *Malcom Bell v Daniel Toroitich Arap Moi & another* ? 342 of 2005; [2006] KECA 58 (KLR) - (Applied)
2. *Rai & 3 others v Rai & 4 others* Petition 4 of 2012; [2014] KESC 31 (KLR) - (Followed)
3. *Steyn v Ruscone* Application 4 of 2012; [2013] KESC 11 (KLR) - (Applied)



4. *Thika Coffee Mills v Rwama Farmers' Co-operative Society Limited* Application 11 of 2020; [2020] KESC 17 (KLR) - (Applied)
5. *Wandabusi & another v Attorney General for and on behalf of the Commissioner for Lands & 3 others* Originating Motion 23 of 2017; [2019] KESC 4 (KLR) - (Explained)

Statutes

Kenya

1. Constitution of Kenya articles 28, 40, 53(3); 163(4)(b)(5) - (Cited)
2. Marriage Act (cap 150) sections 3(1); 9(a)- (Interpreted)
3. Matrimonial Property Act (cap 152) section 2 - (Interpreted)
4. Supreme Court Rules, 2020 (cap 9B Sub Leg) rule 33- (Interpreted)

Advocates

Ms. Nancy Murage for the applicants

Mr. Mike Mulei for the respondent

RULING

1. Upon perusing the originating motion dated March 8, 2024 and filed on April 26, 2024 by the applicants pursuant to rule 33 of the *Supreme Court Rules, 2020* seeking review of the Court of Appeal's ruling dated February 23, 2024 in Mombasa Civil Applic No E003 of 2022 which declined to certify that the applicants' intended appeal to this court raises issues of general public importance; and
2. Cognisant of the pertinent facts which culminated in this motion to wit, that despite TMG (the 1st applicant) and RAP (P) celebrating a monogamous marriage before the Registrar of Marriages; on March 19, 2003, P left for the United States on the very same day and never returned; the 1st applicant commenced divorce proceedings seeking nullification of the said marriage on the ground that the marriage was not consummated, which proceedings are still pending before the Kilifi Chief Magistrate's Court; the 1st applicant was blessed with QFG (a minor) on November 15, 2005 from a different relationship; thereafter, in 2008 the 1st applicant and AP (the respondent) began an intimate relationship and moved in together in a 3-bedroom house in Mtwapa which was registered in both their names; and that they however sold the house and shared the proceeds thereof. Subsequently, in 2011, the respondent purchased a parcel of land referred to as CR 40958/7 sub division 17235 (Original No 13324/4 of section I Mainland North) (the suit property) situated in Shanzu, and erected a residential house thereon; and the applicants moved into the suit property in 2014 but the relationship between the 1st applicant and the respondent came to an end in 2016. As a result, the respondent served the 1st applicant with a notice to vacate the suit property.
3. Consequently, the applicants filed a suit in the High Court against the respondent being, Mombasa Matrimonial Property Cause No 1 of 2016, which was premised on the grounds that, the 1st applicant and the respondent lived as husband and wife; the respondent had accepted to take up parental responsibility over the 2nd applicant, as evidenced by adoption proceedings, Mombasa HC Adoption Cause No 5 of 2013, which is still pending; the suit property was purchased for the sole aim of setting up their matrimonial home, and upon its completion the respondent moved the applicants therein; and as such, the applicants sought "a permanent injunction restraining the defendant (the respondent herein), his agents, servants and/or employees from interfering with the plaintiffs' (the applicants herein) use and enjoyment of the suit property; and a declaration that the 1st plaintiff (1st applicant herein) has an equitable interest in the suit property"; and



4. Noting that the respondent denied the applicants' allegations and contended that, the 1st applicant received the lion's share of the sale proceeds of the house in Mtwapa in order to build a house for both herself and the 2nd applicant; he purchased and developed the suit property for resale; he only allowed the applicants to move into the suit property for a short period as the 1st applicant was putting up her home, which she never did; he never took up parental responsibility over the 2nd applicant, and he not only abandoned the adoption process but also broke off the relationship upon discovering that the 1st applicant was married; therefore, the respondent through a counterclaim prayed for a "declaration that no marriage existed between the respondent and the 1st applicant; a declaration that the respondent has no obligation to maintain the applicants; and an order for delivery of vacant possession of the suit property to the respondent"; and
5. Further noting that the High Court (Thande, J) by a judgment dated April 10, 2019 found that, the marriage between the 1st applicant and P still subsists since the divorce proceedings before Kilifi Chief Magistrate's Court had not been finalised; therefore, the 1st applicant lacked the capacity to enter into another marriage, and equally, no presumption of a marriage could arise with respect to her relationship with the respondent as it would be tantamount to sanctioning bigamy; in the circumstances, the suit property was neither matrimonial property nor was there evidence that the respondent held the same in trust for the 1st applicant; the respondent did not follow through the adoption process and there was nothing to demonstrate that the respondent's relationship with the 2nd applicant was akin to that of a parent. In the end, the court dismissed the applicant's suit and allowed the respondent's counterclaim in the following terms:
 - a. No marriage exists between the 1st applicant and the respondent.
 - b. The respondent has no obligation to maintain the applicants.
 - c. The applicants shall deliver to the respondent vacant possession of the suit property within 3 months and in any event not later than July 31, 2019.
 - d. The circumstances of this case do not call for award of costs. I therefore direct that each party bears its own cost; and
6. Appreciating that the applicants challenged the High Court's decision in the Court of Appeal, Mombasa Civil Appeal No. 138 of 2019, which appeal was dismissed by a judgment dated May 6, 2022; subsequently, the applicants filed a notice of motion dated May 13, 2022 before the same court seeking certification that their intended appeal to this court against the Court of Appeal judgment (impugned judgment) raises issues of general public importance; and by a ruling dated February 23, 2024, the Court of Appeal (Murgor, Laibuta & Odunga, JJ A) declined to issue the certification and dismissed the said Motion; and
7. Upon considering the affidavit sworn by the 1st applicant, on March 8, 2024 in support of the instant motion and the applicants' submissions dated April 22, 2024 to the effect that; society has overtime accepted and recognised what they termed as "unconventional" relationships such as that of the 1st applicant and the respondent; that such relationships are now commonplace and regarded as presumed valid marriages/unions; that in their view, the Law of Succession Act recognises the right of women in such relationships to inherit from the estate of the deceased husband who had initially celebrated a monogamous marriage; it was unfair for the superior courts below to find that the 1st applicant and respondent's marriage was non-existent simply because the 1st applicant's marriage with P had not been nullified; the applicants at all material times relied on the respondent's promise that the suit property



- would constitute the matrimonial home; and the issues sought to be raised in the intended appeal transcend the circumstances of the dispute between the parties; and
8. Whereas the applicants did not specifically set out in their motion the issues they deem to be of general public importance, but instead, in their written submissions urged this court to pronounce itself with finality on the following issues:
 - i. Whether the doctrine of presumption of marriage can apply in matrimonial property causes;
 - ii. Whether the failure to consummate a registered (monogamous) marriage deprives a party to the marriage capacity to enter a subsequent marriage with another person;
 - iii. Whether a party can rely on the fact he or she is already married to avoid sharing of matrimonial property pursuant to article 53(3) of the *Constitution*;
 - iv. Whether secluding cohabitants from the Matrimonial Properties Act contravenes their rights enshrined in articles 27, 28, 40 and 43 of the *Constitution* (sic);
 - v. Whether constructive parental responsibility lapses where parties who have already shown their intention to relate to the child as parents part ways; and
 9. Upon examining the respondent's grounds of opposition and submissions dated May 6, 2024 the tenor of which is that, the impugned judgment did not raise any matters of public importance; the issues intended to be raised were never raised or considered in the superior courts below, and in any event, the said issues are peculiar to the parties herein; therefore, the instant motion is an abuse of the court's process and should be dismissed; and
 10. Acknowledging that this court has jurisdiction to review the Court of Appeal's ruling declining certification as set out under article 163(5) of the *Constitution* and rule 33 (2) of the *Supreme Court Rules*; and that the parameters for such review are well settled in *Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscione*, SC App No 4 of 2012; [2013] eKLR and *Malcolm Bell v Daniel Toroitich Arap Moi & Another*, SC Appl No 1 of 2013 [2013] eKLR; and
 11. Upon deliberations on the motion and the rival arguments, we opine as follows:
 - i. It is trite that a matter(s) of general public importance which would warrant the exercise of this court's appellate jurisdiction under article 163(4)(b) of the *Constitution* should transcend the dispute between the parties, and have a significant bearing upon public interest. Further, the onus lies with the applicants to demonstrate that the matter in question carries specific elements of real public interest and concern.
 - ii. We cannot help but note that the applicants did not concisely set out the issues they deem are of general public importance in their motion. Rather, they set out the issues in their written submissions. This court has time and time again underscored the requirement and necessity of an intended appellant(s) to concisely set out the issues deemed to be of general importance as appreciated in *Hermanus Phillipus Steyn v Giovanni Gnechchi-Ruscione* (*supra*). In short, the delineated issues form the basis upon which both the Court of Appeal and this court determine whether indeed an intended appeal raises issues of general public importance which warrant this court's consideration. Therefore, we find that for proper order and notice to the other parties, an intended appellant, like the applicants, should concisely delineate the issue(s) of general public importance he/she deems arises from an impugned decision of the Court of Appeal not only in a motion seeking certification but also in the instant motion seeking review of the decision of the Court of Appeal declining such certification. Be that as it may,



do the issues set out in the applicants’ written submissions constitute issues of general public importance?

- iii. The applicants’ contention is that the superior courts below erred by finding that the 1st applicant and respondent’s relationship was not a marriage simply because her marriage with P had not been nullified. We understand the applicants to argue that the superior courts below had failed to take into account that society has since accepted such relationships which they termed as “unconventional” relationships as giving rise to valid unions/marriages.
- iv. To begin with the applicants have not demonstrated that there is any lacuna or inconsistency with regard to what constitutes a valid marriage. In point of fact, as correctly observed by the superior courts below, the *Marriage Act* (cap 150 Laws of Kenya) is clear on this issue. In particular Section 3(1) of the Act defines a marriage as, “... a voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act”. Section 9(a) thereof provides that-

“9. Subject to section 8, a married person shall not, while —

- a. in a monogamous marriage, contract another marriage;
...”

Likewise, section 11(1)(c) expressly speaks to the relationship between the 1st applicant and the respondent in the following manner:

11. Void marriages

1. A union is not a marriage if at the time of the making of the union

—

- a. either party is incompetent to marry by reason of a subsisting marriage; ...”

- v. It is common ground that the applicants claim to the suit property was anchored on the contention that it was the matrimonial home. Similarly, the superior courts below found that the law is clear as to what constitutes a matrimonial home. In that regard, the courts found that since no marriage could be presumed between the 1st applicant and the respondent, it followed that the suit property was not matrimonial property. The *Matrimonial Property Act* (cap 152 Laws of Kenya) is quite explicit on what constitutes a matrimonial home. Section 2 thereof defines matrimonial home as follows:

“‘matrimonial home’ means any property that is owned or leased by one or both spouses and occupied or utilized by the spouses as their family home, and includes any other attached property; ...”

The said interpretive section also defines a spouse as –

“‘spouse’ means a husband or a wife; ...”



- vi. Looking at the issues that were before the superior courts below, we note that, as the Court of Appeal correctly observed, issues relating to violation of the applicants’ constitutional rights were never subject of the litigation before the said courts. Therefore, such issues cannot be raised for the first time at the point of seeking certification as appreciated in *Thika Coffee Mills v Rwama Farmers’ Co-operative Society Limited* (Application 11 of 2020) [2020] KESC 17 (KLR). Moreover, allegations of the violation of articles 28, 40 and 53(3) were not even raised by the applicants in their motion seeking certification before the Court of Appeal. This court in *Wandabusi & another v Attorney General for and on behalf of the Commissioner for Lands & 3 others* (Originating Motion 23 of 2017) [2019] KESC 4 (KLR) held that an intended appellant cannot introduce new issues in a motion seeking review of the Court of Appeal’s decision declining certification, when such issues had not been raised in the motion for certification before the Court of Appeal.
 - vii. In totality, we find that the instant motion has fallen short of demonstrating to our satisfaction beyond a mere restatement that the intended appeal raises issues of general public importance. It is apparent that the intended appeal seeks to secure an interpretation of the law in the context of the peculiar facts of this case, which is beyond this court’s appellate jurisdiction under article 163(4)(b) of the *Constitution*. Therefore, we find the instant motion lacks merit and is hereby dismissed.
 - viii. Taking into account the nature of this matter and this court’s decision in *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, we deem it just to order that each party bears his/her own costs.
12. Consequently and for the reasons afore-stated, we make the following Orders:
- i. The originating motion dated March 8, 2024 and filed on April 26, 2024 is hereby dismissed.
 - ii. Each party shall bear his/her own costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF AUGUST, 2024.

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M. K. KOOME

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

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P.M. MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT

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M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT

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S. C. WANJALA

JUSTICE OF THE SUPREME COURT

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W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR

SUPREME COURT OF KENYA

