



REPUBLIC OF KENYA



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**CAL v JSMB (Matrimonial Appeal E017 of 2022)
[2025] KEHC 5601 (KLR) (29 April 2025) (Judgment)**

Neutral citation: [2025] KEHC 5601 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
MATRIMONIAL APPEAL E017 OF 2022**

SC CHIRCHIR, J

APRIL 29, 2025

BETWEEN

CAL APPELLANT

AND

JSMB RESPONDENT

(Being an Appeal from the Judgment of Hon. H. Wandere SPM delivered on 1st November 2022 in Kakamega CM's court in Matrimonial cause No. 13 of 2013)

JUDGMENT

1. The respondent filed Matrimonial cause No. 13 of 2013, at the Chief Magistrate's Court at Kakamega, seeking a declaration that her cohabitation with the Appellant, between the year 2002 and 2012 constituted a Marriage and that after the court granting the declaration, it further dissolves the marriage.
2. The Appellant filed a defence in which he denied the plaintiff's claim. He also filed a counter-claim for Kshs. 514, 800 being the proceeds of sugar cane sale for an unspecified period.
3. At the conclusion of the hearing, the court returned a verdict in favour of the plaintiff and dismissed the counter-claim.
4. The Appellant was aggrieved by the outcome and hence this Appeal. The Appellant has set out the following grounds;
 1. That the learned Trial Magistrate fell into error of Law in holding that there existed a marriage contrary to the evidence on record when there was glaring evidence that the Respondent had failed to prove her case.
 2. That the Learned Trial Magistrate misconstrued and failed to appreciate that she did not have the jurisdiction to entertain the cause before her given that the Appellant is a Muslim which



contravened the provisions of Article 170 (5) of *the Constitution* of Kenya read with section 5 of the Kadhi's Court Act Cap 11 Laws of Kenya.

3. That the Learned Trial Magistrate failed to give reasons in his said Judgment and the same was not backed but any law or facts.
 4. That the Learned Magistrate fell to take into error on account of the pleading and evidence before her thus causing a miscarriage of justice.
 5. That the Learned Trial Magistrate had no basis and legal justification in allowing the Respondent's suit which was hopeless, incompetent, fundamentally defective and a mere abuse of the due process of the court thus miserably failed to appreciate what was before her for determination and thus engaged her mind on evidence that was not available or backed by the law.
5. The Appeal proceeded by way of written submissions.

Appellant's submissions

6. It is the Appellant's first submission that the trial court had no jurisdiction to entertain the cause; that consequently there was contravention of Article 170 (5) of *the constitution* as read with Section 5 of the Kadhis Court's Act, given that the Appellant is a Muslim. It is further stated that the cause should have been filed either at the Kadhi's court, or the High court.
7. It is stated that despite the respondent alleging that she conducted a Muslim marriage, she did not back it up with any evidence.
8. The trial court is further faulted for holding that there existed a marriage between the parties when there was no evidential basis for it ,and that cohabitation is not a marriage.

Respondent's submissions

9. It is the respondent's submissions that the question of jurisdiction was not raised in the trial court; that considering that it is a point of law, it should have raised at the earliest opportunity.
10. That the Appellant's failure to challenge jurisdiction at that first instance should be taken as an affirmation of the trial court's jurisdiction. It is further stated that in any event, submission to the Khadi's Court require one to first convert to Islam, and the marriage too , ought to have been contracted under the Islamic Law. In this regard the respondent has relied on the court's decision in the case of RMM Vs JKM (2019) eKLR where the court held that "The Kadhis Court has no Jurisdiction relating to dissolution of a marriage where parties proffered the Islamic faith but were married under customary law". Counsel submits that the marriage was under customary law and not Islamic Law.
11. On whether there existed a marriage, the respondent submits that the cohabitation was not denied; that the Appellant too did not deny that he assumed parental responsibility over the children of the respondent from her first marriage, and that he did not deny converting them to Islam.
12. It is further submitted that the presumption of marriage is drawn from their long co-habitation of 10 years and the introduction of the respondent to the Appellant's family.
13. On grounds of divorce, the respondent submits that the marriage had broken down irretrievably and it was proved that the Appellant had been cruel to the respondent.



Analysis and determination

14. This is a first Appeal, and it is trite law that a first Appeal is by a way of a re-trial. The first appellate court is therefore mandated to relook at the evidence , evaluate it and arrive at its own findings. It must however bear in mind that the trial court had the added advantage of hearing and seeing the witnesses first- hand. (see : Gitobu Imanyara & 2 Others Vs A.G (2016) eKLR.
15. I have considered the record of Appeal and the parties' rival submissions. In my view the following issues arise for determination:
 - a. Whether the trial court had jurisdiction to entertain the cause.
 - b. Whether a presumption marriage was established.
 - c. Whether divorce should be granted.

The Question of jurisdiction

16. I agree with the respondent that the issue of jurisdiction, critical as it is to a trial, was never raised at the trial court. It is therefore an afterthought on the part of the Appellant. However, since jurisdiction is “everything”, (see : Owners of v Motor vessel “ Lilian S” vs Caltex Oil (Kenya) Ltd (1989) 1 KLR) then in my view, nothing would cure a suit decided by court with had no jurisdiction. Any declaration that the court that tried the suit had no jurisdiction has a retrospective effect. In the circumstances much as it was not raised in the Lower Court, I am compelled to address it.
17. The Appellant has argued that only the Khadi's Court or High Court should have entertained this suit. Article 170 (5) which the Appellant has relied on states as follows; “The jurisdiction of a Kadhi's court shall be limited to the determination of questions of Muslim law relating to personal status, marriage, divorce or inheritance in proceedings in which all the parties profess the Muslim religion and submit to the jurisdiction of the Kadhi's courts.” Section 5 of the Kadhis Court make the same provision.
18. Thus, the Khadi's court has jurisdiction, where both parties profess the Muslim faith and where they have voluntarily subjected themselves to the jurisdiction of the court.
19. There is no dispute that the Appellant is a Muslim. However, there was no evidence that the respondent was a Muslim. In her evidence she stated: “I was not fully converted but I used to go and attend some sermons. In Muslims, it is the Christians to convert, so Abdi wanted to convert both of us to Islam. Abdi later started saying the first wife should have converted first..... he had started converting me.....we wanted to conduct marriage in Islam when we stayed from 2002 to 2013, when differences emerged”. What these portions of her testimony show is that she had not converted to islam. Indeed it is the Appellant who has stated that there is no evidence that the respondent was a Muslim. It follows that since both parties were not Muslims there was no obligations to subject themselves to the jurisdiction of the Kadhi's court.
20. In any event, the respondent was not seeking a declaration in the name of Islamic law. She sought a declaration of marriage based on cohabitation.
21. What about the Hight court? The respondent moved the court seeking for declaration of presumption of marriage through cohabitation. At this point, I need to point out that there is no evidence that customary rights under Kabras customary Law of marriage were carried out. Further based on her pleadings , the respondent was not basing her claim on customary law. It is therefore erroneous to submit, as did her counsel, that the marriage was under customary law. Presumption of marriage through cohabitation is a common law concept, not a customary law one.



22. Back to the issue of jurisdiction of the high court, the presumption of marriage being a common law concept, then based on the provisions of the Judicature Act, all the courts are empowered to apply common law , where circumstances allow.
23. There is no provision under the Judicature Act barring the Magistrate’s Court from determining issues arising from common law. Indeed with the exception of admiralty jurisdiction, which is a preserve of the High Court, all other courts at are liberty to deal with common law issues or apply common law. (Ref section 5.3 (1) of the Judicature Act). In view of the foregoing it is my finding that the trial court was clothed with the jurisdiction to entertain the cause.

Whether presumption of marriage through Cohabitation was proved.

24. Section 119 of the Evidence Act provides as follows;

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common cause of natural events human conduct and public and private business, in their relation to the facts of a particular”.
25. Justice Musyoka in *SWG Vs AM* (2015) eKLR stated “When a Marriage does not comply with the relevant formalities laid down by the Marriage Act or under Customary Law, it may be rescued by the presumption of Marriage by cohabitation”.
26. In the case of *MNK Vs POM Initiative for Strategic Litigation (Amias Curie)* (2023) KESC 2 (KLR), the Supreme Court stated :“Presumption of Marriage is a well settled common law principle that long cohabitation with a general reputation as husband and wife, raises a presumption that the parties have contracted a marriage.....” . It added that it is a rebuttable presumption.
27. In the same case,(*MNK VS POM- Supra*) the court set out the parameters within which a presumption of marriage can be met. The parameters were stated as follows;
 - a. the parties must have lived together for a long time.
 - b. The parties must have the legal right or capacity to marry.
 - c. The parties must have intended to marry.
 - d. There must be consent by both parties.
 - e. The parties must have held themselves out to the outside world as being a married couple.
 - f. The onus of proving the presumption was on the party who alleged it.
 - g. The evidence to rebut the presumption had to be strong, distinct, satisfactory, and conclusive.
 - h. The standard of proof was on a balance of probabilities.
28. What evidence is available in the case? The respondent told the court that she had cohabitated with the Appellant between 2002 and 2013. That would add up to 11 years of cohabitation. On the other hand, the Appellant talked of 2005 to 2013. That would add up to 8 years. In my view, all parameters remaining in place, whether the period was 8 , 10 or 11 years, the period is long enough to have given rise to a presumption of marriage.
29. Further the respondent, stated that the Appellant went to see her parents in 2003 for introduction to his parents and his first wife, Mary. He also introduced the children as his children. She also stated that in the same year the Appellant went to see her parents and the parents accepted him as their son



- in-law. On the other hand the appellant states that the respondent was just a girlfriend that he never planned to marry her.
30. I find the evidence of the respondent plausible as her evidence was corroborated by the Appellant's brother(PW4). PW4 is the biological brother of the Appellant. He told the court that the respondent was her sister-in-law. He got to know her in 2003, when the Appellant took her and introduced her to them as his wife; that they had lived for 10 years; that they used to reside in West Kenya. That all the family members knew her and that she joined the family with 5 children. He further stated that the two separated when the respondent was working in Butali. I am of the considered view that this witness would have no reason to lie about his own brother. I therefore find his evidence credible.
31. The respondent further testified that the Appellant converted her children to Islam and she too was in the process of being converted. In paragraph 4 of the plaint, the respondent has listed her children's' original names and in paragraph 7 the Islamic names, that had been given to them by the Appellant upon conversion. The conversion was as follows:Alfine Wakukaha to: Alfine Mohammed AbdiBryn Sunguti to: Bryn Sharif AbdiAnjeline Mariam to : Shakila AbdiBrenda Mwandu to : Shariff AddiMunira Khaoya to : Munira Abdi
32. The Appellant denied converting the children to islam, but the respondent produced certificate of conversions for at list two of the children. It is also instructive that the children adopted the surname of the Appellant, at the same time as the conversion.
33. I am not convinced that the Appellant would go to the extent of giving his name to the children of the respondent and changing their religious beliefs to his own , if he considered the respondent as merely a girlfriend, as he alleges.
34. They had also purchased land Parcel No. Kabras/Samitsi/1379 during the subsistence of their union. The agreement was witnessed by the Appellant and PW4. However, the question of whose property it is, is beyond the preview of this Appeal. What is relevant is the fact that the couple had presented an image of and acted as a married couple.
35. In view of the foregoing, I am satisfied, and I agree, with the findings of the trial court in that there existed a marriage between the parties herein , through cohabitation.
36. On whether the marriage should have been dissolved, this was not one of the grounds of Appeal. Consequently, I have no reason to address myself to it.
37. In the end, I find that the Appeal herein has no merit. It hereby dismissed, and the findings of the court below, upheld.
38. Each party to meet their own costs on this Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY, AT ISIOLO, THIS 29TH DAY OF APRIL 2025

S. CHIRCHIR

JUDGE.

In the presence of :

Godwin Luyundi- Court Assistant

Mr. Onsango for the Appellant

Mr. Iddi for the Respondent.

