MG v BW & another (Civil Appeal 63 of 2019)
[2025] KEHC 11860 (KLR) (1 August 2025) (Judgment)

Neutral citation: [2025] KEHC 11860 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL APPEAL 63 OF 2019

MA ODERO, J

AUGUST 1, 2025

BETWEEN

MG ..... APPELLANT

AND

BW ..... 1ST RESPONDENT

FR ERM ..... 2ND RESPONDENT

JUDGMENT

1. Before this Court is the Memorandum of Appeal dated 12th November 2019 by which the Appellant MG seeks the following orders;-

> "(a) That the appeal herein be allowed.
>
> (b) That costs be borne by the Respondents."

2. The Respondents BW and ERM opposed the appeal.

Background

3. The Appellant filed in the Nyeri Chief Magistrates Court Civil Case No. 4 of 2014 seeking the following orders;-

> "(a) An order that the customary marriage and/or presumptive marriage between the plaintiff and the 1st Defendant be declared dissolved and/or annulled.
>
> (b) General Damages from 1st and 2nd Defendants jointly and severally for breach of contract of the Marriage between the plaintiff and the 1st Defendant.

(c) Costs of the suit"

4. The matter was heard in the lower court and vide a judgment delivered on 25th October 2019, the Appellant's suit was dismissed in its entirety.

5. Being aggrieved by this judgment the Appellant filed this memorandum of Appeal which is premised upon the following grounds;-

   (i) The Learned Trial Magistrate erred in Law and in fact in finding that the plaintiff had not adduced sufficient evidence to enable court to presume marriage despite the overwhelming evidence that was presented.

   (ii) The Learned Trial Magistrate erred in Law and in fact in failing to find that indeed there was a marriage that subsisted between the Appellant and 1st Respondent.

   (iii) The Learned trial Magistrate erred in law and in fact in wrongly finding that the plaintiff was seeking a marriage by a Court decree.

   (iv) The Learned trial Magistrate erred in law and in fact to consider the plaintiffs submissions and authorities provided.

   (v) The learned trial Magistrate erred in law and in fact in finding that the plaintiff was seeking marriage for purposes of dissolving it.

   (vi) The learned trial Magistrate erred in Law and in fact in failing to find that long cohabitation between the Plaintiff and Defendant was adequate presume marriage. [sic]

   (vii) The Learned Trial Magistrate erred in law and in fact in making an award for costs in the circumstances.

6. The appeal was canvassed by way of written submissions. The Applicant

   filed the written submissions dated 24th June 2025 whilst the 1st Respondent relied upon her written submissions dated 10th June 2025.

Analysis And Determination

7. I have carefully considered this memorandum of appeal as well as the record of Appeal filed on 9th October 2023.

8. This is a first appeal. It is settled law that the duty of the first appellate court is to re-evaluate the evidence which was adduced in the subordinate court both on points of law and fact and come up with its own findings and conclusions [see Peters -vs- Sunday Post Limited [1958] E.A 424]

9. In SELLE and Another -vs- ASsociated Motor Boat Company Ltd & Others [1968 1 E.A 123 it was stated as follows:-

> "…….this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind [the fact] that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular this court is not bound necessarily to follow the trial judge's findings of fact if it appears that he has clearly failed on some point to take into account particular circumstances or probabilities materially to estimate the evidence."

10. Likewise in Gitobu Imanyara & 2 Others -vs- Attorney General [2016] eKLR, the Court of Appeal stated thus;-

> " An appeal to this court is by way of a retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect."

11. The Appellant had filed a suit in the lower court seeking that the court declare the existence of a marriage between himself and the 1st Defendant and thereafter said marriage be dissolved.

12. The types of marriage recognized under the law in Kenya are as set out in the *Marriage Act* 2014. Section 6(1) of the *Marriage Act* provides that:-

> " 6(1) A Marriage may be registered under this Act if it is celebrated.
>
> a. In accordance with the rites of a Christian denomination.
>
> b. as a civil marriage.
>
> c. In accordance with the customary rites relating to any of the communities in Kenya.
>
> d. In accordance with the Hindu rites and ceremonies.
>
> e. In accordance with Islamic law.
>
> (2) .....
>
> (3) ....."

13. The Appellant told the court that he married the 1st Respondent under Kikuyu customary law in the year 1993. That they cohabited as man and wife until 30th January 2013 when the 1st Respondent left. The Appellant accused the 1st Respondent of engaging in an adulterous relationship with the 2nd Respondent.

14. On her part the 1st Respondent denied that she entered into any form of a marriage with the Appellant. The 1st Respondent did however concede that she cohabited with the Appellant in her own house at King'ong'o church View Estate and that they bore two (2) children together. That they continued to cohabit until the year 2013 when the Appellant chased her away. The 1st Respondent denies that she engaged in an adulterous relationship with the 2nd Respondent or indeed with any other person. The Respondent denied that a valid and legally recognizable marriage existed between herself and the Appellant.

15. It is trite law that he who alleges must prove. In law the burden of proof lies upon the party who asserts the existence of a fact or set of facts. Section 107 of the *Evidence Act* Cap 80 Laws of Kenya provide as follows:-

> " Burden of proof.

107 (1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person."

16. In the case of Evans Nyakwana -vs- Cleophas Bwana Ongaro [2015] eKLR, it was held that:-

> " As a general preposition the legal burden of proof lies upon the party who invokes the aid of law and substantially asserts the affirmative of the issue. That is the purport of Section 107(1) of the *Evidence Act* Chapter 80, Laws of Kenya. Furthermore, the evidential burden is cast upon any party, the burden of proving any particular fact which he desires the court to believe in its existence. That is captured in Section 109 and 112 of the law of proof of that fact shall lie on any particular person....."

17. Therefore the burden lay on the Appellant to adduce sufficient evidence to prove that he got married to the 1st Respondent under one of the systems of marriage known to law.

18. It is interesting that in his plaint the Appellant stated that he and the 1st Respondent entered into a customary marriage or that in the alternative there existed a presumption of marriage. As pointed out by the trial magistrate the fact that the Appellant seemed unsure of what type of marriage he had contracted was very telling. Surely as a party to the alleged marriage the Appellant should have been very clear as to what type of marital union he had entered into.

19. Be that as it may the court needed to consider whether there existed sufficient proof that the parties had contracted a customary marriage under Kikuyu customary law.

20. Section 43 of the *Marriage Act* 2014 provides as follows:-

> " 43(1) A marriage under this Part shall be celebrated in accordance with the customs of the communities of one or both of the parties to the intended marriage.
>
> (2) Where the payment of dowry is required to prove a marriage under customary law, the payment of a token amount of dowry shall be sufficient to prove a customary marriage."

21. In the case of Hortensiah Wanjiku Yawe -vs- The Public Trustee [1976] eKLR the court held that;-

> " The onus of proving of customary law marriage is generally on the party who claims it. The standard of proof is the one usually for civil action namely "a balance of probabilities required for a customary law marriage must be proved to that standard....." [Own emphasis]

22. A Kikuyu customary marriage (like customs of other African communities) consists of certain rites which must be performed. Further marriage is not a clandestine or secret affair. It involves the coming together of two families and clans and is often conducted publicly and with much fanfare.

23. Eugene Contran's casebook on customary Law at page 30 sets out the essentials of Kikuyu Customary Marriage. These are stipulated as:

> " 1. Capacity; the parties must have capacity to marry and also the capacity to marry each other.

2. Consent; the parties to the marriage and their respective families must consent to the union.

3. Ngurario; no marriage is valid under Kikuyu customary law unless the Ngurario ram is slaughtered.

4. Ruracio; there can be no valid marriage under Kikuyu law unless a part of the ruracio (dowry) has been paid." [Own emphasis]

24. The Appellant claims that he paid a dowry of Kshs. 20,000 to the family of the 1st Respondent. No witness was called to confirm that the Appellant paid this dowry as alleged. In many instances when a customary union is entered into the parties do record any payments made either in cash or in kind. The Appellant did not produce any records to prove that he paid this Kshs. 20,000 dowry.

25. The Central feature of any Kikuyu customary marriage is the 'Ngurario ceremony'. The appellant did not claim much less prove that such ceremony ever took place in respect of himself and the 1st Respondent.

26. In the case of Eva Naima & Another -vs- Tabitha Waithera Mararo [2018] eKLR the Court of Appeal in observing that 'ngurario' ceremony did not take place stated as follows:-

> " From the above it becomes apparent that, no ram or goat was slaughtered to mark the coming into existence of a marriage. Without the presence of the central feature of the ngurario ceremony, it cannot be said that a valid Kikuyu customary marriage came into existence between Waithera and the Deceased." (Own emphasis)

27. I find and hold that the evidence adduced by the Appellant was not sufficient to prove on a balance of probability that he entered into customary marriage with the 1st Respondent.

28. The next question is whether the evidence was sufficient to lead to a 'presumption of marriage.' In the case of Hortensiah Wanjiku (supra) the court stated as follows:-

> " Long cohabitation as a man and wife gives rise to a presumption of marriage in favour of the party asserting it. Only cogent evidence to the contrary can rebut the presumption....."

29. In the case of Mary Njoki -vs- John Kinyanjui Mutheru & 3 Others 1985 eKLR the Hon. Nyarangi Judge of Appeal stated as follows:-

> " The concept of presumption of marriage is with us, having been recognized and approved by this courts predecessor in Hortensia Wanjiku Yawe v Public Trustee.....
>
> The presumption does not depend on the law of systems of marriage. The presumption simply is an assumption based on very long cohabitation and repute that the parties are husband and wife. In my judgment before a presumption of marriage can arise a party needs to establish long cohabitation and acts showing general repute. If the woman bears a child or better still children, so that the man could not be heard to say that he is not the father of the children that would be a factor very much in favour of presumption of marriage. Also if say the two acquired valuable property together and consequently had jointly to repay a loan over a long period that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. To sum it, there has to be evidence that the long cohabitation is not close friendship

between a man and a woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage..... To my mind, presumption of marriage, being an assumption does not require proof of an attempt to go through a form of marriage known to law." [Own emphasis]

30. The fact that the Appellant and the 1st Respondent had cohabited for a period of ten (10) years does not in itself lead to a presumption of marriage. There must be evidence that this period of cohabitation had crystallized into a marital union.

31. In the case of MWK -VS- AMK [2017] Eklr Hon. Justice Joel Ngugi (as he then was), in discussing the concept of a presumption of marriage stated as follows:-

> "Since then our case law has been consistent in following the English common law in requiring that a presumption of marriage arises only when a person proves two factual predicates;-
>
> a. Quantitative element – namely the length of time the two people have cohabited with each other; and
>
> b. Qualitative element – namely acts showing general repute that the two parties held themselves out as husband and wife. Factors tending to demonstrate these qualitative element include whether the parties had children together, whether the community considered the two as husband and wife, whether the two carried on business jointly or whether they took a loan jointly, whether the two held a joint bank account and so forth."

32. The fact that the Appellant and the 1st Respondent cohabited for a long period of time and the fact that they bore two (2) children together does not lead to a presumption of marriage. The 'qualitative' aspect of a marriage has not been proved.

33. No evidence has been called from persons who knew the two and to whom the two had represented themselves as man and wife. There is no evidence of joint business or jointly purchased assets.

34. The Appellant attempted to rely on the facts that in the obituary of the 1st Respondents father he was named as an in-law. This is not proof of a marriage. The Appellant did not call any witness to testify that the two were deemed by society to be married to each other. I find that the evidence falls short of leading to a presumption of marriage.

35. Finally I find that there is no evidence that a marital union recognized in law existed between the Appellant and the 1st Respondent. Once again I reiterate that the fact that the Appellant did not himself appear to be sure of what type of marriage he had contracted is a pointer to the fact that no marriage existed between the two.

36. I am in full agreement with the following observations made by the trial court:-

> "The court finds that the plaintiff is not sincere. One cannot presume a marriage just for the purpose of dissolving it. If he cared to be married to the 1st defendant, he would have taken some steps to formalize the union and not condone what he alleges was a long term relationship with the 1st defendant. It's instructive that he took no steps to solemnize nor salvage alleged marriage, but wants the court to declare him married to the 1st defendant, then unmarry him.

> Unfortunately, there can be no marriage by the decree of the court. The statutes have set out the various types of marriages and the court has no mandate to declare anyone married. He did not even call a witness to say that they were deemed by society to be married.
>
> Accordingly, the court finds that since there was no marriage between the plaintiff and the 1st defendant and therefore there is nothing to dissolve. It then follows that the other prayers cannot be granted. The allegations against the 2nd defendant were not proved either."

37. The Appellant was merely groping in the dark. With respect to the allegations of adultery with the 2nd Respondent no effort was made to prove the said allegations, during the trial.

38. I do agree with the trial court that marriage cannot be contracted through a court decree. The forms of marriage legally recognized in Kenya are provided for by Section 6(1) of the *Marriage Act* 2014. The Appellant failed to prove the existence of any of the legally recognized forms of marriage. As such the trial court was right in dismissing his suit. Since no valid marriage existed between the Appellant and the 1st Respondent there existed nothing to dissolve.

39. The Appellant challenged the decision of the trial court to award costs to the Respondent. It is trite law that costs follow the event. Having failed to prove his case at trial, it was in order for the trial court to order that the Appellant meet the costs for the suit. I find no legal irregularity with the order made on costs.

40. Finally I find no merit in this appeal. The same is dismissed in its entirety. Costs will be met by the Appellant.

DATED IN NYERI THIS 1ST DAY OF AUGUST 2025.

.....

MAUREEN A. ODERO

JUDGE