



**W v W; Rotich & 3 others (Interested Parties) (Civil Case 129 of 2007) [2024] KEHC 362 (KLR) (25 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 362 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL CASE 129 OF 2007  
RN NYAKUNDI, J  
JANUARY 25, 2024**

**BETWEEN**

**VMW ..... PLAINTIFF**

**AND**

**RMW ..... DEFENDANT**

**AND**

**PHILIP TARUS ROTICH ..... INTERESTED PARTY**

**JOHN KELAI EKIRU ..... INTERESTED PARTY**

**BENJAMIN RUTO ROTICH ..... INTERESTED PARTY**

**ROSE BIWOTT ..... INTERESTED PARTY**

**JUDGMENT**

1. This Plaintiff instituted this suit vide originating summons dated 24<sup>th</sup> July 2007 seeking determination as to whether the properties known as;
  1. Uasin Gishu/kimumu/XXXX
  2. Uasin Gishu/kimumu/XXXX
  3. Uasin Gishu/kimumu/XXXX
  4. Uasin Gishu/kimumu/XXXX
  5. Uasin Gishu/kimumu/XXXX
  6. Uasin Gishu/kimumu/XXXX



2. Are matrimonial property acquired during the marital relationship between the plaintiff and defendant by the Plaintiff's contribution. Further, the plaintiff also sought a determination as to whether in view of the fact that the defendant disposed of the properties known as Uasin Gishu/Kimumu/XXXX,XXXX,XXXX and XXXX without her consent, she is entitled to a full share and vacant possession of Uasin Gishu/kimumu/XXXX and XXXX. Additionally, the plaintiff sought a determination as to whether the defendant should execute the transfer instruments in favour of the plaintiff and in default the deputy registrar do execute the same.
3. The originating summons was supported by an affidavit sworn by the plaintiff. She averred that she is the wife to the defendant and they were married under customary law in 1976, a fact which can be confirmed from the proceedings of the land case in Eldoret SRMC land case no 41 of 1983. During their stay as husband and wife, the defendant was allotted the land known as Kimumu plot 117 for the family. He sold that parcel to Dr David K Bii on 14<sup>th</sup> June 1978 without her knowledge despite her being a co-owner. She then managed to get a judgment from the elders' panel nullifying the transfer and ordering a refund of Kshs. 25,000/- to the purchaser. She refunded the money but the defendant registered himself as the sole proprietor of the property despite her substantial contribution to the purchase. The land was then mutilated to form the above-mentioned parcels and the defendant has disposed a substantial portion of the land to various third parties, using the proceeds to feed his second family. She stated that it was only just that she be given the portions known as Uasin Gishu/kimumu/738 and XXXX fully as settlement of matrimonial property. She maintained that she contributed to the purchase price with her pay as an employee of Ministry of Lands.
4. The defendant opposed the originating summons vide a replying affidavit filed on 14<sup>th</sup> February 2008. He denied being married to the plaintiff and stated that he is married to NCL, producing a marriage certificate as evidence of the same. He maintained that the relationship between him and the plaintiff was a casual one that never materialised into a marriage. Further, that the plaintiff has never been an allottee of the land referred to as Kimumu XXXX and that he is the registered parcel of the said land. He urged that the plaintiff's claim is an attempt at unjust enrichment and therefore the same should be dismissed.
5. The Plaintiff had five witnesses who filed their witness statements in court. PW1 was Chief William Sang who stated that he was the area chief Chepkoilel location, Kimumu sub location. He stated that he knew the parties and that they lived as husband and wife from 1989 when he came to know of them. Further, that in 1996 he appointed the defendant as the elder of Kimumu sub location. They used to reside on a property of 2.5 acres in 1987 which was later increased by the defendant to 5 acres, being LR No. UG/Kimumu/XXXX. It was his testimony that the defendant began to sell the parcel of land at different intervals and when the plaintiff enquired about the same, the defendant became angry and violent and threatened her. The plaintiff later placed a caution on the land upon realizing that portions have been sold. He summoned the purchaser's to his office but only John Kalai and the defendant ever attended and they discussed the issues pertaining to the agreements not to sell the land. In 2007 he advised the parties to follow the judicial process.
6. PW2, John Odeke Okisegere, a resident of Kimumu, stated that one evening he met the plaintiff's children crying that the father had beaten and killed the mother. he called the chief and together they went to their home where they found the plaintiff naked and they rushed her to the hospital.
7. PW3, FR, stated in her witness statement that she is the second born daughter to the plaintiff. That on one day, Jane ran to her house and informed her that the defendant had beaten the plaintiff unconscious. The chief and neighbours took her to the hospital and after she recovered they wanted



to take her home but on arriving home, they found that the plots had already been subdivided. Some parts had been sold off without her knowledge or consent.

8. PW4 Cecilia Ikirute, reiterated the same sequence of events as PW2. PW5, Taphrosa Kibandika, testified that she was a neighbour of the plaintiff and that they had a farm near Kimumu secondary school. That her husband sold the farm and the plaintiff complained to her husband. She went to court and had the land reverted back. Later he resold the farm and when she enquired the husband assaulted her. The buyers are still in occupation of the property.
9. The defendant testified that he worked on the settlement fund trustee in Kitale in 1975 and he was transferred to Kimumu in 1976. He was single when he worked with the Plaintiff and as employees they were allotted land to settle and farm by the government. He was allotted Uasin Gishu/Kimumu/XXXX measuring 2 ½ acres. The plaintiff was also allotted land known as Kaptagat/Mvita SFT Plot XXXX. The government later allotted land to them totalling 5 acres which the plaintiff also received her piece of land.
10. The parties filed submissions on the suit.

### **Plaintiff's case**

11. The plaintiff was represented by the firm of Messrs Morgan Omusundi & Co Advocates. Counsel cited article 45(3) of *the Constitution* and submitted that it does not however equate equal rights to a 50/50 sharing of assets but rather to the rights to be treated equally and fairly. The statute (*Matrimonial Property Act*) provides under Section 7 that;

“Ownership of property vests in the spouses according to the contribution of either spouse towards its acquisition and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
12. Counsel submitted that the Plaintiff made a significant contribution towards acquisition of the suit property. Her contribution is major in the circumstances and cannot be ignored particularly the money she solely refunded to Dr. Bii after a sale transaction between the defendant and Dr. Bii dated 14<sup>th</sup> June 1978 was reversed. Counsel cited the case of Peter Mburu Echaria v. Priscilla Njeri Echaria (2007) eKLR in support of this submission. The logical conclusion flowing from the judicial precedents is that in determining the distribution of matrimonial property at the dissolution of a marriage, the Court should dispassionately scrutinize the direct and indirect contribution of each party to the marriage in acquisition of the suit property. Furthermore, where property is registered singularly in the name of one spouse, there shall be a rebuttable presumption that such property is held in trust for the other spouse.
13. Counsel urged that the suit property is matrimonial property since it was acquired during the subsistence of their marriage. It is important that the court pronounces itself on this issue because the Plaintiff is apprehensive that the defendant might adversely deal with the property since he is the registered proprietor. Further, that section 2 of *Land Registration Act* has defined matrimonial property as any interest in land or lease that is acquired by a spouse or spouses during the subsistence of a marriage.
14. Prior to the amendment of section 93 through the Land Laws Amendment Act on 21/9/2016, Section 93 (2) of the *Land Registration Act* stipulated that land held by one spouse only and the other contributes by their labour or other means to the productivity, upkeep and improvement of the land, the spouse shall be deemed by virtue of the labour to have acquired an interest in the land in the nature



- of an ownership in common with spouse and the rights gained by spouse(s) shall be recognized in all cases as if they were registered.
15. After the amendment of section 93 through the Land Laws Amendment Act on 21/9/2016, the provision stipulates that if a spouse obtains an interest in land during the subsistence of a marriage for the co-ownership and use of both spouses or all spouses, such property shall be deemed to be matrimonial property and shall be dealt with under the *Matrimonial Property Act* subject to any written law to the contrary.
  16. Counsel cited section 6 of the *Matrimonial Property Act* (and further, stated that Section 2 of the act has defined matrimonial home to mean any property that is owned or leased by one or both spouses as their family home and includes any other attached property.
  17. The defendant denied that the said property is matrimonial property due to the lack of financial contribution during acquisition of the same from the part of the plaintiff. He however does not acknowledge the fact that when the court directed them to refund the purchaser, one Dr. Bii, it is the Plaintiff who solely refunded the purchaser.
  18. The plaintiff submitted that she has made substantial contribution towards the acquisition of the subject land, having made a deposit to court of Kshs. 25,000 being a refund to the purchaser after the sale transaction between the defendant and him was nullified. Further, that she invested her time and effort to acquire the same.
  19. The Plaintiffs urged that it is significant that the suit property be declared matrimonial property since it was acquired during the subsistence of their marriage. Even though the suit property is registered under the defendant's name, the Plaintiff has established that she significantly contributed towards the acquisition of the property. Therefore, even as the parties await divorce proceedings, the defendant should be restrained from dealing with the suit property in any manner.
  20. It is the plaintiff's case that prior to the amendment of section 93 through the Land Laws Amendment Act on 21/9/2016, section 93 (3) (b) of the *Land Registration Act* stipulated the need of spousal consent to be obtained should the spouse who acquired the property intends to dispose of the same by way of sale and transfer. Section 93 of the *Land Registration Act* as amended by the Land Laws Amendment Act as read with section 12 of the MPA stipulates that any interest in any matrimonial property shall not, during the subsistence of a monogamous marriage and without the consent of BOTH spouses be alienated in any form including by way of sale. Also, the Court of Appeal in Mugo Muiro Investments Limited vs E W B & 2 Others (2017) eKLR, held that when a spouse enjoys overriding interest in the matrimonial property, any disposition would be subject to that spouse's overriding interest being part owner of the said property by way of a consent. The court went further and found that any disposition in the property undertaken without the spouse's consent would be deemed null and void ab initio.
  21. The plaintiff is alive to the fact that the property was allotted to the defendant sometime in 1976, which was before the either *Land Registration Act* or the *Matrimonial Property Act* came into force in 2012 in 2014 respectively. To that extent, the plaintiff invites this court to be guided by the Court of Appeal decision in Mugo Muiro Investments Limited (supra) and find that she enjoyed and still continues to enjoy overriding interests in Uasin Gishu/kimumu/XXXX even where the same was acquired before the stated Acts came into force since the cause of action arose after the said laws came into force.
  22. It is the plaintiff's case that it is not disputed that the defendant entered into various land transactions without consent from the plaintiff. Further, that it is the defendant's case that the plaintiff's spousal consent wasn't necessary during the transaction since he did not consider the property to be



matrimonial property. According to the plaintiff, her consent was necessary during both transactions by virtue of having beneficial interest in their matrimonial property which made her part owner of the suit property, Uasin Gishu/kimumu/XXXX.

23. The plaintiff has sought orders of permanent injunction restraining the defendants from dealing with the matrimonial properties known as Uasin Gtshjtj/kimumu/XXXX and 739. For the court to grant a permanent injunction, Snell's Principles of Equity (21<sup>st</sup> Edition) by R E Megarrv and P V Baker at Page 578 states:

“A perpetual injunction is granted only after the plaintiff has established his right and the actual or threatened infringement of it by the defendant...It follows that a perpetual injunction is so called because it is granted at the final determination of the parties' rights and not because its operation will necessarily last forever. For example, a perpetual injunction may continue only during the currency of a lease”.

24. The plaintiff urged that she has discharged the burden of proof to the required standard that she is entitled to Uasin Gishu/kimumu/XXXX and XXXX to warrant a permanent injunction as sought by virtue of having spousal interests. Further, that the said property Uasin Gishu/kimumu/XXXX and XXXX is matrimonial property. It is her case that upon contracting their marriage sometime in 1975 to the defendant, the defendant was allotted the said property.
25. The defendant testified that the suit property Uasin Gishu/kimumu/XXXX and XXXX is not matrimonial property. It is not disputed that the said property is currently registered in the name of the defendant. It is the Plaintiffs case that she had invested finances, time and effort in the property and thus the move to court to invalidate the contract her husband had entered into disposing the suit property without her consent. She maintained that she has demonstrated the need for a permanent injunction to issue as she has clearly demonstrated the criteria to warrant issuance of the same.

#### **Defendant's case**

26. The defendant was represented by the firm of Marrimoi Chemurgor & Co Advocates. He submitted that the plaintiff was never married to the defendant. On what constitutes matrimonial property, we are guided by Section 6 of the [Matrimonial Property Act](#) that defines matrimonial property as;
- (a) the matrimonial home or homes;
  - (b) household goods and effects in the matrimonial home or homes; or
  - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.
27. It is the defendant's case that for property to qualify as matrimonial property, it must meet the definition in Section 6 quoted above. The suit property does not fall under matrimonial property since there was never any recognizable union between him and the plaintiff. The plaintiff has not supplied the court with any document to prove that she was married to the defendant. She has not furnished the court with any marriage certificate or even photographs to prove that there was any traditional marriage and that bride price was paid.
28. The plaintiff therefore does not have any right to dictate how the property is supposed to be used and/or claim any part thereof. Further to the above, the defendant did not require spousal consent to dispose the suit land.



29. The defendant submitted that the Court of Appeal in *TKM v SMW* [2020] eKLR pronounced itself on contribution towards acquisition of property and further, that contribution towards the acquisition of matrimonial property is defined under Section 2 of the *Matrimonial Property Act*, 2013 in the following terms;
30. In this Act, unless the context otherwise requires
- “contribution” means monetary and non-monetary contribution and includes
- a) domestic work and management of the matrimonial home;
  - b) child care;
  - c) companionship;
  - d) management of family business or property; and
  - e) farm work.
31. In the case of *NWM v KNM* (2014) eKLR it was stated that the court must give effect to both monetary and non-monetary contributions that both the applicant and the Respondent made during the currency of the marriage to acquire the matrimonial property. The same position was held by the House of Lords in *White vs White* (200) UKHL 54 where the Court alluded to the greater awareness of the value of non-financial contributions to the welfare of the family. The Plaintiff and the defendant were involved in a romantic relationship which led to the birth of four children. This relationship should not be construed as a marriage as earlier stated.
32. It was clear during cross- examination of PW1 and examination in chief of DW1 supported by DW2 that they all worked at Settlement Fund Trustee in Kimumu. It was also clear that as staff they could apply for land that the employer owned and the monies were deducted from their salaries at that time until payment in full. It was also clear that both the plaintiff and the defendant were allotted each 2 acres at first which was increased to five acres. It was also clear that each of them the plaintiff and the defendant paid for their portions separately until completion which led to the processing of the Title in their individual names. PW1 also confirmed that she had her parcel of land named which is known as Kaptagat/Mvita/XXXX that she has to date.
33. The defendant submitted that the plaintiff never made any monetary and/or non-monetary contribution towards the acquisition of the suit property to enable her have a claim on it. She has her own portion that the defendant has not laid any claim own and both parties should be allowed to use their land as they please.
34. The defendant denied the existence of marriage and/or any form of contribution is denied by the defendant. Section 7 of the *Matrimonial Property Act* is clear in its terms that:
- “Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
35. Section 9 of the same Act recognizes contribution through improvement of a property acquired before or during the marriage in the following terms:
- “Where one spouse acquires property before or during the marriage and the property acquired during the marriage does not become matrimonial property, but the spouse



makes a contribution towards the improvement of the property, the spouse who makes a contribution acquires a beneficial interest in the property equal to the contribution made.”

The Constitution in Article 45(3) article provides that;

“Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of marriage”

36. Although this provision grants equal rights to parties to a marriage as stipulated, this does not mean that a party to a marriage is entitled to equal share of the property acquired during marriage unless his or her contribution is ascertained to have been equal to that of the other spouse. The view, that the provisions of Article 45(3) of the Constitution does not entitle parties to equal distribution of matrimonial property, was taken by the Court of Appeal (Kiage, JA) in PNN v ZWN [2017] eKLR
37. The share of each party to a marriage is pegged on the contribution made by each party. That is the law as it is and as applied in various decisions. We contend that in this matter there was no marriage in the first place, therefore the plaintiff has no claim over the suit property.
38. The defendant proceeded to sell his land to 3<sup>rd</sup> parties who are the interested parties in this suit. Section 26 of the Land Registration Act provides that a Certificate of title is to be held as conclusive evidence of proprietorship. There has been no claim that that has challenged the ownership of the defendant’s absolute and indefeasible title on these grounds. The defendant has already established that he did not require spousal consent. Therefore, because he had good title he could pass good title. Therefore, since the 3<sup>rd</sup> parties had already purchased they should be allowed to proceed with registration of the Titles to their names as bonafide purchasers. The plaintiff’s claim is based on the existence of a marriage which marriage never existed and therefore she has no claim whatsoever on the defendant’s property. The defendant urged this Honourable Court to dismiss this suit.

### **Interested parties’ case**

39. The interested party was represented by the firm of Kimaru Kiplagat & Company Advocates who filed submissions on 18<sup>th</sup> October 2023. Counsel submitted that it is well stated under Section 7 of Matrimonial Property Act 2013 that-;  

“a person may apply to a court for a declaration of rights to any property that is contested between the person and/or a former spouse.”

Sub- Section 6 (3) states-;

“Ownership of the matrimonial property rests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”
40. Further, that it is settled law that Parties are bound by their pleadings. This was well stated in Raila Odinga & Another -vs- IEBC & 2 Others (2017) eKLR. Looking at the pleadings it is not clear neither is it written anywhere the specific prayer of the Petitioner, furthermore, it is not stated by the Petitioner in any of her prayers that she is seeking for the dissolution of her marriage. It was prudent that, the Petitioner first sought prayers for dissolution of her marriage before praying for assertion of her rights over the properties. The Matrimonial Property Act Section 6(3) states clearly that a person seeking the distribution of matrimonial property has to show that there has been a divorce or dissolution of marriage. They relied on the decision in the High Court of Kenya at Nairobi, Milimani Law Court, Family Division, Civil Suit no. 66 of 2012 (O.S) N.C.K -VS- G.V.K 3/11/2015 J.A.O Muchelule. The



position was also reiterated by Judge L. Gacheru in Environmental and Land Court at Thika, ELC Case No. 110 of 2019 (OS) Gladys Muthoni Kibui -VS- Geoffrey Ngatia.

41. The interested parties submitted that from the proceedings herein, it is clear that the suit property was initially measuring five acres. The whole chunk of land was sold by the Defendant and the Petitioner. The Petitioner presented to this court exhibit 8 as a bundle. A keen perusal of the documents before the court, the petitioner participated in selling the respective parcels of land, the agreements are in court and had been signed by the said Virginia Muthoni, the Petitioner herein, the suit properties in question right now measures one acre. Four (4) acres were sold but the Petitioner never raised an issue about those properties. The Petitioner is not seeking ownership of the Five (5) acres of land. Her interest is particularly in this one (1) acre. She has not sought for orders for cancellation of titles to properties already sold to the other third parties. There is no reason given by the Petitioner on why she has targeted these properties. It can therefore well be said that her claim is only but anchored on malice and greed.
42. It is also clear from the proceedings of the case that both the Petitioner and the Defendant were working with the Government of Kenya Ministry of Lands and Settlement. Each was given Five (5) acres. The Plaintiff/Petitioner was given 5 acres in Kaptagat Mvita Plot No. XXXX. The Plaintiff/Petitioner did not deny this fact that she was given five acres and on cross-examination she said that she still owns the said parcel of land Kaptagat Mvita Plot No. 56 and the same only belonged to herself and it cannot be owned and/or shared between herself and the Defendant.
43. The Plaintiff has not shown any contribution that she made towards acquiring of the Plot Nos. Uasin Gishu /Kimumu/XXXX & Uasin Gishu /Kimumu/XXXX. The Defendant acquired the parcels of lands solely. The Kshs. 25,000/= that is alleged to have been paid by the Plaintiff was not towards acquiring this specific parcels of land. Initially the land that was in question was Uasin Gishu / Kimumu/56 measuring 2.5 acres. Be it as it may, the Defendant denied that the said money was not paid by the Petitioner.
44. The Defendant stated categorically that since he had been arrested, he had to send the Petitioner to pay for the Kshs. 25,000/= so that she could secure his freedom. The Defendant further stated after being released in Court from a civil jail, he went back sold part of his parcel of land and refunded one William Tuwei and Dr. Peter Thurania the Kshs. 25,000/=. This evidence by the Respondent/Defendant was never rebutted by the Plaintiff/Petitioner.
45. The Interested Parties have stayed on the suit lands for over 25 years and have built permanent homes on the suit lands. These are innocent purchasers for value. The Seller/Vendor is married to two wives. Section 12 of the *Matrimonial Property Act* provides-;  

“an estate or interest in any matrimonial property shall not, during subsistence of a monogamous marriage and without the consent of both spouses, be alienated in any form, whether by way of sale, gift, lease, mortgage or otherwise”.
46. The intention of the law makers was not to curtail all transactions and dispositions irrespective of the circumstances for the sole reason that the other spouse has refused to give consent. The intention of the law makers for making it mandatory to seek consent of the other spouse was so that one spouse does not make unilateral decisions on matters affecting both or all the spouses or rendering the other spouse homeless, or without property, because of a single unilateral decision of the other spouse.
47. Article 45(3) of *the Constitution* also provides for parties in a marriage to be entitled to equal rights, but it should be carefully noted that equal rights should not be construed to mean the same as unreasonable rights. From the foregoing, the Petitioner's actions are tainted with malice and her prayers ought to fail. The prayers sought by the Plaintiff are equitable and equity demands that whoever seeks equity must



approach this court with clean hands. The Plaintiff has a parcel of land known as Kaptagat/ Mvita Plot No. XXXX which is in her name and she is categorical that she is not willing to share the same with the Defendant. The suit properties herein Uasin Gishu /Kimumu/XXXX & Uasin Gishu /Kimumu/XXXX are not matrimonial homes. Nothing has been presented to this court to warrant the orders of permanent injunction being issued against the Defendant and the Interested Parties. The Defendant states that he stays in Kitale the Plaintiff is not destitute, he has a vast parcel of land in Kitale where she can go and build her house. They prayed that the orders sought herein should be dismissed and the Defendant be allowed to proceed and transfer the parcels of land to the Interested Parties names.

### Analysis & Determination

48. Upon considering the pleadings, responses thereto and evidence tendered in court, the following issues arise for determination;

1. Whether the plaintiff was married to the deceased
2. Whether the marriage was dissolved

49. Whether the Plaintiff was married to the deceased. Is there a valid marriage so to speak? It is settled in law under section 3 (1) of the *Marriage Act* 2014 that “marriage is voluntary union of a man a woman whether in a monogamous or polygamous union and registered in accordance with this Act.” What emerged from the evidence by the plaintiff was some kind of relationship which had not crystallized into a marital union as defined in the *Marriage Act*. In Blacks law dictionary a marriage by habit and repute is defined as an illegal marriage created by cohabitation that implies mutual agreement to be married. Let assume for a moment for purposes of this case that the relations between both parties to this suit was of a nature that presumption of marriage could be inferred. The Court of Appeal in its pronouncement in the case of Phylis Njoki Karanja & 2 others vs Rosemary Mueni Karanja and another (2009) eKLR held as follows;

Before a presumption of marriage can arise a party need to establish long cohabitation and acts of general repute that long cohabitation is not mere friendship or that the woman and it is safe to presume the existence of a marriage. We are of the view that since the presumption is in the nature of an assumption it is not imperative that certain customary rites be performed”

50. This very principle was well articulated in the case of Hortensia Wanjiku Yawe vs Public Trustees EACA C.A. No. 13 of 1976 (UR) held that;

Long cohabitation as man and wife gives rise to a presumption of marriage only cogent evidence to the contrary can rebut such a presumption. The presumption is nothing more than an assumption rising out of long cohabitation and general repute that the parties must be married irrespective of the nature of the marriage actually contracted.”

51. My reading of the *Marriage Act* which is the anchor of marriage unions in it is a definition of cohabitation seems to place presumption of marriage at the lowest structure of a legally recognized marriage in Kenya. This is what the drafters stated in section 2 of the Act that cohabitation is defined as to live in an arrangement in which an unmarried couple lives together in a long term relationship that resembles a marriage. By the forgoing statement it is not conclusive that cohabitation has any fundamental characteristics to bring the marriage union within the provision of section 3 (1) of the Act. So this popular acronym come we stay together marriage by couples raises various challenges as a result of the high standard and burden of proof vested in the plaintiff or applicant as against the respondent/defendant in any such cause of action. The legitimacy of the presumption of marriage in



Kenya is based on one key threshold cogent evidence. It is easier stated/pleaded than proven before a court of law. The Supreme Court in *MNK vs POM (2023) KLR* outlined the following guidelines within which a party must lead evidence to establish existence of a presumption of marriage.

- a. The parties must have lived together for a long period of 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.

52. In order for a claim for matrimonial property to arise, the plaintiff must first establish that there was a subsisting marriage. In the originating summons, she claims that she was married to the deceased under African customary law in 1976. A determination of the existence or non-existence of the marriage will be based on satisfaction of the provision of section 43 of the *Marriage Act*, No.4 of 2014 which provides that;

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.

53. Proof of customary marriage was brought out clearly by the Court of appeal in the case of *Kimani v Gikanga [1965] EA 735*. It was observed that;

To summarise the position; this is a case between Africans and African customary law forms a part of the law of the land applicable to this case. As a matter of necessity, the customary law must be accurately and definitely established. The Court has a wide discretion as to how this should be done but the onus to do so must be on the party who puts forward customary law. This might be done by reference to a book or document reference and would include a judicial decision but in view, especially of the present apparent lack in Kenya of authoritative text books on the subject, or any relevant case law, this would in practice usually mean that the party propounding customary law would have to call evidence to prove that customary law, as would prove the relevant facts of his case.”

54. The plaintiff's reliance on the proceedings of the Eldoret SRMC Land Case No. 41 of 1983 as proof of marriage cannot suffice. There is no evidence that was led to prove that there was a customary marriage between the plaintiff and the defendant.

55. In *Mary Wanjiku Githatu Vs Ester Wanjiru Kiarie (2010) eLKR Bosire JA* held as follows;

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 depended 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 long cohabitation or other circumstances evinced an intention of living together as husband and wife.”

56. After it had been shown by the defendant that there was an actual marriage solemnised in the method which the law prescribes and may be followed by birth of an issue or issues every inference is invoked in support of its validity and against an alleged customary law marriage or presumption of marriage for that matter. Parties to a marriage are entitled to a security provided by the law. The legal premise permits them to enjoy all rights that accrue from the validity of that marriage so that they can plan and order their lives accordingly. The strength of the evidence on customary law marriage advanced by the plaintiff is not persuasive in absence of compliance with the mandatory elements establishing that the marital union was solemnised within the dictates of the custom governing the plaintiff or the defendant. Generally speaking, any such marriage purported to exist between the plaintiff and the defendant is voidable for reason of the validity of the marriage under Statute celebrated by the defendant. In this case even the presumption in its widest sense as graphically stated in case law cannot be supported by the evidence placed before this court by the plaintiff. The marriage claim by the plaintiff was never registered in any church, or public registry, there was evidence of some intention to marry which was never carried into fruition. Therefore, as long as the parties in this case acquiesced in their defective so called marriage, nullity hangs over their heads like the sword of Damocles but falls down immediately should a whim or a long-harboured grudge put the law into motion. In the Kenya legal system, a valid marriage results whenever a man and a woman engages in activities which by the law of the country where it occurs is recognized as making them husband and wife. There must be certain conduct engaged in by competent parties under circumstances whereby they intend matrimony and both understanding and freely consent to acquiring that status. While the language on the part of the plaintiff evidence is that of a valid marriage by the law making of it renders it voidable as demonstrated by the defendant’s cogent upholding the validity of a marriage with a third party who is not the plaintiff in this case. Unfortunately for the plaintiff even placing reliance on what constitutes an appropriate customary ceremony to achieve a recognised marriage union with the defendant fell short of the legal threshold to accord her any rights under the *Matrimonial Property Act*. While it is customary to have witnesses to a marriage there is no legal requirement of attesting or even presenting witness for normal marriage ceremonies. If the mandatory requirements of a customary marriage ceremony are stated to be lacking the marriage is totally void and may not be ratified by the court. It is also true that if at the time of the marriage in question one of the parties to the suit was already married to another person under prior valid marriage under the *Marriage Act* which had not been dissolved by death, absolute divorce, or annulment the later marriage is totally void and no evidence is capable of giving it legitimacy. Thus on these points the marriage occurrence by the defendant has been sufficiently proved and as of now there are no legal devices to reach the upholding of any marriage with the plaintiff.

### **Whether the marriage was dissolved**

57. In the event that the parties were indeed in a marriage, in order for matrimonial property to be distributed the marriage must be dissolved. Section 7 of the *Matrimonial Property Act* 2013, provides for division of matrimonial property upon divorce and/or dissolution of the marriage. It reads as follows:

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.”



58. I am guided by the decision of Justice L. A Achode (as she then was) in ZSN v WNO [2019] eKLR where she declined to determine the distribution of the matrimonial property as the court had no jurisdiction due to the fact that the marriage had not been dissolved. No evidence has been led to prove that the alleged marriage was dissolved. It is my considered view that if there existed any marriage at all, the same has not been dissolved and therefore, this court has no jurisdiction to determine the matrimonial property cause.
59. Before I pen of the entire circumstances of this case has not met the test laid down in Giella Vs Cassman Brown (1973) EA 358 for grant of an injunction against the marital estate. What are the key principles that were pronounced by the court for a remedy of an injunction to issue?
- a. Has the applicant established a prima facie case with high chance of success?
  - b. Will the applicant suffer irreparable damages unless an injunction is issued? And
  - c. Where does the balance of convenience lie?
60. On the first question, the Court of Appeal in Mrao Ltd Vs First American Bank of Kenya Ltd & 2 others (2003) KLR 125. Prima facie case was defined as follows, in Civil a tribunal properly directing itself will concluded that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter.
61. The court notes that the plaintiff was asserting her claim based on the validity of the marriage. I have no doubt that from the depositions on record one cannot adequately find probative evidence to bring the facts of the case to declare the plaintiff as a wife to the defendant. The rights on matrimonial property flow from existence of a valid marriage. In my discernment of the law the plaintiff has no prima facie case with a probability of success to warrant this court granting injunctive relief. With this condition precedent not established by the plaintiff any agitation by the plaintiff for either a temporary or permanent injunction against the purported matrimonial property fails including reference to her suffering irreparable harm and further on the balance of convenience.
62. The upshot of it all the originating summons stand dismissed in its entirety with costs to the defendant.

**DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25<sup>TH</sup> DAY OF JANUARY, 2024**

.....

**R. NYAKUNDI**

**JUDGE**

**In the presence of;**

Ms. Adongo for the defendant

Mr. Wanyonyi for Omusundi present

adongoadvocate@gmail.com

