



**BKR v PWG (Matrimonial Case E033 of 2021)  
[2024] KEHC 2070 (KLR) (Family) (27 February 2024) (Judgment)**

Neutral citation: [2024] KEHC 2070 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CASE E033 OF 2021  
SN RIECHI, J  
FEBRUARY 27, 2024**

**BETWEEN**

**BKR ..... APPLICANT**

**AND**

**PWG ..... RESPONDENT**

**JUDGMENT**

1. This judgement is in respect of the Notice of Motion dated 15<sup>th</sup> June 2021 filed by the Applicant Benjamin Kipkurui Rotich in which the applicant seeks the following orders; -
  1. That there is no presumption of Marriage between the Applicant and the Respondent.
  2. That an injunction be issued against the respondent restraining the respondent, whether by herself, her agents or whatsoever from harassing, threatening, intimidating, insulting and or interfering with;
    - i. The applicant and his family
    - ii. Issues of the cohabitation at the Applicant home, schools, learning institutions and or any other places wherever they may be
    - iii. The applicant’s property
  3. That an injunction be issued against the respondent restraining the respondent, whether by herself, her agents or whatsoever from interfering with Land parcel No.655/Nandi and land parcel No.288/Nandi as it’s not a matrimonial property but a gift from the Applicant father.



4. That the declaration that the property on Land Parcel Number 655/Nandi and Land Parcel Number 288/Nandi, household goods and effects thereon are not matrimonial property of the applicant and the respondent within the meaning of the Matrimonial Property Act, 2013.
  5. An injunction against the respondent, her authorized servant and/or agents deterring the respondent from intimidating and/or threatening harassing the applicant in any manner or at all.
  6. It is in interest of justice and fairness that the application be heard urgently and the prayers granted as prayed.
  7. General damages for loss and suffering experienced in the hands of the defendant.
2. The application is premised on the grounds on the face of it and supported by an affidavit of the Applicant dated on the even date.
  3. The application was opposed by the respondent, Priscillah Wanjiku Gichiri who filed a replying affidavit dated 4<sup>th</sup> November 2021.
  4. The applicant filed response to the respondent's replying affidavit dated 13<sup>th</sup> October 2022.
  5. The application was canvassed by way of written submissions. The applicant filed written submissions dated 13<sup>th</sup> October 2022 whilst the respondent filed written submissions dated 18<sup>th</sup> July 2022.
  6. The applicant's case is that he lived with the respondent from 2003 to 2014. He states that out of the said cohabitation they were blessed with two children. He states that during the cohabitation the respondent was cruel which forced him to move out in 2006 from the place were cohabiting in Mathare.
  7. The applicant states that he was forced to find another place at Embakasi Imara Daima where he lived with his children and the respondent did not look for him and the children until 2008 when she resurfaced to his place in Embakasi and they lived together until 2014.
  8. The applicant states that during this period they lived together and the respondent began having adulterous liason with other men. He states that their relationship deteriorated and she left their home without informing him. The applicant states that in mid-2014 he was unable to take care of the children alone and as they were minors he took them to his parent's house at Nandi where they would have been given better care.
  9. The applicant states on 20<sup>th</sup> October 2020, his son was undergoing circumcision and the respondent came to his parents house to stay on grounds that she would take care of Ian Kibet(Minor). The applicant states further s that he did not object and once the school opened in January 2021, the respondent left the premises.
  10. The applicant states further that in April 2021, the respondent came unannounced to his parents' place and decided to demolish the house that was within applicant's compound in parcel land number 655/Nandi, the plot that was given to applicant by his father in 2019 so as to build a matrimonial home with his wife Patricia Nasimiyu who he had married under customary law and they have been living together since 2017. The applicant avers that at the moment the respondent is still at his parent house destroying the properties that he had built and farming in that piece of land.
  11. The applicant states that the respondent has refused to leave the said land claiming she should get a share as she was a wife, a position in which is not correct. He stated he only has one wife name Patricia Nasimiyu.



12. The applicant prays that the court do evict the respondent from the property parcel land number 655/Nandi as it was gifted to the applicant by his father. He states further that the respondent has never been his wife. The applicant states that he has never introduced her as his wife and thus there is no presumption of Marriage.
13. The applicant states that the respondent did not contribute in the purchase of property parcel number 288/Nandi and he was gifted parcel land number 655/Nandi in 2017 by his father.
14. It is respondent's case that she was not served with the instant application however she perused the court file and had the tenor and meaning of the file. The respondent states that the application as filed is defective and a matrimonial cause can only be instituted by way of originating summons. She states that she got married to the applicant under the Kalenjin Customary Law in 2003. She states that they have been staying together as husband and wife to date, 8 years down the line.
15. The respondent states further that during the cohabitation they were blessed with two minors namely Ivy Chebet and Ian Kibet. The respondent states that during their stay a little misunderstanding occurred in 2014 and the applicant abandoned the minors and she relocated and the applicant left the burden of maintenance and upkeep solely to her.
16. The respondent states that in 2014 while she was at work and without her knowledge the applicant removed the minors from her custody and relocated them to upcountry. The respondent states that she was informed about their suffering and she decided to be visiting them every weekend. She states that in late 2014 the applicant's father prevailed upon her and she resigned and relocated to the village to take care of the minors and him. The respondent states that she stayed at Nandi with minors and father in law for better part of 2014 and 2015 until 2016 when she decided to relocate to Nairobi.
17. The respondent states that it was in the year 2020 while at home that she was informed that the applicant had married. The respondent states that she has been living in a semi-permanent house while they built a permanent house which was completed in 2021 and the family hoped to move in the said house and resume life as normal.
18. The respondent states that previously while working she provided the applicant with funds to buy construction materials and also catered for the payment of construction workers and their food when construction was in progress.
19. The respondent states that at the time of their marriage they were given parcel of land number 655/Nandi by the applicant's father to build matrimonial home. She states further that she participated in the purchase of land No.288/Nandi as she provided funds towards its purchase and she has all along known it as a matrimonial property. The respondent states that recently she was chased out of the applicant's house and told never to come back. She states that she has never demolished any house nor destroyed any property as alleged. The respondent states that she opposes the application as filed.
20. The Applicant submitted through his Advocate on record Mr. Rashid. Counsel in his submissions reiterated averments in Applicant's affidavit and I do not need to reproduce them. Mr. Rashid further briefly submitted on whether there was presumption of marriage between the applicant and respondent. Mr. Rashid submitted that from the respondent's response there is no doubt that there was some relationship between the parties but this relationship was at best, sporadic if not fleeting.
21. Mr. Rashid submitted that there is difficulty in drawing a finding of presumption marriage by cohabitation and repute given the strange circumstances on and off in nature, by which the two parties herein conducted their affair. Mr. Rashid submitted that the reliance placed by the respondent on cohabitation and acts of general repute cannot confer upon her the status of wife as anticipated by the



- Marriage Act. In support the applicant placed reliance on Section 2 of the Marriage Act, 2014 and case law decision in CWN V DK (2012).
22. Mr. Rashid also submitted on whether inherited property can be matrimonial property. He submitted that it would be miscarriage of justice and unfair to the applicant if court orders share the applicant's inheritance in favor of the respondent. He relied on the case law in P.M.O. VS M.N.K. (2017) Eklr in support.
  23. It was submission of the applicant's Advocate that the respondent did not contribute financially in building any of the improvements on the parcel of land number 655/Nandi. He submitted that reliance is placed on section 7 of the Matrimonial Property Act.
  24. Mr. Rashid submitted that the parties herein have never been in formal marriage with each other. He submitted that all they had was mere cohabitation. It was submitted that the respondent is not entitled by any means to an interest in parcel land no 655/Nandi and Land Plot number 288/Nandi as it is clear the parties herein were never in matrimonial union with each other. Mr. Rashid urged this court to grant the orders sought in the application.
  25. The respondent on his part submitted in Person and in her submissions, she reiterated averments in her affidavit and do not need to reproduce the same. It was the respondent's submission that they were married customarily and blessed with two minors. The respondent submitted that they acquired the two subject properties during the subsistence of the said marriage and the subject property constitute matrimonial property and therefore she is entitled to a share of it under section 7 of Matrimonial Property Act.
  26. The respondent also submitted on whether the applicant has demonstrated justifiable reasons to entitle him to the enforcement of injunctive orders. It was respondent's submission that if the eviction by applicant is executed it will likely expose the respondent to irreparable damage and also likely to subject her to embarrassment and premature removal from the matrimonial home without according her alternative place with the children.
  27. The respondent submitted that the children are likely to suffer irreparable damage by being rendered homeless. The respondent submitted that the applicant has not demonstrated justifiable reasons to entitle him to enforcement of injunctive orders.
  28. The respondent submitted that she is entitled to the matrimonial property land No. 655 and 288 Nandi. She submitted that the application as filed is defective, not merited and that the application should be dismissed.
  29. I have considered the application herein, the respondent's replying affidavit and the parties' submissions. The issues for determination are whether;
    - i. Whether the Applicant and the Respondent were legally married.
    - ii. Whether the Properties listed in the application can be declared Matrimonial Properties.
    - iii. Whether the said Properties should be distributed between the Applicant and the Respondent.
    - iv. Who pays the costs of the suit?
  30. On the 1<sup>st</sup> issue as to whether the Applicant and the Respondent were married, it is trite law that he who alleges a fact is duty bound to prove the said fact. In the current case, the Applicant submitted that they lived together from 2008 to 2014. He submitted that they were blessed with two children. The applicant submitted that the respondent left their home and only resurfaced in 2016.



31. The applicant submitted he has never been married to the respondent. the applicant submitted that she is currently married under customary marriage with one Patricia Nasimiyu who have been blessed with two children and were happily married until April 2021 when the respondent decided to come to the applicant home unannounced. The applicant submitted that he seeks injunctive orders against the respondent and a declaration that the respondent is not a wife and never was she under the Marriage Act.
32. The respondent on her part submitted that she is wife to the applicant and their marriage celebrated vide the Kalenjin Customary Law in 2003.
33. The Applicant is asking this court to presume that there was no between the parties herein. The Court of Appeal in PhylisNjokiKaranja& 2 others v Rosemary MueniKaranja&Another NRB CA Civil Appeal No. 313 of 2001 [2009] eKLR, held that the presumption of marriage could be drawn from long cohabitation and acts of general repute. It held that:
 

“Before a presumption of marriage can arise a party needs to establish long cohabitation and acts of general repute; that long cohabitation is not mere friendship or that the woman is not a mere concubine but that the long cohabitation has crystallized into a marriage 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.”
34. A respondent who proposes to the court to find that there was existence of Marriage must;
  - i. Produce evidence of certificate of marriage under the Marriage Act.
  - ii. Produce evidence of customary marriage within the community
34. If a party seeks presumption of marriage he or she must produce evidence from which the court will find a presumption of marriage. The respondent in both her affidavit and submissions has not produced any of the above evidence. This court therefore find that there was no marriage between the applicant and the respondent.
35. From the evidence on record, I find that the nature of the relationship between the Applicant and the Respondent does not favour the raising of presumption of marriage.
36. I accordingly find that in the circumstances, no form of marriage existed between the Applicant and the Respondent. The only evidence on record is that the two had a relationship which culminated in the birth of the two children.
37. I therefore find that the properties listed in the application cannot be declared Matrimonial Properties as it has not been shown that they were acquired during the subsistence of a marriage.
38. Matrimonial property is defined as follows;
  6. Meaning of matrimonial property
    - (1) For the purposes of this Act, matrimonial property means— (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.
    - (2) Despite subsection (1), trust property, including property held in trust under customary law, does not form part of matrimonial property.



- (3) Despite subsection (1), the parties to an intended marriage may enter into an agreement before their marriage to determine their property rights.
- (4) A party to an agreement made under subsection (3) may apply to the Court to set aside the agreement and the Court may set aside the agreement if it determines that the agreement was influenced by fraud, coercion or is manifestly unjust.

39. It accordingly follows that the said properties cannot be distributed between the Applicant and the respondent. Section 7 of the Matrimonial Properties Act provides that Matrimonial Property can only be divided if it is established that they were acquired during the pendency of the marriage and only after dissolution of the marriage and in accordance with the contribution of the parties towards acquisitions. The said Section 7 of the Matrimonial Properties Act states 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".

40. In the instant case, I find that the respondent has not established that the Properties herein are matrimonial property since there is no evidence of the existence of any form of valid marriage between the Applicant and the Respondent. I accordingly dismiss the application dated 15<sup>th</sup> June 2021.

**DATED AT NAIROBI THIS 27<sup>TH</sup> DAY OF FEBRUARY 2024.**

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**S. N. RIECHI**

**JUDGE**

