JTO v AP (Appeal E128 of 2022) [2024] KEHC 10464 (KLR) (Family) (29 August 2024) (Judgment)

Neutral citation: [2024] KEHC 10464 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

APPEAL E128 OF 2022

H NAMISI, J

AUGUST 29, 2024

BETWEEN

JTO ..... APPELLANT

AND

AP ..... RESPONDENT

(Being an Appeal from the Judgement of Hon J.A. Aduke, Senior Resident Magistrate delivered on 28th November 2022 in Milimani Divorce Cause No. E1288 of 2021)

JUDGMENT

1. This appeal arises from a divorce cause in which the Appellant petitioned the lower court for dissolution of his marriage to the Respondent. In his Petition dated 25th November 2021, the Appellant sought a divorce on grounds of cruelty by the Respondent.

2. Briefly, the parties got married in August 2002 under Luo customary law. Their union was blessed with 3 issues. The parties lived together until December 2020, when the Respondent left the country for a visit to the USA, never to return home. It was the Appellant's assertions that this cruelty perpetuated by the Respondent had caused him untold anguish, stress and emotional trauma.

3. The Respondent entered appearance but did not file any response to the Petition. The matter was certified ready for hearing and proceeded as an undefended cause.

4. The trial court delivered its judgement on 28th November 2022. In dismissing the Petition, the court observed thus:

> " It is generally accepted that a court may presume the existence of any fact which it thinks is likely to have happened in relation to the facts of the particular case. This is provided under section 119 of the *Evidence Act*. In this instance, the question before me is whether or not the parties merit an order of divorce. To arrive at this finding, the petitioner has not implored the court to presume the existence of a marriage between the petitioner and the respondent.

> In essence the petitioner herein indirectly asks the court to declare that the respondent and petitioner were married for the court to then grant a divorce. This contravenes the provisions of section 3 of the *Marriage Act*, which requires that all parties should register their unions under the Act. In particular, section 96 (2) and (3) of the Act requires that parties who cohabited before the commencement of the Act apply for registration within 3 years of commencement of the Act. A marriage by long cohabitation and repute was in the case of Hotensiah Wanjiku Yahweh -vs- Public Trustee can, therefore, be recognised under the *Marriage Act* by way of registration of the said union."

5. The trial court went further to refer to the case of Joseph Gitau Githongo -vs- Victoria Mwihaki [2014] eKLR. The Court also noted that at the trial, the petitioner relied on his pleadings on record in evidence and that the Petitioner (Appellant) statement did not make any references to an expert witness testifying and furnishing the court with information on the issue of fact of traditional marriage. The trial court, thus, found that the fact of marriage had not been proved on a balance of probabilities.

6. For avoidance of doubt, the prayers that the Appellant sought in the Petition were:

    i. That the marriage between the Petitioner and the Respondent be dissolved;

    ii. Each party to bear its costs of the Petition;

    iii. Any further or other relief that this Honourable Court may deem just and fit to grant to the Petitioner in the circumstances

7. Being aggrieved by this decision, the Appellant lodged the appeal on the following grounds:

    i. That the Learned Magistrate erred in law and in fact in declining to grant the prayers sought in the Petition dated 25 November 2021 being an undefended cause;

    ii. That the Learned Magistrate erred in law and in fact in departing from the facts as pleaded hence misdirecting herself on the facts of the case;

    iii. That the Learned Magistrate erred in law and in fact in purporting to frame a presumption of marriage between the parties whereas the court had not been called upon to do so;

    iv. That the Learned Magistrate erred in law and in fact in framing an issue of the existence of a marriage between the parties when the same had not been disputed by the Respondent;

8. The Appellant, therefore, seeks the following prayers from this court:

    i. That this Honourable Court be pleased to allow this Appeal in its entirety;

    ii. That this Honourable Court be pleased to order that the Judgement delivered on 28th November 2022 by Hon. J.A Aduke SRM be set aside;

    iii. That this Honourable Court be pleased to order that the Petition dated 25th November 2021 be allowed in its entirety.

9. Parties were directed to canvass the Appeal by way of written submissions. The Appellant filed his submissions dated 12th June 2024.

Applicant's Submissions

10. The Appellant submitted that the Petition having proceeded as an undefended cause, then the trial court erred in insisting that the Petitioner ought to have called an expert witness. Since the Petitioner's averments remained unchallenged, it was not upon the trial court to descend onto the litigation arena

and inquire as to whether the ingredients of a Luo customary marriage had been adhered to, the same having not been in issue.

Respondents Submissions

11. On her part, the Respondent filed Respondent's Declaration and Written Submissions, pursuant to Order 42, rule 16 of the Civil Procedure Rules, in which she stated as follows:

> "I declare that I do not intend, at the hearing of the Appeal, to appear in person or by an Advocate.
>
> That I further submit that I do not oppose the Appeal on the following grounds:
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> a. The marriage between the parties has irretrievably broken down;
>
> b. I did not oppose the Petition in the lower court and it proceeded as an undefended cause;
>
> c. I am advised in view of the saving provisions of Section 98 (1) of the *Marriage Act*, the learned Magistrate misapplied the import of section 96 (2) and (3) of the *Marriage Act* in holding that the parties had to apply for registration of the customary marriage before a petition for divorce can be filed.
>
> For the forgoing reasons, the Respondent prays that the Appeal ought to be allowed and the marriage between the parties dissolved as desired by the parties."

Analysis and Determination

12. It is now well established that the role of the first appellate court is to re-evaluate, re-assess and re-analyze the evidence tendered at the trial in a bid to reach its own independent conclusion. This principle was well captured in the case of Abok James Odera t/a A.J. Odera and Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR where the Court of Appeal held that:-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyse the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way. See the case of Kenya Ports Authority versus Kuston (Kenya) Limited (2009) 2EA 212 wherein the Court of Appeal held inter alia that:-
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> "On a first appeal from the High Court, the Court of Appeal should 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 that respect. Secondly that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence""

13. The same principle was enunciated by the Court of Appeal in the case of Nation Media Group Ltd & 2 others v John Joseph Kamotho & 3 others [2010] eKLR where it was held that:-

> "It is trite law, and we accept Mr. Kiragu's submission that this Court is not bound necessarily to accept the findings of fact by the court below and that an appeal to this Court from a trial by the High Court is by way of 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 allowances in this respect. See Selle and Another v Associated Motor Boat Company Limited and others [1968] EA 123."

14. In a divorce cause, just as is the case in any civil cause, the onus of proving the existence of a fact generally lies on the party who claims it. The required standard of proof is on a balance of probabilities. Sections 107, 108 and 109 of the *Evidence Act* provide for the burden of proof as follows:

    107: Burden of Proof

    1. Whoever desires any court to give judgement as to any legal right or liability depending 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.

    108: Incidence of Burden

    The burden of proof in a suit or proceedings lie on that person who would fail if no evidence at all were given on either side

    109: Proof of Particular Fact

    The burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.

15. With regard to marriages, Section 43 of the *Marriage Act*, Cap 150 of the Laws of Kenya, provides the governing law for customary marriages as follows:

    i. 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.

    ii. 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. (emphasis mine)

16. Section 44 of the *Marriage Act* provides that parties to a customary marriage shall notify the Registrar of such marriage within three months of completion of the relevant ceremonies or steps required to confer the status of marriage to the parties in the community concerned. (emphasis mine)

17. Section 45 provides for the contents of the notifications, namely:

    (i) a specification of the customary law applied in the marriage;

    (ii) a written declaration by the parties that the necessary customary requirements to prove marriage have been undertaken; and

    (iii) signatures or personal marks of two adult witnesses, each of whom must have played a key role in the celebration of the marriage.

18. Once all these rituals are completed, parties are then required to apply to the Registrar of Marriages for registration of the marriage. The application may be done by either party within 6 months of the celebration of their union, whereupon the Registrar will issue a certificate, pursuant to section 55 of the Act.

19. The enactment of this Act in 2014 placed upon parties to a customary marriage the mandatory requirements of registration of such unions within 6 months. The transitional provisions under

section 96 provide a grace period for registration of those customary marriages that were contracted prior to the commencement of the Act, such as the case herein. Section 96 (2) provides that parties to a marriage contracted under customary law, the Hindu Marriage and Divorce Act (Repealed) or the Islamic Marriage and Divorce Registration Act (Repealed) before commencement of this Act, which is not registered shall apply to the Registrar or County Registrar to assistant Registrar for the registration of that marriage under this Act within three years of the coming to force of this Act. The effect of this provision, therefore, is that any customary marriage contracted before May 2014 had to be registered by May 2017.

20. The reprieve came in the form of the Marriage (Customary Marriage) Rules 2017, which came into force in August 2017, through which, the Attorney General by invoking section 96 (3) of the Act, extended the period of registration by 3 years, ending on 31 July 2020.

21. Turning to the facts of this case, the Appellant filed a petition in which he claimed the existence of a customary marriage between himself and the Respondent, which was celebrated in 2002 accordance with Luo customs. It is this marriage that he sought to have dissolved by the trial court. One thing is clear, that the burden of proving the existence of the fact lay on the Appellant, whether or not the issue was unchallenged by the Respondent. The Appellant was required to prove to the trial court that indeed there was a marriage that the court ought to dissolve. The question then lies: how does one prove the existence of a customary marriage in Kenya?

22. This question is aptly answered in section 59 of the *Marriage Act*, which provides as follows:

    1. A marriage may be proven in Kenya by-

        a. A certificate of marriage issued under this Act or any other written law;

        b. A certified copy of a certificate of marriage issued under this Act or any other written law;

        c. An entry in a register of marriages maintained under this Act or any other written law;

        d. A certified copy of an entry in a register of marriages maintained under this Act or any other written law; or

        e. An entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith'nasheri, Shia imam, Ismaili or Bohra communities, or a certified copy of such an entry

23. In this instance, the Appellant did not provide any of the evidence enumerated at section 59 of the Act. Ostensibly, having overlooked the aspect of registration of his customary marriage, the Appellant was locked out from seeking a dissolution of whatever nature of union he shared with the Respondent. However, in my view, there is a clear distinction between the wording of section 59, as compared to other sections governing customary marriages. Unlike in the other sections, at section 59, the drafters used the word "may", thus implying that the list is not exhaustive.

24. Noting that a large number of adult citizens are married customarily, the strict interpretation of sections 44, 45, 96 (2), would mean that a vast majority of these unions are unrecognisable. The reality is that many couples who are married under customary law are yet to register their unions, either due to ignorance or for whatever other reasons. This would mean that there is no legal recourse for parties who feel trapped in such unions since they unable to prove the existence of such a marriage as per the provisions of section 59.

25. Needless to say, it is from this ignorance of the requirement for registration that a lot of disputes end up in the courts, either as divorce proceedings, succession proceedings or even as property disputes. It is high time that civic education was taken seriously, to ensure that the public is enlightened on this and other legal provisions that may have serious ramifications extending beyond what appears on the surface of the dispute.

26. Looking at this instant case, one wonders why the Appellant, having had his Petition dismissed and essentially being informed that he is marriage of 22 years is not legally recognised, would insist on pursuing an appeal. It is difficult to comprehend why the Appellant would persist with this cause, yet he has been "freed" from the union, the very remedy that he sought in the trial court. I would hazard a guess that this goes beyond the mere divorce cause. There may be other interests at play that may not necessarily be reflected in the pleadings.

27. Turning back to the issue at hand, it would be ludicrous to inform two individuals who have lived together for the better part of their adult lives, gone through the rituals of a supposed marriage, held themselves out as husband and wife, borne 3 children and generally suffered and enjoyed the ebbs and flows of life together, that their union is not considered a marriage simply because they failed to register the same and get a certificate. Consequently, due to this lack of registration, the doors of the court are closed to them at the point when they wish to bring their union to an end. Equity will not suffer a wrong without a remedy.

28. In my considered view, the recourse for parties who are yet to register their customary marriages in proving the existence of their marriage would lie in the position enunciated in the case of Hottensiah Wanjiku Yawe -vs- Public Trustee [1976] eKLR, in which the Court of Appeal laid down the following principles:

    (a) First, the onus of proving customary law marriage is generally on the party who claims;

    (b) Second, the standard of proof is the usual one for a civil action (on a balance of probabilities);

    (c) Third, evidence as to the formalities required for a customary law marriage must be proved to that standard;

    (d) Fourth, long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;

    (e) Fifth, only cogent evidence to the contrary can rebut the presumption; and

    (f) Sixth, if specific ceremonies and rituals are not fully accomplished, this does not invalidate such a marriage.

29. The upshot of the cited case is that the Appellant would need to prove the existence of a customary marriage, on a balance of probabilities, by demonstrating that all formalities required for customary law marriage were conducted. As observed by the trial court, this would require calling evidence of experts to testify as to the customs and traditions of a particular tribe and/or witnesses to the traditional marriage ceremonies and rituals. It is evident from the case herein that the Appellant did not do so. He merely adopted his witness statement which did not provide conclusive evidence of the customary marriage, thus calling upon the trial court to make a presumption that there was a valid customary marriage between him and the Respondent.

30. A second option lies at section 61 of the *Evidence Act*, which provides as follows:

> No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:
>
> Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions

31. In summary, to prove the existence of the customary marriage, the Appellant ought to have produced the documents enumerated at section 59 of the *Marriage Act*, or called evidence to prove that the formalities of customary marriage were conducted, or an admission of the existence of the marriage by the Respondent. Notably, whereas the Respondent filed her submissions herein admitting the existence of the marriage, such admission was not forthcoming in the trial court. The Respondent merely entered appearance but did not file any Reply to the Petition nor did she testify.

32. The upshot of this is that I concur with the trial court that the Appellant failed to prove his case to the requisite standard. As such, I find no reason to interfere with the decision. The appeal is hereby dismissed. This being a family matter, each party shall bear its own costs.

DATED AND DELIVERED AT NAIROBI THIS 29 DAY OF AUGUST 2024

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

...Ms. Anyanga h/b Mr. Orina .....for the Appellant

...N/A.....for the Respondent