REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

(Coram: Mwilu DCJ & VP; Ibrahim, Wanjala, Njoki & Lenaola SCJJ)

CIVIL APPLICATION NO. 5 OF 2020

BETWEEN

MARY NYAMBURA KANGARA alias
MARY NYAMBURA PAUL ..... APPLICANT

AND

PAUL OGARI MAYAKAKA ..... RESPONDENT

(Being an Application for Review of the decision of the Court of Appeal (Karanja, Kantai & Koome JJA) dated 21st February, 2020, dismissing an application for certification and leave to appeal to the Supreme Court against the Court of Appeal Judgment dated 25th January, 2019 in Civil Appeal No. 343 of 2017 (Waki, Kiage & Sichale, JJA).

RULING

I. INTRODUCTION

[1] Before the Court is an application dated 4th March, 2020 and filed on 6th March 2020. It is brought under Articles 159(2)(d) and 259 of the Constitution; Sections 15 and 16 of the Supreme Court Act; and Rule 24 of the Supreme Court Rules 2012 (now Rule 33 Supreme Court Rules 2020). The application springs from a suit concerning long cohabitation, presumption of marriage and dealing with property acquired during such cohabitation under Section 17 of the Married Women's Property Act (1882), (MWPA). The Applicant seeks review of the Court of Appeal decision denying certification of the matter as one of general public importance

(GPI). Leave is also sought to appeal to the Supreme Court. The application is supported by the affidavit of the Applicant and it seeks the following orders:

> *(i). THAT this Honourable Court be pleased to review the Court of Appeal decision dated 21st February, 2020 in CACA SUP No. 4 of 2019 at Nairobi and grant the applicant leave to appeal to the Supreme Court against the Honourable Court of Appeal's Judgment dated 25th January, 2019 and issue a certificate that a matter of General Public Importance is involved in the intended appeal.*
>
> *(ii). THAT the costs of this application be in the intended appeal.*

II. LITIGATION BACKGROUND

(a) In the High Court

[2] The Respondent moved the High Court via an Originating Summons under Section 17 of the Married Women's Property Act (1882). He sought a declaration that the suit property, Plot No. Dagoretti/Riruta/168, was acquired and developed jointly with the Applicant during their marriage by cohabitation, hence that it was jointly owned. He also sought restraining orders barring the Applicant from disposing of the suit property; and that it be subdivided equally and each share be registered in the respective party's name or that it be valued and sold and proceeds shared equally.

[3] It was the Respondent's case that they met with the Applicant in 1986 and cohabited as a husband and wife up to the year 2011. Each was by then earning a living and that they jointly saved enough and purchased a quarter acre of land, the suit property, being Plot No. Dagoretti/Riruta/168. He averred that the seller of the suit property, at the time of their purchase, was not willing to sell it to a person outside her community and they thus agreed to have the property registered in the Applicant's name, but to include one of the Respondent's name to cater for his

interests. The reason the property title was registered as Mary Nyambura Paul, so it was urged.

[4] The Respondent further urged that they invested in the property jointly, built rental houses and that he, the Respondent, retired from employment in 1993 to invest in a bar and a butchery (*Kwa Mkisii*) within the property. That utility bills were registered in the Respondent's name until 2011 when the Applicant changed the electricity bills to her name but water bills remained registered in the Respondent's name. Further, that tenancy agreements for the rental houses were drawn in the Respondent's name and he was the chairman of the sewer line construction committee within the estate in respect of the suit property. That he invested his lifetime earnings in developing the suit property, now a three floor storey building where he resided for two decades. That they agreed to engage an agent to manage the estate due to the Respondent's age and an agreement was signed between the parties and the agent.

[5] That subsequently, the Applicant obtained restraining orders against the Respondent. That was in Milimani CMCC 4364 of 2011 in which suit, she also produced a contrary estate agent agreement. The Respondent was evicted and the Applicant started collecting all the rents, of about Kshs.258,000/- per month, rendering the Respondent without any source of income to support himself and his other family. Conflict started when the Respondent requested the Applicant that they allocate one bedroom on a permanent basis to his son from another marriage who was finishing college, as they had allocated one to the Applicant's son from her earlier marriage. It is on this basis that the Respondent moved the High Court for the orders contained in the Originating Summons.

[6] Before the High Court, the Applicant denied marriage to the Respondent. She averred that she was at all material times married to one Kangara, with whom they separated in 1987. She agreed to cohabiting with the Respondent for some time, but contended she did not have the capacity to contract a subsequent marriage

since she had not divorced Kangara until his death in 2011. She thus urged that with lack of proof of marriage, the Respondent could not be afforded protection under the MWPA. She submitted that the Respondent was her agent who sold water within the premises, having a butchery and a bar. That some utilities bills were therefore registered in his name for the premises he had rented. She urged that she had purchased the suit property by herself and that the name Paul appearing amongst her names on the property's title document, referred to her father who was christened as Paul in the year 1979.

[7] Upon hearing the parties, the High Court (*Musyoka J*) ruled that even though the parties had cohabited for a long period with repute of being married, he could not presume marriage. That the Applicant, formerly married to Kangara under customary law, remained married to the said Kangara until his demise in 2011, since they had never divorced. That the Applicant did not have capacity to contract a subsequent marrriage. That the Applicant was living in an adulterous relationship and not a marriage. The name Kangara whose origin could not be explained from the Applicant names, could only be attributed to her former husband. In absence of a marriage, the Court held, the Respondent could not rely on the provisions of MWPA whose reliefs are based on proof of marriage.

(b) In the Court of Appeal

[8] The Respondent was aggrieved and appealed to the Court of Appeal. The Court of Appeal allowed the appeal holding that the High Court erred in finding that there was long cohabitation but declined to presume marriage because of a *'Kangara'*, whose existence the Court of Appeal found was not proved. The appellate Court presumed existence of a marriage, allowed the appeal, and ordered the suit property to be divided into two halves, a share for each party.

[9] Aggrieved by that decision, and desirous to appeal to this Supreme Court, the Applicant sought certification and leave before the Court of Appeal. Her application for leave was denied by a majority decision of the Court of Appeal. The

majority held that the issues the Applicant intended to be raise before the Supreme Court were not issues before the trial court or on appeal. They held that the matter before the High Court had been a simple one - whether the Applicant and the Respondent had cohabited and whether, during that cohabitation, they had acquired the property in question. To the learned Judges in the majority, these were straight forward matters of a private nature and findings had been made on those issues. There was thus no issue raised meeting the standard set by the Supreme Court in ***Hermanus Phillipus Steyn v Giovanni Gnecchi-Ruscone*** [2013] eKLR on what amounts to a matter of general public importance.

[10] Dissenting, *Koome JA*, found that the matters raised bore public interest significance. First that when the Respondent filed the suit, he was not claiming to be husband to the Applicant. Consequently, the learned Judge of Appeal opined that it is necessary for the Supreme Court to determine whether it was appropriate to resolve the issue of presumption of marriage under the said regime of law. Further that the legal regime under the MWPA had majorly been available to women, hence this case, where it is a man who was claiming under it, raised pertinent questions that the Supreme Court should settle. These she stated as follows:

> *"However this case raises questions which in my humble view are of general public importance; these are, whether, parties who are not in a recognized union of marriage in the first place and where there is even no prayer sought for presumption of marriage can file a case under the* ***MWPA,*** *which was a procedural form of determining uncontested matters between husband and wife. Can a court therefore proceed to determine weighty contested issues of presumption of marriage in the same manner? What comes first a suit for presumption and what consideration should be taken into account in determining ownership of property within marriage?"*

Based on these and other questions she posed, the learned Judge of the Court of Appeal dissented from the majority holding that the matter had met the threshold in ***Hermanus*** case.

III. APPLICATION BEFORE THE COURT

[11] Before the Supreme Court, the Applicant has anchored her application on the dissenting decision of *Koome, JA*. The issues raised are: *whether parties in an unrecognized marriage where no prayer is sought for presumption of marriage can file a case under Married Women Property Act [MWPA] which provides for husband and wife; whether a suit for presumption of marriage should precede claim under the MWPA; what consideration should be taken into account in determining property ownership in marriage; whether the Court of Appeal made an actual assessment of the parties respective contribution to acquisition and development of the suit property*.

[12] Other issues raised are presumption of marriage where there is no consent; capacity of parties to enter into multiple relationships; and principles of equality of ownership of property, which are stated to be constitutional controversies affecting the unit of family. That these issues touch on the Bill of Rights and principles of equity and equality governing sharing of property in a marriage. That this Court is called upon to address claims by men for courts to know the principles to apply since men and women play different roles in marriage. That these are matters of public interest because of rampant long-term cohabitation trends in Kenya; and these issues transcend the circumstances of this particular case and have a bearing on marriage and the family which are fundamental pillars of social order protected by the Constitution. Further, that there is uncertainty in law relating to whether the Common Law doctrine on presumption of marriage ought to continue being applied under the current constitutional dispensation due to lack of recognition under the current provisions of the Marriage Act No. 4 of 2014. The

Applicant urge that the Supreme Court ought to settle the law in line with Section 3 of the Judicature Act.

[13] The Respondent opposed the application via a Replying Affidavit dated 5th June 2020. He contends that there was no appeal by either party on the High Court finding that there was long cohabitation between the parties. His appeal was limited to the Applicant's denial of consent and capacity to enter into marriage by cohabitation due to her undissolved marriage to 'Kangara'. He thus urges that the issues raised in the application as the issues in contention were not issues raised in the Court of Appeal.

[14] The Respondent deponed that the Marriage Act does not apply retrospectively and that presumption of marriage, based on common law doctrine is not ousted by the Marriage Act. He relied on Section 119 of Evidence Act on presumption of facts. That the application does not raise matters of general public importance and it was properly dismissed by the Court of Appeal. That the matters intended to be placed before the Supreme Court were never placed before the superior courts before and do not transcend the interests of the parties.

IV. PARTIES WRITTEN SUBMISSIONS

(a) Applicant's submissions

[15] In her submissions dated 4th March 2020, the Applicant urges that there was no cohabitation by the time the suit was filed under the MWPA and Section 3 of the Judicature Act. That presumption of marriage was never sought whereas property under MWPA is given to a spouse. That the prayer for presumption of marriage was introduced at the Court of Appeal violating right to fair hearing. Reliance was placed on the principles set by the Supreme Court in the ***Hermanus*** case among other decisions of this Court.

[16] It is submitted that the appeal raises issues of GPI as prayed. The claim is made by a man, revolving around cohabitation and presumption of marriage doctrine. The matter raises substantial points of law as per the minority finding by *Koome JA*. She submits that cohabitation outside marriage is rampant nowadays and the Supreme Court should take judicial notice of the same. Being not a recognized form of marriage in the Marriage Act 2014, the Supreme Court's input is needed.

(b) Respondent's submission

[17] In his submissions dated 5th June 2020, the Respondent reiterates his averments in the Replying Affidavit. He contends that the issues the Applicant intends to raise in this Court of alleged general public importance do not met the requirement under Article 163(4) of the Constitution. He submits that the issues claimed to be issues of law never arose in the superior courts below as required. It is his contention that there is neither uncertainty in law nor existence of contradictory precedent as alleged. He asserts that the Applicant's submissions would have been useful if tendered before the superior courts below. Thus, that the application fails to meet the set principles by case law and the same should be dismissed.

V. ANALYIS AND DETERMINATION

[18] The single issue for determination in this matter is *whether the Applicant has made a case for review of the Court of Appeal denial of certification, and whether the leave to appeal to the Supreme Court should thus issue upon that review*.

[19] The power of this Court to review a denial of certification by the Court of Appeal is provided for under Article 163(5) of the Constitution and Rule 33(2) of the Supreme Rules 2020 (previously Rule 24 of Supreme Court Rules 2012 (Repealed) under which this application was brought. This jurisdiction is now

circumscribed in a replete of decisions by this Court which lay out the guiding principles on the same, notably the ***Hermanus*** case.

[20] We have specifically weighed this application against the guiding principles set in the ***Hermanus*** and ***Town Council Of Awendo v Nelson Oduor Onyango & 13 others*** [2015] eKLR cases, among other principles setting cases on certification. The crux of the issues the Applicant formulated for determination by this Court and arguments thereto are informed by the dissenting opinion of the Court of Appeal. We reiterate that in an application for review of the decision of the Court of Appeal on certification, akin to this one, the decision of the court under review is the majority decision, as that is the decision of the court. This is the decision which an applicant is under a duty to demonstrate how the majority in making it erred, so that the Supreme Court is persuaded to review and set it aside. More premium should therefore be on the majority decision and not the dissenting opinion. In that regard, we note the words of *Nyamu, JA* in the persuasive Court of Appeal decision in ***Stanbic Bank Kenya Limited v Kenya Revenue Authority*** [2009] eKLR, on dissenting opinions thus:

> "***The above notwithstanding I do salute the dissent of my learned brother Justice Visram, J.A. I therefore, consider it appropriate to try and explain what I consider to be the position of dissenting judgments should occupy in our jurisprudence. First in my view, dissenting judgments constitute an expression of independence, freedom of thought and intellect and, second, <u>they may lay the basis for future development of the law</u>. Third, they may provide a firm base for future generations not to contain themselves in straight jackets, but to always remember that at the end of the day, that much sought justice might after all not be in the thunder of the***

majority judgment, but in the silent breeze of the minority judgment!

Charles Hughes, a one time U.S. Supreme Court Chief Justice is often quoted as having said:-

> *"dissenting opinions constitute an appeal to the brooding spirit of the law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting judge believe the Court to have betrayed."*

A dissenting judgment should never stir up anger but instead encourage a brotherhood of service to the law and society."

[21] Thus, to the judges, dissenting opinions grant them an avenue to freely express their contrary views while maintaining the brotherhood and comity of service to the law. On the other hand, to the litigants and the society at large, dissenting opinions assures them that their views have not been disregarded and may in fact form the basis of future development in that particular area of the law. Having said that, it cannot be that the mere fact that there is a dissenting opinion, outrightly gives a litigant a right of review of the Court of Appeal decision to this Court and that that litigant now converts that dissenting opinion to his/her foundation for the review application before the Supreme Court. A dissenting opinion is not a panacea for a meritorious review application before the Supreme Court.

[22] Having so said and turning to the merit of the application before us, at the core of the findings of both superior courts was the issue of consent to marriage now framed in line with the Article 45 (2) of the Constitution 2010. That argument is the backbone of all other arguments in the application. From it, it is argued that without consent to marry as required, there was no valid marriage by reputation between the parties, and in absence of a marriage, the MWPA could not apply to

the parties. This leads to the contention that the order dividing the property allegedly acquired jointly by the parties during continued cohabitation had no legal basis.

[23] From the Record, parties led viva voce evidence in proof of their cases, each party calling witnesses. The High Court found that there was long cohabitation but failed to move further to determine other aspects of the case because it could not presume a marriage based on morality, holding the cohabitation to be an adulterous relationship in absence of capacity to marry. The issue before the Court of Appeal was thus whether the High Court was right in failing to presume a marriage having found there was long cohabitation and whether in presence of consent, whether the suit property could be equally shared by the parties. Before this Court, it has been submitted that the Court of Appeal could have re-assessed all aspects of the case including contribution had the Applicant cross appealed. Finding that the Applicant had capacity to marry, the Court of Appeal ordered the suit property to be divided equally.

[24] On our part, we note that the issues raised are not frivolous and indeed transcend the specific circumstances of the parties before us. The question of property acquired during cohabitation or in a marriage which is unrecognized by law is an important one for the general public and this Court cannot shut its eyes to the need to settle the law in that regard. Furthermore, we are of the opinion that we need to give guidance on whether, proceedings can lie under the Married Women's Property Act, in such a situation.

[25] In the circumstances, while granting a review of the decision of the Court of Appeal declining certification under Article 163(5) of the Constitution, parties shall file submissions and highlight them on the following issues only:

i) Whether parties to a union arising out of cohabitation and/or in a marriage unrecognized by law can file proceedings under the Married

Women's Property Act? And if so, upon what basis would this be done?

ii) What relief is available to the present parties?

[26] The upshot is that considering the principles of this Court on review of certification, we make the following orders;

(a) The Applicants' application for review of certification and leave to appeal to the Supreme Court dated 4th March 2020 is hereby allowed but only to the extent that this Court has stated.

(b) There is no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this **16th Day** of **July, 2021.**

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P. M. MWILU **DEPUTY CHIEF JUSTICE &** **VICE-PRESIDENT** **OF THE SUPREME COURT**	**M. K. IBRAHIM** **JUSTICE OF THE SUPREME COURT**
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S. C. WANJALA **JUSTICE OF THE SUPREME COURT**	**NJOKI NDUNGU** **JUSTICE OF THE SUPREME COURT**

.....
I. LENAOLA
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,
SUPREME COURT OF KENYA