REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA AT NAIROBI

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

PETITION NO. 9 OF 2021

–BETWEEN–

MARY NYAMBURA KANGARA alias MARY NYAMBURA PAUL ..... PETITIONER

-VERSUS-

PAUL OGARI MAYAKA ..... RESPONDENT

AND

INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA (ISLA) ..... AMICUS CURIAE

(Being an appeal against the Judgement and Order made on 25th January 2019 by the Court of Appeal in Civil Appeal No. 343 of 2019 at Nairobi (Waki, Kiage & Sichale JJA)

Representation:

Mr. Andrew Kagicha h/b Mr.Mitheka for the Appellant
(*Instructed by Mitheka & Kariuki Advocates*)

Ms. Moses Siagi for the Respondent

(*Instructed by Moses N. Siagi & Co. Advocates*)

Ms. Nyokabi Njogu for Amicus Curiae

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] This appeal raises a fundamental legal issue pertaining to property rights. It is premised on the provisions of the *repealed* Married Women's Property Act of 1882. The Act was repealed in January 2014 while this matter was filed in the High Court in November 2013. The appellant challenges the decision of the Court of Appeal (Waki, Kiage & Sichalle) which set aside the decision of the High Court (Musyoka J) and determined that there was a presumption of marriage between the appellant and the respondent and that the respondent was entitled to half of the suit property being Plot No.29 within Dagoretti/Riruta/168 together with the developments thereon.

B. BACKGROUND

i. Proceedings in the High Court

[2] The respondent instituted Nairobi **High Court Civil Suit No. 6 of 2012**, POM vs. MNK, by way of an originating summons dated 5th November 2013 against the appellant whom he claimed to be his wife. The respondent invoked the provisions of Section 17 of the Married Women's Property Act (1882), (MWPA) on the claim for division of matrimonial property.

[3] The respondent's contention was that he and the appellant began to cohabit as husband and wife sometime in 1986. It was his case that from joint savings, they purchased the suit property. He asserted that he belonged to the Kisii tribe and that the seller who belonged to the kikuyu tribe was not comfortable selling the parcel of land to a non-Kikuyu therefore, the parties resolved to have the

property registered in the appellant's name although they had both contributed to its acquisition.

[4] According to the respondent, the parties took possession of the parcel of land between 1992 and 1993 which they developed, and constructed rooms thereon, one of which they used as their matrimonial home, and let the other rooms out. It was his case that he did the legwork relating to the connection of electricity, sewerage, and water to the premises. In addition, he operated a bar from the premises. He claimed that the appellant evicted him from their matrimonial home in 2011 and at this time the amount of rent collected from the premises was Kshs. 258,100 per month.

[5] The appellant rejected all the respondent's claims. She denied his involvement in the purchase of the suit property, his contentions on registration of the property urging that she allowed him to manage the suit property because they were friends. According to her, she was already married under customary law to a one KM now deceased and although they were separated, she never divorced him. Therefore, she did not have the capacity to contract another marriage while her first marriage was still subsisting. She also claimed that after KM died in 2011, the respondent intensified harassment to coerce her into marriage. She subsequently filed ***CMCC No.4364 of 2011*** to restrain the respondent from trespassing into her properties.

[6] By a judgment delivered on 9th June 2017, *Musyoka J* dismissed the Originating Summons with costs to the appellant. The learned judge found that although there was long cohabitation between the parties, the principle of presumption of marriage, was inapplicable under the circumstances seeing that the appellant was already in a married to KM. The learned judge held that the appellant did not have the capacity to marry the respondent, that the relationship between the parties was adulterous and the resulting cohabitation could not be deemed a marriage. In the absence of a marriage, the court held that the

respondent could not rely on the provisions of MWPA whose reliefs are based on proof of marriage.

ii) Proceedings in the Court of Appeal

[7] Dissatisfied with the judgment of the High Court, the respondent filed **Civil Appeal No. 343 of 2017** based on two grounds. That the learned Judge erred:

i. *In fact, in finding that the appellant, during the subsistence of the relationship between the appellant and the respondent, was married to one KM.*

ii. *In law, in declining to deal with the property acquired by the respondent and the appellant during the relationship and/or cohabitation of parties, the fact that the appellant was married to somebody else notwithstanding.*

[8] 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 one KM, whose existence the Court of Appeal found was not proved. The appellate Court presumed the existence of a marriage and allowed the appeal, and ordered the suit property to be divided into two halves, a share for each party.

[9] Aggrieved by this decision, and desirous to appeal to the Supreme Court, the appellant sought certification and leave before the Court of Appeal that her matter was of general public importance. Her application for leave was denied by a majority decision of the Court of Appeal. The majority held that the issues the appellant intended to 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 straightforward matters of a private nature and findings had been made on those issues. Thus, there were no

issues 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.

iii) Proceedings in the Supreme Court

[10] Dissatisfied with the Court of Appeal's ruling on certification, the appellant sought for review. On 16th July 2021, in *Sup. Civil Application No. 5 of 2020*, this court in a ruling held that the issues raised by the appellant were not frivolous and they transcended the specific circumstances of the parties. As such, the court granted a review of that certification, granted leave to file an appeal and confined the parties to the following issues for determination now before us:

> ***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?***

[11] Consequently, the appellant filed an appeal before this Court. The appeal is premised on Article 163(4) (b) of the Constitution, Section 3 of the Supreme Court Act No. 7 of 2011, and this Court's ruling of 16th July 2021 in Sup. *Civil Application No. 5 of 2020*. The appellants seek, *inter alia*, the following orders from the Court:

> *i. A declaration that the common law doctrine of presumption of marriage has no application in Kenya in light of Article 45 of the Constitution, Section 3 of the Judicature Act, and the comprehensive provisions of the Marriage Act No. 4 of 2014.*

ii. *A declaration that presumption of marriage is no longer a concept which is beneficial to the institution of marriage, to the status of the parties and to the issue of their union or in the alternative.*

iii. *A declaration that the doctrine of presumption of marriage ought to be sparingly applied as per this Court's guidelines and principles.*

iv. *An order setting aside the judgment of the Court of Appeal and upholding the judgment of the trial court.*

v. *An order granting costs to the appellant.*

vi. *Any other relief that the court may deem just to make.*

C. PARTIES' SUBMISSIONS

a. The appellant

[12] The appellant relied on her written submissions. On the *issue of 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,* the appellant submitted that the existence of a marriage recognized in law remains the central status that grants a party *locus standi* under Section 17 of MWPA. Additionally, she argued that marriage by cohabitation is not recognized under the current marriage legal regime in that it is neither one of the kinds of marriages that can be registered under **Section 6(1)** of the Marriage Act, 2014 nor is there evidence of cohabitation- one of the means of proving the existence of marriage under of the said Act.

[13] It was the appellant's case that mere cohabitation without any evidence on capacity, consent, and intention to marry is not enough to establish a marriage by presumption, especially in a situation where one party is denying consent, capacity, and intention to marry. Citing ***M v R M*** **[1985] eKLR (Civil Appeal No. 61 of 1984),** the appellant argued that courts should not be used to force parties into a marriage relationship through the doctrine of presumption of marriage.

[14] The appellant also submitted that in as much as the suit commenced before the enactment of the Marriage Act No. 4 of 2014 and Matrimonial Property Act No. 49 of 2013 these laws cannot be ignored as they were enacted in furtherance of Article 45 of the Constitution which was in place before the respondent's suit was filed.

[15] She urged that the doctrine of presumption of marriage ceased to apply in Kenya after the enactment of the current marriage legal regime which is not necessarily subject to the principles against retroactivity in that it was enacted in furtherance of Article 45 of the Constitution.

[16] She further submitted that Section 17 of MWPA cannot be used to establish a marriage by presumption, assuming that the doctrine is still alive in Kenya today. That this was applicable where such relief was not pleaded and prayed for before the trial court, the prayer initially sought being one for ascertainment of property rights between unmarried persons. In addition, the appellant argued that the respondent ought to have first established, in a separate suit, the existence of marriage by presumption and obtained a valid court declaration before purporting to file his proceedings under Section 17 of MWPA.

[17] In the alternative, the appellant submitted that the respondent ought to have at least pleaded and prayed for the establishment and declaration of marriage by presumption in his Originating Summons to enable the court to entertain evidence touching on long cohabitation and presumption of marriage. The appellant concluded by urging the Court to set aside the judgment of the Court of Appeal.

b. The respondent's case

[18] The respondent relied on his written submissions. On *the question of whether parties to a union arising out of cohabitation and/or in a marriage unrecognized by law can file proceedings under the Married Women Property Act*, the respondent's counsel urged that the correct interpretation of the term

"marriage" in the MWPA should be that it applies to all marriages recognized or unrecognized in law. Counsel was of the view that a plain and reasonable appreciation of the MWPA led to the inescapable position that any marriage qualifies as such under that Act. As a result, the essence of the MWPA is to enable people in a union, who have jointly invested in property, to access courts with ease in a manner that meets the expectations of people in all spheres of life as envisaged in the Constitution.

[19] It was further urged that the appellate judges, while aware that the matter was commenced under the MWPA, had no problem deciding the matter of sharing the properties amongst the parties. He submitted that the appellate judges thus appreciated the existence of a presumption of marriage albeit unrecognized in law. On the issue of the relief available, the respondent agreed with the finding of the Court of Appeal on marriage and division of the suit property. In conclusion, the respondent urged that the judgment of the Court of Appeal be upheld and costs awarded to him.

c. Brief of Amicus Curiae

[20] The *amicus curiae* submitted that although cohabiting relationships are mentioned in Section 2 of the Marriage Act, it is not provided for in the substantive section of the legislation. The legal framework that is used to determine the existence of a marriage is therefore to be found in Section 119 of the Evidence Act as well as case laws developed by the Court of Appeal.

[21] ISLA asserted that long cohabitation and general repute will give rise to a rebuttable presumption that marriage exists between a man and wife as was recognized in ***Hortensia Wanjiku Yawe v. The Public Trustee Nairobi*** [1976] eKLR and ***Mary Wanjiku Githatu v. Esther Wanjiru Kiarie*** [2010] eKLR.

[22] It submitted that courts have also considered whether parties had the capacity to marry in determining if there would be a presumption of marriage. It cited S.M.M ***alias G.S.M alias S.S.M v. C. A. K. M*** [2017] eKLR and ***O.K. N v. M.P.N*** [2017] eKLR to buttress this assertion.

[23] It was urged that there is currently no legal framework to recognize and provide legal consequences to cohabitation relationships. Therefore, courts have been applying the legal framework applicable to recognized marriages. It was contended that though the division of property is determined based on the contribution, decisions do not take into consideration contribution to ensure equality. Consequently, parties who find themselves in cohabitation unions and who contribute to the acquisition and development of property that is used for the benefit of that union are often deprived of this property when the union ends. It urged that if protections afforded to marriage are extended to these relationships, the same should be extended even in the division of property.

[24] ISLA pointed out that the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) Committee has developed its analysis to extend rights that apply to women in marriage to women who are in relationships that are not recognized in law. It also submitted that various jurisdictions, such as the United Kingdom, Tanzania, Malawi, and Trinidad and Tobago have developed legislation and policies to extend protection to cohabitation unions. In the United States of America, the doctrine of common law marriage protects women upon the dissolution or relationships of dependence. If they qualify as wives under the system, it was contended, then the court ought to grant them all the rights of a wife or widow. Further, those States which provide for the protection of cohabitants provide for the protection of parties' property rights as well.

[25] It further submitted that in South Africa, courts have grappled with this issue as there is no legislation that explicitly protects cohabitation. In various

cases, the courts in dealing with the issue of cohabitees or long-term relationships have accorded the same benefits as spouses in terms of various statutes. Also, courts have had to consider that the relationships in those cases were worthy of similar protections as extended to marriages. It relied on ***Ryland v Edros*** 1997 (s) SA 690 (CC) and ***Amod v Multilateral Motor Vehicle Accidents Fund*** 1999 (4) SA 1319 (SCA at 1327 G – H) to support the argument.

[26] Based on the foregoing, ISLA submitted that the interpretation of Article 45 of the Constitution of Kenya, as well as the international and regional human rights treaties to which Kenya is a party, means that provision for those parties in cohabitation unions, or unrecognized marriages must be afforded similar protections in the division of property acquired during those unions; and there is therefore need for a legal standard that ensures the right of parties to all forms of marriage, including cohabitation unions or other unrecognized marriages that ensure the protection of the right to access property.

[27] It urged that the beginning of the development of this legal standard can start with this Court deciding on the rights of those affected parties and how property should be equitably divided. This can be done under the legal framework for division of matrimonial property; and any remedies granted by this Court on the foregoing would benefit from a structural order, requiring the State to report on the progress made in the reform of the law on division of property. This would ensure the effective implementation of any orders that the Court will make.

D. ISSUES FOR DETERMINATION

[28] The issues framed for determination are as follows;

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?

E. ANALYSIS AND DETERMINATION

[29] Before delving into the issues as framed by this Court, we note from the record that the cause of action in this matter arose in 2011 and the matter was filed in 2012 before the enactment of the Marriage Act, 2014, and Matrimonial Property Act, 2013. This court in the case of ***Samuel Kamau Macharia & Ano. vs. Kenya Commercial Bank Ltd & 2 Others,*** SC Application No. 2 of 2011 [2012] eKLR we held as follows regarding retrospective application of legislation:

> *"As for non-criminal legislation****, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective effect is not to be given*** *to them unless by express words or necessary implication it appears that this was the intention of the legislature."* [emphasis added]

[30] Flowing from the above, it is our considered view that the Marriage Act, 2014 and Matrimonial Property Act No. 49 of 2013 are not applicable in this matter as the cause of action arose before the said statutes were enacted into law and cannot be applied retrospectively. We now turn to the issues as framed.

(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?

[31] While it is the appellant's case that the existence of a marriage recognized in law remains the central status that grants a party *locus standi* under Section 17 of MWPA, the respondent contends that the correct interpretation of the term marriage in the MWPA should be that it applies to all marriages recognized or unrecognized in law.

[32] In that context, the MWPA was enacted in England in 1882. It found its way into the Kenyan legal regime when it was inherited as a statute of general application pursuant to the Judicature Act. This made the MWPA applicable in Kenya but that was until 16th January 2014 when our own statute, the Matrimonial Property Act, 2013 (MPA) commenced. However, as earlier stated we will not delve into the MPA.

[33] The MWPA reads that it is ***"An Act to consolidate and amend the Acts relating to the Property of Married Women."*** Lord Morris of Borthy-Guest in ***Pettit v. Pettit [1970]*** **AC** 777 stated:

> *'One of the main purposes of the Act of 1882 was to make it fully possible for the property rights of the parties to a marriage to be kept separate.'*

[34] Section 17 of the MWPA states as follows;

> ***'In any question between husband and wife as to the title to or possession of property, either party …… may apply by summons or otherwise in a summary way to any judge of the High Court of justice ……and the judge ….. may make such order with respect to the property in dispute, and to the costs of and consequent on the application as he thinks fit.'***

[35] Accordingly, and in answer to the question posed above, it is clear to us that the MWPA applied only to '***parties to a marriage; husband and wife.'*** It is worth noting from the onset that the MWPA only refers to *'parties to a marriage'* and *'married women'*. It does not go into details as to how the marriage came to be or how it was contracted. To our minds therefore, we are of the view that parties to a union arising out of cohabitation and/or in a marriage unrecognized by law could file proceedings under the MWPA upon the basis that the MWPA does not distinguish between marriages recognized or unrecognized in law. In other words, the MWPA applies to all marriages recognized or unrecognized in law. The question that then arises in the matter before us, is whether or not, the parties to this dispute were married.

[36] The Appellate Court in this matter had determined that *'the appellant was, by presumption married to the respondent.' It is this determination that falls to us for examination.* Presumption of marriage is a well-settled common law principle that long cohabitation of a man and woman with a general reputation as husband and wife raises a presumption that the parties have contracted marriage. However, a presumption of marriage is a rebuttable presumption and can disappear in the face of proof that no marriage existed.

[37] According to ***Halsbury's Laws of England, Matrimonial and Civil Partnership Law*** (Volume 72) 5th Edition 2015:

> *"Where a man and a woman have cohabited for such a length of time, in such circumstances, as to have acquired the reputation of being man and wife, a lawful marriage between them will be presumed even if there is no prior evidence of any marriage ceremony having taken place, particularly where the relevant facts have occurred outside the jurisdiction and this presumption can be rebutted only by strong and weighty evidence to the contrary."*

[38] Similarly, ***Bromley Family Law 5th Edition*** provides that:

> *"If a man and woman cohabit and hold themselves out as husband and wife, this in itself raises a presumption that they are legally married."*

[39] Section 119 of the Evidence Act, Cap 80 Laws of Kenya is also instructive. It provides as follows:

> ***"The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."***

[40] From the foregoing, courts are permitted to make a *prima facie* legal inference that certain facts exist without proof, regard being taken to the common course of natural events and human conduct, in relation to the facts of a particular case.

[41] The presumption of marriage was first applied in Kenya in ***Hortensia Wanjiku Yawe v. The Public Trustee Nairobi*** [1976] eKLR. The principles distilled from this former Court of Appeal (W*ambuzi P, Mustafa VP and Musoke JA*) for East Africa decision were outlined in ***Mary Njoki v John Kinyanjui Mutheru & 3 Others, (Mary Njoki)*** [1985] eKLR by Kneller JA as follows:

i. *The onus of proving customary law marriage is generally on the party who claims it;*
ii. ***The standard of proof is the usual one for a civil action, namely, 'on the balance of probabilities;***

iii. *Evidence as to the formalities required for a customary law marriage must be proved to that standard; (Mwagiru vs. Mumbi, [1967] EA 639, 642)*

iv. ***Long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;***

v. ***Only cogent evidence to the contrary can rebut the presumption (Toplin Watson vs. Tate, [1937] 3 All ER 105***

vi. *If specific ceremonies and rituals are not fully accomplished this does not invalidate such a marriage. (Sastry Veliader Aronegary vs. Sembecutty Vaigalie (1880-1) 6 AC 364; Shepherd George vs. Thye, [1904] 1 Ch 456)*

[42] The Judge went on to state:

> "***Cohabitation and repute do not always constitute a marriage. They can be part of a mode of proving one in that they are substituted for some missing element or elements.*** **One of the earliest put it this way. *Cohabitation, with habit and repute, in the absence of countervailing proof to the contrary, establish a marriage on the ground that the cohabitation as husband and wife is proof that the parties have consented to contract that relationship.*"** ***[Emphasis ours]***

[43] *Nyarangi JA* in the same judgment delivered himself as follows*;*

> *"In my judgment,* ***before a presumption of marriage can arise, a party needs to establish long cohabitation and acts showing general repute****. If the woman bears a child or better still children, so*

that the man could not be heard to say that he is not the father of the children, that would be a factor very much in favour of presumption of marriage. Also, if say, the two acquired valuable property together and consequently had jointly to repay a loan over a long period, that would be just what a husband and wife do and so it would be unreasonable to regard the particular man and woman differently. Performance of some ceremony of marriage would be strong evidence of the general repute that the parties are married. ***To sum it, there has to be evidence that the long cohabitation is not close friendship between a man and woman, that she is not a concubine but that the cohabitation has crystallized into a marriage and that it is safe to presume that there is a marriage****. To my mind, these features are all too apparent in the* ***Yawe*** *and in* ***Mbiti*** *(supra). To my mind, presumption of marriage, being an assumption does not require proof, of an attempt to go through a form of marriage known to law."*

[44] Our courts have subsequently applied the doctrine of presumption of marriage in several cases. In ***Phylis Njoki Karanja & 2 others v Rosemary Mueni Karanja & another*** [2009] eKLR the Court of Appeal stated as follows:

"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.

[45] In ***Mary Wanjiku Githatu v Esther Wanjiru Kiarie*** [2010] eKLR 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 dependent 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 along cohabitation or other circumstances evinced an intention of living together as husband and wife."*

[46] More recently, Ngaah J, in ***CWN v DK [2021]*** **eKLR** was of the view that;

> "***as far as presumption of marriage is concerned, it is a status of relationship that turns much on evidence as much as it is a presumption of law."***

[47] Bearing in mind the above case law, did the instant relationship possess the constitutive elements of presumption of marriage, that is, long cohabitation and repute of marriage absent cogent evidence to the contrary? In other words, is it safe in the circumstances of this case to presume a marriage?

[48] The appellant argued that parties to a marriage must have the capacity to enter into a marriage and that she did not have the requisite capacity for the relationship between her and the respondent to be presumed a marriage as she was married to KM and had three children out of that relationship. The appellant further contended that she was married to KM in the 1980s, therefore, she did

not have the capacity to enter into another marriage with the respondent, and that lack of capacity, consent, and intention to marry rebuts any presumption of marriage. This was interrogated by the High Court and the learned judge found as follows at paragraphs 26 and 27:

> *"26. I note that the plaintiff sued the defendant as M N K. Indeed, in all the other suits between the parties hereto, that is to say Milimani CMCCC No. 4364 of 2011 and Milimani CMCCC No. 454 of 2011, she is referred to as such. It would appear to me that that is her official name; it is the one appearing in her national identity card serial number[.....]. There is also material, procured by the plaintiff, indicating that her father was called M W. That then should raise the question as to where she could have gotten the surname K from. I feel inclined to agree with the defendant, and to conclude that she had contracted marriage with the said K M which led to her adopting his name as part of her name."*
>
> *27. ".....It is a cardinal principle of the civil process that he who alleges must prove. It is the plaintiff who came to court claiming that the defendant was his wife; it was therefore incumbent upon him to prove that assertion. When the defendant countered the claim by asserting that she was a spouse of a K M, the plaintiff ought to have sought to disprove that, especially given that the defendant had the K name as her surname, yet that could not possibly have been her maiden surname. He failed to adduce any evidence to disprove the defendant's assertions that she had no capacity to marry him at the time. I will therefore find that the marriage between the defendant and K M was not terminated until 2011 when he was alleged to have died. That would then mean that the defendant had no capacity at the time to marry the plaintiff. It is a notorious fact that polyandry is not practiced in Kenya, whether under statute or customary law. The relationship between the parties hereto*

was no doubt adulterous, and the resulting cohabitation could not be deemed to have brought forth a marriage."

[49] The Court of Appeal on the other hand determined as follows;

"The learned Judge placed much weight on the appearance of the name "K" on MNP's identity card and drew the conclusion without evidence being led, that the name appeared because she was married to him. In fact, it would seem that beyond that fact, no other cogent evidence existed as to the said marriage. ***We are not ourselves prepared to accept as correct a proposition that the appearance of a name on the identity card of a woman, without more, proves that the owner of that name, whoever he be, is the woman's husband.*** *It is also troubling that the issue of the appearance of that name in the identity card did not feature in MNP's testimony so that the determinative conclusion the learned Judge reached was not preceded by any jural testing and was founded on the learned Judge's own untested theorizing or extrapolation.*

[50] Case law guides us on the issue of capacity. In ***Machani vs. Vernoor*** [1985] KLR 859, the Court of Appeal held that:

"The presumption covers two aspects, that the parties must have capacity to enter into a marriage and that they did so in effect. During the continuance of a previous marriage, the already married party would have no capacity to enter into the new marriage, and the new marriage would be null until the previous marriage had been brought to an end by a final decree or divorce."

[51] Indian case law is also persuasive on the issue of capacity. The Supreme Court of India in ***Gokal Chand v. Parvin Kumari*** **AIR 1952 SC 231** held that continuous cohabitation of man and woman as husband and wife may raise the presumption of marriage, but the presumption which may be drawn from long cohabitation is a rebuttable one and if there are circumstances which weaken and destroy that presumption, the Court cannot ignore them. Polygamy, that is, a relationship or practice of having more than one wife or husband at the same time, or a relationship by way of a bigamous marriage that is marrying someone while already married to another and/or maintaining an adulterous relationship that is having voluntary sexual intercourse between a married person who is not one's husband or wife, cannot be said to be a relationship in the nature of marriage.

[52] In ***Indra Sarma vs V.K.V.Sarma,*** (2013) 15 SCC 755 the Supreme Court of India held that:

> *"**There is no necessity to rebut the presumption** since **the appellant was aware that the respondent was a married person even before the commencement of their relationship,** hence the status of the appellant is that of a concubine or a mistress, who cannot enter into relationship in the nature of a marriage. Long standing relationship as a concubine, though not a relationship in the nature of a marriage, of course, may at times, deserves protection because that woman might not be financially independent, but we are afraid that DV Act does not take care of such relationships which may perhaps call for an amendment of the definition of Section 2(f) of the DV Act, which is restrictive and exhaustive."*

[53] On analysis and guided by the record, we are unconvinced that the appellant had capacity to contract a marriage with the respondent. Before the High Court,

the appellant urged that her father gave her the name 'P' upon her baptism in 1979. She produced her baptism card before the court and also averred that she added the name 'P' on the suit property because she was having a dispute with her now deceased husband. She urged that although she had other properties, the suit property was the only one with the name "P.'

[54] It is also not disputed that her father was MW and his name did not appear in her identity document. We find that the Court of Appeal disregarded the appellant's evidence regarding her name and the reasons for use of the name 'P' and 'K.' Without the benefit of having sight of the baptism card produced during the hearing, we have perused the record and find that the respondent did not controvert the production of the baptism card.

[55] Furthermore, the appellant claimed she was married to 'KM'. Her evidence was her identity card, her official national identification document which bears this name. We find that by parity of reason, the learned High Court judge was well within his bounds to determine that K was her husband's name bearing in mind that Kenyan adult women have their father's or husband's names as their surnames in their official identification cards. We also find that the appellate court, inclined to disbelieve the appellant, did not thoroughly interrogate this issue. In our considered view, the appellant has sufficiently proved that her name is MNK and the name K is attributable to the deceased man 'KM'.

[56] The appellant also argued that a long-term relationship that resembles a marriage is not a marriage, and the person who alleges the existence of such a marriage must prove it.

[57] On the issue of long cohabitation, the High Court held at paragraph 21 & 22as follows:

"So what do I make of the material that was placed before me with regard to the alleged relationship between the plaintiff and the defendant? From the documents annexed to the affidavits to the parties and the oral testimonies of the witnesses called by both sides, I am satisfied that the plaintiff and the defendant were indeed living together on a plot within Dagoretti/Riruta/xxx. It would appear that some people might have at that time considered them to be husband and wife, going by the oral testimonies and the documents, particularly the minutes of the meetings held with respect to the issues concerning the subdivision and excision of the plots from Dagoretti/Riruta/xxx.

22. What should be of concern is whether that cohabitation could lead to a presumption that the two parties had between them a marriage... From the material placed before me, I would be persuaded that there was a long cohabitation of the parties, from 1986 according to the plaintiff and 1992 or thereabout from the other witness, terminating in 2011 or 2012 when the plaintiff was allegedly locked out of the premises by the defendant. There is also material to suggest that there was a general repute within that period that the two were a married couple."

[58] From the evidence on record, we agree with both the High Court and the Court of Appeal that there was long cohabitation between the appellant and the respondent. However, did the long cohabitation and repute as husband and wife raise a presumption of marriage?

[59] The first issue to note here is that from the record, it is evident that when the respondent filed the suit in the High Court, he was not claiming to be the husband of the appellant. The issue of the presumption of marriage through long cohabitation was not specifically pleaded. Indeed, it was only during the proceedings that the respondent asserted that they were married by repute. This

assertion was vehemently denied by the appellant and she claimed that she was married to another man and known by his name. We have already made a finding on this issue and will say no more on it.

[60] In addition, is trite law that he who alleges the existence of certain facts must prove its existence. Accordingly, Section 109 of the Evidence Act provides:

> *"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."*

[61] The respondent, having claimed that he was married to the appellant, ought to have adduced cogent evidence to prove the marriage. However, in his own testimony in the record, he had a first wife and the appellant was allegedly his second wife. He also confirmed that he had not paid dowry for the appellant. We are therefore not convinced that his cohabitation with the appellant was sufficient to prove his marriage to the appellant.

[62] We are thus in sync with the High Court that the respondent did not controvert the evidence by the appellant that she was married to KM until 2011 when he died. In this regard, she only had the capacity to marry from 2011. This evidence was in the form of her identity card. This was not disproved by the respondent. As such, we are of the view that the appellant's evidence that she was married to KM under Kikuyu customary marriage was uncontroverted.

[63] Uncontroverted evidence is weighty and courts will rely on it to prove facts in dispute. Considering the facts as pleaded and the evidence as tendered in this matter, in particular the existence of the first marriage and failure by the respondent to prove the presumption of marriage and/or controvert the appellant's evidence, we must return a finding that this is not one of the safe

instances where a Court can rightly presume a marriage. We must respectfully find, which we do, that the Appellate Court erred in presuming a marriage between the parties. We agree with the High Court that the relationship between the parties and the resulting cohabitation cannot be deemed to have brought forth a marriage. Consequently, a presumption of marriage cannot apply in the instant case.

[64] We find it prudent at this juncture to lay out the strict parameters within which a presumption of marriage can be made:

1. ***The parties must have lived together for a long period of time.***
2. ***The parties must have the legal right or capacity to marry.***
3. ***The parties must have intended to marry.***
4. ***There must be consent by both parties.***
5. ***The parties must have held themselves out to the outside world as being a married couple.***
6. ***The onus of proving the presumption is on the party who alleges it.***
7. ***The evidence to rebut the presumption has to be strong, distinct, satisfactory and conclusive.***
8. ***The standard of proof is on a balance of probabilities.***

[65] The above notwithstanding, we are of the view, that the doctrine of presumption of marriage is on its deathbed of which reasoning is reinforced by the changes to the matrimonial laws in Kenya. As such, this presumption should only be used sparingly where there is cogent evidence to buttress it.

[66] In the same breath, we would be remiss if we did not point out that marriage is an institution that has traditional, religious, economic, social and cultural meaning for many Kenyans. However, it is becoming increasingly

common for two consenting adults to live together for long durations where these two adults have neither the desire, wish nor intention to be within the confines of matrimony. This Court recognizes that there exists relationships where couples cohabit with no intention whatsoever of contracting a marriage. In such contexts, such couples may choose to have an interdependent relationship outside marriage. While some may find this amoral or incredible, it is a reality of the times we live in today.

[67] For instance, a person may have been in a marriage before and the marriage is no more due to death of a spouse or divorce. Due to their prior experiences, such persons may choose to have an interdependent relationship outside of marriage. For others, it may just be their desire never to marry but have a partner without the confines of marriage. Where such situation is evident and there is no intention whatsoever of contracting a marriage, the presumption of marriage must never be made where this intention does not exist. It must always be remembered that marriage is a voluntary union. As such, courts should shy away from imposing 'marriage' on unwilling persons.

[68] In addition, in our ever-changing society, current statistics reveal that a man and a woman can choose to cohabit with the express intention that their cohabitation does not constitute a marriage. The pervasiveness of having interdependent relationships outside marriage over the past few decades means that no inferences about marital status can be drawn from living under the same roof. *'Interdependent relationships outside marriage'* is not a new concept.

[69] In Alberta, Canada, since 2003, Adult Interdependent Relationships have been recognized and protected through the Adult Interdependent Relationships Act. This creates a specific type of relationship, called an Adult Interdependent Relationship ("AIR"). This term is used in place of the 'common law relationship'. The Act gives rights and obligations to couples in qualifying long-term

relationships. In this regard, perhaps, it is time for the National Assembly and the Senate, in collaboration with the Attorney-General to formulate and enact Statute law that deals with cohabitees in long-term relationships; their rights, and obligations.

[70] To conclude on this issue, we find that the circumstances in which presumption of marriage can be upheld are limited. ***In other words, a presumption of a marriage is the exception rather than the rule.***

ii) What relief is available to the present parties?

[71] Since the presumption of marriage does not exist in this case, is the respondent entitled to a share of the suit property?

[72] Although the respondent urges that at all material times, the two parties contributed to its acquisition and development of the suit property, on analysis of the evidence before the High Court, the appellant's and respondent's financial contribution in purchasing and developing the property was not ascertained.

[73] The Court of Appeal in evaluating the proprietary rights relating to the ownership of the suit property together with the developments thereon held that the respondent had jointly contributed to the acquisition, building and development thereon and awarded each of the parties a 50% share.

[74] We now turn to the history of how the suit property was purchased. From the record, the respondent alleged that the suit property was the subject of a succession matter which upon conclusion was available for transfer but not to someone who was not 'Kikuyu'. The respondent averred that the purchase price was Kshs. 250,000.00 and they jointly contributed Kshs. 200,000.00 and obtained financing of Kshs. 100,000.00 from the appellant's sister one Eunice

Njeri. Upon cross-examination, the respondent averred that he contributed Kshs. 60,000.00. That after the sale, the property was registered under the name MKP. The respondent urged that the utility bills were registered in his name. It is not in dispute that rental rooms were developed on the property and that the respondent operated a bar and butchery business on the premises. The respondent urged that the tenancy agreements were registered in his name as the landlord and that he collected rent which was utilized for his upkeep together with the appellant.

[75] The appellant urged before the High Court that she solely contributed to the acquisition of the suit property. She confirmed that although she had other properties it is only the suit property where she added the name P to her name for registration purposes. The appellant urged that she had allocated the respondent a shop to operate his business and had also appointed him as an agent for purposes of rent collection.

[76] The Learned Judge of the High Court downed his tools on determination of proprietary rights after making a finding that no marriage could be presumed. The Court of Appeal on the other hand made a finding that the High Court erred in failing to make a finding regarding the proprietary rights of the parties and proceeded to make a determination on the legal issue which was the gravamen of the suit filed. We agree with the learned judges that it was crucial to make a finding on the parties' proprietary rights, whatever the nature of the relationship.

[77] Wheareas The Appellate Court in evaluating the evidence made a finding that the purchase and development of the property was a joint effort and proceeded to apportion a 50% share to each party. The Court further held that the true purchaser was the respondent but due to prevailing circumstances regarding tribe, the property was registered in the appellant's name. We disagree as we find there is insufficient evidence on record to make this finding.

[78] On our part, on evaluating the evidence, we are convinced that the two parties contributed to the acquisition and development of the suit property which led to their proprietary rights. These proprietary rights arose out of a constructive trust. The Black's Law Dictionary 9th Edition at pg 1649 defines a constructive trust as *"the right, enforceable solely in equity, to the beneficial enjoyment of property which another person holds the legal title."*

[79] England and Wales Court of Appeal's Lord Justice Browne *in* ***Eves v Eves*** **[1975] 1 WLR 1338** quoted with approval the decision in **Cooke vs. Heard [1972] WLR 518** where it was held;

> *"... **whenever two parties by their joint efforts acquire property to be used for their joint benefit, the courts may impose or impute a constructive or resulting trust. The legal owner is bound to hold the property in trust for them both**. This trust does not need any writing. It can be enforced by an order for sale, but in a proper case the sale can be postponed indefinitely. **It applies to husband and wife, to engaged couples, and to man and mistress, and maybe to other relationships too."***

[80] Likewise, we are persuaded by the decision of the Supreme Court of Queensland in ***Barker vs. Linklater & Another*** [2007] QCA 363 quoted with ***Baumgartner vs Baumgartner*** [1987] 164 CLR 137 where the court held:

> *' Their contributions, financial and otherwise, to the acquisition of the land, the building of the house, the purchase of furniture and the making of their home, were on the basis of, and for the purposes of, that joint relationship. In this situation the appellant's assertion, after the relationship had failed, that the Leumeah property, which was financed*

in part through the pooled funds, is his sole property, is his property beneficially to the exclusion of any interest at all on the part of the respondent, amounts to unconscionable conduct which attracts the intervention of equity and the imposition of a constructive trust at the suit of the respondent.'

[81] According to ***Bromley's Family Law 10th Edition***, disputes between cohabitants or former cohabitants over ownership, occupation, or use of the property must be resolved, generally speaking by applying ordinary legal rules applicable to strangers. This is due to the fact that legislation that enables courts to allocate or reallocate beneficial interests in the assets following a divorce does not apply to cohabiting couples.

[82] Kenya, just like many other countries, does not have laws to protect parties to cohabitation in case of a dispute relating to property acquired during the subsistence of such cohabitation. However, the issue of cohabiting couples' property has increasingly become a social problem due to the high number of people resorting to cohabitation and in the process of acquiring properties, upon separation there is no legislation governing the division of property.

[83] While we acknowledge the difficulties of resolving such disputes, a *laissez fair* approach can result in injustice for parties to a relationship who might be more vulnerable or who contribute less in financial terms than their partners. Conversely, we do note that the interventionist approach risks creating uncertainty, and attaching a monetary value to the party's actions within this type of relationship is often highly complex as is in the present case.

[84] The difficulty was aptly captured *in* ***Walker v Hall*** **[1984] FLR 126** ***where*** Lord Lawton observed as follows:

"During the past two decades the courts have had to consider on a number of occasions the division of property between men and women living together without being married……. courts have been able to make an equitable division of property between spouses when a marriage breaks down and a decree of divorce is pronounced. ***No such jurisdiction exists when the cohabitees are unmarried.*** *When such a relationship comes to an end, just as with many divorced couples, there are likely to be disputes about the distribution of shared property. How are such disputes to be decided? They cannot be decided in the same way as similar disputes are decided when there has been a divorce. The courts have no jurisdiction to do so. They have to be decided in accordance with the law relating to property… There is no special law relating to property shared by cohabitees any more than there is any special law relating to property used in common by partners or members of a club. The principles of law to be applied are clear, though sometimes their application to particular facts are difficult. In circumstances such as arose in this case the appropriate law is that of resulting trusts****. If there is a resulting trust (and there was one in this case) the beneficiaries acquire by operation of law interests in the trust property.*** *An interest in property which is the consequence of a legal process must be identifiable. It must be more than expectations which at some later date require to be valued by a court…"*

[85] In England, courts have long recognized that common intention of the parties at the time of purchase is sufficient to give rise to a constructive trust, which can be inferred from conduct other than making financial contributions to cohabitees.

[86] In defining constructive trusts, the Court of Appeal in the case of ***Juletabi African Adventure Limited & another v Christopher Michael Lockley*** [2017] eKLR the Court held that;

> *'In the absence of an express trust, we have trusts created by operation of the law. These fall within two categories; constructive and resulting trusts. Given that the two are closely interlinked, it is perhaps pertinent to look at each of them in relation to the matter at hand.* ***A constructive trust is an equitable remedy imposed by the court against one who has acquired property by wrong doing.*** *... It arises where the intention of the parties cannot be ascertained. If the circumstances of the case are such as would demand that equity treats the legal owner as a trustee, the law will impose a trust.* ***A constructive trust will thus automatically arise where a person who is already a trustee takes advantage of his position for his own benefit*** *(see Halsbury's Laws of England supra at para 1453). As earlier stated, with constructive trusts, proof of parties' intention is immaterial; for the trust will nonetheless be imposed by the law for the benefit of the settlor. Imposition of a constructive trust* ***is thus meant to guard against unjust enrichment. ... [emphasis added]***

[87] We however note that even though constructive trust is premised on Section 38 of the Land Act, 2012 the same has not been applied in solving disputes relating to cohabitees.

[88] In the case of ***Elayne Marian Teresa Oxley vs. Allan George Hiscock*** **[2004] EWCA 546** the Court of Appeal of England and Wales quoted with approval Lord Diplock in ***Gissing v Gissing*** [1971] AC 886 where the guidelines to consider when interrogating constructive trust were laid down as follows:

". . . the first deals with the nature of the substantive right; the second with the proof of the existence of that right; the third with the quantification of that right.

1. The nature of the substantive right

If the legal estate in the joint home is vested in only one of the parties ('the legal owner') the other party ('the claimant'), in order to establish a beneficial interest, has to establish a constructive trust by showing that it would be inequitable for the legal owner to claim sole beneficial ownership. This requires two matters to be demonstrated: (a) that there was a common intention that both should have a beneficial interest; and (b) that the claimant has acted to his or her detriment on the basis of that common intention.

2. The proof of the common intention

(a) ***Direct evidence****, it is clear that mere agreement between the parties that both are to have beneficial interests is sufficient to prove the necessary common intention. Other passages in the speech point to the admissibility and relevance of other possible forms of direct evidence of such intention.*

(b) ***Inferred common intention****, Lord Diplock points out that, even where parties have not used express words to communicate their intention (and therefore there is no direct evidence), the court can infer from their actions an intention that they shall both have an interest in the house. This part of his speech concentrates on the types of evidence from which the courts are most often asked to*

infer such intention, viz. contributions (direct and indirect) to the deposit, the mortgage instalments or general housekeeping expenses. In this section of the speech, he analyses what types of expenditure are capable of constituting evidence of such common intention: he does not say that if the intention is proved in some other way such contributions are essential to establish the trust.

3. The quantification of the right

Once it has been established that the parties had a common intention that both should have a beneficial interest and that the claimant has acted to his detriment, the question may still remain 'what is the extent of the claimant's beneficial interest?' This last section of Lord Diplock's speech shows that here again the direct and indirect contributions made by the parties to the cost of acquisition may be crucially important." [emphasis added]

[89] The Court further observed as follows:

"I have referred, in the immediately preceding paragraphs, to "cases of this nature". By that, I mean cases in which the common features are: ***(i) the property is bought as a home for a couple who, although not married, intend to live together as man and wife; (ii) each of them makes some financial contribution to the purchase; (iii) the property is purchased in the sole name of one of them; and (iv) there is no express declaration of trust."*** *[emphasis added]*

[90] Applying the above guidelines we reiterate that common intention of the parties at the time of purchase of the suit property gave rise to a constructive

trust between the appellant and the respondent. From the evidence on record that the appellant and respondent had been cohabiting since 1986 and that in 1991 the suit property was bought by the two parties and registered in the name of the appellant. The respondent was present during the drafting and signing of the sale agreement and was in fact a witness. The parties lived in one of the rooms from 1993 and ploughed the proceeds of rent to construct more rental units. It was proved that the meters were in his name and operated a bar on the same premises. In these circumstances, we conclude that there was a common intention for the appellant and respondent to have beneficial interests in the suit property.

[91] However, in 2011 when the parties herein separated the appellant evicted the respondent from the matrimonial home and from the business premises contrary to the common intention, they had at the time of purchasing the property. Thereby, unjustly enriching herself with a property meant to be of benefit to her and the respondent.

[92] It is in evidence that the respondent paid for the water and electricity connection charges and bills from when the property was constructed to 2011 when he was evicted from the property and that jointly the parties have made several improvements on the suit property. It is, therefore, our finding that the common intention can be inferred from the appellant and respondent's conduct during the existence of their relationship.

[93] Having established that there was a common intention and that both the appellant and the respondent should have a beneficial interest in the property, it follows that we need to proceed and quantify the beneficial interest to the parties.

[94] In assessing the beneficial interests due to the parties, we cannot only be primarily focused on the direct financial contribution to the acquisition of the

property but also interrogate other forms of contribution such as actions of the parties in maintaining and improving such properties.

[95] The record shows that the appellant and the respondent jointly contributed to the acquisition and the construction of the suit property and the two jointly invested in the property for more than 20 years. Therefore, we are of the view that the respondent did prove his case on a balance of probabilities that the suit property was acquired and developed through joint efforts and/or contribution of the parties. We therefore make a finding that the share of the parties is apportioned as 70% for the appellant and 30% for the respondent based on their respective contributions.

[96] This being a matter of public interest, each party shall bear their own costs.

E. ORDERS

[97] Having considered the issues delineated by this Court for determination, the final Orders are as follows:

a. *The appeal dated 12th August 2021 partially succeeds.*

b. *A presumption of marriage between the appellant and the respondent does not exist.*

c. *Both parties having a beneficial interest in the property, the share is 70% for the appellant and 30% for the respondent.*

d. *Each party to bear their own costs.*

[98] It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this 27th day of January 2023.

.....

P.M MWILU

DEPUTY CHIEF JUSTICE & VICE PRESIDENT

OF THE SUPREME COURT

.....	.....
S.C WANJALA	**NJOKI NDUNGU**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
I. LENAOLA	**W. OUKO**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

I certify that this is a true copy of the original

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