

Telephone: Nairobi 0730181600/700/800
Email: supremecourt@court.go.ke
www.judiciary.go.ke/sc



SUPREME COURT OF KENYA
TAIFA ROAD, OFF CITY HALL WAY
P.O. Box 30041-00100
NAIROBI

When replying please quote
Refand date

REPUBLIC OF KENYA
THE JUDICIARY

THE SUPREME COURT OF KENYA

MARY NYAMBURA KANGARA alias MARY NYAMBURA PAUL VS. PAUL
OGARI MAYAKA & INITIATIVE FOR STRATEGIC LITIGATION IN AFRICA
(ISLA) (AMICUS CURIAE)

SC PETITION NO. 9 OF 2021

DATE OF JUDGMENT: 27TH JANUARY 2023

MEDIA SUMMARY: *The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.*

Orders: The appeal partially succeeds.

This case originated in the High Court where the Respondent Paul Ogari Mayaka invoked section 17 of the repealed Married Women's Property Act of 1882 and sought for division of matrimonial property being a property known as Dagoretti/Riruta/xxx. The respondent claimed he had acquired and maintained the property with the Appellant Mary Nyambura Kangara alias Mary Nyambura Paul during the purported subsistence of their long cohabitation from the year 1986 to 2011. The High Court held that the relationship between the Appellant and the Respondent and the resulting cohabitation could not be presumed to be a marriage and dismissed the claim for division of the suit property. On Appeal, the Court of Appeal held that there was a presumption of marriage between the two parties and proceeded to apportion the suit property into two halves, a share for each party.

The Supreme Court in consideration of a further appeal has made a finding that the Marriage Act, 2014 and the Matrimonial Property Act, Act No. 49 of 2013 were not applicable in this matter, as the cause of action arose before the statutes were enacted into law. However, the now-repealed Married Women's Property Act may apply to all marriages recognized and unrecognized in law. The Court also made a finding that presumption of a marriage is the **exception** rather than the rule, and that the circumstances in which a presumption of marriage can be upheld, are limited. The Court has found there exists relationships where couples cohabit with **no** intention whatsoever of contracting a marriage; and that a marriage is a voluntary union and that courts cannot **impose** 'a marriage' on unwilling persons.

Drawing from the submissions of the parties, the Supreme Court has found no marriage can be presumed between the appellant and respondent. However, the Court determined that there was common intention of the parties at the time of purchase of the suit property that gave rise to a **constructive trust** between them. Since they both contributed to the acquisition, improvement and maintenance of the suit

property, the Court apportioned the property at the ratio of 70 % to the appellant and 30% to the respondent. The Court made the following orders:

- 1. Presumption of marriage between the appellant and respondent does not exist.**
- 2. The suit property be apportioned at the ration of 70% to the Appellant and 30% to the Respondent.**
- 3. That each party bears its own costs.**