JKM v MAC (Civil Appeal 154 of 2019)
[2023] KEHC 3056 (KLR) (Family) (19 January 2023) (Judgment)

Neutral citation: [2023] KEHC 3056 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL 154 OF 2019

EKO OGOLA, J

JANUARY 19, 2023

BETWEEN

JKM ..... APPELLANT

AND

MAC ..... RESPONDENT

(Being an Appeal from the Judgment and decree of Hon. Mburu (Mr.) Senior Principal Magistrate dated 6th December, 2019 at Chief Magistrate's Court Divorce No. 463 of 2018)

JUDGMENT

1. This Appeal arises from a judgment delivered in Nairobi Divorce Cause No. 463 of 2018 on 6/12/2019. The Appellant is aggrieved by that decision and has preferred this Appeal. In the lower court, the Respondent sought to annul her marriage to the Appellant because she found out that he was still in a subsisting marriage. The court granted the Respondent's prayers and annulled the marriage.

2. The Appellant filed a Memorandum of Appeal dated 27th May 2021 outlining the grounds of appeal as follows:

    1. That the learned trial magistrate erred in law and in fact by failing to consider that Petition for annulment of marriage has to be made within one year of celebration of the marriage pursuant to section 73(1) of *Marriage Act*, 2014

    2. That the learned Magistrate erred in Law and in fact by failing to consider the Respondent Submissions dated 15th November, 2019 and authorities filed on 18th November, 2019 that, annulment of marriage shall be commenced by way of an Annulment Cause and not a Divorce Cause while arriving at his judgment

3. That the Learned Magistrate erred in law and in fact by failing to consider that, declaring the marriage between the Appellant and the Respondent is void and implies an annulment of marriage, which annulment proceedings ought to have been commenced within one year from 29th July, 2010, while the divorce cause was filed on 25th June 2018 almost 8 years hence the Petition dated 22nd June, 2018 filed on 25th June 2018 was time barred.

4. That the Learned Magistrate erred in law and in fact by failing to consider the Respondent testimony that, a similar divorce cause regarding the same parties, same subject matter, same cause of action had been heard and determined in the United States of America being proceedings Court of Circuit of Baldwin, Alabama (U.S.A) under DR-2017-901557 and was therefore barred by the principle of *Res-judicata* from hearing and determining the Petition. he ought to have referred the matter to Court of Circuit of Baldwin, Alabama (U.S.A) for directions and/or determination

5. That the Learned Magistrate erred in law and in fact by failing to consider that, the fact that the Respondent is the one who presented the Judgment in Divorce Cause No. 303 of 2009 to State of Alabama Baldwin county (United States of America) to authorize for celebration of the marriage conducted on 28th day of July 2010 and Gray S. Porter who issued marriage certificate on 29th July 2019 as her witnesses shed light, under what circumstances was the said marriage conducted based on Judgment in Divorce Cause No. 303 of 2009 in absence of decree absolute

6. That the Learned Magistrate erred in law and in fact by failing to consider that the state of Alabama (USA) laws governing Marriage are not consistent with the Laws of Kenya as *Marriage Act* 2014 does not provide for issuance of decree nisi and or decree absolute, Matrimonial Cause Act provides in the State of Alabama County (United States of America) when the Judge decides all issues in the case, he or she will issue a final order of divorce also known as a divorce decree

7. That the Learned Magistrate erred in law and in fact by failing to consider that, failing to provide legal statutes as over the national law of the State of Alabama County (United States of America) to support her Petition and failing to call makers of marriage license issued 29th July, 2010 and Marriage Certificate Issued on 29th July, 2010 to support her Petition, the Respondent failed to meet the threshold of proving her case on balance of Probability.

8. That the learned Trial Magistrate erred in law and in fact by failing to consider that is did not have jurisdiction to hear and determine the Petition as a similar Petition was heard and determined in the United States of America hence barred by the principle of Res Judicata

3. The Appeal is opposed by the Respondent.

4. The matter proceeded by way of written submissions. The Appellant filed submissions dated 7th March, 2022. The Respondent filed submissions dated 4th July, 2022.

Appellant's Submissions.

5. The appellant's Counsel submitted that the Appellant and the Respondent officiated their marriage in July, 2010 after his marriage to one Sarah Wairimu Kinyanjui was dissolved by court in June, 2010. The Appellant's contention is that it was the Respondent who applied for a civil marriage within the State of Alabama. That the State of Alabama, Baldwin County relied on copy of the Judgment of the dissolution of Marriage between the Appellant and his former wife, to allow the civil marriage between the parties herein. It is the Appellant's case that the said judgment did not require that a decree

nisi be issued or be made absolute. Counsel submitted that a divorce obtained in a foreign country is recognized by states within the United States. The Counsel submitted that the Appellant was not in any subsisting marriage at the time he was marrying the Respondent.

6. Counsel submitted that the Respondent in the lower court filed for annulment of their marriage after seven (7) years of marriage yet the *Marriage Act* at Sections 73 and 74 requires that an application for annulment be made within one year of the celebration of marriage.

7. The counsel for the Appellant further submitted that the parties' marriage has been marred with cruelty and has asked this court to set aside the judgement or decree *nisi* of the lower court given on 6th December, 2019 and for the court to allow the appeal.

Respondent's Submissions

8. Counsel for the Respondent submitted that the issue of Jurisdiction was dealt with by Justice Ongeri which saw the Petition referred back to the lower court for determination and if the Appellant had an issue with the ruling, he should have appealed against it, not raising it with the petition and as a ground of Appeal in this appeal.

9. Counsel submitted while relying on section 15 of the *Matrimonial Causes Act* that the Appellant did not have the capacity to enter into a valid marriage with the Respondent as he was in a subsisting marriage. According to the Respondent, the Appellant obtained a decree nisi on his marriage to Ms. Wairimu but did not extract a decree absolute therefore the divorce process was not complete. Counsel submitted that the Appellant's argument that he did not need a decree absolute since his former marriage was customary is misconceived. Counsel argued that customary marriages are recognized as valid marriages in Kenya and are not exempted from procedures relating to dissolution of marriage.

10. It was submitted that the Appellant herein misrepresented to the Alabama authorities and to the Respondent that he was not married so as to get authority to marry the Respondent. The Respondent seeks that her marriage to the Appellant be declared void ab initio in accordance with section 11 of the *Marriage Act* and not annulment of the marriage.

11. It was the Respondent's submission that the Appellant has mentioned a cross-petition that he did not produce during the hearing of the Divorce Petition and should not be allowed to introduce it at this stage.

Determination

12. This court has carefully considered the appeal herein, the grounds proffered, the parties' submissions and the orders appealed against. The issues arising for determination are as follows: -

    1 Whether the trial court had Jurisdiction to hear the Petition

    2 The issue of annulment

    3 Whether there was a marriage between the parties

    4 Whether the trial court had Jurisdiction to hear the Petition

13. The Appellant has raised the issue of jurisdiction severally. First he raised the issue in the trial by raising a Preliminary Objection to the Petition stating that the court did not have jurisdiction to hear the Petition since the Marriage was conducted under the American Law and there were divorce proceedings pending in the American courts. The trial court held that it could not entertain the petition and went ahead to uphold the Preliminary Objection and dismissed the Petition. The Respondent being

dissatisfied with the decision of the Lower court appealed to the High Court. The Appellant raised a preliminary objection before the High Court raising the issue of jurisdiction arguing that Section 6 of the *Civil Procedure Act* bars courts from dealing with issues that are before a court of competent jurisdiction. The learned Lady Justice Ongeri stated that Section 6 of the *Civil Procedure Act* deals with proceedings pending before the Kenyan Courts and not before other jurisdiction. The Judge dismissed the Preliminary Objection, allowed the appeal and directed that the Divorce Petition be heard by the lower court. When the Petition was reverted to the lower court for hearing, the Appellant again raised issue of Jurisdiction. The court noted that the High court had dealt with the issue of jurisdiction and the Appellant has not appealed against the High Court decision therefore the lower court chose not to deal with the issue.

14. In summary, the issue of jurisdiction has been dealt with by a court of concurrent jurisdiction which stated that the Kenyan court has jurisdiction to handle the Petition. If the Appellant was aggrieved by that decision, he would have proceeded on Appeal to the Court of Appeal, but he waited for the Petition to be heard and proceeded to raise the issue as a ground of appeal in this court.

Issue of Annulment

15. The Appellant has argued that the Respondent in her petition sought for annulment of their marriage. His argument is that their marriage has lasted for eight (8) years and that the respondent sought annulment after the eight years yet the *Marriage Act* requires a person seeking for annulment to do so within one year of marriage.

16. The Respondent has argued that she sought for the court to declare the marriage between herself and the Appellant illegal and void since the Appellant entered into the marriage while he was still in a subsistence marriage. The Appellant argues that the Respondent should have sought the orders within one year into their marriage.

17. The *Black's Law Dictionary* defines annulment as cancelling, making void or destroying while the word void is defined to mean null; ineffectual; nugatory; having no legal force or binding effect; unable, in law, to support the purpose for which it was intended. From this definition, when something is void, it leads to annulment. In other words, the Respondent simply sought for annulment of the Marriage. According to the Appellant, this annulment should have been sought within one year into the Marriage. He relied on section 73(2)(a) of the *Marriage Act* No. 4 of 2014 which provides that: -

> " the court shall only grant a decree of annulment if the Petition is made within one year of the celebration of the marriage"

18. According to the Appellant, the Respondent ought to have brought the Petition within the first year of the celebration of their marriage. The Appellant seems to argue that an annulment application should strictly be done within the first year. However, if one reads section 73(2) keenly, it is clear that grant of annulment is not pegged on the petition being made within the first year. Section 73(2)(b) provides that: -

> " the court shall only grant a decree of annulment if at the date of the marriage and regarding subsection 1 (b) and (c), the Petitioner was ignorant of the facts alleged in the Petition."

Subsection 1 (c) provides that

> "a party to a marriage may Petition the court to annul the marriage on the ground that in the case of a monogamous marriage, at the time of the marriage, one the parties' was married to another person"

19. My understanding of section 73(2)(b) is that a party may apply for annulment when he or she finds out facts amounting to grounds for annulment that he or she was not aware of at the time of entering into the marriage. This section covers those people who do not find out the grounds for annulment within one year of marriage. According to the Respondent, she was not aware that the Appellant was still in a subsistence marriage, a fact which is a ground for annulment.

Whether there was a marriage between the parties

20. Section 3(1) of the *Marriage Act* defines marriage as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with the Act.

21. The parties herein have not disputed the fact that they entered into a marriage with each other, a Christian marriage which was celebrated in the United States of America. However, according to the Respondent, she later found out that the Appellant had not completed the divorce process against his first wife before getting married to her and therefore the Respondent sought the marriage between her and the Appellant be declared illegal and void.

22. The Appellant sought to divorce his first wife in 2009. The Judgment granting the dissolution was delivered on 29th June, 2010. The decree nisi was issued on 29th January, 2018. The marriage between the Appellant and the Respondent was entered into on 29th July, 2010.

23. The trial court while delivering its judgment stated that the Appellant herein married the first wife in 1997 and the Applicable law at that time was *Matrimonial Causes Act* cap 152 (now repealed) which under Sections 15 and 16 provided as follows on Decree *nisi* for divorce and nullity of marriage: -

    15.

    (1) every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree nisi not be made absolute until after the expiration of six months after the pronouncing thereof, unless the court by general or special order from time to time fixes a shorter time.

    (2) after the pronouncing of the decree nisi and before the decree is made absolute, any person may in the prescribed manner, show cause why the decree should not be made absolute by any reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit.

    (3) where a decree *nisi* has been obtained whether before or after the commencement of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree nisi has been granted shall be at liberty to apply to the court and the court shall, on such application, have power to make the decree absolute,

reverse the decree nisi, require further inquiry or otherwise deal with the case as the court thinks fit."

Section 16 provided as follows on re-marriage of a divorced person.

> "As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, may marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired or, if an appeal is so presented, as soon as the appeal has been dismissed.

24. The trial court was guided by the above provisions in deciding that the Appellant had no legal capacity to contract a monogamous marriage with the Respondent as his marriage to Sarah Wairimu Kinyanjui was still subsisting. The trial court declared void *ab initio* the marriage that took place between the Appellant and the Respondent on 29th July, 2010 at Orange Beach Town in the State of Alabama, Baldiwn County within the United States of America.

25. The Appellant does not dispute that a decree absolute was not extracted. His argument was that since his marriage to the first wife was a customary marriage, there was no need for a decree absolute. The Appellant's argument is astounding since he subscribed to the *Marriage Act* to divorce the wife he married customarily but does not want to comply with the provisions of the same Act that provides a requirement for a decree absolute.

26. In *De Reneville v De Reneville* (1948) P. 100;

> " a voidable marriage is one that will be regarded by every court as valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction." Per Lord Greene MR at page 111.

27. In *M v R M* [1985] eKLR the Court of Appeal observed that a decree nisi of divorce was issued by the lower court on 6/2/1979. The court noted that no steps were taken to shorten the statutory period of three months and would not end before May 6,1979. The court of Appeal went on to state

> "but it is not clear whether the decree absolute was applied for or granted, certainly no decree absolute was produced in evidence. The situation is therefore that the Defendant could not enter into a marriage before May, 1979.....Unfortunately the marriage continues until the final decree and indeed while an appeal is pending."

28. A decree *nisi* is a provisional decree of divorce that is given by the court when the legal and procedural requirements for divorce are met by a person. Following this, the marriage still continues and further action must be taken to become fully divorced. A decree absolute is a divorce decree which dissolves the marriage. The Decree absolute is applied for one (1) month after the period of decree nisi lapses and no appeal or review has been raised. The simple difference between the two decrees is that one stands as confirmation that the parties are entitled to a divorce and the other completes the divorce. A decree nisi can be revoked by consent of parties if they change their mind, a decree absolute is the one that is used to revoke a certificate of marriage.

29. The Appellant argued that the trial court erred in law and in fact by failing to consider that the state of Alabama (USA) laws governing Marriage are not consistent with the Laws of Kenya as *Marriage Act* 2014 does not provide for issuance of decree nisi and or decree absolute. Matrimonial Cause Act provides in the State of Alabama County (United States of America) when the Judge decides all issues in the case, he or she will issue a final order of divorce also known as a divorce decree. The Appellant in

this argument does not consider that the marriage was celebrated in Kenya and the divorce was filed in Kenya, that the decree nisi was issued in Kenya; therefore he ought to have applied for a decree absolute.

30. In the instant case, the Appellant obtained a decree nisi in his previous marriage. He did not apply for a decree absolute which is the document that terminates the marriage and revokes a marriage certificate. Therefore, the Appellant entered into a marriage with the Respondent when he was still in a subsisting marriage with another person and so he lacked capacity to enter into the Christian Marriage that he had with the Respondent. From the foregoing, the Appeal fails. This courts upholds the decision of the trial court.

31. This time round, the costs of the Appeal shall be for the Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF JANUARY 2023.

E.K. OGOLA

JUDGE

Judgment read and delivered online in the presence of:

M/s Gathoni for the Appellant

M/s Akoko for the Respondent

Ms. Gisiele Court Assistant