



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 114 OF 2018 (O.S)

IN THE MATTER OF RECOGNITION OF DECREE OF DIVORCE OF A FOREIGN COURT AND REGISTRATION OF THE DECREE IN THE REGISTER

ENM.....APPLICANT

VERSUS

PMM.....RESPONDENT

RULING

1. The applicant ENM and the respondent PMM celebrated their marriage on 16<sup>th</sup> December 2006 at [Particulars withheld] Church in Nairobi in Kenya. They subsequently moved to the United States of America and resided at the State of Nevada. The applicant petitioned for divorce at the District Court, Clark County, State of Nevada. After the trial that was conducted on 23<sup>rd</sup> August 2016, the Judge granted an absolute Decree of Divorce thereby dissolving the marriage between the two. The respondent was granted absolute and separate ownership of the following property that was in Kenya: -

- a. LR No. Kabete/L. Kabete/ [....];
- b. LR No. KJD/Kaputiei/ [....]; and
- c. LR No. [....] Kiambu;

2. On 15<sup>th</sup> August 2018 the respondent came before this court and filed summons under **section 61(1), (2) and 3(a) and (b) of the Marriage Act, 2014** seeking the recognition and registration of the decree of divorce issued by the Court in Nevada in the United States of America. The respondent further sought the enforcement of the order in regard to the property by having the deputy registrar of this court sign all necessary papers to affect the transfer of the parcels of land to her.

3. There is no dispute that no appeal or review had been preferred in respect of the orders of the Court in Nevada.

4. The summons were heard *ex parte* by Justice Asenath Ongeru who on 2<sup>nd</sup> November 2018 gave orders recognizing the decree of divorce and the separate and absolute ownership of the stated property granted to the respondent. The deputy registrar was authorized to execute the necessary papers to effect the transfer of the property to the respondent. Lastly, the respondent was directed to present the decree of the dissolution of the marriage to the Registrar of Marriages for registration.

5. The applicant was aggrieved by these orders and has come before this court by the present summons under **sections 1, 2, 3, 6 and 10 of the Foreign Judgment (Reciprocal Enforcement) Act, section 9 of the Civil Procedure Act and Articles 40(1), 45 (3), 48 and 51 of the Constitution of Kenya** seeking the setting aside of all the orders issued on 2<sup>nd</sup> November 2018 recognizing and enforcing the decree of the court in Nevada. An order was sought to prohibit the respondent and/or her agents from alienating the above property, or in any other way dealing with the property. An order for stay was sought in regard to the execution of the orders of 2<sup>nd</sup> November 2018.

6. Basically, the applicant's case was that the decree of divorce issued by the court in Nevada was not enforceable in Kenya on the ground that Kenya lacked reciprocal arrangements with the United States of America. Further that, the decree could not be executed in Kenya as the

**Marriage Act** only provided for the recognition and registration of the decree, but not its execution. He stated that the enforcement of the decree by the court in Nevada would be contrary to public policy in Kenya and a violation of his right to property, right to fair hearing and access to justice under the Constitution. His case was that he risked being deprived of the suit property, including LR No. Kabete/L. Kabete/[...] on which was his ancestral home. The deprivation was going to cause him great injustice and irreparable loss, he continued. The judgment passed on 19<sup>th</sup> April 2016, he stated, was unenforceable since it could not have been enforced entirely in the United States of America. He contended that he was supposed to be served with the notice of entry of judgment by the respondent before execution. The respondent had alleged that she could not trace him. Lastly, he stated that the respondent had concealed to this court that the decree had partly been executed in Nevada and that, if recognized wholly in Kenya, the decree risked being executed twice.

7. The respondent opposed the application. Her case was that foreign judgments and decree in matrimonial proceedings are recognized and registered under the **Marriage Act** and not the **Foreign Judgment (Reciprocal Enforcement) Act**, and therefore it was not an issue that Kenya and the United States of America had no reciprocal arrangement. Secondly, the applicant had not challenged the jurisdiction of the Court at Nevada, and neither had he appealed or applied to set aside the judgment, and therefore the judgment and decree were valid and enforceable. Thirdly, after the decree was issued by Nevada Court the applicant had relocated to Kenya in 2018 with the intention of defeating the orders of the court, and depriving the respondent of the assets in question which were her only source of income. Fourthly, partial execution of the judgment and decree of Nevada Court in the country of origin was a precondition for recognition of the judgment of Kenya. Fifthly, the enforcement of the decree of Nevada Court by the Kenya Court was a matter of legal process and this court could not sit on appeal over the orders of a court of concurrent jurisdiction.

8. The issues identified by counsel for the court to determine were as follows:-

- a. whether the court had jurisdiction to register a foreign judgment under the **Marriage Act**;
- b. whether recognition of a foreign document under **section 61** of the **Marriage Act** could amount to enforcement;
- c. how a foreign judgment in a matrimonial cause could be enforced in Kenya; and
- d. whether the applicant was entitled to the prayers sought.

9. The application by the applicant was not made under **Order 10** of the **Civil Procedure Rules** seeking the setting aside of the proceedings and orders of this court made on 2<sup>nd</sup> November 2018 in order to allow her to be heard on the summons. He did not approach the court under **Order 45** of the **Civil Procedure Rules** for the review and/or setting aside of the proceedings and orders made on 2<sup>nd</sup> November 2018. The applicant's case was that the decree of divorce issued by the Court in Nevada was unenforceable in Kenya on the grounds that Kenya lacked reciprocal arrangements with the United States of America, and further that the decree could not be enforced in Kenya because the **Marriage Act** did not provide for such execution. It was on these grounds that he asked this court to set aside the orders of 2<sup>nd</sup> November 2018.

10. In short, the applicant is challenging the decision dated 2<sup>nd</sup> November 2018 by this court. He is saying the court had no jurisdiction under the **Marriage Act** to order the registration or the enforcement of the decree issued by the Court in Nevada. Quite unfortunately, this court has concurrent jurisdiction with the court that heard the summons by the respondent and made the orders that the applicant is now challenging. This court has no jurisdiction to discuss or set aside the decision of the court of concurrent jurisdiction.

11. It is for these reasons that I find that the present application is misconceived. It is dismissed with costs.

**DATED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 22<sup>ND</sup> DAY OF APRIL 2021**

**A.O. MUCHELULE**

**JUDGE**