REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

DIVORCE CAUSE NO. 45 OF 2014

DOK (brought by and on

behalf of the Petitioner by his Guardian

Ad Litem GNO).....PETITIONER

VERSUS

JEN

alias JEK.....RESPONDENT

RULING

1. On 29.3.08, DOK the Petitioner then a widower aged 62 years married JEN *alias* JEK, the Respondent then a Spinster aged 42 years at [Particulars Withheld] Church in Kisumu. 6 years later, on 17.6.14, the Petitioner filed the Petition herein dated 6.6.14, seeking the dissolution of his marriage to the Respondent. The grounds upon which the Petitioner seeks the divorce are desertion and cruelty. The record shows that on 23.2.02, the Petitioner had undergone surgery in the United States of America, for excision of a brain tumor.

2. Directions were taken that the matter be disposed of by way of oral evidence. At the hearing of the Petitioner's testimony on 30.6.16 however, it became apparent that the Petitioner was incapable of understanding the meaning and purport of the proceedings. The Court therefore directed that the Petitioner be examined by a competent medical practitioner to establish his mental state. The Petitioner was examined by Dr. Gregory K. Mulunga, a consultant neurosurgeon and Dr. CM Mwangome, a consultant psychiatrist whose reports were filed in Court. It would appear that the filing of the present application dated 31.8.16 (the Application) was provoked by the reports by the doctors that the Petitioner has severe cognitive impairment.

3. In the Application, the Applicant seeks orders that:-

a) Spent

b) That GNO (the Applicant) be appointed Guardian ad Litem to DOK.

c) That the appointed Guardian ad Litem be granted leave to amend the Petition dated 6.6.14.

d) That costs of this Application be costs in the cause.

4. The key ground upon which the Application is premised is that the Petitioner has from 29.3.2002 been suffering from a diminished metal capacity which only became evident with the medical reports of 21.7.16 by Dr. Mulunga and Dr. C. M. Mwangome. In her Affidavit sworn on 31.8.16 in support of the application, the Applicant avers that she is the daughter and caregiver of the Petitioner since 2002. She states that when the Petitioner married the Respondent on 29.3.08 he could not have been in his right mind. Since 2010, the Respondent has never made any effort to see the Petitioner or inquire on his welfare. The Applicant prays for leave to amend the Petition to seek annulment of the marriage on the ground of mental incapacity to contract marriage.

5. The Respondent in her replying affidavit sworn on 18.7.18 averred that when she met and married the Petitioner he was of sound mind. He filed the petition and signed all the affidavits in support of the petition and applications which were decided in his favour. To allow the Applicant to handle the matter on behalf of the Petitioner will be intruding on her personal life as the affairs of marriage are too personal. The application is an afterthought and proof that it is not the Petitioner who filed the petition but third parties whose intention is to break up their marriage. A petition to dissolve a marriage may only be filed by a party to the marriage and the Applicant does not have the *locus*

standi to amend the petition for nullification of marriage. The petition is a nullity *ab initio* and the Application cannot stand on a vacuum. If the Petitioner has been of unsound mind then there is no petition to be amended. The Respondent contends that she and the Petitioner love each other and she cannot allow third parties to break their marriage. She urged the Court to dismiss the Application.

6. The gist of the Applicant's case is that the Petitioner has had diminished mental capacity since 29.3.02 when he had brain surgery. The Applicant contends that the Petitioner's mental state only became evident following his confused testimony in Court on 30.6.16. The Petitioner's mental incapacity was confirmed by the doctors who examined him. At the time he married the Respondent on 29.3.08 therefore, he was not of sound mind. Consequently, the marriage is voidable and invalid in law under Section 12(a)(ii) of the Marriage Act, 2014. The Respondent has not provided a contrary medical report.

7. For the Respondent, it was submitted that under Section 73 of the Marriage Act, a petition to annul a marriage can only be made if the respondent was suffering recurrent bouts of insanity without the knowledge of the petitioner. In this case it is the Petitioner who is suffering and not the Respondent. Further, the Applicant cannot feign ignorance of the Petitioner's condition which was well within her knowledge as she claims to have been living with the Petitioner since 2002. The Respondent further argues that if the Petitioner was of unsound mind since 2002, then he was incapable of filing the petition herein. As such there is no petition before the Court capable of amendment and the Applicant cannot be appointed a guardian *ad litem* at this stage. It was further argued that the application has been made out of the time limit set in Section 73 of the Marriage Act. Further, this Application ought to have been made before the petition was filed and ought to have been filed by the Applicant and not the Petitioner. The Respondent urged that the Application be dismissed.

8. I have considered the Application and the rival affidavits and submissions. It is not disputed that the Petitioner was unable to make coherent statements on 30.6.16 when he testified before Court. Following this Court's order, the Petitioner was assessed by medical doctors to establish his mental state. Dr. Gregory K. Mulunga, a consultant neurosurgeon who had been seeing him previously since 2007 observed in his report dated 6.7.16 that the Petitioner had had brain surgery in 2002 which was complicated by multiple brain infarcts. This made the Petitioner suffer frequent epileptic fits, significant memory loss as well as urine incontinence. He recommended that the Petitioner be subjected to a full psychometric assessment of his faculties by a psychiatrist. Upon assessment Dr. C. M. Mwangome, a consultant psychiatrist in his medical report dated 21.7.16 concluded that the Petitioner has severe cognitive impairment and cannot therefore lead an independent life.

9. The Applicant seeks to amend the petition from seeking dissolution of the marriage to annulment of the same on the ground that the Petitioner was insane at the time of marriage. The Applicant has based her submission on Section 12(a)(ii) of the Marriage Act, 2014 (the Act) which provides:

> ***Subject to section 50, a marriage is voidable if—***
>
> > ***(a) at the date of the marriage—***
> >
> > > ***(i) …***
> > >
> > > ***(ii) either party was and has ever since remained subject to recurrent attacks of insanity;***

10. It is the Applicant's case that following his brain surgery on 23.2.02, the Petitioner has been of diminished mental capacity and has remained in that state since. Consequently his marriage to the Respondent is void as he had no capacity to contract the marriage. The medical reports appear to confirm this position. In the circumstances, my finding is that there is sufficient ground for a petition to annul the marriage between the parties.

11. Section 73 of the Marriage Act provides:

> ***(1) A party to a marriage may petition the court to annul the marriage on the ground that—***
>
> ***(g) at the time of the marriage and without the knowledge of the petitioner, the other party suffers recurrent bouts of insanity.***
>
> ***(2) The court shall only grant a decree of annulment if—***
>
> > ***(a) the petition is made within one year of the celebration of the marriage;***

12. It was submitted for the Respondent that a petitioner may only move the Court to annul the marriage if the other party suffers recurrent bouts of insanity. The Respondent also argues that the party who moves the Court must not have had knowledge of the other party's insanity. A reading of Section 73(1)(g) appears to support the submission of the Respondent. The provision requires that the party against whom a petition at the time of the marriage suffers recurrent bouts of insanity and the party filing the petition was ignorant of this fact. In the instant case, it is the Petitioner who suffers the mental illness. Further his condition was apparent to the Applicant at the time of the marriage to the Respondent. My view therefore is that the circumstances of this case do not fit the stipulations of Section 73(1)(g) of the Act.

13. Further and even more critical, the marriage between the Petitioner and the Respondent took place on 29.3.08. The Application which seeks to amend the petition so that it be a petition for annulment of the marriage was filed on 31.8.16, a period of 8 years after the celebration of the marriage. The law is clear that the Court shall only grant a decree of annulment of the marriage if the petition is made within 1 year of the celebration of the marriage. The intended amended petition which seeks annulment of the marriage herein would therefore be a non-starter. To allow the Application would serve no useful purpose and the Court will not give an order in vain.

14. The medical reports show that since the brain surgery, the Petitioner had significant memory lapses, epileptic fits and urine incontinence.

The Applicant herself averred in her affidavit:

> ***10. That I request the Court to appoint me as the Petitioner's Guardian Ad Litem, having realised that he had diminished mental capacity as at 29/3/2002.***
>
> ***11. That having had diminished mental capacity from the 29/3/2002 the Petitioner could not have contracted a valid marriage as alleged or at all on the 29/3/2008.***

15. If indeed as the Applicant claims the Petitioner had diminished mental capacity since 2002 and had no mental capacity to contract the marriage, then it follows that he had no mental capacity to file the petition herein. It further follows that there is no petition before me. In the case of Macfoy vs United Africa Ltd [1961]3 ALL E.R. 1169 Lord Denning said at Page 1172

> ***… if an act is void then it is in law a nullity and not a mere irregularity. It is not only bad but incurably bad. There is no need for an order of the court to set aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.***

16. The petition before me is void for want of mental capacity on the part of the Petitioner to file the same. This being the case, the Application dated 31.8.16 being founded on a petition that is a nullity at inception is also bad and incurably bad. The petition being a nullity cannot be injected with real life by amendment. It is so hopeless that the wise counsel of Madan JA (as he then was) in the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another[1980] eKLR cannot come to the Applicant's aid. He succinctly stated:

> ***No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.***

17. In view of the foregoing, I find that the Application dated 31.8.16 lacks merit and the same is dismissed. This being a family matter, there shall be no order as to costs.

DATED, SIGNED and DELIVERED in MOMBASA this 26th day of April 2019

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M. THANDE

JUDGE

In the presence of: -

……for the Petitioner

……for the Respondent

……..…….. Court Assistant