



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

FAMILY DIVISION

MISCELLANEOUS APPLICATION NO. 31 OF 2017

MLMK.....1ST APPLICANT

SSB.....2ND APPLICANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

AND

SSB.....INTENDED NECESSARY PARTY

RULING

1. **SSB** the Interested Party and **MLMK** the 1st Applicant are a married couple. Their civil marriage was solemnized at the Registrar’s Office in Mombasa on 11.3.15 and certificate of marriage number ***** issued to them. Thereafter, the parties had another marriage conducted under Islamic law on 8.8.15 and marriage certificate number ***** was issued to them. This resulted in parties having 2 marriage certificates under 2 different systems of marriage.

2. By an application dated 25.9.17, the Interested Party and the 1st Applicant seek an order declaring marriage certificate number [particulars withheld] issued to them by the Attorney General, the Respondent herein, null and void. They also seek an order directing the Registrar of Marriages to deregister the civil marriage. The grounds for this application are that the existing scenario where the parties have 2 marriage certificates is causing a lot of confusion and is as a result of human error by the Respondent’s office. The parties are both Muslims and wish to retain the Islamic marriage only.

3. Prior to the hearing of the application, the Interested Party changed advocates and filed the application now before the Court dated 31.10.18 (the Application). The Interested Party seeks the orders summarized below:

- i) That her name be struck out as an applicant herein and instead be admitted as an interested or necessary party.
- ii) An order declaring the marriage certificate ***** issued on 8.8.15 in respect of the Islamic marriage null and void *ab initio*
- iii) An order that the Registrar of Marriages be directed to cancel the said marriage certificate.
- iv) An order declaring the Marriage Certificate No. ***** dated 11.3.15 in respect of the civil marriage as valid.
- v) Costs.

4. The Interested Party contends that at the time of executing the joint affidavit in support of the Application dated 25.9.17, she did not understand the contents thereof as the same had not been fully explained to her. The parties are now separated since April 2018 and the Interested Party lives with her 2 children at her parents’ home. Although she is a Muslim, she does not agree with the orders sought that the civil marriage be nullified given that it was a valid marriage and overrides the subsequent marriage.

5. Neither the 1st Applicant nor the Respondent filed a response to the Application. Nevertheless the parties' respective counsel made oral submissions before me which I have given due consideration. The issues for determination are:

- i) Whether the Interested Party should be admitted as an interested/necessary party
- ii) Which of the 2 marriages is valid
- iii) What orders are appropriate in the circumstances

Whether the Interested Party should be admitted as an interested/necessary party

6. The application dated 25.9.17 is supported by a joint affidavit of the Interested Party and the 1st Applicant. The Interested Party has stated that she did not understand the import of the joint affidavit. She has clearly stated that she does not agree with the orders sought to nullify the civil marriage. My view is that to retain her name as a joint applicant in the application dated 25.9.17 will greatly prejudice her. It will also deny her the right to access to justice guaranteed under Article 48 of the Constitution of Kenya 2010 which provides:

The State shall ensure access to justice for all persons and, if any fee is required, it shall be reasonable and shall not impede access to justice.

7. The Interested Party wishes to have the dispute relating to the 2 marriages and certificates, from her own point of view, determined by the Court and also the right to seek the orders which she fully understands and agrees with. To proceed with the application dated 25.9.17 the orders of which the Interested Party does not agree with will curtail her constitutional right enshrined in Article 50(1) of the Constitution which provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

8. In the circumstances, it is necessary that she be admitted as an interested party and her name be struck out as an applicant in the application dated 25.9.17.

Which of the 2 marriages is valid

9. It is not disputed that the Interested Party and the 1st Applicant had 2 marriage ceremonies. Both marriage certificates have been exhibited. The civil marriage was solemnized at the Registrar's Office in Mombasa on 11.3.15 and marriage certificate number [particulars withheld] issued. The Islamic marriage was solemnized on 8.8.15 at Memon Villa, Nasserpuria Memon Jamat and marriage certificate number ***** issued at Mombasa. Section 6(2) of the Marriage Act 2014 provides that a civil marriage is monogamous while Section 6(3) of the Act provides that an Islamic marriage is potentially polygamous. Section 9 of the Act prohibits parties in a monogamous marriage to contract another marriage as follows:

Subject to section 8, a married person shall not, while—

(a) in a monogamous marriage, contract another marriage; or

10. The foregoing provision does not state whether the subsequent marriage relates to the same parties or to others. It simply declares that another marriage shall not be contracted. The civil marriage was contracted first in time while the Islamic marriage was contracted subsequently. Accordingly the subsequent Islamic marriage was conducted contrary to law. The civil marriage is a valid marriage and must take precedence over the subsequent Islamic marriage. All marriages are governed by the law and it is not for the parties to decide which marriage is valid and which is not, which marriage they wish to keep and which they do not want. Having contracted a civil marriage, the parties ought to have applied for dissolution of the same before contracting an Islamic marriage. It is untenable for the parties to have 2 marriages under different marriage systems. Clearly one marriage must give way to the other.

11. It was argued for the 1st Applicant that the Interested Party was a virgin at the time the Islamic marriage was contracted as indicated in the marriage certificate and that the parties began to fulfil their marriage obligations after the Islamic marriage. What I understand from this submission is that the civil marriage was not consummated and should therefore be annulled. The Marriage Act at Section 73(1)(a) provides that non consummation of a marriage is a ground for annulment of the marriage. Section (7)(2)(a) goes on to say that a party seeking the annulment of a marriage shall do so by way of petition which must be filed within 1 year of the celebration of the marriage. What is before me is not a petition for annulment of the civil marriage. Further, the civil marriage as contracted on 11.3.15 which is over 4 years ago. In the circumstances, the submission by the 1st Applicant does not hold water and cannot move this Court to annul the civil marriage.

12. The law requires that all marriages be registered. The Registrar is required to establish and maintain a register for each marriage system. Rule 10(1) of the Marriage (Muslim Marriage) Rules, 2017 provides:

The Registrar shall establish and maintain a register of Muslim marriages into which shall be entered the details of the marriages in respect of which certificates are issued under these Rules.

13. Rule 7 of the Marriage (General) Rules, 2014 provides the following in respect of civil marriages:

The Registrar shall enter the details of each marriage certificate into the Marriage Register in the manner set out in Form MA9 in the First Schedule.

14. In conclusion, having considered the facts of this case, the rival submissions and the relevant law I find that the parties, having contracted a civil marriage on 11.3.15, the Islamic marriage of 8.8.15 ought not to have taken place in the first place and the marriage is null and void *ab initio*. It follows therefore that the marriage certificate number ***** dated 8.8.15 is also null and void. The Interested Party has invoked her constitutional right to have this erroneous state of affairs corrected. Article 35(2) of the Constitution provides:

Every person has the right to the correction or deletion of untrue or misleading information that affects the person.

15. Accordingly I make the following orders and declarations:

i) The marriage between **SSB** and MLMK solemnized on 11.3.15 at the Registrar's Office in Mombasa and marriage certificate number ***** are both valid.

ii) The marriage between **SSB** and MLMK solemnized on 8.8.15 at Memon Villa, Nasserpuria Memon Jamat, Mombasa and marriage certificate number ***** are both void *ab initio*.

iii) The Registrar of Marriages is directed to deregister Islamic marriage between **SSB** and MLMK solemnized on 8.8.15 at Memon Villa, Nasserpuria Memon Jamat, Mombasa and cancel marriage certificate number *****.

iv) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 30th day of May 2019

M. THANDE

JUDGE

In the presence of: -

.....**for the Interested Party**

.....**for the 1st Applicant**

.....**for the Respondent**

.....**Court Assistant**