REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

FAMILY DIVISION MILIMANI LAW COURTS

HIGH COURT CIVIL APPEAL NO. 113 OF 2015

B E T W E E N:

D K B.....APPELLANT

and

K S B.....RESPONDENT

R S.....1st CO-RESPONDENT

T P.....2nd CO-RESPONDENT

J U D G M E N T

1. This is an Appeal against the Decision of the Lower Court. The Appellant was the Petitioner in the Lower Court. The Respondents were the Respondent and two Co-Respondents. The Petition was certified ready to be heard and was then heard by Hon I Gichobi sitting in Nairobi on 18th December 2014 (the Trial Magistrate). The Learned Trial Magistrate dismissed the Appellant's Petition on 20th May 2016.

2. The Date of the Notice of Appeal is uncertain because there does not appear to be a copy on the File. However the Memorandum of Appeal is dated 22nd November 2016 and filed on 23rd November 2016. The Appellant appeals against the whole of the Judgment of the Lower Court. The Appellant seeks orders that:

(a) The Appeal be allowed.

(b) The judgment of the Court dated 20th May, 2016 dismissing the Appellant's Petition for Divorce dated 18th December 2014 be set aside and be substituted with an order of this Honourable Court granting the dissolution of the marriage celebrated between the Appellant and the Respondent on 12th December, 1998.

(c) This Honourable Court do grant the Appellant an order for maintenance.

3. The Grounds relied upon can be summarised as follows:

(a) The Learned Trial Magistrate erred in law in finding that the Court lacked jurisdiction to dissolve this marriage

(b) The Learned Trial Magistrate erred in law in finding that the fact that the Petitioner and Respondent had been married pursuant to Hindu Law in Tanzania was grounds for refusing jurisdiction, notwithstanding the existence of a marriage certificate

(c) The Learned Trial Magistrate did take into account that the Petitioner and Respondent were Kenyan Citizens ordinarily resident in the Republic of Kenya, including the periods of co-habitation.

(d) The Learned Trial Magistrate erred in distinguishing a marriage in a foreign jurisdiction for the purpose of divorce and holding that the Court had not been conferred with jurisdiction to dissolve a Hindu Marriage celebrated in a foreign country.

(e) The Learned Trial Magistrate did not apprehend sufficiently that the Marriage Act expressly provides for recognition of Hindu

Marriages

(f) The Learned Trial Magistrate failed to appreciate the full import of the Marriage Act 2014.

Grounds 9 to 11 sound more like legal argument than grounds so are not summarised here.

4. The Divorce Hearing proceeded as an un-defended cause. The Petitioner on 23 April 2015 filed a Chambers Summons for a Registrar's Certificate that the pleadings and proceedings are in order. There was also a prayer that the cause be set down for hearing as an undefended cause. That Certificate must have been granted because the Petition was set down for hearing and we have the Judgment of the Learned Magistrate. In the Judgment it states the cause was certified as ready for hearing uncontested.

5. The Leaned Magistrate heard the matter and did deliver a Judgment. However, as is now being complained of, in that Judgment she found that the Magistrate's Court did not have jurisdiction. In brief this was because (a) the Petitioner and Respondent had a "foreign marriage" and (b) the Court did not have jurisdiction to dissolve "such" foreign marriages.

6. In the circumstances, it is necessary to look carefully at the terms of the Judgment. The Judgment correctly records that the Applicable law "is indeed the ***Marriage Act, 2014***". There is then a implied criticism of the Petitioner for relying on ***Section 70*** (Hindu Marriages). The Learned Trial Magistrate also relates that she saw a copy of the Marriage Certificate of the Marriage Celebrated in Arusha, Tanzania.

7. In her Judgment the Learned Trial Magistrate confirmed that she had seen the marriage certificate (Petitioner's Exhibit 1) which was filed, confirming the Parties were married on 12th December 1998 in Arusha Tanzania and it was an "Hindu Union". It is also confirmed that the birth certificates of the Children were tendered. It is inevitable that those birth certificates would have recorded the place of birth of the Children. The Trial Magistrate did not stop there and decide whether she did have jurisdiction or not. She carried on hearing the matter. The Matter was fully heard during which the Petitioner gave oral testimony and produced all her evidence to the Court including details of cruelty and adultery. That would have taken up time and no doubt caused the Petitioner a degree of distress.

8. In her Judgment the Learned Trial Magistrate records that the Petitioner relies on ***Section 70*** but notes that although the ***Marriage Act*** is applicable ***Section 70*** only highlights the grounds for divorce in a Hindu marriage. The Learned Trail Magistrate then goes on to say "*From the Marriage Act, 2014 I couldnt find anywhere this Court is conferred with jurisdiction to dissolve foreign Hindu Unions and/or marriages . What also comes to mind is whether the grounds for dissolution of marriage in the country it was celebrated are the same as those in out (sic) Act. It is my finding that the Petition was filed before a court without jurisdiction. Consequently the same is dismissed with no orders as to costs.*".

9. It is clear from the above statements that the Learned Trial Magistrate did not adequately address the issues before her. It is inevitable that the first question is whether or not the Parties had a valid marriage recognised by the Courts in this jurisdiction. If there was no valid marriage why was certification given for that matter to be heard? It was clear and obvious from the Marriage Certificate that the marriage ceremony was conducted in Arusha, Tanzania. The ***Marriage Act at Section 38*** provides;

A marriage celebrated in a foreign country otherwise than in accordance with section 37 is valid if—

(a) it was contracted in accordance with the law of that country and is consistent with the laws of Kenya;

(b) at the time of the marriage the parties had the capacity to marry under the law of that country and is consistent with the laws of Kenya;

(c) either of the parties is at the time of the marriage domiciled in Kenya, both parties had capacity to marry under this Act; and

(d) if the Registrar is satisfied that the parties have obtained a certificate of no impediment if the law of that country requires the parties to an intended marriage to obtain such a certificate.

Further Section 40 of the Act provides:

"*A civil marriage contracted in a foreign country shall be recognized as a valid marriage if—*

(a) it is contracted in accordance with the law of that country;

(b) it is consistent with the provisions of this Part; and

(c) the parties have the capacity to marry under this Act."

10. In light of the fact that it recorded that a Marriage Certificate exists, it is logical to assume that the marriage was registered in the country where it was performed (Tanzania). Therefore there was at the very least a civil marriage that could be recognised. The Learned Magistrate records clearly that he/she did not know whether that was inconsistent with Kenyan law. In the circumstances, assuming inconsistency that can vitiate the marriage without evidence is of questionable logic. Civil Marriages by persons domiciled in Kenya, contracted elsewhere are recognised as valid in Kenya. The ***Marriage Act*** at ***Section 6*** also lists the type of marriages that it recognises as valid which are :

A marriage may be registered under this Act if it is celebrated—

(a) in accordance with the rites of a Christian denomination;

(b) as a civil marriage;

(c) in accordance with the customary rites relating to any of the communities in Kenya;

(d) in accordance with the Hindu rites and ceremonies; and

(e) in accordance with Islamic law.

11. The question then arises as to whether the Magistrate's Court has the jurisdiction to dissolve such a marriage. The ***Marriage Act 2014*** is clear and categoric on that issue. All references to "the Court" in the ***Marriage Act*** are defined in the Interpretation section of the Act (***Section 2***) to be "means a resident magistrate's court established under ***section 3*** of the ***Magistrate's Court Act.***

12. Who then can petition for dissolution of the Marriage? ***Section 66*** is also clear and it provides:

66. (1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

(2) A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—

(a) adultery by the other spouse;

(b) cruelty by the other spouse;

(c) exceptional depravity by the other spouse;

(d) desertion by the other spouse for at least three years; or

(e) the irretrievable breakdown of the marriage.

(3) The petitioner may file the petition with the court for the separation of the parties or the dissolution of the marriage despite any effort to reconcile the parties.

(4) The court may refer a matrimonial dispute that arises in a marriage celebrated under Part IV to a conciliatory process agreed between the parties.

(5) The proceedings for the dissolution of a marriage celebrated under Part IV may be adjourned for a period not exceeding six months as the court may think fit—

(a) for the court to make further enquiries; or

(b) for further attempts at reconciliation to be made by the parties to the marriage.

(6) A marriage has irretrievably broken down if—

(a) a spouse commits adultery;

(b) a spouse is cruel a spouse is cruel to the other spouse or to any child of the marriage;

(c) a spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;

(d) the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;

(e) a spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;

(f) a spouse has been sentenced to a term of imprisonment of the for life or for a term of seven years or more;

(g) a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or

(h) any other ground as the court may deem appropriate.

13. Although that section does not expressly require that at least one of the Parties must be within the jurisdiction, that can be presupposed in this case given that they are both resident in Kenya. Equally, that Section does not exclude persons who are not resident within the jurisdiction of the Court. The answer lies in case law, in particular the Appellant relies of the Ruling of Hon W. Musyoka J in ***MNM v PNM [2016] eKLR*** where he states "*The jurisdiction of a family court to entertain a divorce cause is therefore guided by the law of domicile. Whether a court before which such matter has been placed is competent to handle it will depend on whether the parties or either of them have been resident within the jurisdiction of that court for the period stipulated by the relevant law...*." In the case now before this Court and the Lower Court, the Parties were resident and domiciled in Kenya. That pre-requisite of residence can be seen to be consistent with other jurisdictions for example, England and Wales. Further ***Section 67*** provides for a period of residence of 2 years for recognition of a decree of dissolution.

14. The Authorities which is not exhaustive but has been referred to by the Parties in this and similar appeals including:

(1) ***Divorce Cause No 176 of 2014***: Hon Justice R. Ougo said "*On the issue of jurisdiction. I note the marriage between the parties is a civil marriage. Parliament whilst enacting the law to cover such marriages has at sections 30 and 40 of the Marriage Act provided for what makes such marriage valid in Kenya… there is nothing that makes registration of a foreign marriage compulsory for foreign nationals who are foreigners who celebrated their marriage in foreign country*.." She then goes on quote and rely on ***MNM v PNM [2017 eKLR***.

(2) ***Civil Appeal No 53 of 2014 MNM v PNM [2017 eKLR*** Hon W. Musyoka J held that "*In personal matters such as marriage, domicile is critical. Domicile is all about residency. The law of domicile plays and important role in the determination of whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of marriage where the parties have been domiciled within the jurisdiction of that court for the period allowed by the relevant law….*

(3) In ***Divorce Cause No 2 of 2017*** Hon Onyiego J found that the Parties were married and lived in Kenya. He stated "the parties herein are both American citizens abut residents (domiciled) of Kenya. Marriage Certificate was produced as evidence and/or proof of the existence of the said marrieage….. In accordance with Section 40 of the marriage Act, a foreign marriage is recognized as a civil marriage so long as it is … I am therefore satisfied the couple herein properly contracted a marriage in accordance with their country's laws consistent with Kenyan Law. Those Authorities are binding precedent upon the Lower Court. No doubt, they would have been readily available to the Learned Magistrate, had any inquiry been made.

15. Section 67 refers to a period of residence of 2 years for recognition of a decree of dissolution. In addition ***Civil Procedure Rules Rule 15*** requires that a suit be issued in the home court of the defendant (respondent). ***Parts V to VII*** of the ***Act*** deals with Marriages that are not "civil marriages" under the Act although they may be both. ***Section 58*** of ***the Act*** provides that a Kenyan who celebrates a marriage outside Kenya may apply to the Registrar to have the marriage registered. That is not an obligatory provision but is a permissive section tending towards recognition. ***Part X*** of the Act provides for dissolution of various types of marriage. ***Section 59*** sets out what is good evidence, ***59(1)(a)*** provides that a certificate of marriage under the Act or any other written law, is good evidence. That read with ***Section 58*** which makes registration of foreign marriages voluntary ("may apply") means that ***Section 59*** cannot fairly be construed to exclude foreign marriage certificates.

16. Under ***Section 45*** of the Act Hindu Marriages as a concept are also recognised as is consistent with the Constitutional directive of allowing communities to observe their own practices. ***Section 70*** provides the grounds for Divorce for Hindu Marriages. ***Article 159(2) of CoK*** requires that the following principles be applied:

(a) Justice shall be done to all, irrespective of status;

(b) Justice shall not be delayed;

(c) Alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispuAte resolution mechanisms shall be promoted, subject to clause (3);

(d) Justice shall be administered without undue regard to procedural technicalities; and

(e) The purpose and principles of this Constitution shall be protected and promoted.

That applies expressly to the Magistrates Courts under the Magistrates' Court Act. The interpretation given to the Marriage Act by the Learned Trial Magistrate has the effect of non-suiting persons who are ordinarily resident and domiciled within the jurisdiction of the Court. An interpretation that provides such a result is contrary to the Constitution and therefore cannot be a correct interpretation.

17. Further, the ***Cof K*** provides for equality of all communities and religions. In the circumstances, the Learned Trial Judge preferring one type of "foreign marriage" eg Christian as more worthy of recognition than another type of "foreign marriage", as in this case, Hindu leads to the question of what is acceptably foreign and what is "too foreign" for recognition in the eyes of this particular Learned Magistrate. Clearly, such distinctions are contrary to the Constitution and the Rules of natural justice. The amount of thought that went into this Judgment is also apparent from the fact that the Order for dismissal is entitled "Decree Nisi". Which is the definitive part of the Order? The heading or the body of the Order? How is inconsistency to be resolved? Further, the Lower Court did issue a Certificate signifying the matter was ready to be heard. That is the stage at which it would be logical to consider jurisdiction. Once a matter is certified ready to be heard and given a hearing date, that raises a legitimate expectation that the Court seized of the matter and more importantly, accepts jurisdiction.

18. The Appellant through her Advocates filed Written Submissions and Authorities. Those have proved very useful and the Court is grateful for the work that has gone into their production. They are not produced here in the interests of brevity.

19. For the reasons set out above, the Judgment of the Lower Court is dismissed in its entirety together with any orders that may emanate from that judgment. The decision is incorrect in principle and also in terms of access to justice.

20. The Appellant asks the Court to dissolve the marriage and make consequential orders for maintenance. The Court has before it the uncontroverted evidence of the Petition (in the form of the Judgment). That demonstrates sufficient grounds for dissolution for adultery. This Court can, therefore, grant dissolution and it is ordered that a decree nisi do issue forthwith.

21. In relation to the question of child maintenance that is already before the Children's Court. In relation to spousal maintenance, there is no evidence before the Court of the Parties income and needs nor standard of living prior to divorce or separation. In the circumstances, this Court cannot make an order on those issues. The file is to be transferred back to a different Court from the trial court for hearing and determination.

Order accordingly,

FARAH S.M. AMIN

JUDGE

Signed, Dated and Delivered in Nairobi this the 26th day of February 2018

In the Presence of:

Clerk: Patrick Mwangi

Appellant: Mr Bowry