



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL CASE NO. 64 OF 2013 (O.S.)

IN THE MATTER OF THE MARRIED WOMEN'S PROPERTY ACT OF 1882

G M.....PLAINTIFF/APPLICANT

VERSUS

D M M.....DEFENDANT/RESPONDENT

RULING

1. The Plaintiff married the Defendant on 13th August, 2011. The said marriage was however annulled and declared void by the judgment delivered on 24th October, 2013 in **Mavoko Principal Magistrate's Court Divorce Cause No. 6 of 2012**. The basis on which the marriage was annulled was bigamy.

2. The Plaintiff subsequently vide originating summons dated 26th November, 2013 sought distribution of property alleged to have been acquired jointly during the subsistence of the annulled marriage. The Defendant has raised a preliminary objection to the suit on grounds that:

i. The marriage between the plaintiff, G M, and the defendant, D M M, was declared a nullity in Mavoko PMCC Divorce Cause No. 6 of 2012.

ii. The marriage having been declared a nullity, was null and void ab initio and cannot, therefore, confer any rights upon the plaintiff to found a claim under the Married Women's Property Act of 1882 or any other marriage legislation.

iii. That accordingly, no claim of distribution of matrimonial property can arise in law in the circumstances of a marriage that never was since the parties had no capacity to contract marriage.

3. Learned Counsel for the Defendant Mr. Kimuli argued that the pleading, in particular, the originating summons is clear that the marriage between the parties was declared a nullity. That the case of **Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd (1969) E.A. 696** requires that the pleadings filed are correct. That the marriage having been termed as null even in the plaintiff's pleading, no legal consequences arises from it. It was submitted that an illegal contract has no consequences and does not accord benefits out of an illegal situation. Counsel cited section 75 of the Marriage Act which he said stated that parties to a marriage declared a nullity shall be deemed to have been never married. That the law operates from the beginning of the marriage. That the parties cannot be claimed to have been married and none of them should have been married and none of them should have moved to this court on the basis of a marriage. In support thereof, Counsel cited **OKN v. MPN [2017] eKLR** in reliance. The Court of Appeal in the said case held that a marriage that has been nullified would not found a claim based on family law. It was finally submitted that the procedure adopted by the plaintiff is not appropriate since there was no marriage between the parties.

4. Mr. Makau learned Counsel for the Plaintiff on the other hand submitted that the matter before this court is one seeking for declaration and refund of contribution towards some property acquired. That the property in question was bought in July, 2009 and is not disputed by the parties. That the marriage that was annulled was contracted on 13th August, 2011 which is not disputed by the parties. It was submitted that the latter authority supports the plaintiff's case for the reason that the repealed Matrimonial Causes Act section 28 gives this court the discretion to determine the matter. That this court was moved in the year 2013 when the Act gave this court the power to entertain the suit.

5. I have given due consideration to the parties' arguments herein. While it is contended that the property in question was bought in July, 2009 and is not disputed by the parties, it is clear from the prayers sought that the plaintiff's claim is that the same be sold and be distributed in accordance with each parties' direct contribution to the acquisition. From the pleading therefore, an impression is given that the properties were bought together and this court cannot deviate from the plaintiff's own pleadings. What falls for this court's determination therefore is whether or not it has the jurisdiction to distribute property in this case considering that the marriage was found to be a nullity.

6. I am in that regard guided by the Court of Appeal in **OKN v. MPN [2017] eKLR** holding that:

“...the parties’ marriage was annulled because the appellant had no capacity to contract one as he had a subsisting marriage. The law in force at the time was firm. First, section 14 of the repealed Matrimonial Causes Act declared that, among the grounds for decree of nullity included a situation where the former husband or wife of either party was living at the time of the marriage, and the marriage with such previous husband or wife was then in force. The appellant and the respondent purported to enter into a union (at least the respondent) believing it was a marriage when in fact and in law the appellant was incompetent to marry by reason of a subsisting marriage

A felony of bigamy is committed under section 171 of the Penal Code if;

“Any person who, having a husband or a wife living, goes through a ceremony of marriage which is void by reasons of it taking place during the life of the husband or wife, is guilty of a felony and is liable to imprisonment for five years; provided that this section shall not extend to any person whose marriage with the husband or wife has been declared void by a court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife if the husband or wife, at the time of the subsequent marriage, has been continually absent from such person for the space of seven years, and had not been heard of by such person as being alive within that time”.

The exception in the proviso is not applicable to the parties herein.

Section 42 of the repealed Marriage Act, similarly outlawed, by imposing an imprisonment term of not more than five years for a marriage between a person previously married and whose marriage had not been dissolved with another.

It follows therefore that the benefits granted to a lawful marriage are not available to cohabitees who are deemed never to have been married at all. As they would say in Latin in the days of old, nihil fit ex nihilo (out of nothing, nothing comes). As Lord Denning also famously said in Macfoy V United Africa Co. Ltd [1961] 3 All E.R. 1169:

“...if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it 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.”

Not even the presumption of marriage as understood in law could save the situation because the union was in limine nonexistent, contracted without capacity. Such unions present many challenges to those involved and are fraught with legal uncertainties. There being no marriage between the parties, the two properties cannot be shared in accordance with family law.”

7. As the Plaintiff has revealed that the property in dispute had been purchased in 2009 there is a likelihood that the same had been acquired prior to the celebration of the annulled marriage and as such the parties could then address any ownership disputes via a different procedure and not under the married Women’s Property Act 1882 since the marriage has been annulled. It is noted that the Plaintiff has so far not lodged an appeal against the annulment of the marriage and further there is no stay of the Lower Court’s judgement so as to give the Plaintiff some semblance of locus standi even in the interim to maintain these proceedings. This then bolsters the Defendant’s preliminary objection on this Court’s lack of jurisdiction to hear and determine the suit.

8. In the circumstances, I find merit in the Preliminary Objection herein. The suit herein is consequently dismissed. The Applicant to seek redress in the right forum or procedure. Each party to bear its own costs.

It is so ordered.

Dated and delivered at Machakos this 27th day of April, 2018.

D. K. KEMEI

JUDGE

In the presence of:-

Muthama for Makau - for the Plaintiff/Applicant

Kimuli - for the Defendant/Respondent

Kituva - Court Assistant