



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE No. 110 OF 2015
BETWEEN
A M D N.....PETITIONER
VERSUS
S M L.....RESPONDENT
JUDGMENT

By way of a Petition and an Affidavit in support dated 28th July 2015 and filed on 4th August 2015, the Petitioner sought to have his marriage to the Respondent annulled on grounds that the marriage was conducted under a wrong statute being the Christian Marriage and Divorce Act, Cap 151 (now repealed) thus void *ab-initio*.

The petitioner and the Respondent were married on 17th September 2005. The marriage ceremony was conducted at [*particulars withheld*] Church and a marriage certificate of serial [*particulars withheld*] was thereafter issued under the provisions of the African Christian Marriage and Divorce Act, Cap 151 (now repealed). They thereafter continued to live together and the marriage was blessed with one issue F M M C who was born on 11th November 2008.

The Petitioner is an Italian citizen domiciled in Virginia, in the United States of America and the Respondent is a Kenyan citizen of British descent residing in Kenya. The Petitioner is an Economist by profession while the Respondent is a Writer.

Petitioner's Case

In his Petition, the Petitioner elucidated that both him and the Respondent are not Africans and thus the law under which they got married was not applicable to them making their said marriage a nullity. He further contended that they have been living separately since February 2011 due to domestic wrangles. The Petitioner further averred that the issue concerning the custody and maintenance of their Child is ongoing in the Children's Court in Nairobi under Children's Case No. 1358 of 2014. The Petitioner prayed for orders that his marriage with the Respondent be declared a nullity and a declaration be made that there was no valid marriage between them.

In his submissions dated 28th November 2016, relied on section 3(1) of the African Christian Marriage and Divorce Act (now repealed) which limits the application of the Act to persons who are of the African descent. Further, he relied on the case of **MJBM v VLMNG, Divorce Cause No. 12 of 2008** wherein the

court held that the parties; who were of the Asian descent and American descent had no racial capacity to contract a marriage under the African Christian and Divorce Act and thus the marriage was null and void *ab-initio*.

He also relied on the case of **Caroline Dian Jones v Thomas Lyle Jones, Divorce Cause No. 118 of 2003** where the judge in issuing a decree of nullity to the parties who had wrongly contracted their marriage under the African Christian and Divorce Act, held that the parties had did not have the requisite racial capacity to contact the marriage and thus it should not be let to stand notwithstanding any procedural impropriety in the proceeding.

Respondent's Case

The Respondent in this matter filed her Answer to Petition on 8th October 2015. She admitted being married to the Petitioner and that the said marriage was celebrated under the African Christian and Divorce Act, Cap 151 (now repealed). She however denied that the said marriage was void *ab-initio*. In her Answer to Petition, she averred that that the position limiting the applicability of the said Act to Africans was discriminatory and that the same was declared void and thus their marriage is valid. Further, she admitted that they have been living separately since February and that the matter concerning their Child's custody and maintenance is ongoing in the Children's Court in Nairobi. She prayed that the Petition be dismissed with costs.

In her submissions dated 13th December 2016, the Respondent argued that their marriage was valid and not void ad-initio as alleged by the Petitioner. She relied on the section 82 of the Constitution of Kenya, 1963 (now repealed) and Article 27 of the Constitution of Kenya, 2010 which attributed to freedom from discrimination on racial grounds.

Further, the Respondent relied on the case of **E.O v The Attorney General & Others, Petition No. 8 of 2012** and **George Gitau Wainaina v Rose Wainaina, Divorce Cause No. 72 of 2002**. In **Petition No. 8 of 2012, section 3(1) of the aforementioned Act** was declared unconstitutional. The learned judge held:

“...It seems to me that the provisions contained in section 3,14 and 15 of the African Christian Marriage and Divorce Act, as read with section 3 of the Matrimonial Causes Act are in breach of the Constitutional provisions barring discrimination on racial grounds, are obsolete and out of step with present day Kenya and in need of urgent review...”

She also relied on an Affidavit of Domestic partnership dated 13th March 2002 in which they agreed that they were each other's sole domestic partners and intended to remain so indefinitely.

ANALYSIS AND DETERMINATION

From the foregoing, the issue for determination by the Court is whether or not the marriage celebrated under the **African Christian Marriage and Divorce Act, Cap 151 (now repealed)** was valid. This is in light of its **Section 3(1)** which limited its applicability to marriages of Africans one or both of whom profess the Christian religion and to the dissolution of such marriages.

The African Christian Marriage and Divorce Act, Cap 151 came into operation on 17th December 1931 long before Kenya gained independence. The objective of the Act was to provide *inter-alia* for the marriage of African Christians and for the dissolution of such marriages. **Section 3(1) of the Act** provided:

“This Act shall apply only to the marriages of Africans one or both of whom profess the Christian religion and to the dissolution of such marriages.”

From this section, there is no doubt that the Act only applied to parties who were of the African descent as submitted by the Petitioner. This notwithstanding, it is important to firstly appreciate the fact that the

African Christian Marriage and Divorce Act, Cap 151 was enacted more than a decade ago before Kenya gained independence. The circumstances surrounding its enactment then have changed over time and thus the same cannot be applied in light of the changes in our Society today.

Looking at previous cases which interrogated the applicability of that section, it was declared unconstitutional due to the fact that it discriminates on the basis of religion and race contrary to **Section 82 of the Constitution of Kenya, 1963 (now repealed)**. In the case of *George Wainaina v Rose Wainaina, Divorce Cause, 2008 1 KLR, supra*.

In *EO v Hon. Attorney General and Another, 2012*; a similar case decided after the promulgation of the **Constitution of Kenya, 2010**, Majanja J concurred with Kubo J's sentiments and further stated that;

"...once a finding or declaration of unconstitutionality is made, it takes effect immediately unless otherwise stated..."

In addition to the above holdings, the **Constitution of Kenya, 2010** which is currently the Supreme Law provides for freedom from discrimination and upholds its' supremacy by declaring any law that is inconsistent to it void to the extent on the inconsistency. **Article 27(4) of the Constitution of Kenya, 2010** provides:

"The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, color, age, disability, religion, conscience, belief, culture, dress, language or birth."

Further, **Article 2(4) of the Constitution of Kenya, 2010** provides:

"Any Law, including customary law that is inconsistent with this Constitution is void to the extent of the inconsistency with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid."

Accordingly, despite the fact that the marriage between the Petitioner and the Respondent was solemnized before the promulgation of the **Constitution of Kenya, 2010**, its' provisions do apply in this instant case because it is the law that currently governs Kenya. Looking at the Petitioner's case *vis-à-vis* the afore-highlighted Articles, it is this Court's position that the **section 3(1) of the African Christian Marriage and Divorce Act** as invoked is unconstitutional due to the fact that it is offends the spirit of **Article 27 of the Constitution of Kenya, 2010** in that it discriminates against the Respondent's race and religion and the same is void and inapplicable by virtue of **Article 2(4) of the constitution of Kenya, 2010**.

In the same vein, it is also important to acknowledge the fact that the African Christian Marriage and Divorce Act was repealed by the Marriage Act, 2014. **Section 99 of the Marriage Act, 2014** provides that the Act repealed the **African Christian Marriage and Divorce Act, Cap 151** among other statutes. This means that it cannot be invoked because it no longer has any legal force as none of its provisions were saved in the savings clause.

Having said all this, this Court also appreciates the fact that both parties admitted that they had an intimate relationship and they both lived together before solemnizing their union on 17th September 2005. Moreover, after the attempted solemnization, the parties continued to live together and in the year 2008 were blessed with one issue. Although the formalities were not complied with as alleged by the Petitioner, the principle of Common Law Marriages applies in this instant case.

Common Law Marriages arise from the principle of presumption of marriage after a reasonable period of cohabitation by the parties. The presumption usually arises where a man and woman cohabit and hold themselves out as man and wife even though they have not undergone any formal marriage. This presumption is applicable in Kenya by virtue of **Section 3 of the Judicature Act, Cap 3**.

In the case of *S.W.G v H.M.K, 2015* Musyoka J in applying this common law doctrine held that,

“Where a marriage does not comply with the relevant formalities laid down by the Marriage Act or under customary law, it may be rescued by presumption of marriage by cohabitation.”

Further, the principle of presumption of marriage can be alluded to in **Section 119 of the Evidence Act, Cap 80** which provides,

“The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case.”

From the facts, the parties lived together from the year 2002 to 2008. They signed an Affidavit to signify that they were in a stable relationship and that they regarded each other as ‘domestic partners’ in an agreement dated 13th March 2012. They have a child of their union. Their actions and lifestyle evidenced that the two then held themselves out to the public as husband and wife. They believed that they had undergone a formal marriage and the issue of the marriage being void *ab-initio* as alleged by the Petitioner manifested itself as an afterthought only when the union started having challenges.

Having regard to all these circumstances, this Court finds that there was a valid marriage between the Petitioner and the Respondent and thus pursuant to **Section 98 (1) of the Marriage Act, 2014** which provides:

“A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act,”

Their marriage is valid for the purposes of the Act and annulment thereof can only be sought on the grounds listed under **Section 74 of the Marriage Act, 2014** which do not include the ground relied upon by the Petitioner.

DISPOSITION

In light of this discussion, this Court holds that:

- I. The marriage between the Petitioner and the Respondent solemnized on 17th September 2005 is valid. The Petition for nullity lacks merit and is thus dismissed with costs.**
- II. Parties may file their Petition for Divorce in the normal procedure if they desire to have their marriage dissolved.**
- III. The issue on custody and maintenance of the Children shall be heard and determined by the Children’s Court in Children Case No. 1358 of 2014.**
- IV. Each party to bear their own costs.**

DATED, SIGNED & DELIVERED IN OPEN COURT AT NAIROBI THIS 12TH DAY OF APRIL 2017.

MARGARET W. MUIGAI

JUDGE