



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
DIVORCE CAUSE NO 197 OF 2013

I. N. K.
PETITIONER

VERSUS

P. J. K. N.**1ST RESPONDENT**

F. N. K.**2ND RESPONDENT**

RULING

PLEADINGS

By this action brought before this Court by way of a petition filed on 3rd October 2014, I.N.K., hereafter “the Petitioner”, seeks to have the marriage between her and P.J.K.N., hereafter “the 1st Respondent”, dissolved. The Petitioner also seeks to have the marriage between the 1st Respondent and F.N.K., hereafter “the 2nd Respondent”, be annulled. According to the petition, it is said that the Petitioner and the 1st Respondent celebrated a marriage under Kikuyu customary law which was witnessed by the relatives of both parties. This position is accepted by the 1st Respondent in his answer to petition and cross-petition that was filed on 16th December 2014. Details of the Kikuyu customary marriage ceremony between the Petitioner and the 1st Respondent demonstrate that all the relevant elements of a valid marriage were present, and on that basis this Court can make a finding that there is a valid marriage between the Petitioner and the 1st Respondent.

It is the admission of both the Petitioner and the 1st Respondent that they have lived together as husband and wife since the celebration of their marriage in 1969 and that their marriage has been blessed with eight (8) children, six (6) of whom are surviving. They also agree that the Petitioner and the 1st Respondent are currently living together in their matrimonial home in Limuru. They further agreed that the Petitioner only became aware of the civil marriage between the 1st Respondent and the 2nd Respondent when **H.C. Matrimonial Cause No. 53 of 2014 (OS)** was filed by the 2nd Respondent seeking division of the 1st Respondent’s property and transfer of the same to herself on the basis that she was the wife of the 1st Respondent.

The 1st Respondent admitted to having contracted a civil marriage with the 2nd Respondent on 9th October 2001 while his marriage to the Petitioner was still subsisting. But he insisted that he did not freely consent to the latter marriage and that his participation in was obtained by false inducements,

manipulation, threats, misrepresentation, mistake and fraud on the part of the 2nd Respondent. In particular, he stated, among others, that the 2nd Respondent threatened to discontinue the intimate relationship they had if he did not take part in the marriage ceremony, lied to him that their civil marriage would not affect his earlier marriage, and swore a false affidavit that the 1st Respondent was not married under African customary law although she was well aware of the fact of his earlier marriage to the Petitioner. The 1st Respondent maintained that despite his civil marriage, he has never lived with the 2nd Respondent as husband and wife nor has she borne any children with him. He however admitted to having an intimate relationship with the 2nd Respondent and occasional visits to her house which the 1st Respondent built for her in Kasarani, Nairobi.

The Petitioner's application for annulment of the civil marriage between the 1st Respondent and the 2nd Respondent is opposed. By way of a notice of motion filed on 23rd December, the 2nd Respondent through Counsel sought to have the Petitioner's petition struck out and to have the costs of the application provided for. Her action was premised on three grounds. First, she argued that the Petitioner lacked the capacity to petition the court for annulment of the marriage between the 1st and 2nd Respondents since she was not a party to that marriage. Second, she argued that the petition for annulment of the marriage was time barred because it was not filed within one year of the marriage which was solemnized in 2001. Third, she argued that the petition was filed in the wrong forum since the High Court is not a court of first instance and therefore it did not have jurisdiction to entertain the matter.

The 1st Respondent opposed the content of the 2nd Respondent's notice of motion filed on 15th April 2014, arguing that the same was misconceived and as such is unsustainable. The better approach, argued the 1st Respondent, was to take into account the fact that **H.C. Matrimonial Cause No. 53 of 2014 (OS)** filed by the 2nd Respondent against him and seeking the division of his property would directly affect the rights and interests of the Petitioner, his wife. He thus argued that **H.C. Matrimonial Cause No. 53 of 2014 (OS)** be consolidated with the present petition **Divorce Cause No. 197 of 2014** in order that the dispute between the parties be resolved justly, expeditiously, proportionately and affordably. In support of his objection to the preliminary striking out by this Court of the Petitioner's petition, the 1st Respondent pleaded that the effect of such action would be to deny justice to the Petitioner whose petition, in his estimation, discloses a reasonable cause of action. He further submitted that it would not only be unconstitutional to do so but that it would be contrary to the current policy of the Court which eschews determining matters preliminarily without affording the parties the chance to be heard.

On 22nd April 2015, the Petitioner filed a replying affidavit to the 2nd Respondent's application seeking to have her petition struck out. In it she stated, among other things, that the provisions of **Section 74** of the **Marriage Act 2014** are no bar to her action seeking the annulment of the civil marriage between the 1st and 2nd Respondents. She also countered the 2nd Respondent's contention that **Section 73(2)(a)** of the **Marriage Act 2014** precludes her from applying for nullification of the marriage civil marriage by arguing that she only came to find out about the civil marriage in 2014 and therefore justice could not be denied to her. As regards the alleged lack of jurisdiction by the High Court over the petition, the Petitioner argued that this Court has unlimited original jurisdiction in both civil and criminal matters and is thus competent to hear and determine the case.

ISSUES

The pleadings and evidence presented by the parties in this case disclose that the following are the issues for determination to which the Court will focus its legal analysis:

- i. Whether this Court has jurisdiction to hear and determine the petition for annulment of the marriage between the 1st and 2nd Respondents;
- ii. Whether the Petitioner has legal capacity to petition for the annulment of the marriage between the 1st and 2nd Respondents;
- iii. If the answer to (i) is in the affirmative, whether the Petitioner has made a credible case and

- adduced sufficient evidence to warrant the grant by this Court of a decree of annulment of the marriage between the 1st and 2nd Respondents;
- iv. Whether **H.C. Matrimonial Cause No. 53 of 2014 (OS)** should be consolidated with the present petition **Divorce Cause No. 197 of 2014**.

LAW

The jurisdiction of the High Court is set out in **Article 165(3)(a)** of the **Constitution of Kenya 2010** which provides:

Subject to clause (5), the High Court shall have –

- a. *unlimited original jurisdiction in criminal and civil matters;*
- b. *jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; ...*

Article 165(5) of the **Constitution of Kenya 2010** to which reference is made in **Article 165(3)** above, provides:

The High Court shall not have jurisdiction in respect of matters –

- a. *reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or*
- b. *falling within the jurisdiction of the courts contemplated in Article 162 (2) [i.e. the Industrial Court & the Environment and Land Court].*

The statutory definition of the “court” in **Section 2** of the **Marriage Act 2014** is “a Resident Magistrate’s court established under **Section 3** of the **Magistrates’ Court Act**”. This definition is construed by the 2nd Respondent as conferring exclusive original jurisdiction with regard to a petition for annulment of marriage to the Resident Magistrates’ court. On that premise she has argued that the Petitioner’s petition is incompetent since it has been filed in the High Court instead of the Resident Magistrates’ Court. It is however important to recall that in principle the Constitution supersedes any other law because of its supreme status. Accordingly, the scope of the High Court’s jurisdiction as outlined in the **Constitution of Kenya, 2010** must hold sway over the statutory limitation of that scope in the **Marriage Act 2014**. Even though it was never raised by the 2nd Respondent, it is conceivable that the argument could be raised that being the more specific law governing the matter of annulment of marriages in Kenya, the interpretive maxim of *lex specialis derogat generalis* would dictate that the provisions of the **Marriage Act 2014** should in principle supersede those of the **Constitution of Kenya, 2010**. But even then such an argument could easily be defeated by pointing out the simple yet crucial fact that **Article 165** of the **Constitution of Kenya, 2010** establishes the High Court and delimits its jurisdictional scope. Therefore, it follows that in so far as the issue of the jurisdiction of the High Court is concerned the **Constitution of Kenya, 2010** is the more specific law. This would support a finding that this Court is competent to hear and determine the petition for annulment of the marriage between the 1st and 2nd Respondents.

The propriety of this Court’s jurisdiction over the Petitioner’s action also finds support in the wording of **Article 165(3)** of the **Constitution of Kenya, 2010** which outlines the negative jurisdiction of the High Court. This provision states that the High Court shall not have jurisdiction over matters within the exclusive remit of the Supreme Court and those that are within the exclusive purview of the Land and Environment Court and the Industrial Court. Nothing in the language of this provision precludes the High Court from being seized of any other matters. As a matter of interpretation, when **clauses 3 & 5** of **Article 165** are read conjunctively, it becomes clear that the legislators of these provisions did not intend to limit the broad jurisdiction of the High Court.

Even more pertinent is the fact that the Petitioner’s action for annulment of the marriage between the 1st and 2nd Respondents is directly related in substantial terms with the 2nd Respondent’s claim for division of the 1st Respondent’s property over which the Petitioner has proprietary interests. The issue of division

of matrimonial property by dint of the **Matrimonial Property Act, 2013** vests this Court with jurisdiction over the matter. In addition, the rival submissions of the Petitioner and 2nd Respondent show that certain aspects of the right to property which is protected in the Bill of Rights in the **Constitution of Kenya, 2010** are directly implicated. And so while the issues of the protection of the right to property and family rights have not been expressly pleaded by any of the parties as a matter of fundamental rights, it is foreseeable that they will figure more prominently in subsequent submission. In this regard, this Court finds it necessary that it should continue being seized of the present matter in the exercise of its proper jurisdiction.

The above finding is supported in our case law and is also accepted as part of judicial policy. This point is supported by the observation in the case of **MJBM v LMNG [2009] eKLR** where, in respect of a petition for the annulment of marriage which was filed in the High Court rather than in the Magistrate's Court as required by **Section 3** of the **Matrimonial Causes Act**, Karanja J stated as follows:

Ideally, the petition should have been filed in the Magistrate's court at Kisumu. However, on the jurisdictional aspect, the courts (High Court) have developed a trend of acting in ignorance of section 3 of the Matrimonial Causes Act and section 14 of the African Christian Marriage and Divorce Act by upholding the supremacy of the Constitution in dissolving and nullifying marriages contracted under the African Christian Marriage and Divorce Act (see the cited cases of Caroline Dian Jones vs Thomas Lyle Jones Divorce Cause No. 118 of 2003 High Court Nairobi & Sarah Elizabeth Darnborough vs David John Darnborough Divorce Cause No. 82 of 2005 High Court Nairobi). The trend is repeated in the cases of Claire Wanjiku Mwangi vs Famin Mabani & Another Divorce Cause No. 211 of 2001 High Court Nairobi, J. Betty Kamende Kitivo vs Maurice Ndambuki Kitivo Divorce Cause No. 68 of 2004 High Court Nairobi & Wainaina vs Wainaina [2008] 1 KLR (G & F) 88.

The second issue for determination concerns whether the Petitioner has the legal capacity to petition for the annulment of the marriage between the 1st and 2nd Respondents. The evidence on record shows that the 1st and 2nd Respondent contracted a civil marriage, and thus the applicable law concerning the annulment of that marriage is to be found in **Sections 73 & 74** of the **Marriage Act 2014**. The relevant part of **Section 73** of the **Marriage Act 2014** provides:

1. *A party to a marriage may petition the court to annul the marriage on the ground that –*
 - (c) *in the case of a monogamous marriage, at the time of the marriage one of the parties was married to another person;*
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;*
 - b. *at the date of the marriage and regarding subsections (1)(b) and (c), the petitioner was ignorant of the facts alleged in the petition; and*
 - c. *the marriage has not been consummated since the petition was made to the court.*

For its part **Section 74** of the **Marriage Act 2014** provides:

1. *A petition for annulment may be presented only by one of the parties.*
2. *Where a petitioner alleges facts of which only one party was ignorant at the date of that marriage, it may be presented only by that party.*
3. *Where a petitioner alleges the willful refusal of one party to consummate the marriage it may not be presented by the party against whom the allegation is made.*

The 2nd Respondent opposed the Petitioner's action seeking to have the marriage between the 1st and 2nd Respondents annulled on the ground that **Section 74(1)** of the **Marriage Act 2014** requires the relevant petition to be filed exclusively by one of the parties to the marriage. It was her position that the Petitioner

is not a party to the civil marriage between herself and the 1st Respondent. She also opposed the Petitioner's action on the ground that **Section 73(2)** of the **Marriage Act 2014** requires the petition for annulment of marriage to be filed within one year of the celebration of the marriage. It was her position that the marriage that the Petitioner seeks to have annulled was celebrated in 2001 and thus the action for annulment of marriage is time barred. The Petitioner replied to these views by stating that statutory technicalities ought not to bar her from accessing and obtaining justice and redress because she only came to learn about the marriage between the 1st and 2nd Respondent when the 2nd Respondent's action for the subdivision of the 1st Respondent's property was filed.

In order to determine whether the Petitioner has capacity to file for annulment of the marriage between the 1st and 2nd Respondents it is important to take account of the factual circumstances concerning that marriage. The parties to the said marriage which is a monogamous marriage are the 1st and 2nd Respondents. Thus, by dint of **Section 74(1) & Section 73(1)** of the **Marriage Act 2014** the petition for annulment can only be presented by one of the parties to that marriage. On this basis, this Court finds that the Petitioner lacks the requisite legal capacity to petition for the annulment of the marriage between the 1st and 2nd Respondents of which she is not a party.

The third issue concerns whether there is sufficient evidence to warrant the grant by this Court of a decree of annulment of the marriage between the 1st and 2nd Respondents. This issue is directly related to the question of legal capacity of the Petitioner. The finding of this Court is that the Petitioner has no legal capacity to petition for annulment of a marriage in which she is not a party. But it must be emphasized, on the basis of the evidence on record, that this ought to have been the cause of action pursued by the 1st Respondent. Certain relevant statutory provisions are useful and relevant in this regard. **Section 9** of the **Marriage Act 2014** provides:

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

- a. *in a monogamous marriage, contract another marriage; or*
- b. *in a polygamous or potentially polygamous marriage, contract another marriage in any monogamous form.*

Section 11 of the **Marriage Act 2014** which deals with void marriages provides:

1. *A union is not a marriage if at the time of the making of the union –*
 - a. *either party is below the minimum age for marriage;*
 - b. *the parties are within the prohibited marriage relationship;*
 - c. *either party is incompetent to marry by reason of a subsisting marriage;*
 - d. *by order made under section 25, the court has directed that the intended marriage is not to be contracted;*
 - e. *the consent of either party has not been freely given;*
 - f. *either party is absent from the ceremony;*
 - g. *both parties knowingly and willfully permit a person who is not authorized to do so to celebrate the union;*
 - h. *either party is mistaken about the identity of the other party; or*
 - i. *either party knowingly or willfully enters into the marriage for fraudulent purposes.*
2. *Consent is not freely given where the party who purports to give it –*
 - a. *is influenced by coercion of fraud;*
 - b. *is mistaken as to the nature or purport of the ceremony;*

The evidence given by the 1st Respondent is that the civil marriage between him and the 2nd Respondent was procured by way of threats, coercion, fraudulent and false statements, and misrepresentation on the

part of the 2nd Respondent. He further stated that the 2nd Respondent was aware of his subsisting marriage to the Petitioner and that he did not freely give his consent. He also admitted to having kept that marriage from the Petitioner, to having built a house for the 2nd Respondent and to having had the intention to formally introduce her to the rest of his family. In view of the above admissions it is difficult to accept the narrative that the 1st Respondent was unaware of or was mistaken about the consequences of solemnizing his affair with the 2nd Respondent. It is equally difficult to accept that his consent was not freely given. The only rational explanation is that he may have wanted to provide a formal veneer to the informal intimate affair with the 2nd Respondent, a decision he regretted once the latter initiated proceeding for the subdivision of his property. If indeed the 1st Respondent believed that he was deceived by the 2nd Respondent to participate in the solemnization of a marriage without his free consent, he should have petitioned for the annulment of that marriage at the earliest opportunity. But his conduct reveals that he is not candid and also that he is quite canny; by neglecting to initiate proceedings to annul his marriage to the 2nd Respondent then subsequently coming to the defence of the Petitioner when she petitioned for the annulment of that marriage, it can be deduced that the 1st Respondent wishes to have the best of both worlds.

The last issue concerns whether **H.C. Matrimonial Cause No. 53 of 2014 (OS)** should be consolidated with the present petition **Divorce Cause No. 197 of 2014**. In the interests of fairness, efficiency and justice, it is useful to consolidate the two matters in order that all outstanding issues between the Petitioner, 1st and 2nd Respondent are ventilated dispensed with at once. It will give the Petitioner a chance to make further submissions on the specific grounds on which she intends to rely on for the Court to consider with regard to equitable distribution of the matrimonial property for her and the eight (8) children amongst other parties by dint of **Section 17 of Matrimonial Property Act 2013**.

Thirdly in **High Court Matrimonial Cause No. 53 of 2014**, the Originating Summons on division of Matrimonial Property is as a result of dissolution of marriage between the 1st Respondent and 2nd Respondent and the same goal is achieved.

In the premises therefore this Court hereby orders as follows:

- a. **H.C. Matrimonial Cause No. 53 of 2014 (OS)** should be consolidated with the present petition **Divorce Cause No. 197 of 2014**.
- b. The Petitioner to file further submissions outlining specific grounds for the dissolution of the marriage between her and the 1st Respondent and on division of matrimonial property.
- c. Any aggrieved party is at liberty to apply.
- d. No orders as to costs.

READ AND SIGNED IN OPEN COURT ON THIS 19TH DAY OF JUNE, 2015

M. W. MUIGAI

JUDGE

In the presence of