



**IN THE MATTER OF AFRICAN CHRISTIAN MARRIAGE AND DIVORCE ACT CAP 151**

**AND**

**IN THE MATTER OF MATRIMONIAL CAUSES ACT CAP 152**

**IN THE MATTER OF A PROPOSED PETITION BY ZWK FOR THE ANNULMENT OF HIS MARRIAGE WITH LW**

**JUDGEMENT**

**ZWK**, (the applicant) who is wrongly described as the Petitioner in the Originating summons dated 8.12.2011 seeks leave of this court to apply for nullification of his marriage to **LW** who is described as a Respondent in the said originating summons. The ground on which nullification is to be sought is non-consummation of the marriage.

The application is premised on the grounds stated in the originating summons and on the averments contained in the affidavit sworn on 8.12.2011 by the Applicant. I have perused the application.

Under Section 13 of the Matrimonial Causes Act, Cap 152, a husband or wife may present a Petition to seek a declaration that his or her marriage is null and void on any of the grounds stipulated in Section 14 of the said Act. These include non-consummation of the marriage.

The application appears to have been served on the Respondent who on 5.4.2012 filed a replying affidavit and a memorandum of appearance. I have perused the same. The respondent concedes that no consummation took place after the marriage but she blames the Petitioner whom she states denied her the conjugal right.

The marriage between the parties is valid and will continue to exist until the court pronounces a decree of nullity. Petitioner has instigated the proceedings to have the marriage nullified. The marriage is voidable in law if no consummation has taken place. So as to succeed in obtaining a decree nullifying a marriage on the ground of non-consummation, the Petitioner must prove willful refusal to consummate the marriage. This connotes a deliberate decision without lawful excuse not to have sexual intercourse with the Respondent. To determine this, it is incumbent for the court to look at the history of the marriage. The Petitioner must show he has acted reasonably and has unsuccessfully taken such steps as a reasonable husband would take in the circumstances. He must show that the marriage has not been consummated owing to the Respondent's willful refusal, which implies a conscious act of volition. If the Petitioner has acquiesced, he cannot turn around and make a charge of non-consummation against the Respondent.

The marriage was on 29.4.2006 in Kenya. The Petitioner left Kenya for U.S.A. on 30.4.2006. He expected the Respondent to join him in U.S.A. to start a home. But she was denied visa, her marriage to the Petitioner notwithstanding. The Petitioner has remained in U.S.A. since April 2006 to date during which period he took no steps either to come to Kenya where he left the wife he married. He does not show what steps he has taken to help her obtain visa so that she can join him. A period of 6 years since the marriage was solemnized is a long time. The marriage is voidable and can be annulled providing the Petitioner is able to prove that he has acted reasonably and unsuccessfully taken such steps as a reasonable husband would take in the circumstances. He must show willful refusal on the part of the Respondent. The circumstances of this case do not show that the Petitioner has acted reasonably nor that non-consummation can be blamed on the Respondent. It is patent that the marriage exists only in name. But for it to be nullified on the ground of non-consummation, the Petitioner must show by evidence that the Respondent has willfully and unreasonably refused to have it consummated. But being in U.S.A. and having gone there the day after the marriage, the Petitioner cannot hope to have the marriage consummated while he does nothing to make it happen. There is no evidence on the basis of which it can

be said that the Respondent has willfully refused to consummate the marriage.

Finally, Section 14(i)(ii) applies to cases falling under (f)(g) and (h), of Section 14(i) only.

For this reason, I find no merit in the Petition and dismiss it.

**Dated at Milimani Law Courts, Nairobi, this 21<sup>st</sup> day  
of June 2012.**

**G.B.M. KARIUKI, SC  
JUDGE**

**COUNSEL APPEARING**

***Mr. K.J.N. Kirugi, Advocate of J.M. Waiganjo & Co., Advocates for the Applicants***

***Mr. Kugwa – Court Clerk***