



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang, J.)

MATRIMONIAL CAUSE NO. 3 OF 2008

A.M.A.....PETITIONER

-VERSUS-

A.M.ARESPONDENT

JUDGMENT

In the petition dated **16th January, 2008**, it is pleaded that the petitioner, on **15th December, 2005** married the respondent, a citizen of Germany who was a divorcee, at the Registrar's office in the Mombasa District. At the time of this petition, the petitioner was domiciled in Kenya, whereas the respondent was resident at Munich, in Germany. There was no issue of the marriage.

The petitioner seeks a nullification of his marriage to the respondent, on the following grounds:

- (i) that the petitioner's consent to the said marriage was obtained by means of fraud;**
- (ii) that the respondent had celebrated the marriage solely for the purpose of acquiring a residence permit;**
- (iii) that the respondent left the country soon after the celebration of the said marriage, after she failed to obtain a residence permit;**
- (iv) that the marriage has never been consummated owing to the wilful refusal of the respondent;**
- (v) that the respondent has no intention to stay married to the petitioner;**

(vi) that these circumstances warrant a nullification of the marriage under the law;

(vii) that this petition is not made or prosecuted in collusion with the respondent.

In this undefended matter, the petitioner appeared before the Court on **10th June, 2010** and gave evidence as follows: he is a resident of K in Mombasa and had formally married the respondent on **15th December, 2005**, at the Registrar's office in Mombasa; the respondent who at the time was living at Malindi, did not join the petitioner to set up a matrimonial home following the marriage; the marriage was not accompanied by any act of intimacy, and the respondent indicated that she had resorted to marriage only for the purpose of obtaining a residence permit; the respondent continued to live at Malindi after the marriage, and called the petitioner some two-to-three weeks later to say she would be returning to Munich, Germany as her request for a residence permit was not being granted. The respondent stated in the said telephone communication that she had no interest in the marriage; in the petitioner's words: "She said she only wanted a residency permit, and this marriage never gave it to her".

Learned counsel, **Ms. Mutungi** urged that the ground of the petition was that the marriage was never consummated; the married couple had no matrimonial home and, the petitioner "has never lived with the respondent under one roof"; the respondent returned to Germany two weeks after she was denied a residency permit; the respondent kept in touch with the petitioner, and confirmed her disinterest in the marriage once the application for a residence permit failed; the petitioner is aware that the respondent travels to Kenya as a tourist from time to time, but leaves each time without making any physical contact with him.

From such emerging facts, counsel submitted that the respondent had wilfully refused to consummate the marriage. Learned counsel urged that, by virtue of s. 14(1)(b) of the Matrimonial Causes Act (Cap. 152, Laws of Kenya), wilful refusal to consummate marriage is a ground for declaring the marriage a nullity.

Counsel submitted that as the petition is unopposed, it should be allowed as prayed.

This is a straightforward case the strength of which lies in there being no opposition, but more particularly, in there being clear evidence that the marriage has never been consummated. The governing law is s. 14(1)(b) of the Matrimonial Causes Act (Cap. 152) which thus provides:

"The following are the grounds on which a decree of nullity of marriage may be made ?

(a)

(b) that the marriage had not been consummated owing to the wilful refusal of the respondent to consummate the marriage...."

The general procedure regulating the issuance of a decree of nullity is set out in s. 15 of the same Act:

"(1) Every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree nisi not to be made absolute until after the expiration of six months after the pronouncing thereof, unless the court by general or special order from time to time fixes a shorter time".

The six-month time lapse is intended to give an opportunity for any complaint to be made regarding the **bona fides** underlying the **decree nisi**: such as, that it is founded on collusion between the parties.

In this instance, I hereby grant a decree *nisi* of nullity of the subject marriage, which may be made absolute upon application by the petitioner after the expiration of the prescribed period of time.

DATED and DELIVERED at MOMBASA this 28th day of January, 2011.

J.B. OJWANG

JUDGE