



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**DIVORCE CAUSE NO.114 OF 2010**

E.A.O.....PETITIONER  
**VERSUS**  
G. J.....1<sup>ST</sup> RESPONDENT  
C.A.M.....2<sup>ND</sup> RESPONDENT

**J U D G M E N T**

1. The Petitioner herein, E.A.O, by her Petition dated 1<sup>st</sup> September 2010 seeks Orders that the marriage between the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent be declared null and void and the 2<sup>nd</sup> Respondent be restrained from presenting herself in any form or manner as a wife of the 1<sup>st</sup> Respondent. She also seeks Orders that the 1<sup>st</sup> Respondent should pay the costs of the Petition.
2. The Respondents were duly served with the Petition but none deemed it necessary to respond to it and so the evidence as contained in the Petitioner’s Affidavit sworn on 1<sup>st</sup> September 2010, and her oral evidence in Court is uncontested.  
  
It is as follows;
3. That in November 1998, she got married to the 1<sup>st</sup> Respondent at the Registrar’s Office in Nairobi and they co-habited as husband and wife in various places within Nairobi and also had three (3) issues of the marriage born in June 2001, February 2002 and January 2004 respectively. The 1<sup>st</sup> Respondent had a previous marriage and/or relationship and from it, he had three (3) other children who he was raising together with the Petitioner.
4. It is the petitioner’s further case that her marriage to the 1<sup>st</sup> Respondent is still subsisting and he had no capacity to contract any other marriage. That inspite of that fact, the 1<sup>st</sup> Respondent purported to marry the 2<sup>nd</sup> Respondent at the Registrar’s Office in Nairobi in July 2000. It is that marriage that she seeks to nullify.
5. **What is the Law on the subject? Section 11(1) (d) of the Marriage Act provides as follows;**

***“(1)The Registrar, at any time after the expiration of twenty-one (21) days and before the expiration of three months from the date of the notice referred to in Section 8 of this Act, shall, upon being satisfied by Affidavit that-***

- a)...
- b)...
- c)...

*d) neither of the parties to the intended marriage is married by African Customary Law or in accordance with Mohammedan Law to any person other than the person with whom such marriage is proposed to be contracted, issue his certificate in the prescribed form.”*

6. Further, **Section 14** of the **Matrimonial Causes Act** provides as follows;

*“(1) the following are the grounds on which a decree of nullity of marriage may be made-*

*1. a) that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage; or*

*b) That the marriage had not been consummated owing to the willful refusal of the Respondent to consummate the marriage; or*

*c) That the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity; or*

*d) That the former husband or wife or either party was living at the time of the marriage, and the marriage with such previous husband or wife was then in force; or*

*e) That the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the Law of England; or*

*f) That either party was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy; or*

*g) That the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or*

*h) That the respondent was at the time of the marriage pregnant by some person other than the petitioner;*

*Provided that, in the cases specified in paragraphs (f), (g) and (h) of this subsection, the court shall not grant a decree unless it is satisfied-*

*i) That the petitioner was at the time of marriage ignorant of the fact alleged;*

*ii) That proceedings were instituted within a year from the date of the marriage; and*

*iii) That marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds of decree.*

*2. Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.*

*3. Nothing in this section shall be construed as validating any marriage which is by law void but with respect to which a decree of nullity has not been granted.”*

7. **Section 14(1)(d)** is relevant to this case and I have also read the decision of Mwera, J. in *Nirmal Singh Juttla vs. Hafsa Athman Kirao HC Matrimonial Cause No.11/2004 (Mombasa)*, where the learned Judge held inter-alia, that a “**marriage**” between a party whose previous marriage was still subsisting was a nullity in Law. That holding was in line with the decision in *Ayoob vs. Ayoob (1968) E.A. 72* as a new purported “**marriage**” cannot in Law replace an actual and current marriage.

8. With the Law as set out above, I have seen the Marriage Certificate validating the marriage between the 1<sup>st</sup> Respondent and the Petitioner. I have also seen the Marriage Certificate between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. The earlier one between the 1<sup>st</sup> Respondent and the Petitioner is the lawful one and whatever happened on 8<sup>th</sup> July 2000 between the Respondents was unlawful and therefore a nullity. In fact it attracts a charge for the offence of bigamy under **Section 171** of the **Penal Code**.

9. **Should I restrain the 2<sup>nd</sup> Respondent from holding herself out as a wife of the 1<sup>st</sup> Respondent?** I must. Once her purported marriage has been nullified, as I have, then she cannot in Law hold herself out to anyone as the 1<sup>st</sup> Respondent’s wife – see Kimaru J. in *E.N.W. vs. G.N. & Another. [2010]e KLR.*

10. Having held as I have, it follows that prayer 1, 2 and 4 of the Petition dated 1<sup>st</sup> September 2010 must be granted.

11. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 14<sup>TH</sup> DAY OF DECEMBER, 2011**

**CORAM**

ISAAC LENAOLA – JUDGE

Miron – Court Clerk

Mrs. Sijeny for Petitioner

**ORDER**

Judgment duly read.

**ISAAC LENAOLA**

**JUDGE**