REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISUMU

CIVIL APPL NO. NAI. 33 OF 97

MJBM.....PETITIONER

VERSUS

VLMNG.....RESPONDENT

J U D G M E N T

The petitioner, **MJBM,** entered into a marriage relationship with the respondent, **VG**, on the 4th August 2001.

The marriage ceremony was conducted at the Roman Catholic Church at Ukweli Pastrol Centre, Kisumu and marriage certificate Serial No. .....was issued thereafter.

Unknown to the petitioner, the marriage certificate was issued under the provision of the **African Christian Marriage and Divorce Act (Cap 151 Laws of Kenya)** rather that the expected **Marriage Act (Cap 150 L.O.K).**

Thereafter, the petitioner and respondent lived and cohabited as husband and wife at M area of Kisumu until the month of July 2002 when the respondent decided that she could not live in Kenya and returned to her native United States of America.

In the month of October 2002 the petitioner joined the respondent in the U.S.A and both continued to cohabit upto the month of January 2003 when the petitioner returned to Kenya and later learnt that the respondent had conceived.

In the month of October 2003 the petitioner returned to the U.S.A after the birth of their child, **AJM**, on the 5th September 2003.

Within the same month of October 2003 the respondent commenced divorce proceedings in the U.S.A which culminated in an uncontested cause resulting in the petitioner signing a marital settlement agreement and the court endorsing a judgment which granted custody of the minor child to the respondent on or about the 23rd October 2003.

After all that, the petitioner realized that his marriage with the respondent had been conducted under the aforementioned African Christian Marriage and Divorce Act yet neither of them was an “African” within the meaning of the said Act.

The petitioner produced the relevant marriage certificate (P.EX 1) and contended that the marriage was null and void "***ab-initio".*** He therefore prays that the marriage celebrated between him and the respondent be declared null and void and a decree to issue accordingly. He also prayed for an order that the Divorce Proceedings filed by the respondent in the U.S.A are of no effect and be rendered null and void. This last prayer was however abandoned at the hearing of the petition.

The respondent did not participate in these proceedings. She was served in the United States but neither filed any response to the petition nor appeared at the hearing.

The petitioner contended that he did not collude with the respondent to have these proceedings commenced.

Be that as it may, it is worth noting the observation made in the case of **Mwangi & Others –VS- West [1976] KLR 203,** that:-

"**A marriage solemnized according to the rites and ceremonies of Christian African is a marriage under the African Christian Marriage and Divorce Act. The provisions of the Marriage Act apply to all marriages celebrated under the African Christian Marriage and Divorce Act except as otherwise provided by the Latter Act (section 4 of the African Christian Marriage and Divorce Act). Thus, a marriage under the African Christian Marriage and Divorce Act can be dissolved only under the provisions of the Act and the Matrimonial Causes Act and not otherwise.**

Such a marriage may be terminated by a divorce or declaration of nullity. Section 8 (1) of the Matrimonial Causes Act provides the grounds on which a petition for divorce may be presented, whereas a petition for decree of nullity may be presented on any one of the grounds listed under section 14 (1) of the same Act".

The foregoing statement represents the legal position even to this date.

This petition is for a decree of nullity of the marriage between the petitioner and the respondent.

Consequently, section 14 (1) of the Matrimonial Causes Act

(Cap 152 L.O.K) would apply. It provides for grounds for the issuance of a decree of nullity.

Herein, nullification is sought on the main ground that neither the petitioner and the respondent were "Africans" at the time their marriage was solemnized. This is not one of the grounds provided by section 14 (1) of the Matrimonial causes Act.

In any event, a petition of this nature ought to be presented in a Magistrate's Court which is seized of necessary jurisdiction under section 14 of the African Christian Marriage and Divorce Act and section 3 of the Matrimonial Causes Act.

Under the former Act, an aggrieved party has the right of appeal to the High Court (see section 15 of the Act).

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 Nbi, Sarah Elizabeth Darnborough –VS- David John Darnborough Divorce Cause No. 82 of 2005 High Court Nbi).**

The trend is repeated in the cases of **Claire Wanjiku Mwangi-VS- Femin Mabani & Another Divorce Cause No. 211 of 2001 High Court Nbi, J. Betty Kamende Kitivo –VS- Maurice Ndambuki Kitivo**

Divorce Cause No. 68 of 2004 High Court Nbi and Wainaina –VS- Wainaina [2008] 1 KLR (G & F) 88.

The justice of this case prevails upon this court to adopt and develop the trend until such time that the African Christian Marriage and Divorce Act is thrown into the legal dustbins.

The justice of the case also demands that this court makes a determination on the issues arising notwithstanding the non existence of the grounds provided by section 14 of the Matrimonial Causes Act and the existence of the African Christian Marriages and Divorce Act.

The existence of the African Christian Marriage and Divorce Act in our statutes must be deprecated by this court just like in the later decisions cited herein. It serves no useful purposes in the Kenya of today. It is unconstitutional and its very existence is nothing more than an enhancement and maintenance of the colonial mentality and status quo of racial segregation.

A Kenyan means and includes any Kenyan whether black, Yellow or White. And of course, a Kenyan is an African–pure and simple.

It is appreciated that the marriage solemnized on the 4th August 2001 by the parties did not involve persons of "African decent".

The petitioner (PW 1) stated that he is a Kenyan of Asian decent while the respondent is an American Caucasian.

The African Christian Marriage and Divorce Act was enacted in 1931 to provide for the marriage of African Christians and for the dissolution of such marriages.

Section 3 (1) of the Act provides that the Act shall apply only to the Marriages of Africans one or both of whom professes the Christian religion and to the dissolution of such marriages.

The term "African" is not defined in the Act but the Concise Oxford English Dictionary (10th Edition) defines an African as a person from Africa, especially a black person or a person of black African decent.

Being a "Kenyan", the petitioner is for all intent and purposes an African but not of negroid (Black African) decent.

The respondent does not come anywhere to being an African. She is Caucasian (white) American as opposed to an African (black) American.

Consequently, none of them had the necessary capacity to contract a marriage under the African Christian Marriage and Divorce Act. Their marriage solemnized on the 4th August 2001 was invariably null and void "***ab-initio***" the moment they appended their respective signatures on the marriage certificate (P.EX 1).

As it were, contrary to their intention, the parties never married and have never been married under the law.

The ceremony they underwent on 4th August 2001 was merely to legitimize cohabitation and nothing more.

It is only just and fair that each be given a second chance to enter into a valid and proper marriage between themselves and/or otherwise. It is noted that their invalid marriage had already been dissolved by a court in Illinois U.S.A with their consent and under the laws of the United States of America.

In the end result, the prayers sought by the petitioner are granted to the extent that the marriage celebrated

between the petitioner and the respondent be and is hereby declared null and void.

A decree-nisi will issue and be made absolute within thirty (30) days from this date hereof.

Ordered accordingly.

[Delivered and Signed at Kisumu this 24th day of July 2009].

J.R. Karanja

JUDGE

J.R.K/va