



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Divorce Cause 50 of 2007

MHM PETITIONER

- Versus -

NWCC RESPONDENT

RULING

This application is brought by a chamber summons dated 16th November, 2007, and taken out under Rules 3(3) and 13 of the Matrimonial Causes Rules. The applicant applies for the following orders –

1. **THAT** directions be given to the effect that the issue of the existence of a valid marriage capable of dissolution be determined as a preliminary issue to this cause.
2. **THAT** the petition herein be struck out and the entire cause be dismissed for non existence of a marriage between the parties.
3. **THAT** the costs of the application and the entire cause be awarded to the respondent.

The application is supported by the annexed affidavit of NWCC, the Respondent in the main petition, and on the grounds that –

- a) There exists no marriage between the parties herein.
- b) The respondent has thus entered an appearance under protest in the cause and the issue of the existence of any marriage ought to be determined as a preliminary issue to the cause.
- c) The cause is thus misconceived and brought in total abuse of the court process.

Opposing the application, the Petitioner/Respondent filed grounds of opposition the most salient of which include but are not limited to –

- (i) The application is incompetent and irregular in that the supporting affidavit postdates the application.
- (ii) The application is further incompetent as it purports to raise a preliminary objection, a matter which ought properly to be the subject of a formal notice of preliminary objection and which ought to be raised at the first hearing of the petition and not by way of interlocutory application.

(iii) The application is also incompetent as it purports to raise a preliminary objection on a point based on both law and fact.

(iv) The application is defective in that the title deed attached thereto does not contain any particulars to the effect that the land comprised therein is agricultural land.

(v) The applicant does not adduce any sufficient reasons to justify the registration of the suit property in the names of the Petitioner and the Respondent.

During the oral canvassing of the application, Mrs. Makone appeared for the Respondent/Applicant, but there was no attendance for the Petitioner/Respondent. The court noted that the Respondent's Advocate was served on 9th April, 2008, which was a good eight days before the hearing date. Being satisfied that this gave him sufficient time to attend court, and seeing that no reason was given for the non attendance, the court elected to proceed ex parte.

Mrs. Makone for the applicant said that she relied on the supporting affidavit of the Respondent who was married to a third party, and being so married he could not marry again. She argued that the property in dispute was registered in the Petitioner's name because it is agricultural land and the Respondent is a foreigner. She then submitted that ownership of property does not determine the existence of a marriage, and that the Petitioner does not specify the system under which they contracted the marriage. Counsel further contended that the applicant's supporting affidavit was uncontroverted, and therefore the application should be allowed and the petition struck out with costs.

I have considered the application and the submissions of Mrs. Makone. Each party has raised a preliminary technical point. Working it backwards, it is not quite correct to contend that the applicant's supporting affidavit was uncontroverted. The true position is that even in the absence of a replying affidavit, there are on record grounds of opposition which the court can ill afford to ignore.

The Petitioner's contention that the application is faulty on the basis that it is postdated by the supporting affidavit is untenable. Order XVIII rule 9 of the Civil Procedure Rules envisaged a situation such as this one where the affidavit is sworn prior to the dating of the application. It states –

“Unless otherwise directed by the court an affidavit shall not be rejected solely because it was sworn before the filing of the suit concerned.”

Nothing, therefore, turns on this ground of opposition.

To come to the substance of the application, the question is whether the issue of the existence of a valid marriage capable of dissolution should be determined as a preliminary point in the case. The Matrimonial Causes Act, under which to this application is made, defines marriage as the voluntary union of one man and one woman for life to the exclusion of all others. Whether the parties to the Petition herein enjoyed that relationship is a matter which, in my view, may not adequately be determined upon affidavit evidence alone. More facts are needed. A certificate of marriage is not the marriage itself, but only evidence of marriage. Some systems of marriage are known never to issue any documents at all, and yet the law recognizes the validity of marriage under such systems. In short, I think that the Petitioner deserves her day in court to establish her claim that she enjoyed a wife-husband relationship with the Respondent.

The Respondent introduced in this application the issue of the title deed to the property. He deposes that the said property was registered in the joint names of the Petitioner and himself because the said land is agricultural land and he could not register it in his sole name. “In the circumstances,” he says, “the Petitioner was to hold it in trust for me.” I am trying to restrain myself from making any comments which might embarrass the trial judge, but I can't resist observing that this statement raises some interesting questions. Why should the Petitioner be a trustee for the Respondent? Who was the Respondent to her? In a country with a population of more than 30 million people, why was it the Petitioner who had to be a trustee and not, for instance, GM, the Respondent's lawfully wedded wife, or

anybody else for that matter? These and similar other questions need to be answered by oral evidence in which the parties are subjected to cross-examination.

For the above reasons, and as I said earlier, I think that it would be a travesty of justice to deny any of the parties herein their day in court. The application is accordingly dismissed with costs.

Dated and delivered at Mombasa this 23rd day of May, 2008.

L. NJAGI

JUDGE