

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Divorce Cause 90 of 2007

B M M PETITIONER

Versus

C M C RESPONDENT

JUDGMENT

The Petitioner, B M M and the respondent, C M C solemnized a christian statutory marriage on 25.8.2006 at Don Bosco Catholic Church, Upper Hill, Nairobi. They obtain a marriage certificate No. 113013 of the same date. They cohabited in Nairobi for two years but had no children.

Unknown to the petitioner, the respondent on the date of the above marriage, was married to another woman whose name was given as A N and that the said marriage was subsisting. It was in the testimony of the petitioner accordingly, that the respondent after solemnization of the second marriage with the petitioner. His cohabitation with her was under serious physical and mental strain, probably because of his awareness of the truth.

It did not therefore take long before the respondent's irregular conduct, gave him away. He began missing to come home from time to time and soon made it routine. On 26.5.2007 he left home and did not come back. When the petitioner finally traced him, he was living with A N with whom he was married under customary law and had children. The respondent confirmed the customary marriage and that it was in existence as at the time he and petitioner entered the second statutory church marriage.

The Petitioner finally filed this cause on 17.7.2007 seeking for orders of nullification of her marriage with the respondent. The record shows that the respondent chose not to file an Answer to the Petition or defend the same. In the circumstances the court considers that the testimony of the petitioner forms the only evidence on the record as read with the facts averred in the petition.

I have carefully considered the evidence on the record. I am satisfied that the petitioner's testimony is true and credible. That is to say, that the petitioner and the respondent entered into their statutory marriage on 28.8.2006 while the respondent was at the time married to another woman known as A N. The fact that he did not so inform the petitioner, makes no difference in the law as to the consequences. What matters is that by its nature a statutory marriage is a monogamous marriage. It does not welcome any other marriage whether similar to it or customary or mohamedan

In **Juttla v Kirao [2004] e KLR 1** the court found that a marriage which was entered into after the first was dissolved but not absolutely, was itself null and void. In **Nganga v. Ziro [1994] LLR 191 HCK** the petitioner got married to the Respondent under statutory marriage while there subsisted at the time, a customary marriage, although the first customary marriage broke down soon after the second marriage. The court declared that whether or not both parties knew of the first marriage's existence made no difference. What mattered is that the respondent had no capacity to solemnize a monogamous marriage during the subsistence of a lawful polygamous marriage. The same facts and circumstances existed in **Mumo v Karacar [1999] LLR 372 (HCK)** except that both marriages were monogamous and that the first one had been dissolved by court although the respondent had failed to obtain an absolute decree.

In the present matter the respondent was still married under customary law to A N although the Petitioner

had no knowledge of the same. It matters not that the Respondent deliberately kept away the truth about his status. The fact remains that he had no legal capacity to enter and solemnize a monogamous marriage as long as the customary marriage still subsisted. In the circumstances I find that the marriage entered into between the petitioner and Respondent herein is null and void ***ab initio***. I declare it so. Costs are to the Petitioner.

Dated and delivered at Nairobi this 25th day of September, 2008.

D.A. ONYANCHA

JUDGE