



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Divorce Case 7 of 2007**

**R W M.....PETITIONER**

**VERSUS**

**A M K.....RESPONDENT**

**JUDGEMENT**

The petitioner filed a petition against the respondent and stated that they got married on 10<sup>th</sup> September, 2005 in accordance with the *African Christian Marriage and Divorce Act* Cap 151 Laws of Kenya.

A marriage certificate that was issued to them showed that the petitioner was at the time a spinster and responder a bachelor. At the time of the wedding celebration the petitioner was resident and domiciled in Kenya while the respondent was residing in the United States of America on a Permanent Resident Card, popularly known as “*the green card.*”

After the wedding, the couple cohabited at Njambini for a period of 17 days after which the respondent flew back to the United States of America and left behind his newly married wife. The petitioner wanted to reside together with her husband in the United States of America but the respondent was not for the idea and kept on giving the petitioner various excuses as to why that was not possible at the time. The respondent returned back to Kenya in March, 2006 and stayed with the petitioner for 33 days and returned to the U.S.A.

The petitioner became suspicious about the respondent’s conduct and kept on wondering why he had decided to stay in the U.S.A. without her. In the course of time, the petitioner came across some documents which the respondent had completed while applying for an immigrant visa. He had stated therein that he was married to one J W M. The petitioner produced the said papers as an exhibit before the court, P. Exh.3. The petitioner also stumbled upon an affidavit that had been sworn by the respondent on 2<sup>nd</sup> April, 1998 indicating that he was married to one Felista Wanjiku Ndung’u and that they had cohabited as husband and wife since June, 1996. A copy of the said affidavit was also produced as P. Exh.4. A copy of F W’s national identity card, P. Exh.5 was attached to the documents produced as P. Exh.3.

The petitioner was enraged by the said discoveries and she telephoned the respondent and enquired about the documents. He denied any knowledge of the same. The petitioner made further enquiries and confirmed that the respondent was, prior to their wedding, lawfully married J W M.

The respondent returned to Kenya on 5<sup>th</sup> May, 2007 and the petitioner demanded to be told the whole truth. The respondent confessed to the petitioner that indeed he was married to the said J W M when he

purported to marry her. He added that they had a child together. He further told her that J W M had commenced divorce proceedings against him in the U.S.A. The petitioner was very traumatised by the turn of events and fell sick. She was even admitted to a hospital as a result.

Thereafter she confronted the respondent and asked him why he had lied to her. The respondent, rather than apologising to the petitioner, got furious and assaulted her. The petitioner reported the matter to the police at Kikuyu police station. She was issued with a P3 form, P. Exh.7. She also produced a police abstract report, P. Exh.6.

On the basis of the foregoing, the petitioner urged the court to declare that the marriage contracted between her and the respondent as a nullity ab initio because the respondent had no capacity to enter into the same when he was already married. She also sought damages for mental anguish, pain and suffering as a result of the respondent's deception.

The respondent entered appearance and filed an answer to the petition. He however did not attend court for the hearing of the petition. In his answer to the petition, he denied that prior to celebrating the said marriage with the petitioner he was lawfully married to any other woman as alleged by the petitioner. He also denied that he had been cruel to the petitioner. He urged the court to dismiss the petition with costs.

Having considered the evidence that was tendered by the petitioner and having observed her demeanour, I am satisfied that she was truthful in her testimony. She established that the respondent entered in a statutory marriage with her knowing very well that he had no capacity to do so by the fact that he was at the time lawfully married to J W M. It is not clear whether his marriage to F W N is still subsisting. He swore as affidavit on 2<sup>nd</sup> April, 1998 to the effect that the said F W N was his customary law wife. The said affidavit was sworn before the Resident Magistrate, Makueni Law Courts. Looking at the signature of the deponent in the said affidavit, there is no dispute that it is similar to the one in the memorandum of appearance and answer to the petition signed by the respondent herein. The fact that the respondent was married and residing with J W M in the United States of America may explain why he could not allow the petitioner to join him in his country of domicile.

In the circumstance of this matter, I reject the respondent's denials as hereinabove stated. I accept the petitioner's evidence and as a result declare that the marriage that was celebrated between the petitioner and the respondent on 10<sup>th</sup> September, 2005 as null and void ab initio. Regarding the petitioner's prayer for damages for mental anguish, pain and suffering as a result of the respondent's deception, the petitioner should file a separate suit for damages for the tort of deception. Indeed the respondent's misrepresentation to the petitioner caused her considerable pain and mental anguish but her claim for damages ought to be made appropriately. I therefore allow the petition and award costs of the same to the petitioner.

DATED SIGNED & DELIVERED at Nakuru this 6<sup>th</sup> day of July, 2007.

D. MUSINGA

JUDGE

6/7/2007

Before D. Musinga , Judge

Makana, court clerk

Miss Omwenga holding brief for Miss Omwenyo for the petitioner

N/A for the respondent

Court:

Judgment read in open court.

D. K. MUSINGA

JUDGE