

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Nullity Cause 131 of 2004

B N D PETITIONER

Versus

N C D..... RESPONDENT

J U D G M E N T

On 13th October, 2004 B N D filed this Petition against N C D for nullification of their marriage solemnized on 20th June, 2004 and which petition suit was dated 12th October, 2004.

The Petitioner's marriage to the Respondent was conducted at Shree Visa Oshwal Community under the provisions of Hindu Customary Law as provided by Hindu Marriage and Divorce Act (**Cap 157**). A certificate of marriage number 9/2004 was consequently thereto issued by the said Community duly signed by the Chairman and the Hon. Secretary. Subsequently, the Petitioner and the Respondent established their matrimonial home at 1st Avenue Parkland, House No. 7.

The Petitioner seeks for nullification of the said marriage to the Respondent on ground of non-consummation on the part of the Respondent as particularized in paragraph 8 of the said petition. Upon being served with a copy of the Petition and Notice to Appear on 19th October, 2004, the Respondent failed to enter Appearance or to file an answer within the requisite period. When the Petition came for hearing on 5th May, 2005 there was no appearance for the Respondent. The hearing therefore proceeded by way of an undefended cause in accordance with the Registrar's Certificate issued on 11th November, 2004.

I have carefully considered the testimony of the Petitioner. I have scrutinized and inquired into the alleged ground for nullification of the said marriage contained in the petition suit. The Respondent is said to have refused and ignored all intimate sexual advances made by the Petitioner soon after marriage on 20th June, 2004 and during the three day honey moon spent at the Watamu near Mombasa. Even upon return to the said matrimonial home, the Respondent refused, ignored and neglected the many attempts that the Petitioner made to consummate the marriage by declining evading and deliberately avoiding any sexual encounter with the Petitioner. The Petitioner could therefore not tolerate the agony and stalemate in her married life and was consequently compelled to leave the matrimonial home on 12th July, 2004.

I am satisfied that the Respondent has without cause failed to consummate his marriage with the Petitioner, notwithstanding the many sexual attempts and overtures made by the Petitioner since solemnization to date. I am satisfied that the Petitioner has not in any manner whatsoever contributed to the said lack of consummation and that in all respects the Respondent is not interested in the said marriage having invited the Petitioner to commence these proceeding, if she so wished.

Failure of consummation of marriage is one of the principal grounds for nullification of a marriage as provided under section 11 of the Hindu Marriage and Divorce Act (Cap 157) and section 14 of the applied Matrimonial Causes Act (Cap 152). A marriage is said to be consummated as soon as the parties have sexual intercourse after solemnisation; see Bromley's Family Law 8th Edition at page 86. I am satisfied that on the basis of tendered evidence the Respondent has wilfully refused to have any sexual intercourse with the Petitioner. Wilful refusal to consummate marriage, as was held in **Kaur V. Kaur (1972) I All E.R. 292** renders such marriage voidable and may at any time be annulled by the court upon application by the aggrieved party. As was held in **De Reneville V De Reneville (1948) P. 100**;

“a voidable marriage is one that will be regarded by every court as valid subsisting marriage until a decree annulling it has been pronounced by a court of competent jurisdiction.” Per

Lord Greene MR at page 111.

I am satisfied that there has not been any connivance or condonation on the part of the Petitioner and further that no collusion exists between the Petitioner and the Respondent. Lastly, I am satisfied that the Petition has not been presented or prosecuted in collusion with the Respondent and further that there has not been unreasonable delay in presenting or prosecuting the Petition.

I am satisfied on the basis of the evidence adduced that case for the Petitioner has been proved on the balance of probabilities, this to me being the expected standard of proof in respect of nullity proceedings. I hereby therefore pronounce a decree of nullity by reason of non-consummation of marriage and order that the marriage between the Petitioner and the Respondent be and is hereby annulled and dissolved. A decree nisi shall henceforth issue, the same to be made absolute after expiration of one month hereof.

I make no orders as to costs.

It is so ordered.

DATED, DELIVERED and SIGNED at Nairobi this 26th day of May, 2005.

P. J. KAMAU

JUDGE.