REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO.118 OF 2003

CAROLINE DIAN JONES ……...……. PETITIONER

VERSUS

THOMAS LYLE JONES …… RESPONDENT

JUDGMENT

By amended petition dated 20th February, 2004 the Petitioner herein, CAROLINE DIANA JONES, seeks annulment of her marriage to the Respondent, THOMAS LYLE JONES. The marriage was celebrated on 22nd January, 1999 at the Evangelical Lutheran Church, Nairobi and was contracted under the African Christian Marriage and Divorce Act, Cap.151. There are no issues of the marriage. The ground for seeking annulment of the marriage is to be found in paragraph 6 of the amended petition. It is that at the time the marriage was celebrated and contracted neither the Petitioner nor the Respondent were Africans within the meaning of the African Christian Marriage and Divorce Act. Needless to say, the parties, who are of the Caucasian race, have so far not changed their race. I doubt that sort of things is possible. But who knows!

Section 3(i) of Cap.151 is in the following words:-

> ***"3.(i) This 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. Nor is it defined in the Interpretation and General Provisions Act, Cap.2. But there can be no doubt that the term applies to the indigenous peoples of this country, and certainly not to people of European or Caucasian races.

The parties herein could thus not celebrate or contract a valid marriage under Cap.151 as they were not Africans. Their purported marriage was therefore null and void ab initio, and must be declared so. There is little difficulty, though. This is that the ground advanced herein for the order of nullity sought is not one of the grounds set forth in section 14 of the Matrimonial Causes Act, Cap.152, upon which a marriage may be declared null and void. But this court has the inherent power to make such order as is necessary to meet the ends of justice depending on the particular circumstances of the case before it. Here we have two persons purporting to celebrate and contract a marriage under a statute that was clearly not appropriate to them. In essence they did not have the requisite racial capacity to contract the marriage, and the same was clearly null and void from the beginning. The marriage should not be let to stand, notwithstanding any procedural impropriety in these proceedings. I note that the Hon. Mr. Justice A. B. Shah (as he then was) was confronted by similar circumstances in the case of MICHELE CHRISTINE STEPHENSON –VS- GRANT BARTER STEPHENSON Nairobi HC. Divorce Cause No.6 of 1994 (unreported). In that case the parties, who were of European origin in race, had celebrated and contracted a marriage under the very same Cap.151. The learned Judge had no difficulty declaring the marriage null and void ab initio. Like Mr. Justice Shah, I would declare the marriage between the Petitioner and the Respondent null and void ab initio. I hereby do so. In doing so I deeply deprecate the unfortunate fact, so long after reclaiming our own sovereignty, and after working so hard at developing a harmonious multi-racial society, we should still have in our statute book such a blatantly racist statute as the African Christian Marriage and Divorce Act, Cap/151.

There will be a decree of nullity, and a decree nisi shall issue forthwith. The same may be made absolute before expiration of three months. There will be no order as to the costs of these proceedings.

It is so ordered.

DATED SIGNED AND PRONOUNCED AT NAIROBI THIS 27TH DAY OF FEBRUARY, 2004.

H.P.G. WAWERU

JUDGE