REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL NO 37 OF 2002

S W…….…….. APPELLANT

VERSUS

N G K ……...…… RESPONDENT

(An appeal from the Judgment in Eldoret Chief Magistrate's Court

Divorce Cause No 16 of 2001 delivered on 19th April 2002 by

Lucy Gitari Esq PM)

JUDGMENT

In a judgment delivered on 9th April 2002 in Eldoret Chief Magistrate's Court Divorce Cause No 16 of 2001, Miss Lucy Gitari, Principal Magistrate nullified the marriage between S W (the appellant) and N G K (the respondent and placed the custody of their son L K, upon the respondent. It is against those orders that the appellant has filed this appeal.

There are six grounds of appeal which the appellant filed through the law firm of M/s Wena & Co Advocates. These are:

"1. That the learned magistrate erred in law and in fact in failing to appreciate that the petition was defective, the same having been filed out of time.

2. That the learned magistrate erred in law and in fact in holding that the respondent has obtained leave to file the petition out of time.

3. That the learned magistrate erred in law and in fact in holding that the respondent had established his case to the required standards.

4. That the learned magistrate erred in law in fact in granting custody of the infant to the petitioner.

5. That the learned magistrate erred in law and in fact in shifting the burden of proof to the appellant.

6. That the magistrate erred in law and in fact in finding that the marriage was a nullity."

In support of the 1st ground of appeal Mrs Patricia Nyaudi advocate, representing the appellant, submitted that the Matrimonial Causes Act (cap 152) Laws of Kenya was enforced in 1921 and it is a word for word

reproduction of the English Matrimonal Causes Act of 1927. As concerns nullification of marriages the principles in *Latey on Divorce* 14th Edition pages 193, 209 and 211, based on the English Matrimonial Causes Act, apply. Mrs Nyaundi, relying on page 211 of *Latey on Divorce*, submitted that a petition for divorce must be presented within a year of the marriage ceremony. She submitted that the marriage between the appellant and the respondent was celebrated on 22nd August 1998 and the petition for nullity was filed on 22nd June 2001, out of time. Mrs, Nyaundi pointed out that whereas the law in England has been amended to increase the period within which to file a petition for divorce after celebration of the marriage to three years, this had not been done in Kenya, and no extension of time had been provided or applied for and granted. Mrs Nyaundi did not have to refer this court on this point to the law applicable in England, for this covered, with particular reference to this cause by section 14 (1) (f) and the proviso (ii) thereto which reads:

"14 (1) The following are the grounds on which a decree of nullity of marriage may be made ..... (f) that either party was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy..... Provided that, on the cases specified in paragraphs (f), (g) and (h) of this subsection, the Court shall not grant a decree unless it is satisfied.....

(i) .....

(ii) that proceedings were instituted within a year from the date of the marriage."

This point was taken up before the trial magistrate by the appellant but it was held that it could only be determined upon evidence adduced or through a substantive application supported by an affidavit showing when the petition was filed.

I have now perused the pleadings filed. I find that on the 9th February 2001 the respondent filed an *ex-parte* application through a Chamber Summons for leave to file a petition for divorce out of time under rules 3 and 20 of the Matrimonial Causes Act. In his supporting affidavit the respondent deponed that he married the appellant under the African Christian Marriage Act on the 22nd August 1998, that at the time of the said marriage the appellant was of unsound mind but that he was ignorant of her mental status, that he became fully aware of the appellant's insanity in the month of September 2000 when she was diagnosed to be suffering from mental disorders by Dr Owiti, that one year stipulated in the Matrimonial Causes Act within which to file a petition had elapsed and he was now intending to institute proceedings for nullification of the said marriage. In Clause 8 of the said affidavit he deponed specifically that:

"I will suffer torment and anguish if this application is not allowed as I will be forced to live with a woman of unsound mind for the rest of my life."

The trial magistrate granted the application on 14th February 2001 to file the petition out of time, and directed that the said petition be filed within fourteen days from that day (14th February 2001). The petition was to be filed on or before the 28th February 2001. A petition as indeed filed within that period but it was dismissed or withdrawn for want of procedure, thereupon the respondent applied afresh for extension of time within which to file the present petition. The application was granted and the period was extended to the 6th July 2001. The present petition was filed on the

22nd June 2001 well within that extended period.

I have read rule 20 of the Matrimonial Causes Act and it provides that no pleading shall be filed out of time without leave after a step in default has been taken.

It is my holding that, though there is no specific provision in section 14 (1) (f) of the Matrimonial Causes Act for extension of time for the filing of divorce on grounds of insanity or recurrent fits of insanity or epilepsy, rule 20 of the Matrimonial Causes Rules makes such provision and allows pleadings to be filed out of time with the leave of the Court.

The respondent's plea, before the trial magistrate and now before this court is that, at the time he

contracted the marriage with the appellant, he was ignorant of her mental status, that he did not know that the appellant was suffering from recurrent fits of insanity. When the appellant was thus diagonised to be so suffering, the one year period within which he would have filed a petition of divorce on that ground had elapsed, and that he came to court seeking extension of the period to file the petition immediately he became aware of the appellant's said mental status. Unless leave was granted, he would be condemned to live for the rest of his life with a woman of unsound mind. That, he submitted, would subject him to torment and anguish. He pleads with the Court now to hold that the granting of leave by the trial magistrate to file his petition out of time was discretionary justified and lawful.

I have given serious consideration to this plea and, in the peculiar circumstances of this case I hold that the trial magistrate acted lawfully and within the provisions of the Matrimonial Causes Act and Rules made thereunder in extending the period for filing of this petition to the 6th July 2001. There is therefore no merit in the 1st ground of appeal.

In support of the 2nd ground of appeal Mrs Nyaundi basically argued that rule 20 of the Matrimonial Causes Rules was inapplicable. But in my view the respondent was perfectly within his rights to make an application for extension of time before the trial magistrate, and after the petition filed had been withdrawn because it was fatally defective, to make a fresh application for extension of time to file another petition. There is therefore no merit in the second ground of appeal as well.

The 3rd, 4th, 5th grounds of appeal were argued by Mrs Nyaundi as one.

Basically grounds 3 and 5 relate to proof of the ground on which the petition was founded and ground 4 relates to the custody of the issue of marriage.

Mrs Nyaundi's submission can be summarized as follows. Nowhere in his evidence did the respondent allege that, at the time the marriage contract was entered into on the 22nd August 1998 at St Mathews Cathedral, Eldoret, the appellant suffered from a disease of the mind or a bout of insanity such as to render her incapable of entering into the bond of marriage contract. Further, that nowhere did Dr Omar Juma Ali (PW 2) state in his evidence that at the time the marriage was celebrated the appellant was suffering from insanity or from a fit of insanity which would have made it impossible for her to enter into a valid marriage contract.

Mrs Nyaundi submitted that the issue was not whether or not the respondent knew of the illness or mental status of the appellant at the time of celebration of the marriage, but whether the appellant was at that very time able to enter into a valid contract of marriage.

Mrs Nyaundi supported her powerful submission with the decision in *Re Park v Park* [1953] 2 All ER 1411 where it was held that, in considering whether or not a marriage is invalid on the ground that one of the parties was of unsound mind at the time it was celebrated the test to be applied is whether he or she was capable of understanding the nature of the contract into which he or she was entering, free from the influence of morbid delusions on the subject. To ascertain the nature of the contract of marriage a person must be mentally capable of appreciating that it involves the duties and responsibilities normally attached to the marriage.

In *Durham v Durham* (1985) 10 PD 80 quoted at page 1427 in *Re Park v Park* (*supra*) Sir James Hannen said the following about the contract of marriage:

"I may says this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from the engagement, such as protection on the part of the man, and submission on the part of the woman. I agree with the Solicitor-General, that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy

the tribunal that there was not a real apprehension of the engagement apparently entered into."

In *Hunter v Edney* also quoted on the same page 1427 in *Re Park v Park* Sir James Hannen again said:

"The question which I have to determine is not whether she was aware that she was going through a ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject."

At page 1429 of *Re Park v Park*, the opinion of Caruthers J in *Jemima Cole v William Cole* was quoted in which he said:

"Marriage, by our law, is a civil contract and may be avoided like any other contract by want of sufficient mental capacity in the parties. If the mind is unsound at the time, it is incapable of consent, and that is an essential element in contracts".

The issue for my determination is one whether or not the appellant had the mental capacity to enter into a contract of marriage with the respondent on the 22nd August 1998.

The respondent set out to prove, in his petition and in sworn testimony in the trial, that the appellant lacked that mental capacity due to the recurrent fits of insanity she was suffering from. This plea is contained in clauses 7-11 of the petition which are:

"7. That at the time of the marriage the (appellant) was of unsound mind and subject to recurrent fits of insanity caused by Schizo-affective illness and that the (appellant) had suffered from this ailment severally before the marriage, this ailment was known to the (appellant) and her family but the (respondent) was ignorant of this.

8. That immediately prior to the wedding the (appellant) suffered an attack of the ailment Schizo-affective illness and when the (respondent) enquired from her mother what was wrong with (appellant) he was told that she had malaria, and further that she was nervous because of the wedding. The (respondent) was never told that the appellant had an unsound (mind) subject recurrent fits of insanity.

9. That in the Kikuyu traditions the parents of the appellant were under an obligation to inform the (respondent) that the (appellant) suffers from recurrent fits of insanity so that he can make an informed decision on whether to proceed with the marriage or not, and thus the (respondent) avers that the (appellant) and her parents fraudulently failed to inform the (respondent) of the (appellant's) mental status leading him to believe that the (appellant) was mentally a healthy lady.

10. That the (respondent) thus prays for the nullification of the marriage on the grounds that:

(i) The (appellant) suffers from the recurrent fits of insanity and the (respondent) was ignorant of this fact at the time of marriage.

(ii) The (respondent) avers that he would not have married the (appellant) if he knew that the (appellant) was suffering from Schizo-affective illness.

(iii) The consent to marry was fraudulently obtained from the respondent by the deliberate failure on the part of the (appellant) and her family in failing to inform the (respondent) that the (appellant) suffered from recurrent fits of insanity, and further when the (respondent) enquired from the mother of the (appellant) what ailment the (appellant) was suffering from, a few days to the date of the wedding, he was told that she had malaria and was nervous due to the forth coming wedding.

(iv) The (respondent) further avers that the appellant at the time of the marriage was under strong medication to control the Schizo-affective illness and thus not competent to enter into the marriage contract.

11. That the (respondent) became aware of the (appellant's) mental status when she suffered an attack in April 2000 and was thereafter diagnosed as suffering from Schizo-affective illness on the 15th September

2000 by a psychiatrist."

The respondent gave sworn evidence to verify these averments in the petition. He testified that he married the appellant on 22nd August 1998 after he had fulfilled customary rites under Kikuyu Customary Law.

Thereafter they cohabited at Kapsoya estate when a son, whom they named L K, was born to them *on [particulars withheld]* 1999. Unknown to him the appellant was suffering from re-current fits of insanity which her family knew about but that he was not informed. It was only in the month of April 2000 when the appellant suffered the attack of insanity and had to be put on medication that he came to know about it; that on 15th September 2000 he took the appellant to a psychiatrist in Nairobi who examined her and confirmed that she suffers from Schizo-affective illness; and that the appellant herself admitted that she does suffer from delusions, hears voices which tell her what to do.

The respondent further testified that a few days before they contracted the marriage, the appellant suffered that attack. He became concerned and asked her mother what was wrong with the appellant. He said he was told that she was suffering from malaria and was nervous due to the tensions of the wedding. Immediately after the marriage ceremony, the appellant continued taking drugs.

While under cross-examination the respondent stated as follows:

" I had courted the appellant for about two years. In the two years, she did not give an indication of mental illness which I could tell. I came to know of the condition in April 2000. She got an attack around the time we were getting married. There was a ceremony at their home, and they were being given gifts by her sister, as both were getting married. I was called to the bedroom by her mother. She (appellant) looked heavily dazed and overly attentive and was saying much. What struck me most was that she could not comprehend what

I was telling her. I asked her mother what was happening. She was kept away, locked in the bedroom as there were many guests. The explanation of malaria was given to all, as they were asking where she was. I was persuaded that she had malaria. I was satisfied with the explanation."

The respondent called Dr Omar Juma Ali (PW 2) as his witness. He holds a Bachelor of Medicine degree (MB) 1980 from the University of Nairobi and holds a second degree (Psychiatry) 1986 also from the University of Nairobi. It was his evidence that he saw the appellant for the first time on 3rd April 2000 when her mother and sisters took her to him. Appellant was suffering from psychiotic behaviour – hearing voices, removing her clothes, saying her husband was a devil worshipper and that her sisters wanted to kill her. Her mother told him that the problem started much earlier in 1998. Dr Omar Juma Ali diagnosed the appellant's mental condition as Schizo affective illness. He compiled a report which he presented to court as an exhibit. On her mental state examination and conclusion, this is what Dr Omar recorded in the report:

"On Mental State Examination She appeared calm, fairly oriented but looked perplexed. She was not violent. She felt people were out to kill her. She was rather apprehensive that these threats were real and convincing. She was hearing voices of people saying nasty things about her, threatening to kill her. She firmly believed these issues. She was having delusions and auditory hallucinations. She did not have any insight into her illness. That is, she did not have any knowledge that she was ill.

Conclusion

In my summary, I found that Sarah suffers from a Psychotic condition known as Schizo affected disorder.

This is a severe mental disorder in which a patient loses touch with reality and also had an affective affliction.

It sometimes runs in families. It can be precipitated by stress in life or even some medical problems like malaria or typhoid. When the problem occurs the patient can experience false beliefs (delusions) and hallucinations (hearing voices)".

The appellant did not give evidence to verify the averments in the answer to the petition which was drawn on 9th July 2001. She also did not call any witnesses. She did, however, aver at paragraph 4 and 5 of the answer to petition as follows:

"4. The (appellant) avers that she has on 3 occasions in her entire life suffered depression triggered by stress and the same is always cured by anti-depressed drugs.

Despite the depression the (appellant's) day to day activities are not affected and she is able to carry out all her duties and roles normally and in a capable manner unsupervised.

5. The (appellant) avers that it is not true that the (respondent) did not know about her occasional depressive occurrences as she suffered a bout just before the wedding, and her state was explained to the (respondent) by the doctor at length."

With these averments the appellant has conceded, that just before the wedding she suffered a depression triggered by stress and she took antidepression drugs. This averment supports the respondent's case that the appellant suffered a fit of insanity immediately prior to the wedding and she was under medication from then onwards until after the wedding.

When the appellant suffered this attack, the respondent was not told that it was a depression but he was told by the appellant's mother that she had suffered a bout of malaria and was nervous because of the wedding. What struck the respondent most was that, during the attack, the appellant was not comprehending what he was telling her. It means that appellant lacked the mental capacity, not only to understand what he was telling her but of what was going on.

On the issue of proof therefore, it is trite law that all persons of a lawful age are presumed to be sane, in other words with particular reference to this case are presumed to be capable of contracting a valid marriage, until the contrary is made to appear; and if the contrary is alleged, it must be proved by the party imputing it.

The converse must be true. That a lucid interval must be shown to have existed at that material time by the other side through some credible and admissible evidence. In this cause, no such evidence of the appellant's lucid interval was forthcoming from the appellant apart from her averments in the answer-to-petition. The appellant elected not to give evidence to establish that she understood that she was entering into a contract of marriage and her responsibilities under the marriage contract.

The respondent on the other hand, through Dr Omar Juma Ali, has established that the appellant suffers from re-current fits of insanity diagnosed as Schizo-affective illness. This is a severe mental disorder in which a patient loses touch with reality, and also has an affective affliction.

In my view, and I do so hold, the appellant, having admitted to have suffered this seizure immediately before the wedding, and there evidence to show that she continued under medication with anti-depression drugs through to a period after the wedding, the appellant was incapable of understanding the nature of the contract she was entering into by reason of mental imbecility. She had temporarily lost touch with reality and did not understand what was happening around her.

The trial magistrate was therefore entitled to annul this marriage. I do hold that the appellant suffered from recurrent fits of insanity at the time of marriage and this marriage stands annulled on that ground.

The respondent's other ground for annulment of his marriage with the appellant was that his consent to marry the appellant was fraudulently obtained by the deliberate failure on the part of the appellant and her family in failing to disclose to him that the appellant suffers from recurrent fits of insanity. When the

appellant was seized by this attack, the respondent duly inquired from her and her mother what the problem was.

He was told that the appellant was suffering from a bout of malaria. But the truth of the matter contained in the appellant's answer to the petition when she deponed to at paragraph 5 thereof was that she, in fact, had suffered from a bout of "depressive occurrence" just before the wedding.

I reiterate that marriage is a civil contract which may be avoided for want of mental capacity or consent, which are essential elements in all contracts.

That consent may be vitiated by fraud, deliberate misrepresentation or false representation of essential facts to the transaction or contract.

By deliberately misrepresenting to the respondent the true nature of the seizure the appellant suffered immediately before the contract of marriage was entered into between the appellant and the respondent, the mother of the appellant obtained the respondent's consent fraudulently, and the subsequent contract of marriage became null and void for lack of valid consent. On this ground too, this marriage stands annulled.

On both grounds analysed above, the marriage was a nullity. Therefore there is no merit on grounds 3, 5, and 6.

In support of the 4th ground of appeal Mrs Nyaundi submitted that the trial magistrate erred in granting custody of L K to the respondent when there was no evidence that the appellant was incapable of taking care of the infant.

It is trite law that, in maters of custody of children, paramount consideration is the welfare of the infant. In the absence of exceptional circumstances, an infant should be left in the custody of his or her mother. This is holding in *Wambwa v Okumu* [1970] EA 578.

The respondent gave evidence in support of his application for custody of his son. He stated that he is an advocate of this court, with regular income from his practice, has built a permanent residential home at Kapsoya estate, that the young K is now old enough to start school and he has made arrangements to employ people to take care of him while he is at work.

Besides, he has taken out an insurance policy and says he is capable of clothing the young K, taking care of his health and education needs.

About the appellant the respondent has testified that she has recurrent fits of insanity, lives with her parents, has no regular income and finds it difficult to look after herself and is unsuited to have the custody of young K.

I have taken into account all these submissions and I wish to point out that the appellant, in the answer to the petition, did not seek the custody of her son. She also did not surrender herself for cross-examination before the trial magistrate on her suitability as the custodian of this young man.

The young L K is at the moment in the custody of the respondent, pursuant to the trial magistrate's order. The appellant has failed to persuade me that she ought to have this custody. Her plea is accordingly rejected. Ground 6 of the appeal is also rejected.

The upshot of this is that the entire appeal fails and is hereby dismissed. On costs I order that each party meets his/her own costs of this appeal

It is so ordered.

Dated and delivered at Eldoret this 24th day of February, 2003

A.G.A ETYANG

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JUDGE