JOO v MDK (Civil Appeal E125 of 2022)
[2024] KEHC 7395 (KLR) (Family) (20 June 2024) (Judgment)

Neutral citation: [2024] KEHC 7395 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

FAMILY

CIVIL APPEAL E125 OF 2022

HK CHEMITEI, J

JUNE 20, 2024

BETWEEN

JOO ..... APPELLANT

AND

MDK ..... RESPONDENT

JUDGMENT

1. This judgment relates to the Memorandum of Appeal dated 5th December, 2022 filed by the Appellant, JOO seeking Orders That:

   (a) The Judgment entered on 22nd November, 2022 be set aside in its entirety.

   (b) The Court be pleased to issue an order of dissolution of the marriage that was entered into between the Appellant and the Respondent.

2. The Respondent has not filed any response or submissions on the memorandum of appeal dated 5th December, 2022.

3. The Appellant filed written submissions dated 1st February, 2024 placing reliance on the following:

   (i) Owners of Motor Vessel 'Lillian S' v Caltex (LTD) (1989) eKLR where court established that jurisdiction is the cornerstone upon which the validity of legal proceedings rests and that it is basically everything and the moment a court discovers that it lacks the jurisdiction, it steps aside and downs its tools.

   (ii) Section 37 of the *Marriage Act*, 2014 which provides that a person who is not a Kenyan may celebrate a marriage under this Part in a foreign country if the marriage is celebrated in the

presence of the Registrar or a person authorised by the Registrar for that purpose in any Kenyan embassy, high commission or consulate.

(iii) Section 40 of the *Marriage Act*, 2014 which provides that a civil marriage contacted in a foreign country shall be recognized as valid marriage if –

(a) It is contracted in accordance with the law of that country;

b. It is consistent with the provisions of this part; and

(c) The parties have the capacity to marry under this Act.

(iv) Section 66 of the *Marriage Act*, 2014 which provides as follows:

(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have lapsed since the celebration of the marriage.

2. A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds:

(a) Adultery by the other spouse;

b. Cruelty by the other spouse;

(c) Exceptional depravity by the other spouse;

(d) Desertion by the other spouse for at least three years; or

(e) The irretrievable breakdown of the marriage.

(3) The petitioner may file the petition with the court for the separation of the parties or the dissolution of the marriage despite any effort to reconcile the parties.

(4) The court may refer a matrimonial dispute that arises in a marriage celebrated under Part IV to a conciliatory process agreed between the parties.

(5) The proceedings for the dissolution of a marriage celebrated under Part IV may be adjourned for a period not exceeding six months as the court may think fit:

(a) For the court to make further enquiries; or

(b) For further attempts at reconciliation to be made by the parties to the marriage.

6. A marriage has irretrievably broken down if-

a. A spouse commits adultery;

b. A spouse is cruel to the other spouse or to any child of the marriage;

(c) A spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;

(d) The spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;

(e) A spouse has been sentenced to a term of imprisonment preceding the date of presentation of the petition;

(f) A spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more;

(g) A spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or

(h) Any other ground as the court may deem appropriate.

(v) MNM V PNM (2016) eKLR where the court stated as follows:

> " In personal matters such as marriage, domicile is critical. Domicile is all about residency. The law of domicile plays an important role in the determination of whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of marriage where the parties have been domiciled within the jurisdiction of that court for the period allowed by the relevant law."

(vi) *Mursal & Another v Manese (suing as the legal administrator of Dalphine Kanini Manesa) (Civil Appeal E20 of 2021)* [2022] KEHC 282 (KLR) (6 April 2022) where the court stated as follows:

> " First appellate court is mandated to re – evaluate the evidence before the trial court as well as the judgment and arrive at its own independent judgment on whether or not to allow the appeal. A first appellate court is empowered to subject the whole of the evidence to a fresh and exhaustive scrutiny and make conclusions about it, bearing in mind that it did not have the opportunity of seeing and hearing the witnesses first hand."

Background

4. The genesis of this appeal is the Judgment delivered by Hon. H. M. Ng'ang'a (Mr.) on 22nd November, 2022 to wit,

> " ... The parties in the case celebrated their marriage in Tanzania and never moved to Kenya as husband and wife. The respondent still lives in the Republic of Tanzania. I find that the court cannot assume jurisdiction in the circumstances and the petition should be filed in the Republic of Tanzania. As much as it is not disputed that the foreign marriage is valid in accordance with Section 38 of the Kenya *Marriage Act*, 2014, I find the law of domicile takes jurisdiction from the court and without jurisdiction, a court downs its tools. I find that the court has no jurisdiction to hear the petition and dismiss the petition with no order as to costs."

5. An order in light of the judgment above was extracted on 22nd November, 2022.

Analysis and Determination

6. I have carefully considered the appeal before this court and the issue for determination is whether or not Kenyan courts can determine divorce cases where one spouse is Kenyan living in Kenya and the other spouse is Tanzanian living in Tanzania with the marriage having been solemnized in Tanzania.

7. It is worthy at this juncture to look at the provisions of the Tanzanian law regarding marriages.

8. Section 51 of the Tanzania Law of *Marriage Act*, Chapter 29 provides as follows:

> "(1) Where a marriage which was contracted in Tanzania is annulled or dissolved by the decree of a court outside Tanzania, either of the parties may apply to the Registrar – General for the registration of such decree and the Registrar – General shall, upon being satisfied that the decree is one which should be recognized as effective under the provisions of Section 91, register the decree.
>
> (2) Any application under this section shall be accompanied by an office copy of the decree and, where the decree is not in English of Kiswahili, by a translation thereof into English or Kiswahili certified to be correct by a consular officer or notary public or such other person as the Registrar – General may, in any particular case, approve, and by a statutory declaration as to the facts which gave the court jurisdiction."

9. Section 91 of the Tanzania Law of *Marriage Act*, Chapter 91 provides as follows:

> "Where a court of competent jurisdiction in any foreign country has passed a decree in any matrimonial proceedings, whether arising out of a marriage contracted in Tanzania or elsewhere, such decree shall be recognized as effective for all purposes of the law of Tanzania: -
>
> (a) If the petitioning party was domiciled in that country or had been resident therefore at least two years prior to the filing of the petition; or
>
> (b) Being a decree of annulment or divorce, it has been recognized as effective in a declaratory decree of a court of competent jurisdiction in the country of domicile of the parties or either of them."

10. Section 92 of the Tanzania Law of *Marriage Act*, Chapter 92 provides as follows:

> "Where any person has obtained a divorce, otherwise than by decree of a court in Tanzania, in any foreign country, the divorce shall be recognized as effective for all purposes of the law of Tanzania if: -
>
> a. It was effective according to the law of the country of domicile of each of the parties at the time of the divorce; or
>
> b. It has been recognized as effective in a declaratory decree of a court of competent jurisdiction in the country of domicile of the parties or either of them."

11. In D K B v K S B & 2 others [2018] eKLR the court stated as follows:

> "10. In light of the fact that it recorded that a Marriage Certificate exists, it is logical to assume that the marriage was registered in the country where it was performed (Tanzania). Therefore, there was at the very least a civil marriage that could be recognised. The Learned Magistrate records clearly that he/she did not know whether that was inconsistent with Kenyan law. In the circumstances, assuming inconsistency that can vitiate the marriage without evidence is of questionable logic. Civil Marriages by persons domiciled in Kenya, contracted elsewhere are recognised as valid in Kenya. The *Marriage*

Act at Section 6 also lists the type of marriages that it recognises as valid which are:

A marriage may be registered under this Act if it is celebrated—

(a) in accordance with the rites of a Christian denomination;

(b) as a civil marriage;

(c) in accordance with the customary rites relating to any of the communities in Kenya;

(d) in accordance with the Hindu rites and ceremonies; and

(e) in accordance with Islamic law.

11. The question then arises as to whether the Magistrate's Court has the jurisdiction to dissolve such a marriage. The *Marriage Act* 2014 is clear and categoric on that issue. All references to "the Court" in the *Marriage Act* are defined in the Interpretation section of the Act (Section 2) to be "means a resident magistrate's court established under section 3 of the Magistrate's Court Act.

17. .....Further, the Lower Court did issue a Certificate signifying the matter was ready to be heard. That is the stage at which it would be logical to consider jurisdiction. Once a matter is certified ready to be heard and given a hearing date, that raises a legitimate expectation that the Court seized of the matter and more importantly, accepts jurisdiction [Emphasis mine].

19. For the reasons set out above, the Judgment of the Lower Court is dismissed in its entirety together with any orders that may emanate from that judgment. The decision is incorrect in principle and also in terms of access to justice.

20. The Appellant asks the Court to dissolve the marriage and make consequential orders for maintenance. The Court has before it the uncontroverted evidence of the Petition (in the form of the Judgment). That demonstrates sufficient grounds for dissolution for adultery. This Court can, therefore, grant dissolution and it is ordered that a decree nisi do issue forthwith."

12. In light of the foregoing and the fact that the Republic of Tanzania recognizes foreign decrees of dissolution of marriage as shown above, I find that the lower court did have jurisdiction to hear and determine the divorce cause before it. Had the trial court taken time to relook at the Tanzanian Marriage laws it would have found that it had jurisdiction.

13. It is worth noting that the grounds of divorce enumerated above had been proved by the appellant and to deny him the divorce decree would continue to cause him serious emotional damage taking into account that they were not living together with the respondent as husband and wife and no evidence exhibited to indicate any effort to salvage the marriage.

14. In the premises I do find the appeal meritorious and the same is therefore allowed and order dissolution of marriage entered into between JOO and MDK on18th March 2017 in the Republic of Tanzania and a decree nisi is and is hereby issued.

15. Costs of this appeal and at the trial court shall be in the cause.

DATED SIGNED AND DELIVERED AT NAIROBI VIA VIDEO LINK THIS 20TH DAY OF JUNE 2024.

H. K. CHEMITEI

JUDGE