



**RMN v FGM & another (Miscellaneous Application E63 of 2020)
[2023] KEHC 20223 (KLR) (Family) (16 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20223 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

FAMILY

MISCELLANEOUS APPLICATION E63 OF 2020

PM NYAUNDI, J

JUNE 16, 2023

IN THE MATTER OF ARTICLES 28 AND 45 OF THE CONSTITUTION, 2010

AND

IN THE MATTER OF ANNULMENT OF MARRIAGE

AND

IN THE MATTER OF BREACH OF SECTION 8(2) (B) OF THE MARRIAGE ACT

BETWEEN

RMN APPLICANT

AND

FGM 1ST INTENDED RESPONDENT

BC 2ND INTENDED RESPONDENT

RULING

1. The Applicant presents Notice of Motion dated June 15, 2020 under Section 9 (b) (c) (sic), Section 73 (1) (c) and Section 73 (2) (a) of the Marriage Act seeking the following orders
 - i. Spent
 - ii. That leave be granted to the Applicant to file Petition out of time for the annulment of marriage between the intended 1st Respondent and Co- Respondent.
 - iii. Costs be provided for.
2. The Application is supported by the Affidavit of the Applicant sworn on the 15th June 2020 and supplementary (sic) affidavit sworn on 30th June 2021. The Application is opposed by both the



Respondents who have filed Affidavits sworn on 29th July 2020 and 19th April 2022 respectively, alongside a further affidavit sworn by the 1st Respondent on 22nd September 2020.

3. The parties agreed to canvass the Application by written submissions are dated 17th December 2021 and the joint submissions of the Respondents are dated 19th April 2022.

Summary of the Applicant's Case

4. The Applicant seeks leave to file Petition out of time to annul the marriage between the Respondents. She contends that the marriage solemnised between the two on the 9th January 2016 is a nullity as the time, the Applicant and the 1st Respondent were cohabiting as man and wife in a potentially polygamous marriage.
5. As proof of the marriage the Applicant has shown that they have had children together, bought property in common and are currently cohabiting as man and wife at Syokimau in Machakos County.
6. The Applicant contends that the 1st Respondent has made part payment of dowry and had made a promise to make additional payments towards formalising their marriage. Based on the foregoing the Applicant contends that she and the 1st Respondent are deemed to be married by virtue of the long cohabitation and the other actions of the 1st Respondent and relies on the decision in *CWN Vs DK* HCCC No. 17 that cited with approval the decision in *Hottensiah Wanjiku Yawe Versus Public Trustee*, CA Case No. 13 of 1976.
7. This Application was prompted when the Applicant came to learn in February 2020 that the two Respondents celebrated at PCEA Parish Chuka in January 2016.
8. Section 73 (2) (a) provides that an Application for annulment of a marriage must be made within a year of the marriage and it is for that reason that she presents this Application for leave to Petition out of time.

Summary of Respondents' Case

9. The Respondents oppose the Application on the basis that the Application has not satisfied the conditions to entitle her to benefit from the courts discretion to extend time. Secondly she has no locus standi as she is not a party to the marriage as provided for under the *Marriage Act*, 2014.
10. The Respondents further aver that by virtue of Section 28(4) of the *Marriage Act*, 2014, this court lacks jurisdiction as the Court is only granted appellate jurisdiction.
11. The Respondents further contend that the Applicant has not sufficiently explained the inordinate delay so as to entitle her to the orders sought.
12. The Respondent's frame the following issues for determination-
 - i. Has the Applicant satisfied the Conditions required for grant of leave to file Petition out of time?
 - ii. Has the Applicant met the threshold for grant of orders annulling the intended Respondents' marriage?
 - iii. Whether the Applicant has met the requirements for presumption of marriage between herself and the 1st intended Respondent



13. On the first issue, delay in presenting this Application, the Respondents rely on the decision in the case of *County Executive of Kisumu versus County Government of Kisumu & 8 Others* [2017] eKLR and *Japhet Kitbinji Muguna versus Julia Kanana Mwiti & Another* [2014] eKLR.

It is the position of the Respondents that the Applicant has failed to explain satisfactorily the delay so as to warrant the extension.

14. On the second issue, whether the Applicant has locus it is submitted that under Section 73 of the *Marriage Act* it is only a party to the marriage who can petition the Court to annul the marriage. The Applicant it is contended is not a party to the marriage. The Respondents cite the decision in the case of *INK versus JNK & Another* [2015] eKLR, where on facts similar to the instant case the Court found that the Petitioner in that case lacked the requisite legal capacity to petition for the annulment of the marriage between the 1st and 2nd Respondents of which she was not a party.
15. On the third issue, whether the Applicant has met the requirements for a presumption of marriage, it is submitted that the Applicant has failed to do so. The Respondents rely on the decision in *NLS versus BRP* [2016] eKLR and *CWN versus DK* [2021] eKLR which basically state not every intimate relationship will be deemed to be a marriage.

Analysis and Determination

16. Having reviewed the pleadings and the rival submissions of the parties I frame the following as the issues for determination
- i. Whether this Court has jurisdiction to entertain this matter
 - ii. Whether the Applicant has the locus to present this Application
17. It is only if I find in the affirmative that I may proceed to determine the third issue which is
- iii. Whether the Applicant has provided sufficient basis for grant extension of time to file Petition as sought.
18. On the first issue, it is now well settled that Jurisdiction is everything and before this court sets out to explore whether or not it should grant the orders sought it must satisfy itself that it does have jurisdiction to do so.
19. The Court of Appeal in *Jamal Salim v Yusuf Abdulahi Abdi & another* Civil Appeal No. 103 of 2016 [2018] eKLR stated as follows: -

Jurisdiction either exists or it does not. Neither can it be acquiesced or granted by consent of the parties. This much was appreciated by this Court in *Adero & Another vs. Ulinzi Sacco Society Limited* [2002] 1 KLR 577, as follows;

- 1)
- 2) The jurisdiction either exists or does not ab initio ...
- 3) Jurisdiction cannot be conferred by the consent of the parties or be assumed on the grounds that parties have acquiesced in actions which presume the existence of such jurisdiction.
- 4) Jurisdiction is such an important matter that it can be raised at any stage of the proceedings even on appeal.



20. The Respondents state that this Court's jurisdiction is ousted by Section 28(4) of the *Marriage Act*.
21. Section 28 is preceded by Section 27 which clarifies that the objection referred to is the objection to a notice of intention to marry. It is this objection that the statute requires be first be resolved by the person in charge of the place where the marriage is to be celebrated or by the Registrar.
22. An Application under Section 73 for annulment is presented by way of a Petition to a court.
23. For this reason, I find that this Court does have jurisdiction to hear the matter.
24. The second issue is whether the Applicant herein has locus. For the Applicant to activate the Petition she must feet within the categories of person that are provided for under the statute.
25. Section 73 (1) of the *Marriage Act*, 2014 provides; -

‘A Party to a marriage may Petition the Court to annul the marriage on the ground that...’

Section 2 provides, party ‘in relation to a marriage, an intended marriage or a purported marriage, means a spouse in a marriage, or the intended spouse to a marriage or purported spouse in a marriage.’

26. The Marriage which it is intended to annul is the marriage celebrated on 9th January, 2016 between the 1st and 2nd Respondent. The Applicant is not a party to that marriage.
27. Having determined that the Applicant has no locus to annul the marriage between the Respondents, it follows that granting her leave to file that Petition out of time would be an exercise in futility, tantamount to inviting a guest to the table when there is no seat and plate for them.
28. Accordingly, the Application dated June 15, 2020 is dismissed in its entirety with costs to the Respondents.

It is so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 16TH DAY OF JUNE, 2023.

P M NYAUNDI

JUDGE

In the presence of:

.....Advocates for the Applicant

.....Advocates for the Respondent

Karani Court Assistant

