



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL APPEAL NO.13 OF 2018**

**GM.....APPELLANT**

**VERSUS**

**HMG.....RESPONDENT**

**JUDGMENT**

1. This is an appeal arising from the judgment and decree of Hon. P. Mutua (SPM) delivered on 13/02/2018 in Nyeri Chief Magistrate's Court Divorce Cause No. 36 of 2015.
2. The cause of action arose out of a petition for the annulment of the appellant's marriage with the respondent whom he alleged had already been married to a third party, one Wambugu, prior to when she contracted the marriage with the appellant; in the alternative he had also sought orders for the dissolution of the marriage as it had irretrievably broken down;
3. After a full trial the trial court dismissed the appellant's petition as it was found to have been filed out of time and also lacking in merit;
4. The appellant being aggrieved by the decision instituted this appeal and listed sixteen (16) grounds of appeal; which are as summarized hereunder;
  - (i) The trial court erred in finding that the appellant had not proved the issue of annulment or his alternative prayer for the dissolution of the marriage;
  - (ii) The trial court wrongly evaluated the totality of the evidence and erred in finding that the appellant had not proved the existence of the respondent's prior marriage;
  - (iii) The trial court erred in failing to properly frame the issue of irretrievable breakdown of the marriage.
5. The parties were directed to canvass the appeal by filing and exchanging written submissions; hereunder is a summary of the parties' rival submissions.

**APPELLANT'S SUBMISSIONS**

6. The appellant submitted that he had sought an annulment of the marriage between himself and the respondent on the grounds that at the time of the marriage the respondent had a subsisting marriage to another party by the name Wambugu thus making the current marriage void *ab initio*; his contention was that the trial court misdirected itself in finding that the law required that the claim for annulment ought to have been brought within a year of the celebration of the marriage; his marriage was celebrated in 2004 which was way before the enactment of the Marriage Act 2014 and therefore the law could not be applied retrospectively;
7. As an alternative prayer in his petition the appellant had prayed for the dissolution of the marriage on the grounds that it had irretrievably broken down; that the parties had lived together until the year 2006 and thereafter for the last ten (10) years they had been living separately; a fact that the respondent had not denied;
8. There was also sufficient evidence on record from both sides to support the fact that the marriage had irretrievably broken down due to irreconcilable differences; and there was no hope of reconciliation despite several attempts being made to reconcile the parties which had borne no fruits;
9. In the circumstances the appellant prayed that the appeal be allowed as it was merited and the respondent be ordered to bear the costs.

10. Case law relied on; **EAO vs SAA [2018] eKLR** and **ZKN vs JKZ (2017) eKLR**.

### **RESPONDENT'S SUBMISSIONS**

11. The respondent in her response stated that the appellant's case for the annulment of the marriage was premised on the alleged marriage to one Wambugu; apart from Wambugu's name appearing on the respondent's National Identity Card, the appellant had tendered no other evidence to support his case; that the alleged marriage was an issue of fact and the appellant was required to adduce evidence to prove this fact; and her contention was that the appellant had failed in discharging this evidential burden;

12. Further that the proceedings giving rise to the appeal had been commenced eleven (11) years after the consummation of the marriage and one (1) year and six (6) months after the enactment of the Marriage Act 2014; the petition was found to have been filed after the one (1) year limitation period provided under the Marriage Act 2014; therefore, the trial court acted within the law when dismissing the petition as it was statute barred for having been filed out of time;

13. On whether the marriage had irretrievably broken down the trial court correctly found that there was no cogent evidence adduced by the appellant to prove this fact; reference was made to Section 66 of the Marriage Act which clearly provides that whoever elects to rely on this ground has the evidential burden to discharge by tendering cogent evidence;

14. The respondent stated that her evidence was uncontroverted and her conduct could not be faulted and that she has not been guilty of desertion whether constructive or otherwise; that prior to the filing of the petition the parties performed their marital obligations and continued with their cordial relations during the pendency of the petition; she submitted that there cannot be desertion where matrimonial services are performed even though isolated and intermittent;

15. The respondent urged the court to find that the appeal had no merit and that it should be dismissed with costs.

16. Case law relied on; **Kasala vs Kasala [1973] 117; Pleasant vs Pleasant; Stallard vs Stallard [1974]** and **O'neilvs O'neil [1975]1WLR 1118 CA**;

### **ISSUES FOR DETERMINATION**

17. Upon reading the rival written submissions this court has framed the following issues for determination;

(i) Whether the appellant's petition for annulment of the marriage was statute barred;

(ii) Whether the trial court disregarded the appellant's evidence on the issue of the irretrievable breakdown of the marriage and thus arrived at an erroneous finding;

### **ANALYSIS**

18. This being a first appeal this court's duty and primary role is to re-evaluate, re-assess and re-analyse the evidence on record and to arrive at its own independent conclusion; refer to the Court of Appeal decision in **Odera & Associates vs Machira & Co. Advocates (2013) eKLR**;

#### **Whether the appellant's petition for annulment of the marriage was statute barred;**

19. The appellant submitted that the trial court erred in law when it dismissed his petition for being statute barred stating that the period of limitation prescribed had lapsed and therefore the petition had been filed out of time; his contention was that his marriage had been celebrated in 2004 which was way before the enactment of the Marriage Act 2014 and therefore the law could not be applied retrospectively;

20. Indeed, this court notes that it was the appellant who initiated the proceedings under the Marriage Act 2014 ('Act') when he filed the petition on the 18/01/2015 seeking an annulment under the provisions of Section 73(1)(c) of the Act; which date the appellant does not dispute was after one (1) year and six (6) months from the enactment of the Marriage Act 2014;

21. The applicable law is found at Section 98(2) of the Act which provides that the Act is applicable to all ongoing divorce causes filed before the commencement date as far as is practicable; in this instance the cause was instituted after the advent of the Act and it therefore follows that there was no retrospective application of the Act; also the section clearly states that the Act would have still applied had the petition been filed before its advent and was still ongoing after its advent;

22. On the issue of annulment this court has had occasion to peruse the court record and finds that the appellant produced no evidence to support the allegation that the respondent had been married to another man at the time she got married to the appellant; the trial court correctly found that the names on the respondent's Identity Card and the names on the child's Birth Certificate were insufficient evidence; also any possibility of the use of the provision under Section 73(2)(c) which provides for annulment due to lack of consummation of the marriage was removed by the birth of their child;

23. The court is satisfied that on annulment the petition was filed out of time and there was evidence of consummation of the marriage; this ground of appeal is found lacking in merit and it is disallowed;

#### **Whether the trial court disregarded the appellant's evidence on the issue of the irretrievable breakdown of the marriage and thus**

**arrived at an erroneous finding;**

24. The appellant also contended that the marriage had irretrievably broken down and sought dissolution of the marriage on this ground;
25. The applicable law is found at Section 66(6) of the Act which sets out several instances under which a marriage may be presumed to have broken down irretrievably; this includes where the parties have been separated for a minimum of two years preceding the date of presentation of the petition, whether by decree of the court or voluntarily;
26. The appellant stated in his evidence that they have been living separately since 2014; the respondent in her testimony confirmed that the respondent had deserted the matrimonial home but stated that they cohabitated intermittently by meeting in hotels and sleeping in separate rooms; but this cannot be described as being or living together;
27. The fact that the parties have been living separately for a period of over two (2) years has been proved to the requisite standard; from the evidence adduced at the trial this court finds no indicators or evidence that there is commitment to the marriage and that it can be saved; there are very apparent underlying antagonisms brought about by mistrust from the respondent's prior entanglement with one Wambugu; and the fact of sleeping in separate rooms at hotel is an indicator that the parties are not keen on the resumption of their spousal duties;
28. In the light of the above circumstances this court is satisfied that the marriage has irretrievably broken down; this ground of appeal is found to have merit and it is hereby allowed;

**FINDINGS AND DETERMINATION**

29. For the forgoing reasons this court makes the following findings and determinations;
- (i) The appeal is found to be partially meritorious;
  - (ii) The appellant's petition for annulment of the marriage is found to be statute barred;
  - (iii) The marriage between the appellant and the respondent is found to have irretrievably broken down;
  - (iv) In the premises this court hereby sets aside the order dismissing the petition and substitutes it with an order allowing the petition;
  - (v) The marriage solemnized on the 18/05/2004 at the District Commissioner's Office, Laikipia District be and is hereby dissolved;
  - (vi) A Decree Nisi be and is hereby issued and to be made absolute after three (3) months;
  - (vii) Each party to bear their own costs.

It is so Ordered.

**Dated, Signed and Delivered Electronically at Nyeri this 15<sup>th</sup> day of October, 2020**

**HON.A.MSHILA**

**JUDGE**