



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIM ANI LAW COURTS

MISC CIVIL APPLICATION NO. 152 OF 2016

P M.....APPLICANT

VERSUS

V M.....RESPONDENT

RULING

1. The notice of motion application herein dated 9th November, 2016 brought under Article 2(5) and (6) of the Constitution of Kenya, Section 3 (b) and (c) of the Judicature Act, Section 9 of the Civil Procedure rules, the foreign judgments (Reciprocal Enforcement) Act Cap 43, Section 3(a) and (b) Convention of 1 June 1970 on the Recognition of Divorces and Legal Separations Article 2) sought orders as follows:

(1) That this application be certified as urgent and service be dispensed with.

(2) That the honourable court recognizes and adopts the dissolution of marriage decree given to the applicant and the respondent in the Republic of Slovakia in the District Court and Zvolen before Single Judge Mgr. Eva Jombikova on the 25th of February 2013.

(3) Any further orders that the court may deem fit.

2. Application is supported by grounds on the face of it and an affidavit in support deponed on 9th November 2016 by the applicant in person.

3. The applicant herein and respondent celebrated their marriage in Nairobi Kenya at St. Austin's Parish on 5th May 2006. That thereafter they moved and started cohabiting in the republic of Slovakia till 2013 when they divorced. The couple was blessed with one living issue M J M born on the 19th October 2006. Unfortunately, their marriage hit a rock and the same was dissolved on 25th February 2013 in the republic of Slovakia in the District Court of Zvolen before a single Judge Mgr. Eva Jombikova. Custody of their son was subsequently awarded to the respondent.

4. It is the applicant's contention that their marriage having been dissolved in Slovakia which has largely been shaped by the reception and implementation of the European Union law does fall under the bracket of the common wealth law doctrines which form part of the Kenya Law as stipulated in the Kenyan Constitution.

5. I have considered the application herein, affidavit in support and oral submissions by counsel for the applicant. Recognition of foreign judgments is provided under Section 9 of the Civil Procedure Act and Sections 3 and 13 of the Foreign Judgments (Reciprocal Enforcement) Act Cap 43. Under Section 3 of the Foreign Judgments and Reciprocal Act, divorce and separation proceedings are not listed as among those recognized for entry of such foreign judgments before any superior court in Kenya.

6. Equally, Section 13 provides for extension of reciprocal powers by a minister in charge of court affairs beyond Common Wealth countries vide gazette notice under the Foreign Judgments (Reciprocal Enforcement), Extension Act order 1984 vide legal Notice No. 35/1984. Slovakia is not among the listed countries. There is no doubt that the republic of Slovakia is not a common wealth country so as to have an automatic recognition and entry of its foreign judgments. The fact that Slovakia is a member of European Union as contended by the applicant does not make Slovakia a common wealth country. In the absence of extension authority by the minister, judgments from Slovakia will not qualify for recognition and registration in the Kenyan Superior courts under the foreign judgments (Reciprocal Enforcement) Act.

7. Regarding Article 2 of the 1st June 1970 Convention on the recognition of Divorces and Legal Separations entry force 24-VIII-1995, the same is only binding on contracting states. Among the listed countries, Kenya is not a signatory. For those reasons, the said convention although falling in the category of international law under Article 2 (5) & (6) of Kenya Constitution cannot apply. Article 1 of the said

convention provides:

“The present convention shall apply to the recognition in the contracting state of divorce and legal separations obtained in another contracting state which follow judicial or other proceedings officially effective there”.

Article 2 goes further to provide:

“Such divorces and legal separations shall be recognized in all other contracting states, subject to the remaining terms of this convention, if, at the date of institution of the proceedings in the state of the divorce or legal separation (hereinafter called in “the state origin”)-

(1)The respondent had his habitual residence there;

or

(2)The petitioner had his habitual residence there and one of the following further conditions was fulfilled-

a)Such habitual residence had continued for not less than one year immediately prior to the institution of proceedings;

b)The spouses last habitually resided there together.....”.

8. However, the applicant would find solace under Section 67 of the Marriage Act which permits recognition of foreign judgments. The said section provides:

“where a foreign court has granted a decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, that decree shall be recognized in Kenya if:

(a)Either party is domiciled in the country where that court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings.

(b)Being a divorce of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them”.

Under this provision, the need for reciprocity in the recognition and registration of foreign judgment as provided under the foreign judgments (Reciprocal Enforcement Act) 1984 is not mandatory.

9. From the wording of Section 67 above quoted, it envisages recognition of all foreign judgments regarding matrimonial proceedings without the need to demonstrate reciprocity as long as there is proof that either party was domiciled in the foreign country where that decree or order was made and that that court had jurisdiction. Secondly, that the decree of annulment or divorce or separation, should be effective in the country of domicile. There is nothing on record to show that the Slovakia Court had no jurisdiction. The presumption is that, having made and pronounced the divorce or annulment orders it had jurisdiction to do so unless challenged in an appellate or higher court which is not the case here.

10. Having moved to Slovakia the year 2006 immediately after solemnizing their marriage, and the divorce proceedings having been instituted the year 2013, the parties are said to have been domiciled in the republic of Slovakia for a period exceeding one year thus rendering jurisdiction over the divorce proceedings before the court in Slovakia. To that extent, the divorce orders made in Slovakia can be recognized by Kenyan courts.

11. It should however be borne in mind that recognition of foreign judgments is not the same as registration. Whereas the provisions of sovereign judgments (reciprocal enforcement) Act only regulates registration of foreign judgments, it implies that judgments arising out of matrimonial cause are registrable not for enforcement purposes given that matrimonial causes are declaratory in nature for dissolution of a marriage which is a personal right with no orders for enforcement unlike commercial transactions.

12. However, foreign annulment and dissolution of marriage are now registrable under Section 61 of the Marriage Act 2014. Registration of such orders is a preserve of the registrar of marriages and not the courts. For clarity purposes and avoidance of doubt, I wish to reproduce Section 61 of the Marriage Act 2014 which provides that:

Sub-Section (1) – “where a marriage celebrated in Kenya is annulled or dissolved by a decree of a foreign court, any party to the annulled or dissolved marriage may apply to the registrar to register the decree”.

13. While handling a similar case in which he recognized foreign judgment entered in U.S.A. in the case of M.N.M vs PNM (2016) eKLR,

Justice Musyoka had this to say:

“foreign annulments and dissolution of marriages are now registrable under Section 61 of the Marriage Act, 2014. However, unlike the provisions in the foreign judgments (reciprocal enforcement) Act, which envisages adoption of such orders by the

courts, the registration envisioned in Section 61 of the Marriage Act 2014 is by the registrar of marriages”.

The honourable court went further to say:

“...it was suggested that foreign judgments in matrimonial cause are not recognized in Kenya. That cannot be the correct position”.

14. It is therefore clear that under the Marriage Act 2014, foreign judgments annulling marriages or generally dealing with matrimonial proceedings are recognized in Kenya and the prayers herein are properly sought and therefore allowed in terms of prayer No. 2 to the effect that:

(a) This honourable court do recognize and adopt the dissolution of marriage decree given to the applicant and the respondent in the republic of Slovakia in the District of Zvolen before single Judge Mgr. Eva Jombikova on 25th of February 2013.

(b) Costs be in the cause.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2018.

J.N. ONYIEGO (JUDGE)

In the presence of:

No appearance for.....Counsel for the applicant

Edwin Court Assistant