



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 186 OF 2014**

**A L M.....PETITIONER**

**VERSUS**

**P M M .....RESPONDENT**

**JUDGMENT**

1. By a petition dated 10<sup>th</sup> September 2013 and filed on 20<sup>th</sup> September 2013, the petitioner prayed for orders annulling her marriage to the respondent citing the ground of fraud particularized as hereunder;

**a. That the respondent was at the material time of contracting this marriage married to one R N N under common law with whom he has two children.**

**b. That the respondent and the said N N are still married.**

**c. That the respondent fraudulently concealed this fact when entering into the marriage with the petitioner.**

**d. That the respondent misrepresented to the petitioner that the said R N N was his cousin.**

2. Briefly, on 3<sup>rd</sup> February 2012, the petitioner herein an American citizen contracted her marriage to the respondent (a Kenyan) at the Registrar of Marriages office Nairobi under the Marriage Act Cap 150. After the said marriage, the couple settled at various places within Nairobi thus cohabiting as husband and wife. The couple has not been blessed with any living issue out of the said marriage.

3. It is the petitioner's contention that, sometime 2013, she discovered that their marriage was a sham, null and void due to the respondent's fraudulent actions, misrepresentation and concealment of material facts. She stated that the respondent had obtained her consent to marriage through fraud by not disclosing to her that he was engaged in another marriage relationship with one R N N .

4. On 14<sup>th</sup> June 2013, the respondent entered appearance through the firm of Waiganjo Advocate. He however did not file any answer to the petition.

5. Although this petition was originally filed at Milimani Chief Magistrate's court as petition No. 340/2013, it was later transferred to the high court due to lack of jurisdiction. Pursuant to a Chamber Summons dated 8<sup>th</sup> September 2014, the file herein was transferred to the high court for hearing and determination vide an order dated 21<sup>st</sup> January 2015. On 8<sup>th</sup> April 2015, the matter was certified as properly filed and proceedings to proceed as undefended cause.

6. After perusing the record, the matter appears to have proceeded for hearing on 23<sup>rd</sup> March 2017 in the absence of the respondent. However, on 8<sup>th</sup> June 2017, the record shows that the respondent did appear while represented by Irungu Advocate. On that day, the respondent indicated his intention to oppose the petition. He was subsequently granted 30 days to file a response.

7. When the matter came up for hearing on 13<sup>th</sup> July 2017, the respondent had not filed any reply. The court proceeded to grant an adjournment which culminated to the filing of the respondent's answer to the petition on 20<sup>th</sup> September 2017. The respondent opposed the petition arguing that by the time he contracted the marriage to the petitioner, he was not married to one R N. He claimed that R N was his former girlfriend with whom he had two children and that the petitioner was fully aware of that position even before solemnizing their marriage.

8. After the close of the petitioner's case, the respondent did not tender any evidence in defence. Mrs. Wanjiku for the petitioner however

made oral submissions urging the court to nullify the marriage on the grounds stated notwithstanding the fact that under the Matrimonial Causes Act now repealed there was no time limitation for nullification of a marriage. Learned counsel quoted the case of **Moses Masika Wetangula vs Musikari Kombo & 2 Others (2015) eKLR** which case deals with election offences. She further relied on the case of **David Omwenga Maobe vs R (2015) eKLR** in which the court ordered the respondent to be charged for perjury on lack of credibility.

9. I have considered the petition herein, answer to petition and the evidence by the petitioner. There is no dispute that the petitioner did contract a marriage with the respondent as evidenced in the marriage certificate S/No. 158404. The only issue in contention is whether, the said marriage was contracted through fraud or concealment of material facts.

10. Was the respondent already married to one R N N by the time of contracting the marriage herein? If so, was the petitioner aware? Is the marriage between the petitioner and respondent null and void for non disclosure of material facts? These are key questions that beg for answers.

11. Under Section 13 of the Matrimonial Causes Act Cap 152 now repealed, a husband or a wife may present a petition to the court praying that his or her marriage be declared null and void. Section 14 of the said Act goes further to provide grounds for issuance of a decree of nullity as follows:

Sub-Section (1) –

(a)

(a)....

(b) .....

(c) .....

**(d) that the former husband or wife or either was living at the time of the marriage, and the marriage with such person's husband or wife was then in force; or**

**(e) that the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England.**

(f) .....

(g).....

(h).....

12. The petition herein is seeking nullification of a marriage and not divorce which ordinarily under section 6 of the repealed matrimonial causes Act should be filed three years after the marriage unless there are exceptional circumstances with leave of the court. However, subsection 3 does not prohibit presentation of a petition based on matters which have occurred before the expiration of three years from the date of the marriage. Such situations would in my opinion include annulment of a marriage under section 13 and 14 of the same Act.

13. According to the petitioner, she was not aware at the time of the marriage that the respondent had another wife contracted under common law. During her testimony, the petitioner testified that during the subsistence of their marriage, the respondent introduced a lady referred to as Nikki as a cousin. That they later employed the said Nikki as a house help only to discover the truth later from a lady known as Betty and Margaret that the lady the respondent had introduced as a cousin was actually a wife by the name of N N. That she then confronted the respondent who allegedly admitted lying to her. She stated that, the lady referred to as Nikki was indeed the respondent's wife and the mother of his two children and that she had employed her as a house help on the mistaken belief that she was a cousin to the respondent when in actual sense she was a wife.

14. Despite filing an answer to the petition, the respondent did not tender any evidence to controvert the testimony of the petitioner. The petitioner gave a detailed testimony how she was deceived by the husband that their house help one Nikki was a cousin. She however came to discover the truth that Nikki was a co-wife with whom she was sharing a house and a husband in the pretext of being a house help.

15. Having not challenged the testimony of the petitioner, I am left with no other evidence to rely on except that of the petitioner. The petitioner shifted the burden of proof to the respondent who failed to discharge his onerous duty.

16. Having evaluated the testimony of the petitioner which is consistent and detailed, it sounds like a holly wood movie beyond imagination when a spouse is deceived to the extent of maintaining a co-wife in the name of a house help. Obviously, the marriage between the petitioner and the respondent was obtained through false pretences and misrepresentation of material facts with the sole purpose of the respondent using the petitioner an American citizen to secure a green card for himself and his children to gain American citizenship which failed.

17. The petitioner was not made aware of the existence of another wife. She was deceived hence a victim of "get rich quickly syndrome kind of husband". I am convinced that under Section 13 and 14 of the Matrimonial Causes Act, the marriage between the two was obtained by the respondent through fraud and concealment of material facts. (**See Divorce Cause No. 103/2006 (JPP vs PHR (2007) eKLR**) where the court held that:

**“I find that the respondent must have known that the information he posted about himself in the website was false and misleading. Indeed that information misled the petitioner to choose him and picked up correspondence with him, and eventually agreed to marry him. This was clearly “marriage based on false pretences”, and cannot be allowed to stand”.**

18. It is unfortunate that the petitioner in search of love and happiness ended up in being frustrated by his new found soul mate bent on quick riches. This court cannot perpetrate further frustration by allowing a marriage that was founded on falsehood to continue. The petitioner has proved her case on a balance of probability and she must not be tied further with a marriage that was never to be had she known all material facts or the truth.

19. Accordingly, the marriage celebrated by the petitioner to the respondent on 3<sup>rd</sup> February 2012 is hereby declared null and void hence the same is nullified. A decree nisi shall issue and the same be declared absolute within one month. There shall be no order as to costs.

DATED AND DELIVERED IN OPEN COURT THIS 6<sup>TH</sup> DAY OF DECEMBER 2018.

J.N. ONYIEGO

JUDGE