REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 53 OF 2014

M N M ..…..…… APPELLANT

VERSUS

P N M ……RESPONDENT

(Being an Appeal from the Ruling of the Hon. Obulutsa C., Ag Chief Magistrate delivered on 25th June 2014 in Mililani Commercial Courts Chief Magistrate's Court Divorce Cause No. 89 of 2010)

JUDGEMENT

1. The appeal herein challenges a decision made by the lower court in the divorce cause on the grounds that revolve around the holding that the court in Florida, United States of America (USA), in USA Circuit Court Judicial Circuit in and for the Duval County Florida Case No. 00-00142-FM, had jurisdiction to dissolve the Kikuyu customary marriage between the appellant and the respondent.

2. The appellant seeks that the judgment of the lower court be set aside, that the court considers the facts and the law and issue an order dissolving the customary law marriage between the parties, and the respondent be ordered to pay the costs of the appeal and of the proceedings of the lower court.

3. When the matter came up for directions on 2nd October 2014, the parties consented to disposing the application by way of written submissions to be highlighted.

4. The record before me indicates that the appellant filed her written submissions, dated 30th November 2014, on 26th November 2014. A list and bundle of authorities was filed simultaneously with the written submissions. There is nothing on record to indicate that the respondent filed written submissions, but there is a supplementary list and bundle of authorities by the respondent dated 16th March 2015, filed in court on 18th March 2015. At the oral hearing, counsel appearing for the respondent mentioned that the respondent had filed written submissions.

5. I will only recite the arguments made in the written submissions by the appellants as I am unable to find those filed by the respondent. On the facts, the appellant states that there is no dispute that the parties had contracted marriage under Kikuyu customary law, cohabited in Kenya before emigrating to the USA, proceedings were conducted before a court in Florida commenced by the appellant seeking dissolution of the marriage, the plea by the appellant was granted and the marriage was dissolved, and the appellant subsequently unsuccessfully sought to have the decree dissolving the marriage set aside. It was urged that the lower court in Kenya, at the trial of the matter before it, was required to decide whether the judgment entered in the Florida case was

applicable in Kenya and, if not, whether the appellant was entitled to dissolution of the customary law marriage.

6. The appellant cited a number of statutory provisions and decisions on jurisdiction in her quest to establish that the Florida court had no jurisdiction on the matter. She also cited the fact that the respondent did not appear at the lower court to give evidence, to support the position that this court ought to order dissolution of the marriage. It is also submitted that the dissolution of the marriage by the Florida court was founded on a consent of the parties which was contrary to Kenyan law.

7. The parties gave their highlights on 30th April 2015. Mr. Gatheru Gathemia stated the case for the appellant, while Mr. Njenga urged the respondent's case.

8. Mr. Gatheru addressed me principally on jurisdiction. He argued that the issue of jurisdiction was not raised before the lower court, and therefore the lower court erred in holding that the Florida court was competent to dissolve the customary law marriage contracted in Kenya. He asserted that the Florida had no jurisdiction to entertain a suit for dissolution of such a marriage and only courts in Kenya could dissolve the same. He stated that jurisdiction goes to the root of the matter.

9. Mr. Njenga, on his part, submitted that at the time the Florida court granted the divorce in question, the parties were resident there. They were therefore, in his view, subject to the jurisdiction of the place where they resided. He submitted further that the marriage sought to be dissolved had be contracted under a system of law that was recognized in Kenya and in their jurisdiction. Subsequent to the dissolution of the said marriage the appellant proceeded to contract two other marriages in the USA. The appellant then came to Kenya and applied for divorce here in Kenya, arguing that the proceedings in Kenya were intended purely to facilitate prosecution of a suit she had filed at the High Court for division of matrimonial property.

10. He further submitted that once the Florida court declared a divorce, there could not be any other tenable proceedings anywhere else for divorce. He argued that it would be untidy for a person to be divorced, say, in the USA but remain married in Kenya. Such a scenario would suggest that the parties would be forced to file for divorce whenever they changed jurisdictions. He cited the decision of Chitembwe J. in *BN vs. EM* (2014) eKLR, where it had been held that once a divorce was declared, it did not have to be registered anywhere. He submitted that after the parties obtained divorce in the USA, they did not have to have it registered in Kenya under the Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, Laws of Kenya. He concluded by submitting that the divorce proceedings in Kenya were *res judicata*, in view of the decision of the Florida court. He stated that the appellant had unsuccessfully sought to have the decision of the Florida court overturned to no avail. He submitted that there were no substantial grounds to warrant the court overturning the decision of the lower court.

11. In his rejoinder, Mr. Gatheru referred to the decision of Nzioka J. in *ASM vs. SRKM* (2012) eKLR, where it had been stated that divorce cannot be granted by consent, asserting that the fact that the Florida court granted divorce by consent rendered the proceedings before that court null and void *ab initio*.

12. This appeal turns on only one issue, the integrity of the decision of the Florida court in USA Circuit Court Judicial Circuit in and for the Duval County Florida Case No. 00-00142-FM, specifically, whether the said court had jurisdiction to entertain a suit for dissolution of a marriage contracted in Kenya under Kikuyu customary law.

13. From the material on the record, it appears that the parties hereto lived in Kenya for some time after contracting marriage, before relocating to the USA, with their children, in 1992. The appellant moved the Florida court for divorce in 2002, which was granted by consent after mediation. It would appear that she contracted two other marriages subsequent to the dissolution of the marriage on 5th February 2002.

14. At the time the she moved court in the USA, the appellant had been resident there for roughly ten (10). She was under that jurisdiction for that period of time. She moved the relevant court in that jurisdiction under the belief that that court had the competence to pronounce judgment on matrimonial issues arising from a marriage that she had entered into before her relocation with the respondent to the USA.

15. 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.

16. The Marriage Act, No. 4 of 2014, does not have clear provisions of the domicile of parties seeking dissolution of marriages in Kenya. The only reference in the Act to domicile is to be found in section 67, which states as follows:-

> '*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 decree of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them.'*

17. The Matrimonial Causes Act, Cap 152, Laws of Kenya, which was repealed by the Marriage Act, 2014, was more elaborate on domicile. It dealt with it in sections 4 and 5. Section 4 stated: -

> *'Nothing in this Act contained shall authorise _*

a. *The making of any decree of dissolution of marriage or of nullity of marriage unless the petitioner is domiciled in Kenya at the time when the petition is presented;*
b. …'

Section 5(1) stated that:-

> '*Notwithstanding that the husband is not domiciled in Kenya, the court shall have jurisdiction in proceedings by a wife for divorce, if the wife is resident in Kenya and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.'*

18. The jurisdiction of a family court to entertain a divorce cause is therefore guided by the law of domicile. Whether a court before which such matter has been placed is competent to handle it will depend on whether the parties or either of them have been resident within the jurisdiction of that court for the period stipulated by the relevant law. In this case the parties had been resident in the USA for about ten years. No doubt the US court would have jurisdiction in a marital matter in the circumstances

19. I have noted that although the appellant has argued strenuously that the Florida court had no jurisdiction to dissolve their marriage, I have not been pointed to any law that states that position. No material was placed before me to say that the parties had not been resident at Florida for long enough to confer jurisdiction or competence on the Florida court to handle their matter. Neither was any law cited that would suggest that a court in the USA was not competent to dissolve a marriage celebrated in Kenya under African customary law.

20. It was urged that the marriage had been dissolved by the Florida court on the basis of a consent, yet under Kenyan law marriage by consent is not recognized. With respect, I do not find force in that argument. The law of Kenya that the appellant cited, with respect to a consent to divorce, relates to statutory marriages. None has been cited to me which states that customary law marriage cannot be dissolved by consent. In any event a court in the USA, exercising jurisdiction under the US law, is not bound by the Kenyan law on the same matter. Needless to say that the appellant has not demonstrated that the US law similarly provides that divorce cannot be by consent.

21. The appellant sought to persuade the court that the decree of the Florida court ought not to be recognized in Kenya. The provisions of the Foreign Judgments (Reciprocal Enforcement) Act were cited in that regard. It was suggested that foreign judgments in matrimonial causes are not recognized in Kenya. That cannot be the correct position. The Foreign Judgments (Reciprocal Enforcement) Act only regulates registration of foreign judgments, and its effect is that such judgments in matrimonial causes are not registrable. That is not the same as saying that such judgments are not recognized. Registration is necessary under the Foreign Judgments (Reciprocal Enforcement) Act for enforcement purposes. A decree for dissolution of marriage is not for enforcement, and therefore there really is no need for it to be registered under the Foreign Judgments (Reciprocal Enforcement) Act, for a divorce decree amounts to a mere declaration that a marriage has been dissolved.

22. 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 envisage adoption of such orders by the courts, the registration envisioned in section 61 of the Marriage Act, 2014, is by the Registrar of Marriages.

23. As I have stated above, I have not been persuaded that the Florida court had no jurisdiction to entertain the matter. Consequently, the order in question is an order of a court of competent jurisdiction. It is valid and binding, unless it is set aside, reversed or varied by the court which made it or by a higher court on appeal. The court which made the order declined to vacate it or vary it. There is no evidence that a higher court in USA has interfered with it.

24. In view of the above, I cannot proceed as if the order does not exist. It binds me in view of the very clear provisions of section 9 of the Civil Procedure Act, Cap 21, Laws of Kenya, on the effect of foreign judgments. I cannot purport to sit on appeal on it. Certainly, the lower court which dealt with the matter could do nothing about the said foreign judgment in the circumstances.

25. In view of everything that I have said above, I have come to the conclusion that the appeal herein is without merit and I do hereby dismiss the same with costs to the respondent.

DATED, SIGNED and DELIVERED at NAIROBI this 3RD DAY OF JUNE, 2016.

W. MUSYOKA

JUDGE