



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO.231 OF 2013

R WPETITIONER

VERSUS

D O W.....RESPONDENT

JUDGMENT

1. The Petitioner has filed a petition dated 18th October 2013 seeking the dissolution of her marriage to the respondent. She married the respondent on 19th May 2009 a month after their meeting. The petitioner and respondent cohabited as husband and wife in Nairobi and they were blessed with one issue of the marriage, WW in 2010 who is currently 3 years old. The petitioner avers that the respondent in 2010 deserted their matrimonial home for his Embakasi home where he became resident never to return. That upon her travelling to the respondent's home she found that the respondent was already married to one BAO under Luo customary law and they had been blessed with 4 issues within the age bracket of 3-13 years. That at the time of their said marriage the said marriage was still in force. She avers that the respondent has failed to maintain the minor which has as a result caused the petitioner economic struggle in earning a living as she is an administration police officer earning income of Kshs. 25,000/- which is not sufficient to maintain both her and the minor. She avers that the respondent is also an Administration police officer earning Kshs. 30,000.

2. The petitioner's petition is grounded on section 14(1) of the Matrimonial Causes Act. She avers that at the time of her proposed marriage to the respondent he was still married to BAO and that they were still married and living together at the time he contracted the marriage to her and did not inform her of the same. She avers that the respondent has shown all intentions to nullify this marriage by leaving the matrimonial home and failing to dissolve his 1st marriage to BO before marrying her. The petitioner prays that her marriage to the respondent is nullified. That she is granted legal custody of the minor and that the respondent is compelled to pay the maintenance of the minor.

3. The respondent filed a statement of defence on 22nd April 2014. He admits that their marriage was solemnized in Nairobi on the said date but denies that the same was done a month after their meeting, adding that he and the petitioner had cohabited at [particulars withheld] SGB camp around 16th October 2008 and denies that their marriage was ever blessed with any issue. He avers that in November and December 2008 he and the petitioner travelled to Usege for purposes of familiarization and construction of a dwelling home. He denies being married to the said BO, adding that he is legally married to the petitioner.

4. The matter came up for hearing on 23/10/2016 she reiterated the averments of her petition, adding that after discovering that the respondent had another wife, things were not the same and she quit the marriage and stayed alone. That the respondent did not maintain her and the minor and only went for his conjugal rights. That every time he sought assistance the respondent beat her up. He stated that the respondent did

not inform her that he was married to one BA. In support of the said claim, she relied on a copy of next of kin form she claims was from the respondent's personal file having been filed by the respondent as evidence by his personal number [particulars withheld]. The said form indicated that one of his next of kin was his wife BA.

5. On cross-examination, she stated that she last saw the respondent in 2009 and delivered her child in 2010. She stated that she now had two children and was married to the inspector. The petitioner insisted that the respondent had 5 children with the said B.

6. Stephen Muriuki a legal officer attached to the Administration police stated that the information provided in the respondents file for next of kin is one of BO who is listed as the respondent's wife. On cross-examination, the officer stated that the respondent's documents were not in the public domain and was not aware of how the petitioner could have obtained them. He added that it was difficult to bring the whole personnel file in court but assured the respondent that a certified copy was sufficient.

7. D O he reiterated the averments of his defence adding that before the said marriage to the petitioner, he visited her home in Lugari and she did the same to know where she came from and both sets of parents consented to them solemnizing their marriage. Which they did at the Attorney General's chambers on 19/2/2008. That in 2010 he took a loan from KCB bank to put up a structure to stay in and spent about 120,000 to settle dowry as the petitioner's family wanted Kshs.240,000 claiming the dowry he gave was not enough. That sometime in 2011, the petitioner started extra marital affairs with Sergeant M and after a meeting, they were relocated to [particulars withheld] police camp. In 2012, he took out a loan and he went on leave. Only to receive a call from the petitioner telling him that their marriage was over. That before his colleagues the petitioner's father told him that his daughter cannot be married to a poor man like him. He stated that he has incurred a lot of expense and currently survives on Kshs.14,000 per month due to loan deductions, which he took on the strength of their marriage.

8. On cross-examination, he stated that BA was a member of their church. He added that he had no child with the petitioner and was not willing to support the child. He denied having filed the disputed next of kin personnel form. He disputes that the same is not in his handwriting nor was the signature appearing his.

9. Parties filed written submissions. The petitioner stated that the respondent lacked capacity to enter into a legally binding marriage with the petitioner in that at the time they celebrated their marriage the respondent was already married to the said BAO. That from the personal records the same discloses the children born by the said parties. As such the said marriage was void for lack of capacity to marry under the system the said marriage was conducted. On custody and maintenance, she submits that both parties are under the Constitution, the children's Act and the Marriage Act to maintain the child of the marriage. In addition, the petitioner seeks damages of kshs.100,000 for injury caused on discovering that the respondent entered into the said marriage knowing very well he had no capacity.

10. The respondent avers that he has no issue with the nullification of the said marriage and is not willing to contest the same. He also stated that he had no issue on the petitioner having custody of the minor but agrees that maintenance should be their joint responsibility adding that the petitioner is yet to prove that the respondent is the minor's father.

Determination

11. The petitioner seeks nullification of the said marriage to the respondent on grounds that the respondent concealed the fact that he was in a marriage with one B previously contracted when he the same was still subsisting at the time the parties got married. The petitioner has moved the court under section 13 of the Matrimonial causes Act which provides that, "*A husband or wife may present a petition to the court praying that his or her marriage may be declared null and void.*"

Further Section 14 (1) lays down grounds on which a decree of nullity of marriage may be made –

“(d) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such previous husband or wife was then in force;”

Section 73 of the Marriage Act 2014 in grounds for annulment of marriage

Provides that, *“(1) A party to a marriage may petition the court to annul the marriage on the ground that —*

(c) in the case of a monogamous marriage, at the time of the marriage.”

(2) The court shall only grant a decree of annulment if —

(b) at the date of the marriage and regarding subsections (1)(b) and (c), the petitioner was ignorant of the facts alleged in the petition;”

The petitioner avers and testified that at the time of the celebration of the said marriage she was not aware of the union between the respondent and the alleged B whom the respondent still claims is not his wife. I find that the respondent is not being truthful to this court. The legal officer who appeared in court indicated that the information as stated in the respondent’s personnel indicate that he is married to BAO. Though the respondent claims that the said B is not his wife and has alleged that the said forms are a forgery he has not adduced any evidence to prove the same. The petitioner testified that she went to his home and found a wife and children. As such I find that the respondent having knowledge that he was in another marriage chose to contract another marriage with the petitioner. The respondent at the time of contracting the said marriage lacked capacity to enter into another marriage as such any marriage union contracted thereafter was a nullity. I therefore nullify the marriage between the petitioner and respondent.

12. The petitioner also claims that the respondent deserted the matrimonial home. Desertion as a ground of divorce under section 8(1) (b) of the Matrimonial Causes Act requires that the desertion be for a period of at least three years preceding the presentation of the petition for divorce.

13. The petitioner in her own testimony stated that she was already in another relationship with a senior officer with whom she has a daughter and is cohabiting with to-date. It is clear from analysis of the evidence presented before the court that both parties have by their individual conduct contributed to the deterioration their relationship.

14. In my view the union between the parties was a sham marriage contracted after a brief encounter of the two parties. The petitioner stated that they got married a month after meeting. The two I find did not give themselves ample time to know each other only to realize they made a mistake after having entered into the “marriage”. The Petitioner having admitted that she is in another relationship is not entitled to damages. A decree nisi to issue forthwith and to be made absolute within 30 days.

15. On the issue of custody and maintenance. The respondent disputes being the father to the minor. The issues of children as set out in section 113 of the children’s Act lies with the children’s Court and the same extends to custody and maintenance of the child as laid out in part VII of the Children’s Act. As such this court will not comment on the same. Issues of custody and maintenance lie with the lower court and only come to this court as a matter of appeal. Each party to bear its own costs. It is so ordered.

Dated, signed and delivered this 1st day of **December** 2016.

R. E. OUGO

JUDGE

In the presence of:

..... **For the Petitioner**

.....**For the Respondent**

M/s Charity.....Court Clerk