



REPUBLIC OF KENYA

High Court at Mombasa

Miscellaneous Civil Cause 13 of 2012

**IN THE MATTER OF: AN APPLICATION BY FELIX ODHIAMBO ORINA FOR LEAVE TO
APPLY FOR JUDICIAL REVIEW**

AND

IN THE MATTER OF: MARRIAGE ACT CAP. 150 OF THE LAWS OF KENYA

AND

**IN THE MATTER OF: OBJECTION TO INTENDED MARRIAGE BETWEEN FELIX
ODHIAMBO ORINA AND NORAH SECHERE BY VIVIAN ATIENO**

BETWEEN

FELIX ODHIAMBO APPLICANT

VERSUS

DEPUTY REGISTRAR 1ST RESPONDENT

THE ATTORNEY GENERAL 2ND RESPONDENT

AND

VIVIAN ATIENO 1ST INTERESTED PARTY

NORAH SECHERE 2ND INTERESTED PARTY

THE PRIEST IN CHARGE HOLY GHOST CATEDRAL MSA 3RD INTERESTED PARTY

RULING

1) The Applicant seeks leave of court to apply for an order of certiorari to remove into the High Court and quash the decision of the Senior Principal State Counsel and Deputy Registrar Mombasa contained in the letter dated 26th September 2012 to the Priest in Charge, Holy Ghost Cathedral, Mombasa directing

that the marriage and wedding between Felix Odhiambo Orina and Norah Sechere not to take place until further notice. The Applicant further seeks an order for mandamus to compel the Deputy Registrar to issue the Applicant with a marriage certificate depicting the marriage between the Applicant and one Norah Sechere as duly and lawfully married upon conclusion of their wedding ceremony scheduled for 6th October 2012 and for an order that the grant of leave operates as a stay of Deputy Registrar's decision aforesaid.

2) The impugned decision is contained in the 1st Respondent's letter dated 26th September 2012 which is in the following terms: -

DRG/MSA/MRG/2012/.. 26th September 2012
The Priest In charge
Holy Ghost Cathedral
Mombasa

RE: OBJECTION TO INTENDED MARRIAGE BETWEEN FELIX ODHIAMBO ORINA AND NORAH SECHERE

I have to inform you that an objection/caveat has been lodged with me by VIVIAN ATIENO objecting to the intended marriage involving the above named FELIX ODHIAMBO ORINA and NORAH SECHERE.

Mr. Orina and Ms Sechere placed a notice with me on 6th September 2012 about the intended marriage to be solemnized in your Church where I understand a corresponding announcement was first made on 28th July 2012. However, Vivian Atieno has written to me stating that she is married to Mr. Felix Odhiambo Orina since the year 2002 under the African Customary Law of the Luo tribe and that they have children together.

I shall therefore not issue the registrar's certificate authorizing the marriage until the allegations by Ms Vivian Atieno are deliberated on and dismissed or I am served with a court order.

I hereby advise and direct that the marriage must not take place until further notice. This directive applies equally to all other pastors and registrars licensed to conduct marriages and any person that ignores this directive shall have her or his license revoked.

Tom Ogweno

Senior Principal State Counsel & Deputy Registrar General,

Mombasa

Copy: Vivian Atieno
Felix Odhiambo Orina
Norah Sechere

Any other pastor licensed to conduct marriages."

3) The applicant complains at paragraphs 11-15 of the Statement in support of the application that: -

"11. The deputy Registrar does not have the jurisdiction under the Marriage Act to cancel a marriage ceremony in church.

12. The Deputy Registrar General has acted outside his powers by not seeking orders from the court to stop the said marriage.

13. ***The African Customary Marriage of the Luo cannot be a bar to a statutory marriage under the Marriage Act Cap. 150 of the Laws of Kenya.***

14. ***It is only the court that can have the aversive power to stop a marriage and not the Deputy Registrar General.***

15. ***The Respondent is engaging in an ultra vires exercise of discretion which is clearly affecting the Applicant's rights to marry a person of his choice in accordance with Article 45 (2) of the Constitution.***

4) The Respondent and the 1st Interested Party filed replying affidavits to the application, and together with counsel for the Applicant, counsel for the Respondent and the 1st Interested Party made respective oral submissions on the application. The principal defences of the Respondent and the 1st Interested Party are, respectively, that the Deputy Registrar acted within the provisions of section 11 of the Marriage Act with regard to processing of notices of intended marriages under the Act and that the 10-year marriage which had been blessed with two children, between the Applicant and the Interested Party, was still subsisting and therefore the Applicant could not contract another marriage with another person under the Marriage Act.

5) At this stage of the proceedings, the court cannot make any findings on disputed facts on the merits of the case. In accordance with the Court of Appeal decisions in **Meixner & Another v. Attorney General (2005) 2 KLR 189** and **R. v. Attorney General & Another (2006) 1 KLR 219** leave to file for judicial review should be granted if on the material available the court considers without going into the matter in depth that there is an arguable case. The main issue before the court therefore is whether leave to file for judicial review shall on the material before the court be granted and whether the grant of such leave shall operate as a stay of the decision challenged by the proceedings.

6) **Whether leave to file judicial review proceedings shall be granted.**

Section 11 of the Marriage Act Cap. 150 under which the application had lodged notice of his intended marriage grants the Registrar discretion to issue a certificate of marriage in the following terms: -

“11 (1) The Registrar, at any time after the expiration of twenty-one days and before the expiry of three months from the date of the notice referred to in section 8 of this Act, shall, upon having satisfied by affidavit that –

a)

b)

c)

d) neither of the parties to the intended marriage is married by African Customary Law or in accordance with Mohammedan Law to any person other than the person with whom such marriage is purposed to be contracted.

This provision, in my view, grants the registrar the discretion to refuse to issue the certificate where he is not satisfied that parties or either of them are not married under Customary Law or Mohammedan Law to any other person. Moreover, the Registrar's discretion is taken away under section 15 of the Act where a person who has just cause why the marriage should not take place enters a caveat against the issue of the Registrar's Certificate. In that circumstance, **“the Registrar shall not issue this certificate until that caveat is removed”** in accordance with the Act. Under the sections 16, 17 and 18 of the Act the procedure for removal of the caveat by the Supreme Court (now High Court) and compensation for wrongful caveat is set out.

7) The Registrar defaulted in referring the matter to the court under section 16 of the Act which is in the

following terms:

“16. Whenever a caveat is entered against the issuance of a certificate, the Registrar shall refer the matter to the Supreme Court, and that court shall thereupon summon the parties to the intended marriage, and the person by whom the caveat is entered, and shall require the person by whom the caveat is entered to show cause why the Registrar should not issue the certificate, and shall hear and determine the case in a summary way, and the decision of the Supreme Court shall be final.”

8) The Registrar’s letter of 26th September 2012 clearly not only set out the law as provided under section 11 of the Marriage Act, but also proceeded, apparently, without jurisdiction, in an arrogant tone of superiority to declare that: -

“I hereby advise and direct that the marriage must not take place until further notice. This directive applies equally to all other persons and registrars licensed to conduct marriages and any person that ignores this directive shall have her or his license revoked.”

As a matter of law, it would appear that the Registrar has no power to stop a marriage, he may only refuse to issue a certificate in accordance with the procedure set out in the Marriage Act. Furthermore, the power to license church ministers, pastors and registrars to conduct marriages lies with the Minister responsible under section 7 of the Marriage Act and section 6 of the African Christian Marriage and Divorce Act Cap. 151. Accordingly, the objection as to the 1st Respondent’s purported exercise of pretended powers to revoke Licenses and to direct that the marriage does not take place is valid. No substance exists however in the Applicant’s challenge of the 1st Respondent’s letter of 26th September 2012 with regard to the 1st Respondent’s discretion to issue a certificate. I do not therefore find that there is an arguable case for presentation before the court on judicial review proceedings except with regard to the last paragraph of the said letter.

Accordingly, because of the court’s power to quash part of a decision after severing the offensive fact of the decisive from the whole, I would grant the Applicant the leave sought to file for judicial review order of certiorari. However, I decline to grant leave to file for an order of mandamus because the issue of the Registrar’s Certificate is circumscribed by the provisions of sections 11 and 16-18 of the Marriage Act. The court may, if the Applicant is successful in his application for certiorari, issue an order of mandamus of its own motion to compel the Registrar to perform his duty under section 16 of the Marriage Act to refer the matter to the High Court for determination.

9) Whether Grant of Leave to operate as a stay.

Despite the grant of leave to file judicial review proceedings to challenge the 1st Respondent’s purported stoppage of the intended marriage without jurisdiction, I would not allow that such leave operates as a stay of the decision because: -

a) The letter of the 1st Respondent substantially sets out the provisions of the Marriage Act relating to issuance of the Registrar’s Certificate in circumstances where the Registrar is not satisfied that neither of the parties to the intended marriage is married under Customary Law or Mohammedan Law to any other person;

b) The alleged fact of subsistence of a Customary Law marriage between the Applicant and the objector 1st Interested Party is a just cause within the meaning of section 16 of the Marriage Act which must be determined by court on the basis of evidence in the absence of a valid decree of divorce. Although the Applicant claims that the marriage had been dissolved, the dispute thereon is a matter for determination by the court, and in the meantime the intended marriage should be put on hold. The Applicant who sought to establish that his marriage with the 1st Interested Party has been dissolved by Elders in accordance with the Luo Customary Law did not adduce any evidence of such allegation by affidavits sworn by the persons who took part in the dissolution ceremony. In the **Restatement of African Customary Law Vol. 1 at p. 178 (1968)**, Dr. Eugene Cotran records the

following on divorce among the Luo community: -

“1. Machinery for Divorce

A divorce can either be granted by family and clan elders (joka anyuola) under Luo Customary Procedure, or by a court.

(a) Divorce by Joka Anyuola Elders. If a man wishes to divorce his wife he sends her back to her father. If she wishes to divorce her husband, she runs away to her father and tells him of her wish. A meeting of joka anyuola elders of both sides is called. The elders try to reconcile the parties and only if they fail do they then consider whether the grounds adduced by the party seeking dissolution are sufficient to justify a divorce. The elders may then agree to or refuse the dissolution of the marriage.”

The Applicant did not adduce any evidence on any **joka anyuola** proceedings and I am unable to find that the marriage between the Applicant and the 1st Interested Party has been dissolved.

c) No useful purpose will be served by staying the effect of the letter of 26th September 2012 as by the church minister’s letter of 26th September 2012 in response to the 1st Respondent’s letter the intended marriage has already been put on hold until the issue is resolved. The latter letter says: -

“Thank you for your communication dated 26th September 2012. I am aware of the issue even before your letter arrived, and I have already informed the parties that the intended wedding cannot take place until and unless the issue is resolved, pending further communication from your office.”

The status of the marriage between the Applicant and the Objector 1st Interested Party must be determined by the court before the Applicant’s capacity (or lack of it) to contract the new marriage with the 2nd Interested Party can be confirmed.

10) The question before the court is not one of enforcement of the right of **“every adult to marry a person of opposite sex based on the free consent of the parties”** as provided under Article 45 (2) of the Constitution but rather one of capacity to contract a marriage under the Marriage Act during the subsistence of another marriage between the Applicant and another person under customary law which is recognized under Article 45 (4) of the Constitution. I do not find that the Applicant’s right to marry has been infringed in any way by the 1st Respondent’s decision under challenge.

11) Accordingly, for the reasons set out above, I dismiss the applicant’s Chamber summons dated 1st October 2012 with regard to the prayer for leave to file an application for an order of mandamus to compel the Deputy Registrar to register a marriage between the Applicant and the 2nd Interested Party scheduled for 6th October 2012.

I however grant leave to file an application for an order of certiorari to quash the decision of the 1st Respondent contained in letter of 26th September 2012 and in particular the last paragraph thereof.

12) The Applicant is at liberty to file for dissolution of the marriage between him and the 1st Interested Party in court or to conclude a valid divorce proceeding using the machinery for divorce under the Luo Customary Law, as he may be advised, and only thereafter to seek to contract the intended marriage before the Church or otherwise under the statutory form of marriage in accordance with the provisions of the Marriage Act or the African Christian Marriage and Divorce Act.

13) Costs in the cause.

Dated and delivered on the 5th day of October 2012

EDWARD M. MURIITHI

JUDGE

In the presence of:

Mr. Mutiso for Mr. Opulu for the Applicant

Mr. Ogweno for the Respondents

Mr. Ogweno holding brief for Mr. Mabonga for the 1st Interested Party

No appearance for the 2nd and 3rd Interested Parties

Mr. Obart – Court Clerk