REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Matrimonial Case 122 of 2006

M.S.A. ……..…….. PETITIONER

VERSUS

P.K.A..... ……..…….. **RESPONDENT**

JUDGMENT

The Petitioner **M.S.A** and the Respondent, P.K.A are husband and wife. By a Petition for Nullity of Marriage dated 24th August, 2006 and filed in court on 30th August, 2006, the petitioner sought that: -

(a) The marriage between the Petitioner and the Respondent celebrated on the 25th of September, 1995 at Sikh Temple in Southhall, London be annulled.

(b) The Respondent be condemned to pay costs of this cause and

(c) The court do grant any further or other relief the court may deem fit.

The Respondent filed a response to the above petition by an Answer to Petition for Nullity of Marriage and Cross-Petition dated 6th October, 2006, filed in court on the same day. She sought the following prayers: -

(a) That the prayer for nullity of marriage be rejected and the petition be dismissed with costs.

(b) That, the court grants a declaration that by virtue of long cohabitation of the Petitioner and Respondent living as husband and wife for more than 16 years there is a valid marriage.

(c) That all the property held solely by the Petitioner and/or jointly with other members of the extended family, the petitioners share be declared as matrimonial property.

(d) That the marriage between the Petitioner and the Respondent be presumed valid out of long duration of cohabitation.

(e) That Respondent be awarded a half share of all the matrimonial property.

(f) That the court be pleased to make provisions for future financial support of the Respondent and the child of marriage from the Petitioner.

(g) That the Respondent be granted custody of the child of the marriage.

(h) That on the grounds in the Cross-Petition, the marriage be dissolved against the original Petitioner. and

(i) That the original Respondent be granted an ancillary order of maintenance pending the final determination of the suit.

The Petitioner thereafter filed a Reply to the Answer to the Petition for Nullity and also an Answer to the Respondent's Cross-Petition.

By agreement of both parties, the court made orders dated 16th October, 2008 to the effect that either party's evidence to prove their cases be reduced into affidavits of evidence which were to be filed in court and be cross-served on the other party on or before 17th November, 2008. The orders were complied with by both sides.

On 17th November, 2008 the cause was mentioned and on 3rd December, 2008 the Registrar's certificate that the cause was ready for hearing was granted.

When the suit came up for a hearing on 4th December, 2008, both counsel for the parties agreed that common issues could be identified which indeed were reduced into the following four main issues: -

1) Whether the Respondent had capacity to contract a legal marriage on 25th September, 1995 when she entered into the present marriage.

2) Whether the Petitioner was at the material time of entering the present marriage aware of the Respondent's status of having entered an earlier marriage which might still have been existing at the time of entering into the present marriage.

3) Whether in the said circumstances there was a valid marriage contracted between the Petitioner and the Respondent.

4) Whether a valid marriage can and should be presumed from the facts and circumstances pleaded in the Cross-Petition.

An agreement had also on 2nd December, 2008 been reached between the parties and the court requested to and made orders that each party would by 18th December, 2008 have filed in court and served the other side, a written submission answering the issues above mentioned and then leaving it to this court to make findings of fact and a final determination of the issues abovementioned.

On 18th December, 2008, each party, having been served with the written submission of the other party, sought leave to file a responding additional written submission to address any issues which may have been raised but may have not been earlier addressed. The court gave leave that such responses be filed by 24th December, 2008.

On 12th February, 2009 the court notified both sides to clarify certain issues of fact on 26th February, 2009. It later turned out that the court could proceed to write the judgment without such clarification and both parties were orally informed when they attended court on a related child matter.

The pleadings referred to earlier in this judgment bring out the facts of this case. The said pleadings are supported and explained, by each party, through the evidence affidavits filed by the Petitioner and the Respondent and their witnesses where a party chose to file a witness evidence affidavit.

I have carefully perused all the pleadings and all the evidence affidavits filed herein. I have noted all

or any admissions made by either of the parties, the summary of the facts as I finally understand them is as follows: -

The Petitioner, **M.S.A**, was introduced to the Respondent, P.K.A sometimes in early 1995, by the latter's sister. The two struck a deep friendship and on 25th September, 1995, they entered into a Sikh marriage in a Sikh Temple in Southhall, London. The marriage was properly consummated and the couple cohabited and lived together as husband and wife first shortly in the United Kingdom and soon thereafter in Kenya until the late first half of the year 2006 when they separated. They then began to pursue these nullification and divorce proceedings. They were meanwhile on 18th June, 1996 blessed with one child called Akash Singh Amrit who they both appear to love greatly.

It is not in dispute and the evidence on the record confirms so, that the Respondent P.K.A had contracted an earlier marriage with one I.S.P on 4th January, 1986. This had taken place at the Registrar's office in the Metropolitan District of Coventry, in the United Kingdom. It is also not denied by the Respondent that her said marriage with the said I.S.P, had not been legally dissolved by the 25th September, 1995 when her marriage with the petitioner, M.S.A, was contracted.

The Respondent as well, raised the issue as to whether or not the Sikh religious ceremony in a Sikh Temple in Southhall, London on 25th September, 1995 between the Petitioner and the Respondent, amounted to a marriage which would offend the monogamous nature of her earlier marriage. It was not disputed by either party, that it was the said "**religious**" ceremony which authorized and/or legalized their cohabitation as husband and wife thereafter. I will shortly also revert to this issue to resolve it.

In my view however, there are uncontradicted facts that show that the Respondent was at all material times aware that the first marriage between her and I.S.P existed and that the first marriage required to be put out of the way of her second marriage with the petitioner. The court will need to resolve the issue as to whether or not the Petitioner knew of the continued existence of the Respondent's first marriage when he agreed to enter into the marriage with the Respondent on 25th September, 1995. It will also decide what would be the legal consequences, if any, of the Petitioner's awareness of the continued existence of the first marriage.

It is not in dispute, however, that in 1997, the Respondent filed a Divorce Petition in the Coventry County Court London, England, being case Number 97D 00917. She was granted a Decree Nisi on 3rd June, 1998. She proceeded to obtain a Decree Absolute on 16th July, 1998. It is not clear whether the Petitioner was aware of the above events, but he categorically denied such knowledge before the year 2006. This court will need to determine what he knew and when he knew it.

At the commencement of the hearing of this case the advocates for both parties agreed that in the light of the various averments of fact in the Petition, Cross Petition, Answer to Petition and Answer to Cross-Petition, and the Replies to Answers from either party, the parties could record agreed issues to be placed before the court for resolution. It was on that basis that they recorded the issues tabulated on page 4 of this Judgment. To that end counsel agreed that each party was to file a written legal submission based not only on their evidence affidavits which each side had earlier, by consent filed, but also on agreed facts as computed by both parties from the totality of the pleadings on the record.

Strictly, therefore, the parties were ideally supposed to have agreed on all facts upon which the commonly filed issues enumerated at page 4 of this judgment were to be determined. I make this comment because the Respondent in her written submission, appears to dispute certain specific facts already identified herein above and which the court must therefore, resolve before proceeding to resolve the commonly filed legal issues on page 4.

The first issue of fact raised by the Respondent was whether or not by the 25th September, 1995 when she and the Petitioner contracted their present marriage, her first husband I.S.P was still alive. This is important because if he was not alive then the Respondent's first marriage might not be a bar to her second marriage to the Petitioner herein.

The Petitioner in the "**Particulars**" section of this Petition dated 24th August, 2006, made the above question an issue by pleading as follows: -

"**8(b) The Respondent was a wife of one I.S.P as at the 25th September 1995.**

(c) There was no declaration of death of the said I.S.P at the time of marriage Between the Petitioner and the Respondent"

In her Answer to the Petition and Cross-petition, the Respondent averred:–

"**5. That she admits the particulars contained in paragraph 8©."**

In my view therefore the Respondent had without a doubt admitted that she had not made any declaration nor was there any declaration made on or before the 25th September 1995 that **I.S.P** was dead. Having so clearly pleaded and without any amendment from her of her pleadings, it is difficult for the court to understand why the Respondent would in her written submissions, attempt to create a doubt or a dispute over the fact which she had so admitted.

Apart from the admission aforesaid, it is on record, numerous times, that in 1997 the Respondent filed a divorcé process which culminated in a decree Nisi and Decree Absolute being granted to her. That is a process which required personal service at various stages, upon the said Anderjit Singh Purewal. Indeed the process would not have succeeded without a personal service being made upon **I.S.P** in the Divorce Case referred to as No.97000917, both in 1997 when the same was filed and in 1998 when the two decrees of Nisi and Absolute were respectively obtained. The assumption and conclusion I make from the above facts is that the said **I.S.P** was alive in 1997 to 1998 in order for the Respondent to have first successfully served him and eventually in obtaining the divorce against him.

The conclusion the court draws accordingly is that on 25th September, 1995 when the Petitioner and Respondent herein went through a ceremony of marriage between them, the former husband of the Respondent **I.S.P**, was alive.

The second issue to resolve concerns the Sikh Temple ceremony which united the Petitioner and respondent as husband and wife. While the Petitioner categorically asserted that the two got married on 25th September, 1995 at a Sikh Temple in Southhall, London, the Respondent averred that the ceremony was merely a religious ceremony and not a legal contract of marriage. She raised two issues to support her assertion.

(a) That no registration of the ceremony of marriage was made resulting to no certificate of marriage being issued.

(b) That apart from the ceremony setting the two on a course of a cohabitation as husband and wife and probably laying an eventual foundation for a common law marriage by presumption, it was not a legal marriage but merely a religious ceremony with no legal consequences.

The Respondent's above approach clearly once more, attacked the legal common issues placed before me for resolution. It calls upon the court to determine the issue as to whether or not, the 25th September, 1995 ceremony amounted to and was a recognized marriage. I have again examined the pleadings of both parties. As to whether or not the above ceremony was meant to be and actually was a legal marriage to the two parties, the Petitioner pleaded thus in her paragraph 1 of the petition: -

"1. **That on 25th September, 1995 the Petitioner M.S.A. got married to the Respondent, P.K.A. at a Sikh temple in Southhall, London"**

In reply in her paragraph (1) of her Answer to Petition for Nullity of Marriage and Cross-Petition, the respondent averred thus: -

"**The Respondent in her answer to petition filed in this suit states: -**

(1) That she admits the contents of paragraphs (1) to 7 of the Petition.

(2) That she admits the contents of Paragraph 8 except in so far as it is alleged that the said marriage with the said I.S.P was still subsisting as at 25th of September, 1995."

I find the Respondents pleadings above to be clear in that she admits the first paragraph of the Petitioner's pleadings which reiterates the fact that the two got married in a Sikh Temple in Southhall, London. She also admits the contents of paragraph 8 of the Petition which effectively repeats the marriage contract aforementioned. What she appeared to contest is the fact as to whether or not the first marriage with **I.S.P** was then still subsisting? The conclusion which reasonably flows from the normal and express interpretation of the Respondents pleadings, is that she conceded that the Petitioner and Respondent actually married or entered a legal marriage on 25th September 1995 when they went through a Sikh Marriage ceremony in a Sikh temple in Southhall in London. The Respondent's attempt in her written submission, to go back on her clear admissions on this issue, do not with great respect, make much sense.

However, besides this court's conclusion which is based purely on the two parties pleadings, I in addition, revert to the Respondents reasons for asserting that the 25th September, 1995 ceremony did not amount to a marriage contract. She argued first that the marriage was not registered. This arises from the fact that no evidence of registration of the same was put in evidence by either party and no registration certificate of the marriage was similarly shown.

I however find that the Respondent herself produced a kind of certifying document marked by her as exhibit 2 in her affidavit of evidence. The letter or document was written by the General Secretary, Guru Granth Gurudwara, Villiers Road, Southhall and was properly signed.

It stated as follows: -

"**To WHOM IT MAY CONCERN"**

This is to confirm that the religious wedding of Mr. M.S.A. and P.K.A., was solemnized on 25th September, 1995. The wedding ceremony was performed by Mr. Satwinder Singh Sarb and Party.

Signed

General Secretary

Guru Granth Gurdwara

Southhall, Middx.

I have carefully perused and considered this document. In my view the document firmly states that the parties herein solemnized a religious Sikh marriage wedding on the relevant date. It further firmly states the name of the religious leader who performed the religious wedding. On my part, accordingly, I find it safe to come to the conclusion, which I hereby do, that the ceremony aforestated, was a marriage wedding conducted in accordance with the Sikh religious rites, standards and procedures between the Respondent and Petitioner herein.

It would indeed have been helpful and useful if the defendant (who now appears to find a problem with the meaning and/or purpose of the said ceremony) would have put in evidence and submission material or proof that she herself at the time and all the time thereafter, understood the ceremony to have been something else other than a Sikh marriage ceremony. She would, for instance, submit with evidence that

the ceremony of 25th September 1995 at Southhall Temple was a mere bethrothal or marriage engagement which would later be completed or perfected. However, that is not how the Respondent's case came out. Indeed she clearly became shy to argue that the 25th September ceremony was not intended to be a competent or proper marriage in accordance with the then existing legal framework.

In conclusion on this point then, the court finds that apart from the defendant's admissions in her pleadings that a religious marriage was contracted between her and the defendant on 25th September 1995, the letter above quoted, written by the Secretary General of Guru Granth Gurudwara of Southhall Sikh temple, further confirms the contracting of such marriage.

It is important at this stage to consider and dispose of the issue of possible lack of registration of the 25th September, 1995 marriage between the parties herein. The Respondent strongly contended that the said marriage was not registered in England where it took place despite the fact that the legal system there required it to be so registered. She further asserted that the failure to register the marriage confirmed the fact that the 25th September, 1995 ceremony was not intended to be a marriage contract. Also that the failure by the Petitioner to produce evidence of registration of the marriage, inclusive of the non-existence of a marriage certificate, was a confirmation that the parties did not intend it to be such marriage, otherwise they would have insisted on obtaining one.

The court understands and agrees indeed that failure to produce a certificate of marriage in such a case as this is an evidential omission. The omission may indeed as argued, lead to the conclusion that the marriage never took place. However, the circumstances in this case cannot reasonably allow such a conclusion to be reached on the grounds already recorded herein. On the other hand, lack of registration or failure to produce evidence of registration may not always lead to the conclusion that marriage was not contracted or did not legally exist.

In the case of **Re Taplin, Watson** V. **Tate**, (1937) All E.R .p.106, the petitioner contended that there was no marriage as no evidence of registration thereof, inclusive of the certificate of marriage, could be produced or shown. However, Simonds, J stated at page 108: -

"**The evidence before me is not cogent; but it is adequate to satisfy me that the man and woman lived together at Rockhampton for ten years as man and wife in the sight of that small community. They were there received into society, which was not a society of loose and uncertain morals, but with proper views as to maritial relations and were at all times regarded as man and wife. This being so, the presumption is not to be disturbed except by evidence of the most cogent kind. Here it is sought to displace the presumption in two ways. First of all, because the parties pinned themselves to a marriage at a certain date and place, and the records contain no entry of such marriage. Whatever the compulsory nature of the administration, this cannot, in my view, displace the presumption of marriage. The absence of a record is always a possibility. The presumption rests mainly upon the notorious fact of their living together, which has been fully proved"**

My understanding of the principle in the case cited above is that apart from dealing with the strong presumption in favour of marriage, such presumption is not easily rebutted by reason of the absence of an entry in the register of marriages in respect of a marriage of known date and place celebrated in an area where registration of marriages is compulsory. Moreover, in this case here before me, not only do pleadings of both parties concede a contractual existence of the marriage on 25th September, 1995, but they also concede the fact of the parties living together as husband and wife in England and later here in Kenya since the day of the marriage ceremony. While the absence of a marriage certificate and evidence of registration of the marriage in these proceedings would be frowned upon by this court, it will, nevertheless be difficult to deny the fact that the parties herein have lived together openly and unquestionably as husband and wife since the ceremony date until the year 2006. Indeed the document from the Secretary of the Southhall Sikh Temple and community leaves no doubts over and about the parties' clear intention and purpose which was to enter into a marriage through the ceremony conducted on the material day. Whether or not the marriage was officially registered in the register of marriages, then, may not have been high in the couple's minds and that did not indeed change the fact that they had

married each other. Indeed, that became the basis of their cohabitation.

Surprisingly, however, the Respondent in her Reply to petitioner's written submissions, argued that the ceremony of the 25th September, 1995 at Southhall Sikh Temple did not amount to a marriage under any known law. She further argued that that was the reason for the Petitioner's failure to produce a marriage certificate during these proceedings. This interesting approach by the Respondent imperatively invites this court to examine and make a finding as to whether or not the ceremony between the parties on 25th September, 1995 amounted to any kind of marriage. The court will try to make a related advance finding without at the same time interfering with one of the main issues i.e. whether or not the first marriage between the Respondent, **P.K.A.** and one **I.S.P** was in existence at the time of the second marriage.

The marriage entered between the Respondent and the Petitioner on 25th September, 1995 was first introduced in these proceedings by the Petitioner's pleadings dated 24th August, 2006 and filed in court on 30th August, 2006. Paragraph (1) of the pleadings asserted that on 25th September, 1995 the Petitioner **M.S.A.** got married to the Respondent **P.K.A.** at Sikh Temple in Southhall, London. The fact that both were probably Sikhs and since the ceremony of marriage was conducted in a Sikh Temple, raised a safe presumption that the said marriage was a Hindu marriage conducted in accordance with Hindu wedding rites and/or procedures. The letter of the General Secretary of the Hindu Community, the Guru Granth Gurudwara (marked as exhibit 2) and earlier discussed, confirms that the ceremony was a religious wedding between the Respondent and the Petitioner and that it was performed by a Sikh Priest called Satwinder Singh Sarl. The Respondent also in her Answer to the Petition for Nullity of Marriage, admitted adequately that the parties got married at a Sikh Temple in Southhall, London on the material date. In my view the admissions were adequate proof of the occurrence of the said marriage.

Nevertheless, the Respondent appears at some point in the proceedings to argue that the ceremony of their marriage which is the one that sanctioned and/or authorized their living together as husband and wife for many years, was not a legally recognizable marriage. The basis of her odd, argument if I understand it, is that the said marriage ceremony of 25th September, 1995, was simply a religious ceremony which could not amount to a marriage. With great respect, that is a convoluted approach, considering the admissions and concessions already made by both parties on the face of the record of pleadings.

To start with, the parties in their pleadings, written evidence affidavits and finally, in their written submissions, used words like – "**got married**", "**wedding ceremony**", "**religious wedding**" etc to describe the event of 25th September, 1995. The Chambers Concise Dictionary defines the words "**wed**" and "**wedding**" to mean, "**to marry**", or "**to join in marriage**" or "**a marriage ceremony**.' The impression the court got from the use of these words by the parties in their court documents, therefore, was that the ceremony of 25th September, 1995 aforesaid was a marriage ceremony between them. The marriage ceremony could have been conducted in accordance with religious rites or customary religious rite or statute-authorized procedures; the rites really, in my view, did not matter. What matters and is important, is the fact that both parties knew and accepted that they were being married by the priest through the ceremony that the two were going and went through.

The above takes us to the second point; the law applicable in these circumstances in Kenya. A Hindu marriage in Kenya is regulated by an Act of Parliament – the Hindu Marriage and Divorce Act, Cap 157 of the Laws of Kenya. A Hindu Marriage is, in section 2, described as a marriage between Hindus, the latter being described as a person who is a Hindu by religion in any form, or a person who is a Buddhist of Indian origin or a Jain or a Sikh by religion. Section 5 of the Act authorizes a Hindu marriage to be solemnized in accordance with the customary rites and ceremonies of either party. The two rites and/or ceremonies recognized by the Act are "**Saptapadi**" where the couple takes seven steps before a sacred fire, and the second is the "**Anand Karaj**" where the couple goes around the Granth Sahib at least four times. In my understanding from the Act, the ceremonies are customary religious rites which are sanctioned or authorized or recognized by the Act.

The Respondent and the Petitioner must have adopted one of the above two ceremonies whether religious or customary or both as the case may have been. To however, now deny, as the Respondent tries to do,

that such ceremony did not amount to a recognized marriage, appears really strange and clearly contrary to her pleadings, contrary her admissions on the record and, contrary to the overwhelming evidence throughout the record before this court. What I believe was driving the Respondent to deny a marriage she has otherwise depended on, is the fact that this marriage, being statutory or being recognized by the statue above-mentioned, may have legally threatened her wish and position to support a purported possible marriage through long cohabitation as pleaded in the Cross-Petition.

In conclusion of the issue above discussed however, it is the view and finding of this court, based on the overwhelming evidence in these records, that the marriage or religious wedding ceremony of 25th September, 1995 amounted to and culminated in recognized Hindu marriage between the Petitioner and Respondent. The said marriage is properly and fully recognized under the Hindu Marriage and Divorce Act, Cap 157 of the Laws of Kenya.

The court finds it necessary to clarify the issue of registration or lack of registration of the marriage, particularly under the Kenyan law. This is relevant because the Respondent submitted to the effect that their said marriage or marriage ceremony did not amount to a recognized marriage because it was never registered as required by the English and/or Kenya Law relating to Hindu or Sikh marriages. As a result the Respondent indeed gratuitously produced the letter marked exhibit 2 from the General Secretary of the Sikh Community of Southhall, London, to prove the religious marriage ceremony. The relevant provision of the Hindu Marriage and Divorce Act aforementioned is section 6. It provides:-

"**(1) The Minister may make rules requiring and prescribing the manner of registration of all or any marriages solemnized in Kenya.**

(2) …….

(3) Without prejudice to the generality of the foregoing provisions, any such rules may: -

(a) require marriages to be compulsorily registered

(b) Require the priest or other person performing the marriage ceremony to issue a certificate of marriage in the prescribed form.

(c) Require any marriage to be registered within the period prescribed by the rules

(d) ……

(e) ……

(f) ……..

(4) Notwithstanding anything contained in this section, the validity of a marriage shall in no way be affected by the omission to make an entry in any marriage which would otherwise be invalid."

It is clear from the above provisions that registration of a Hindu marriage, while it may be important for proof that the marriage took place, is not the only means of proving such marriage. Indeed the provision indicates that an entry of such marriage alone does not conclusively prove that the marriage took place. My understanding of this provision which is also my finding in relation to this case before me, is that any party to a marriage can use any admissible evidence, oral or written, to prove that a marriage took place or did not take place. Registration is therefore, one way only of proving that a Hindu marriage was performed.

In this case I am totally already satisfied that a marriage was prima facie, properly performed between the Petitioner and the Respondent. It seems to me as well, that the principal and logic of law underlying Simond, J's reasoning in the case of **Tapling, Watson** v. **Tate**, earlier quoted, informs and is similar to that underlying section 6(4) of the Hindu Marriage and Divorce Act of Kenya. The principle stresses that

even in fairly strict conditions, the absence of a registration record is always a possibility and can easily be dealt with or borne, but a real existence of a marriage cannot be just brushed aside except in cases of strict and express requirement of the law.

Having this far resolved side issues of fact and quasi fact and law, it is necessary now to revert to the four common legal issues placed before the court for resolution. They are as earlier stated, found on page 4 of this judgment.

The summary of facts and conclusions to which this court has arrived and from which I will approach the common issues aforesaid, are as follows: -

a) That the Respondent, **P.K.A.** entered into an arranged statutory or statute-recognized traditional marriage with one **I.S.P** on 4th January, 1986 in the District of Coventry Register Office in the Metropolitan District of Coventry, in the United Kingdom.

b) That there was no divorce, annulment or any other kind of determination of the said marriage until 3rd June 1998 when a Decree Nisi to determine the marriage was lawfully issued. A Decree Absolute thereof was issued on 16th July, 1998, thus lawfully ending the marriage between the Respondent herein and the said **I.S.P**

c) That on 25th September, 1995, the Respondent and the Petitioner, entered and went through a Hindu (probably, Sikh) marriage which is the subject matter of this cause.

d) That there is no evidence that the said **I.S.P**, the first husband of the Respondent, had died between 4th January, 1986 and 16th July, 1998 when a Decree Absolute finally determining the said first marriage, was issued against him, thus confirming that **I.S.P** personally or through his lawyers, received court processes and was accordingly, alive. In addition and on the other hand, there was no evidence of his death or of any declaration of his death.

e) That the marriage entered between the Respondent and the Petitioner on 25th September, 1995 clearly took place while the first marriage between the Respondent and one **I.S.P** still was in existence since the latter was not dissolved until July 1998.

I now turn to the agreed issues the first of which is whether or not the Respondent, **P.K.A.**, had capacity to contract a legal marriage on 25th September, 1995 when she entered the present Hindu marriage with the Petitioner, **M.S.A.**.

The Respondent through her counsel, M/s Judy Thongori submitted that the law applicable locally since the parties are members of the Hindu community is the Matrimonial Causes Act Cap 152, either by virtue of its applicability to these parties who are resident in Kenya or even because it is the substantive Law for the Hindu Marriage and Divorce Act, Cap 157 of the Laws of Kenya. Mr. Oduol for the Petitioner did not express any different view and court independently agrees with that legal view. It is section 9 of Part III of the latter Act that applies the former by stating: -

"**S. 9 Except where and to the extent that other provision is made in this Act, the provisions of the Matrimonial Cause Act shall apply to matrimonial causes relating to marriages, and the Matrimonial Causes Act shall, in relation to marriages, be subject to the provisions of this Part."**

It will be noticed that the legislature applied the Matrimonial Causes Act to Hindu Marriages in respect only to situations where the Hindu Marriage and Divorce Act does not independently provide. To that end the Hindu Marriage and Divorce Act, in Section 10, independently provides grounds for divorce applicable to Hindu marriages. Also in Section II provides the grounds for decree of nullity of the Hindu Marriages. It is however appropriate at this point to refer to section 3 of the same Act since it first and foremost tabulates the conditions for entering a Hindu marriage. In my understanding and it is my view and finding, the said section 3 gives the "**capacities**" a party should have before qualifying to enter a

Hindu Marriage. While five conditions are enumerated, I will quote only ground (a) of section 3 because it is the only relevant one to this case: -

"**S.3(i) A marriage may be solemnized if the following conditions are fulfilled: -**

(a) Neither party has a spouse living at the time of the marriage….."

Clearly then if a party who wishes to contract a Hindu marriage was already married and his/her spouse is living at the time when he/she wishes to enter another marriage, he/she will have no legal capacity to enter the second or subsequent marriage. If a subsequent marriage is entered under those conditions where a party has no such capacity, the second party has a legal right to petition for a decree of nullity of the marriage. Indeed Section 11 (i) (a) of the Act provides as a ground for nullification of such Hindu marriage: -

"… **that either party had spouse living at the time of the marriage, and the marriage with such spouse was then in force."**

The clear and express meaning from the interpretation of sections 3(1) (a) and 11(i)(a) above quoted appears to be and means that a marriage entered contrary to those provisions of the law is expressly not only illegal and void but also a nullity. The marriage in those circumstances, is a contract entered by the parties contrary to the express provisions of the Acts and other related law. It will be observed that the Matrimonial Causes Act Cap 152, of the Laws of Kenya, has similar provision in its Section 14(1) (d). I also understand and accept that the basic principal under consideration is based on English law on marriage in which marriage is understood as: -

"… **the voluntary union for life of one man and one woman to the exclusion of all others……."**

It is observed that a Hindu marriage such as this is treated in a similar manner as a marriage under the Matrimonial Causes Act by virtue of Section 7(2) of the Hindu Marriage and Divorce Act. This removes any possible differences if any between the said marriages. In my view therefore, this allows and authorizes similar or equal treatment in respect to any matrimonial cause issues arising from them as guided by relevant English principles.

In this case before me the Respondent **P.K.A.**, as earlier found, entered a Hindu marriage with the Petitioner, **M.S.A.** on 25th September, 1995. At the time, her earlier marriage with one **I.S.P** entered into on 4th January, 1986, was still in existence as it had neither been annulled nor terminated by divorce or any other lawful act. The said **I.S.P** was by evidence in this record, had not been declared dead and was accordingly, alive. Indeed by the undisputed evidence on record, a final decree of divorce was not granted to the Respondent until the 16th July, 1998. In these clear circumstances I hold that the Respondent herein had no capacity to contract the subsequent marriage with the petitioner on the material date. That is so on the ground that she had a spouse living at the time of the subsequent marriage of 25th September, 1995.

The clear consequence of my finding just made above which should be the answer to issue Number 3 the issues placed before me, is that the purported marriage between the Respondent and the Petitioner herein contracted on the 25th September 1995 , was not only illegal and void but a nullity. It is therefore a marriage liable for nullification under section 11(1) (a) of the Hindu Marriage and Divorce Act, aforementioned, which is the relief sought in these proceedings by the Petitioner.

I now turn to the 2nd main issue before me which is whether or not the Petitioner was on 25th September, 1995, aware of the Respondent's incapacity to marry. The Respondent pleaded in her pleadings as well as deponed in her evidence affidavit, that she and the Petitioner, courted for six months during which time they opened to each other about their past lives. That she told him that she was once married before and that that revelation made him know her marital status before the two got married. That the Petitioner accordingly knew that the Respondent had while being only 17 years old been forced into a marriage with

her first husband which marriage had not been consummated before she ran away. The Respondent indeed appeared to argue that she was under the above circumstances entitled to a nullification of the first marriage in respect of which she actually filed a petition which in the end did not materialize any expected result.

A further piece of evidence presented to this court on the above issue is a photocopy of some record belonging to the firm of Blake, Lapthorn Linnell's office records dating the 20th September, 1995 and suggesting that the Respondent accompanied by Petitioner went to the legal firm to inquire of the Respondent's marital status. It is on the above evidence that the Respondent asserts that the petitioner knew of her marital status before the two married.

On the other hand the Petitioner's position from his pleadings and deponements of evidence, is that he was not at the time of marrying the Respondent, aware that she had been married before. Nor did she reveal the same to him before marriage. That he learnt of the Respondent's earlier marriage only in 2006 when he discovered the Respondent's divorce papers while she was away in England. He accordingly further asserted that the Respondent misrepresented her status to him. That the misrepresentation made him believe that she had capacity to marry him when, on the contrary, she did not have such capacity since her marriage to **I.S.P** was still in existence and the latter was still alive.

I have carefully considered the evidence on the record. I have in particular considered the photocopy of what appears to be an office record of the legal firm of Blake, Lapthorn Linnell. I do not find it convincing. The document only appears to state that on 20th September, 1995 when the Respondent went to inquire whether her court petition to annul her earlier marriage had succeeded, the Petitioner was in her company. This was of course categorically denied by the Petitioner. I also find it strange that the document purports to carry the Petitioner's phone and fax number and yet he was not the client whose address would be required by the legal firm for contact. And finally, the document clearly records that the marriage in question was contracted on 4th January 1985 while all other relevant records before the court show 5th January, 1986 as the date of the said marriage.

In my view the document's authenticity is most doubtful and its evidential value therefore minimal. The conclusion I reach which is my finding, is that the Respondent had not introduced the Petitioner to the existence of her first marriage. Furthermore, it is totally unlikely that the legal firm of Blake, Lapthorn Winell who according to the Respondent's evidence knew her marital status shortly before she entered the second marriage with the Petitioner, would have failed to warn her and the Petitioner, (if he indeed was present), that she had no capacity to contract another marriage while the first one subsisted. And yet the document shows that the lawyers explained to the Respondent and her financee "**what needs to be done**".

In the above circumstance I hold to issue No. 2, that the Petitioner as on 25th September, 1995 was not aware that the Respondent was in an earlier marriage with one **I.S.P** which marriage was still subsisting at the material time.

The incidental issue which arises from the above conclusion is whether the Respondent in the circumstances misrepresented her status to the Petitioner by failing to disclose her true marital status and thereby made him believe that she had capacity to marry the Petitioner. I have considered this issue as well and I answer the question in the affirmative. In my view it was her obligation to properly and fully disclose her marital status to the Petitioner and thereby give him opportunity to freely decide whether or not to continue with the engagement until a legal solution would be found. Her failure to fully disclose her status, in my view, amounted to a fraudulent misrepresentation that she had capacity to marry the Petitioner.

I have already made a finding to the effect that the purported marriage between the Respondent and Petitioner on 25th September, 1995 was illegal, null and void. I have also already stated that the reason for such a conclusion lay on the fact of the Respondent's contracting a second or subsequent marriage while the first subsisted. I have further made a finding that the Respondent failed to disclose her first marriage or her full marital status before the second marriage with Petitioner was contracted.

Would it have made any difference if the Respondent had actually disclosed her first marriage to the Petitioner or if the Petitioner actually full knew that the said first marriage actually still subsisted before or at the time he and the Respondent contracted the marriage?

In my view, awareness of the Respondent's first marriage and its continued existence by the Petitioner would not have validated her second marriage on the 25th September, 1995. The reason for this conclusion has already been discussed above. It is that the Respondent had under Section 3 (1) (a) of the Hindu Marriage and Divorce Act, no capacity to contract another marriage. Her first husband **I.S.P** was still alive and the marriage with him had not been lawfully terminated either through a divorce as per Section 10(1) (a) of the Act or through nullification as per the provisions of Section II (1) (a) of the said Act.

In any case the parties' marriage was a monogamous marriage. The Treatise "**Law and Practice in Matrimonial Causes**" by William Watey, 3rd Edition at Chapter 2, page 2 para 2.419, states:

"**If the marriage is still subsisting according to English Law of monogamy a would-be-marriage between one of the spouses and another person during the lifetime of the other spouse is bigamous and invalid."**

And in paragraph 2.420 he further states:-

"**A petitioner has right *Ex debito justicie* to a decree of nullity where the Respondent husband or wife was alive at the time of the second marriage; and the court has no discretion to withhold relief."**

Similarly, Bromley in his "**Family Law**" treatise in Chapter 3, paragraph 4.3.1, states: –

"**In order that a person domiciled in England should have capacity to contract a valid marriage, the following conditions must be satisfied:**

(a) Neither party must be already married……"

And at page 221 paragraph 2.2420 he states:-

'**Misconduct, however gross, of the party proceedings to annul a marriage by reason of bigamy, is no bar. Even where one party marries again after a decree nisi, but before decree absolute, the marriage is void."**

What is being stressed by all the above citations is that marriage as understood in English law and under our Matrimonial Causes Act, which includes in this case the Hindu Marriage and Divorce Act, is monogamous. Neither party of such marriage can accordingly enter a second marriage while the first one subsists. A marriage entered against the above provisions is therefore, not only invalid but also illegal and void. In most of such cases, inclusive of this case before me, the marriage is as well, bigamous.

In the case of **Wilson** Vs. **Carnely** [1908] All E.R. at page 120, an action was brought by a woman in respect of breach of promise to marry by a man, although the latter's wife had died and he was therefore free to marry the applicant. The trial court found for the applicant and the Respondent appealed. The Respondent however, succeeded on appeal because the Appeal Court found that the promise to marry when it was made, was illegal and therefore unenforceable. The promise was found to be also against public policy and morals, especially since the applicant knew that the Respondent was a married man at the time of promise.

In conclusion accordingly, the fact that the Petitioner may have been given information that the Respondent had earlier been married and that the earlier marriage may not have been legally terminated, which he successfully denied, did not make a difference in law. The second Respondent's second marriage, on 25th September 1995 was accordingly, notwithstanding such awareness, illegal and null and

void.

I now turn to the fourth and final issue placed before me. It is whether or not a valid marriage can be presumed from the facts pleaded in the Cross-Petition. I have carefully perused the Respondent's cross-petition referred to and the summary thereof. The extent the court understands it, and understands her evidence affidavits to the following effect:-

That the Respondent and Petitioner with full awareness of the other's marital status continued to live together as husband and wife. This continued so until the Respondent's first marriage with **I.S.P** was finally and lawfully terminated on 16th July 1998. That from the date of dissolution of the first marriage and until the present marriage with the Petitioner appeared to break down in June 2006, the Petitioner represented himself as a married man and husband to the Respondent, to both sides of the families, to friends and finally to the whole society. That the family, friends and society were made to regard and regarded the two as husband and wife. That the Petitioner at no time took steps to suggest that he was not married to the Respondent or that they were not husband and wife. And finally that they as a result of the said relationship, sired a son called Akash Singh Amrit.

In the above circumstances, asserts the Respondent, the law, through this court, should estop the Petitioner from denying the existence of a marriage between them. Instead the court should presume existence of marriage due to long cohabitation, representation to the whole world of actual existence of such marriage and the supporting of her and the child of the marriage morally and financially, to the knowledge of the whole society during the whole period.

In reply however, the Petitioner answered as follows, if the court understands him sufficiently; that he does not deny the fact that the two indeed went through a ceremony of marriage on the 25th September, 1995. Nor does he deny that they lived and cohabited as husband and wife and sired a child aforementioned. What he states however is that he entered the marriage because the Respondent represented herself as having capacity to contract the marriage that she did. That it was only later in June 2006 that he discovered documents of her decree nisi and decree absolute of a marriage entered between the Respondent and one **I.S.P** on 4th January, 1986. That the decrees showed that the said marriage was in existence when his marriage with the Respondent was contracted and that it was not finally dissolved until 16th July, 1998. That the Respondent had not made him aware of the first marriage and that even were it to be found that he was made aware before entering the second marriage, which fact he denied, nevertheless his marriage with her was illegal, null and void as well as bigamous. That in these circumstances the marriage should be declared void and be nullified.

I have carefully considered the above opposed arguments from the parties. The principles upon which this court will declare a presumption of marriage due to long cohabitation and other related circumstances are not even disputed or denied by the Respondent and Petitioner in this case. There is undenied long cohabitation. There is a child born to both parties out of their free acceptance that they were a married couple. They represented to the whole society including family members and friends that they were a legally married couple and more. On the above facts and concessions from both parties, this court could have found no obstacles to easily declare the relationship between the parties as a lawful marriage by presumption. Indeed principles upon which such presumption of marriage are based are now settled in our jurisdiction and this would indeed have been an excellent candidate in which to declare the presence of such marriage.

However, in this case the real issue for determination is not simply whether or not there is evidence enough for the court to establish a presumed marriage. The issue before the court is whether the marriage entered between the Petitioner and the Respondent on 25th September, 1995 which the court has found to be illegal, null and void and against public policy, can nevertheless be salvaged due to long cohabitation and open representation by both parties that they were during the relevant period, married.

I have carefully but anxiously considered this issue, keeping in mind the fact that a court should as much as possible tend to salvage a marriage. To this end I considered whether there were any aspects of

evidence on the record upon which to separate the parties marriage entered on 25th September, 1995 from any other presumed marriage which could have independently started after a decree absolute was issued between the Respondent and her first husband, **I.S.P**on 16th July, 1998. I however, with respect, saw or found no possible new marriage between the parties herein after the Respondent's first marriage was finally dissolved. On the other hand, I came to the conclusion that the marriage entered between these parties on 25th September, 1995 is the one and same marriage that has persisted until the petitioner, through these proceedings, wishes to terminate it by nullification. It is the same marriage under which the parties only child was born and no other. It is the same marriage that sanctioned between the parties the long uninterrupted marital cohabitation now being considered. But most important, it is the same marriage contract that this court has found to be illegal for being expressly contrary to the Kenya Law and statutes. In addition, it is the same marriage contract which the court has found to be null and void, bigamous and contrary to Public Policy of Kenya and England where it was originally contracted. There is therefore no evidence that the said marriage ended with Respondents divorce in July 1998 to enable a new marriage based on presumption to begin.

It is the further view and finding of this court that in enacting the Hindu marriage and Divorce Act and the Matrimonial Causes Act caps 157 and 152 of the laws of Kenya, the Parliament of Kenya and the English legislations expressly intended to preserve and protect the monogamous nature of marriages entered under those laws.

The basis upon which illegal or immoral contracts (including marriage contracts) are unenforceable was effectively explained by Lord Mansfield in the case of **Holman** Vs **Johnson** (1775-1802) All E.R, 98: -

"…**the principle of public policy in this; *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendantis.*"**

In this case the cause of action arises from a contract which is clearly and expressly a transgression of a positive law of Kenya and England, the latter country being where the marriage was contracted before the spouses took domicil in Kenya. The Respondent is therefore asking that this court should ignore the illegality and immorality of her marriage with the Petitioner merely and due to the long cohabitation and the bearing of a child in it in order to declare a presumed marriage out of it. To do so in my opinion, would be to aid her in her transgression of the earlier cited positive Laws of Kenya and England. That, this court cannot do.

In the case of **North Western Salt Company** vs **Electrolytic Alkali Company Ltd**, (1914) Ac, 461 the Privy Council put the principle thus

"**My Lords it is no doubt true that where in the Plaintiff's case, it appears to the court that the claim is illegal, and that it would be contrary to public policy to entertain it, the court may and ought to refuse to do so. But this must be only where the agreement sued on is on the face of it illegal, or where, if facts relating to such agreement are relied on, the plaintiff's case has been completely presented…**"

In conclusion of this issue, it is my finding that the Respondent's case seeking a presumption of marriage based on long cohabitation and other related and incidental circumstances, is founded on illegality and immorality. The possible presumed marriage arising from the circumstances of long cohabitation and representation of existence of the purported marriage cannot therefore be enforceable by this court, which accordingly declines the Respondent's prayer thereon.

The summary of the findings of this court in this petition are accordingly as follows: -

1) That the Respondent, **P.K.A.** had in her pleadings herein admitted that she did not make any declaration before her marriage to the Petitioner on 25th September, 1995, that her former husband **I.S.P**l was dead.

2) That for the Respondent to file and successfully process divorce proceedings against the said **I.S.P** in 1997 to 1998 when decrees nisi and absolute were issued, the Respondent must, of necessity personally or through personally instructed advocate have served the said **I.S.P** with court processes. This confirms that the latter was alive earlier in September 1995 when the marriage between the Respondent and Petitioner herein took place.

3) The Respondent in her Reply to the Petition and Cross-Petition, admits that she and the Petitioner got legally married through a Sikh religious ceremony in a Sikh Temple in Southhall, London on 25th September, 1995 and, her latter day regression on the point, makes little sense and accordingly is found to be untrue.

4) That alternative to the Respondents admission as in (3) above, other independent evidence on the record including the letter from the Secretary General of Guru Granth Gurudwara of Southhall, London, does firmly and undoubtedly and to the fully knowledge of the Respondent, confirm that the 25th September, 1995 ceremony, was a complete and proper Sikh marriage between the two parties herein.

5) That lack of evidence of registration of a marriage or failure of a party to produce a certificate of marriage may not always as in this present case, lead to the conclusion that a marriage was not contracted.

6) That the Respondent and Petitioner, without doubt knew, intended and accepted the 25th September ceremony at Southhall Sikh Temple, to be a binding marriage ceremony conducted in accordance with the provisions of Hindu Law, Hindu Customary or religious or statute-backed rites.

7) That Hindu marriages are in Kenya governed by the Hindu Marriage and Divorce Act Cap 157 of the Laws of Kenya as read with the Matrimonial Causes Act, Cap 152, thereof. The former Act sanctions Hindu marriages to be performed in accordance with Hindu customary or religious rites and recognizes existence of two ceremonies – "**Saptapadi**" and "**Anand Karaj**". The Respondent and Petitioner must have applied one of the two, being Hindu.

8) That the registration of Hindu marriage as provided in Section 6 of the Act is important for proof that marriage took place but registration is not the only means of proving conclusively that the marriage took place. Other admissible evidence may be produced to independently prove Hindu marriage.

9) Hindu marriage such as this one in question before the court, like other statutory marriages in Kenya and England, is monogamous i.e. a voluntary union for life of one man and one woman to the exclusion of all others.

10) That on 25th September, 1995, the former husband of the Respondent, **I.S.P**, was alive and her marriage to him had not been lawfully terminated. Respondent in the circumstances, lacked legal capacity to marry the petitioner **M.S.A.**

11) The legal consequences from (10) above, is that the purported marriage between the parties herein was not only illegal and void but a nullity and therefore liable for nullification.

12) That the Petitioner was not by 25th September, 1995 properly aware of the Respondent's marital status and its consequences on his intended marriage with her with the most probable likelihood that he would not have proceeded with the marriage had he been made aware of the same before the a marriage was contracted. The respondent's failure to inform the Petitioner amounted to fraudulent misrepresentation, negative as it may have been.

13) That even if the Petitioner may have had full knowledge or awareness of the Respondent's marital

status before contracting his marriage with her on 25th September, 1995, nevertheless, this would not in law, have salvaged the subsequent marriage which was entered into contrary to express statutory provisions and therefore was null and void and against public policy of England and Kenya.

14) The facts and circumstances which led and produced the long marital cohabitation and representation to society of existence of a marriage between the parties herein arise from and thrive in an illegal, bigamous and void contract of marriage. A possible presumed marriage from those circumstances cannot be enforceable by this court as that would amount to aiding a party who entered a contract which is illegal, immoral and contrary to public policy.

The final orders of the court are: -

ORDERS

1) The marriage entered between the Petitioner, **M.S.A.** and the Respondent **P.K.A.** on 25th September, 1995 is hereby declared to be null and void and hereby ordered nullified under section 11(i) (a) of the Hindu Marriage and Divorce Act, Cap 157, of the Laws of Kenya.

2) A decree nisi thereto shall issue for six months with liberty to either party to apply to make it absolute.

3) The Respondent's prayer for dissolution of the purported presumed marriage between the Respondent and the Petitioner, is hereby dismissed.

4) There will be no order as to costs in both petitions.

Dated and delivered at Nairobi this 3rd day of July,2009.

……..

D A ONYANCHA

JUDGE