REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

CIVIL SUIT NO 853 OF 1995

M M …….....……PLAINTIFF

VERSUS

D C J ……..1ST DEFENDANT

V N K ……2ND DEFENDANT

RULING

M M, the Plaintiff herein, seeks an interlocutory injunction to restrain **D C J**, the 1st Defendant, from contracting a marriage under Marriage Act (Cap. 150) of the Africa Christian Marriage and Divorce Act (Cap. 151) with **V N K**, the 2nd Defendant, at Mombasa C.P.K. Memorial Cathedral on the 9th day of December, 1995. Her case is that she is the lawful wife of the 1st Defendant under Taita Customary Law, that the intended marriage between the defendants is unlawful, illegal and void as being contrary to the provisions of the Marriage Act and of the African Christian Marriage and Divorce Act, and that unless the Defendants are restrained from contracting the said marriage, she will loose the status of a married woman and will be unable to claim her right to maintenance and consortium from her husband, the 1st Defendant. The 1st Defendant vigorously opposes the application. He denies that there subsists a valid Taita Customary Law marriage between himself and the Plaintiff. In his contention, any marriage that may have subsisted between himself and the Plaintiff now stands dissolved. He has annexed an agreement to his affidavit which, according to him, verifies the dissolution of the said marriage.

The necessary conditions for the grant of an interlocutory injunction were spelt out by Spry, V.P. in GIELLA –v- CASSMAN BROWN & CO. LTD., [1973] E.A. 358. They are that, first an applicant must show a *prima faice* case with a probability of success; secondly, an interlocutory injunction will normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages; and thirdly, if the court is in doubt, it will decide an application on the balance of convenience. That criteria has been expressly approved by both the former court of appeal for Eastern Africa and the present Kenyan Court of Appeal (see for example NSUBUGA –v- MUTAWE [1974] E.A. 487, ABEL SALIM & OTHERS –vs- OKONGO & OTHERS, [1976] K.L.R. 42, and TERESA SHITAKHA –vs- MARY MWAMODO & OTHERS, [1982-88] 1 K.A.R. 965). I may add that whereas those conditions are necessary, they are not sufficient. As in injunction is an equitable remedy, a condition of equal importance with the above three is that the conduct of applicant must meet the approval of a Court of Equity. Delay, acquiescence, unclean hands and other matters that go to the exercise of an equitable discretion have to be considered if it is averred that the applicant is undeserving of equitable relief. I shall approach this matter with those principles in mind.

First, I ask whether the Plaintiff has made out a prima facie case for the existence of the right asserted and of its probable violation by the Defendants conduct. It must be remembered that the right which the plaintiff claims to presently have is to enjoy the status f being the First Defendant's wife together with all the privileges and burdens appurtenant thereto. And her contention is that this right will be violated, nay destroyed, if the defendants marry each other on 9.12.95. The Plaintiff's affidavit is categorical that a marriage under Taita Customary Law subsists between her and the 1st Defendant. The affidavit by the 1st Defendant and by **H N M**, who has deposed to the Plaintiff's maternal uncle, is that the marriage between the Plaintiff and the 1st Defendant was dissolved in accordance with Taita Customary Law. In view of the fact that the latter two affidavits are uncontradicted and in view of the fact the Plaintiff's uncle, who

would not be expected to swear falsely about his niece's marital status, is one of the deponents thereto, I am of the view that the Plaintiff has failed to make out a prima facie case that she is the lawful wife of the First Defendant by virtue of a subsisting customary law marriage. She accordingly has no right which stands to be violated or destroyed, as she fears, by the intended action of the Defendants. Moreover, even if I had found that the Plaintiff is still a lawful wife of the 1st Defendant, I would have ventured the view, which I hereby do, that by virtue of the provisions of Section 35 (1) of the marriage Act, (which applies to the Defendants intended marriage whether the same be contracted under either the Marriage Act itself or under the African Christian Marriage and Divorce Act by virtue of the provisions of section 4 of the latter statute), the marriage intended to be contracted on 9.12.95 between the defendants would be invalid and of no legal effect and accordingly such an obvious nullity could not violate or indeed destroy the Plaintiff's marriage. So on any view of the matter the defendants intended conduct cannot in law prejudice the Plaintiff's legal right, if any. If it is borne in mind that in interlocutory injunction is granted in order that the risk of a serious prejudice to the Applicant's legal rights between the time of the application and the time of trial may be forestalled, it becomes self-evident that as I am not satisfied that the Applicant has any legal right she may have is at risk of serious prejudice, the application for the interlocutory relief cries out for dismissal. Being of that bent of mind, I regard any discourse as to whether the breach of the Plaintiff's right could be compensated for in damages as an academic one ill befitting a court of law. And as I am not in doubt about the Plaintiff's failure to satisfy the very first necessary condition for the grant of interlocutory injunctive relief, I need not trouble myself with weighing the balance of convenience. In short, I am of the opinion that an interlocutory injunction cannot issue in this matter as the Applicant has not made out a prima facie case with a probability of success. I know that her conduct of attempting to stop the Defendants marriage at the eleventh hour was attacked by counsel for the Defendants. I will, however, say nothing on it beyond stating that equity does not aid the indolent. I could not have possibly stopped a marriage on the basis of an application made at the last possible moment if I were satisfied that the Applicant had heard the reading of the marriage banns or had otherwise known of the intended marriage before the said eleventh hour. In the present case, I was not satisfied that the Applicant had earlier knowledge of the intended marriage and in any event, nothing turns on her conduct for the question whether an injunction ought to issue in view of her conduct does not call for an answer where, as here, the court has come to the conclusion that the relief cannot issue of the virtue of the Applicant having failed to satisfy the necessary conditions for the grant thereof.

In the result, I dismiss this application with costs to the Defendants.

Dated and delivered at Mombasa this December 7, 1995

A.G RINGERA

JUDGE