REBUBLIC OF KENYA

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MARAGA, MUSINGA & OUKO, JJ.A.)

CIVIL APPEAL NO. 299 OF 2009

BETWEEN

P K A.....APPELLANT

VERSUS

M S A.....RESPONDENT

(Being an appeal against the Judgment and Decree of the High Court of Kenya

at Nairobi (Onyancha, J.) dated and delivered at Nairobi on 3rd July, 2009

in

H.C.C.C. No. 122 of 2006)

****

JUDGMENT OF THE COURT

1. This appeal arises from the judgment of Onyancha, J. in Matrimonial Cause No. 122 of 2006. In that matter the respondent, (who was the petitioner), had filed a petition seeking nullification of the marriage between himself and the appellant.

2. In the petition, the respondent stated that on 25th September, 1995 he got married to the appellant at a Sikh Temple in Southhall, London. However, at the time of the marriage and unknown to him, an earlier marriage between the appellant and one **I S P** which had been solemnized on 4th January, 1986 was still subsisting. The appellant and the respondent have one child, who we shall refer to as **"A.S.A.",** born on 18th June, 1996.

3. The respondent further stated that there was no divorce, annulment, or determination of non-existence of the marriage between the appellant and the said Inderjit Singh Purewal at the time of the marriage between him and the appellant and that the appellant instituted divorce proceedings between herself and her former husband in the Coventry County Court in 1997, being case number 97D00197. The decree nisi in the said case was issued on 3rd June 1998 and the decree absolute was issued on 16th July, 1998.

4. In view of the foregoing, the respondent added, his consent to the marriage between him and the appellant was obtained by deception and/or fraud. He therefore urged the High Court to annul the marriage between him and the appellant.

5. The appellant filed an answer to the petition as well as a cross-petition. She admitted that on 25th September, 1995 she got married to the respondent as stated in the petition. She further conceded that earlier, on 4th January, 1986, she had married I S P at the Registrar's Office in the Metropolitan District of Coventry, in the United Kingdom. However, she denied that the said marriage was still subsisting as at 25th September, 1995 when she got married to the respondent. She contended that the marriage to the said I S P was an arranged one, courtesy of her parents, when she was only 17 years of age. Further, that the said marriage was never consummated by virtue of her refusal to do so; that she ran away from her husband the same day of the wedding ceremony back to her father's house. The said marriage was therefore voidable by virtue of non-consummation of the same, she argued.

6. Regarding the proceedings for annulment of the earlier marriage, the appellant stated that the same were instituted in 1986 but the proceedings never went beyond the stage of acknowledgment of service. That notwithstanding, she conceded, the court issued a decree nisi and decree absolute as stated by the respondent.

7. The appellant denied that the respondent's consent to marry her was obtained by misrepresentation of her status, or that at that time she was lawfully married to the said I S P and thus lacked capacity to contract another civil marriage. She alleged that the respondent was made fully aware of all details relating to her previous marriage well before they got married.

8. In her cross-petition, the appellant stated that she continued to live with the respondent as husband and wife, both during and after the dissolution of her previous marriage for a period of over eight (8) years. Out of that cohabitation they had one child. Consequently, the respondent was estopped from seeking prayers for annulment of their marriage, she added. That notwithstanding, the appellant contended, the marriage between her and the respondent had broken down irretrievably because the respondent had been cruel to her. She set out the particulars of cruelty and urged the court to dismiss the respondent's petition for nullification of their marriage and instead issue a declaration that by virtue of their long cohabitation there was a valid marriage between them and then proceed to dissolve it on the ground of cruelty. She further prayed that all the property held solely by the respondent and/or jointly by both the respondent and other members of the extended family, the respondent's share thereof be declared as matrimonial property and half share of the same be awarded to her. She also urged the court to make provision for future financial support of their child.

9. Before the commencement of the hearing before the High Court, the parties through their respective advocates agreed that the issues for determination were as follows:

> ***a) Whether the appellant had capacity to contract a legal marriage on 16th September, 1995.***
>
> ***b) Whether the respondent was at the time aware of the appellant's status.***
>
> ***c) Whether there was a valid marriage between the appellant and the respondent; and***
>
> ***d) Whether a valid marriage can be presumed from the facts and circumstances pleaded in the cross petition.***

The parties agreed by consent to file written submissions and let the Court determine the aforesaid issues on those submissions. As such, no oral evidence was adduced.

10. In his judgment, the trial Judge held, *inter alia*:

- *That Hindu marriages in Kenya are governed by the Hindu Marriage and Divorce Act as read with the Matrimonial Causes Act.*
- *That on 25th September, 1995 when the parties contracted a ceremony of marriage the appellant's former husband, I S P, was alive and the appellant's marriage to him had not been lawfully terminated and consequently she lacked legal capacity to marry the respondent.*
- *That Hindu marriages, like other statutory marriages in Kenya and England, are monogamous.*
- *The legal consequences arising from the above is that the purported marriage between the parties herein was not only illegal and void but a nullity and therefore liable for nullification.*
- *As at 25th September, 1995 the respondent was not aware of the appellant's marital status and its consequences of his intended marriage to her.*
- *The appellant's failure to inform the respondent of her earlier marriage amounted to fraudulent misrepresentation but even if the respondent was aware of the appellant's marital status before contracting marriage with her, that would not in law have salvaged the subsequent marriage as it was contrary to statutory provisions and was therefore null and void and against public policy, both in England and Kenya.*
- *That in the foregoing circumstances the long cohabitation between the parties could not give rise to a presumption of marriage between the two as that would amount to aiding a party who had entered into a contract that is immoral and also contrary to public policy.*

11. The trial court declared the marriage entered into between the appellant and the respondent on 25th September, 1995 null and void and nullified it under **Section 11 (1) (a)** of the **Hindu Marriage and Divorce Act, Cap 157 Laws of Kenya.** The court also dismissed the appellant's prayer for dissolution of the purported marriage between the parties.

12. Being dissatisfied with the said judgment, the appellant preferred an appeal to this Court and raised 13 grounds which were grouped into four main clusters.

13. Firstly, **Mr. Amutallah**, the appellant's learned counsel, argued that the trial Judge erred in law in making a wrong choice of the applicable law. It was contended that the appellant, being a British national with a tourist visa in Kenya, celebrated the marriage with the appellant in London and it was therefore wrong for the trial Judge to hold that the marriage was governed by the Kenyan Hindu Marriage and Divorce Act. Counsel submitted that the applicable law was the Marriage Act of England. He cited the case **De Reneville v. De Reneville (1948) 1 ER 56** in support of that argument. In that case the wife was born in England and was residing in England but the husband, a French man, was domiciled in France and had resided there at all material times. The marriage had taken place in Paris in 1935 and until 1939, except for a few months, the parties had resided together in France. The court held, *inter alia*, that since the husband was domiciled and at all material times resident in France, the fact that the wife was resident in England when the petition was filed was not sufficient to confer jurisdiction on the English Courts.

14. Secondly, the appellant's counsel submitted that the parties' alleged marriage on 25th September, 1995 was not valid at all for the following reasons:

> *(i) The place of marriage, that is, the Sikh Temple, was not a registered one under the Marriage Act. He cited Section 76 (1) of the Marriage Act of England.*
>
> *(ii) There were no witnesses to the alleged marriage. The priest who conducted the ceremony issued a mere document entitled:*
>
> ***"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. S S S and Pati."***

The said document should not have been recognized as proper evidence of a marriage, the appellant's

counsel added.

15. It was further submitted that the trial court should have concluded that there was a presumption of marriage due to the long period of cohabitation between the parties herein. The trial Judge was also faulted for determining the matter entirely on pleadings, affidavits and written submissions, totally excluding oral evidence. The procedure was prejudicial to the appellant in light of the factual issues that had been raised, counsel stated. He urged the court to allow the appeal.

16. In response, **Mr. Oduol**, learned counsel representing the respondent, submitted that a party is bound by its pleadings, affidavits and submissions. He stated that there were several material facts that had been admitted by the appellant which did not require proof by the respondent, for example, the fact that as at 25th September, 1995 when the parties got married the appellant's earlier marriage had not been dissolved.

17. Regarding the divorce proceedings in the Coventry County Court between the appellant and her first husband, Mr. Oduol submitted that the case was premised on the appellant's contention that the two had lived apart for a period of five years, the issue of non-consummation of the marriage was not raised in that matter.

18. The respondent's counsel supported the High Court finding that the appellant had no capacity to contract the second marriage when the first one was still subsisting. He added that the long cohabitation could not give rise to a presumption of marriage in the circumstances aforesaid. Regarding the suitable law, Mr. Oduol submitted that under **Section 13** of **Kenyan Matrimonial Causes Act,** a husband or a wife may present a petition praying that their marriage be declared null and void. The trial Judge was right in holding that the applicable law was the Kenyan Hindu Marriage and Divorce Act and not the Marriage Act of England as both parties were residing in Kenya.

19. We will now proceed to determine the main issues that were raised in this appeal.

THE APPLICABLE LAW

20. The applicable law is the law of the country where parties are domiciled at the time of institution of a suit. In this case the parties were admittedly resident and domiciled in Kenya at the time of filing the petition that gave rise to this appeal. And as the parties are both Hindu, we concur with the trial Judge their marriage was governed by the Kenyan Hindu Marriage and Divorce Act as read with the Kenyan Matrimonial Causes Act and not the Marriage Act of England. Both **Sections 13** and **14** of the **Matrimonial Causes Act** permit a party to a marriage to seek a decree to nullify the same. The grounds for seeking such a decree include such as were pleaded by the respondent herein. Further, **Section 11 (1) (a)** of the **Hindu Marriage and Divorce Act** provides that a party to a marriage contract may seek nullification of the marriage if either party had a spouse living at the time of marriage and the marriage with such spouse was still subsisting. This was the case between the appellant and Inderjit Singh Purewal when she purported to get married to the respondent. That was admitted by the appellant in her reply to the petition.

B) WHETHER THE APPELLANT HAD CAPACITY TO CONTRACT A LEGAL MARRIAGE ON 25TH SEPTEMBER, 1995

21. In her answer to the petition, the appellant admitted that she was married to I S P on 4th January, 1986, the only qualification she added was that it was an arranged marriage when she was 17 years old and that it was not consummated. Under the English Law, the lower age limit for a party to a marriage is 16 years.

22. **Family Law** by **Bromley**, chapter 3 at page 32, on the issue of capacity as a prerequisite to a valid marriage contract states as follows:

"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;***
b. ***both parties must be over the age of 16;***
c. **…..**
d. **…..”**

23. As at 25th September, 1995 when the appellant married the respondent her first marriage was still subsisting. The first marriage had not been annulled and neither had I S P died. The appellant commenced divorce proceedings in 1997, almost two years after she had undergone another marriage ceremony with the respondent. We therefore find that the appellant had no legal capacity to marry the respondent.

C) <u>WHETHER THERE WAS A VALID MARRIAGE BETWEEN THE APPELLANT AND THE RESPONDENT</u>

24. It is not right for the appellant to argue that the first marriage never existed in law because it had not been consummated. If indeed the marriage had not been consummated as alleged, that could only have been a ground for seeking a declaration that the same was void before the appellant could purport to marry the respondent. The act of seeking a divorce in the Coventry County Court was itself an admission on the part of the appellant that indeed there existed a valid marriage between her and I S P. And that is why the decree absolute was issued on 16th July, 1998.

25. The learned trial Judge was correct in holding that the appellant had no capacity to contract a subsequent marriage to the respondent. It was not necessary for the trial court to interrogate the validity of the document headed **“TO WHOM IT MAY CONCERN”** to determine whether it was sufficient evidence that the appellant and the respondent got married on 25th September, 1995 at a Sikh Temple in London. That is a fact that had been specifically pleaded by the respondent in his petition and expressly admitted by the appellant in her answer to the petition. We agree with Mr. Oduol that parties are bound by their pleadings, affidavits and submissions.

26. Although the appellant’s counsel submitted that the Sikh Temple in Southhall London was not a registered place where a marriage could be conducted, there was no evidence to that effect.

27. Regarding the procedure that was adopted by parties in conducting the trial before the High Court, we have already pointed out that the parties through their respective advocates chose to have the matter determined by way of affidavit evidence and written submissions. Consequently, the appellant is estopped from complaining that the trial Judge should have called for *viva voce* evidence.

D) <u>WHETHER PRESUMPTION OF MARRIAGE CAN BE INFERRED FROM THE PARTIES’ COHABITATION</u>.

28. That the appellant and the respondent cohabited since 25th September, 1995 when they purportedly contracted the second marriage until sometimes in June 2006 is not denied. It is also a fact that they have a child together. However, the trial court held that the said marriage was null and void, bigamous and contrary to public policy and this Court has upheld that position. The respondent contended that it was only in June 2006 that he came across the decree nisi and decree absolute of the marriage that had been celebrated between the appellant and her first husband on 4th January, 1986.

29. In declining to make an order for presumption of marriage as sought by the appellant in the cross-petition, the trial Judge held that the marriage entered into between the appellant and the respondent on 25th September, 1995 was the one that subsisted until the respondent filed the petition for nullification of the marriage. He further held that there was no evidence that the said marriage ended after grant of the decree absolute in 1998 to enable the parties to be presumed as married on the basis of their long cohabitation. We are satisfied that was the right holding in law. As stated earlier, whether the respondent

became aware of the earlier marriage in 2006 or earlier is immaterial, as long as his marriage to the appellant as at 25th September, 1995 was null and void because the first one had not been dissolved.

30. But for the fact that the marriage between the appellant and respondent was illegal, there would have been no difficulty in holding that the long period of cohabitation gave rise to a presumption of marriage. In **HORTENSIAH WANJIKU YAWE vs PUBLIC TRUSTEE, Civil Appeal No. 13 of 1976**, Mustafa, JA. held that:

> ***"Long cohabitation as man and wife gives rise to a presumption of marriage in favour of the appellant. Only cogent evidence can rebut such a presumption."***

In this case, the factor that negates the presumption of marriage inspite of the long cohabitation is that that cohabitation was premised on the assumption that there was a valid marriage in existence, which was not the case.

31. Lastly, it was alleged that the trial Judge was biased against the appellant. The appellant's counsel referred the court to various parts of the judgment which, according to him, from the manner in which the trial Judge expressed himself showed that he became personally involved in the dispute and seemed to favour the respondent. However, counsel did not allege that the trial Judge exhibited any bias or mistreatment of the appellant in the cause of the trial. Having carefully perused the impugned judgment, we do not find any scintilla of evidence that may support the appellant's contention that the trial Judge was biased against her. In our view, the trial Judge rendered a well considered judgment in temperate judicial language and the appellant's accusation against him is without merit.

32. In conclusion, we dismiss this appeal as lacking in merit. Each party shall bear its own costs of the appeal.

Dated and Delivered at Nairobi this 7th day of February, 2014.

D.K. MARAGA

.....

JUDGE OF APPEAL

D.K. MUSINGA

.....

JUDGE OF APPEAL

W. OUKO

.....

JUDGE OF APPEAL

I certify that this is

a true copy of the original.

DEPUTY REGISTRAR

/dkm