



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
MATRIMONIAL CAUSE NO.11 OF 2004

N S J PETITIONER

VERSUS

H A K RESPONDENT

J U D G E M E N T

This petition is one of the not-so-common causes brought up in these climes. It is about annulment of a marriage on the main ground that when the petitioner and the respondent contracted the marriage in question the petitioner's earlier marriage was still subsisting and therefore he had no capacity to enter into the present marriage. The usual petitions are for dissolution of marriages by divorce.

On 5th May 2004 N, the petitioner filed this cause. He averred that on 13.6.03 he had married H, the respondent, at a civil marriage registry at Mombasa. That he had no capacity to do so because his 1994 marriage to one F N E in the United Kingdom was in fact still subsisting. While the petition stated that N and H had one issue of the subject marriage (a daughter, Z) he had (7) children with F. The petition went on to state that on 20-8-98 the petitioner filed divorce proceedings at the Willesden County Court (UK) against F. That before he marriage H F had informed N that their U.K. divorce had been finalized. But later it transpired that that was not correct; the U.K. divorce petition had never been finalized yet acting and believing the information from F that it was, he had married H. That as at the time of filing these proceedings and even as at the time of this hearing the petitioner's first marriage was still subsisting and accordingly this court should declare the marriage between him and the respondent a nullity.

On 21.5.2004 H filed an answer to the petition. On her part she pleaded that on the face of this petition no cause of action had been disclosed; the petition should thus be dismissed. She added that it was full of falsehoods, and that the facts as per the petition were not known to her when she with the petitioner began courting and ended by proceeding to marry. That all were known to N and he cannot be heard to say that he did not know that his first marriage (to F) had not been dissolved before he contracted the present one. She thus opposed the declaration sought on the basis that N had "wasted her" (or her time"). She concluded however that if this marriage is declared a nullity, the court should order for the maintenance of the child and the respondent herself. That orders also be made about the custody of that child (Z) and the matrimonial property be shared on a 50-50 basis. And that costs go to her.

At the hearing both the petitioner and the respondent testified. N going by his pleading in the petition produced a copy of the marriage certificate with H (Exh. P1) at Mombasa and that with F in U.K. (Exh. P2). He added that while he and F initially lived in the UK he has since moved to reside in Nyali Mombasa and is working as a workshop manager with some transport company. That Freda had at one

stage come to live with N at Mombasa. She went back and called him to report that the 1998 divorce proceedings in UK had been finalized. N produced copies of proceedings in that cause (Exh. P3) adding that the report given by F had in fact not been correct. That no decree absolute had ever issued in the matter (Exh. P4) and that with the divorce still pending, his marriage to F still subsisted.

The court heard that when N and H married he stayed at Nyali while she lived at Kingorani. That this was so because he was living with his children (of the first marriage). But that sometime in November 2003 she shifted and forced her way into the Nyali home. H seemed to have gotten in contact with F who informed her that F (first) marriage to N still existed. This must have fired H to lay a criminal complaint against N who found himself charged with bigamy contrary to section 171 Penal Code in Mombasa Chief Magistrate's Criminal Case No. 911 of 2004 (Exh. P5). The parties seemed to have found some way out of all this when H wrote a letter dated 13-4-2004 and swore an affidavit to withdraw her complaint (Exh. P6, 7). N ended his testimony by praying this court to issue the declaration of nullity of their marriage which, to him, was contracted in error and the error ought to be corrected now.

In cross examination, the petitioner said that although he did not follow up with his London lawyers to know the status or outcome of his petition against F or that he did not leave them with his Mombasa contact, it was all for no ill-motive or advantage to/over Hafsa. He maintained that in the circumstances he acted ignorant of the still subsisting first marriage and all because F had intimated to him that their U.K. divorce was through and so he proceeded to marry H. And that the truth was different. That all this had caused stress all round and so the marriage ought to be annulled.

On her part H told the court that she was greatly hurt by all this fiasco of which she played no part. That since marrying N she had in fact been living a lie. The marriage should be dissolved and orders made about her own support and that of their child Z whom she wants to keep.

In the brief submissions that followed Mr. Okanga (for the respondent) remained with the view that the petitioner who did not even care to find out the fate of the U.K petition from his lawyers, cannot be heard to say that he was genuinely ignorant that the first marriage (to F) was still in place when he married H. That if the court was minded to annul this marriage, strict conditions should issue regarding the care of the respondent and the child.

Mr. Ndegwa replied that all in all the petitioner had no capacity to marry H. That the marriage should thus be annulled as per the Matrimonial Causes Act (Cap 152). That the issues about care, custody and other of the child warranted separate proceedings in different forms/fora. The same applied to property, and that in any case the petitioner was already maintaining the child, Z. This ended the pleadings and testimony. Now the determination.

In the Matrimonial Cause Act (Cap 152), the Act, the kind of declaration sought by the petitioner falls under SS. 13, 14. In this court's opinion the pertinent provision is:

“14. (1) The following are the grounds on which a decree of nullity of a marriage may be made –

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

In the present case N wife F (in the first marriage) is still alive. She was alive as at the 13-6-03 when N purported to marry H and the UK divorce proceedings between N and F had not been finalized with issuance of a decree absolute at all. That seems still to be the position. Accordingly N had no capacity to marry H as at 13-6-2003. Although the court was asked to impose stiff conditions in case it was minded

to grant the declaration and the respondent testified that she was greatly hurt by the whole thing, this court has no alternative but to declare the marriage between N and H null and void because the former lacked capacity to marry the latter. An earlier marriage was still in subsistence, but N believed F when she told him that all was over. The court did not form any other impression.

The court concludes with the view that any other reliefs may be waged by the respondent as by law established and not at this juncture. Otherwise the marriage is annulled but costs go to the respondent.

A decree nisi will issue to be followed with the rest of the usual formalities.

Judgment accordingly.

Delivered on 29th December, 2004.

J.W. MWERA

JUDGE



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