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IN THE HIGH COURT OF MALAWI AT BLANTYRE

CIVIL CAUSE NO. 7 OF 1986

BETWEEN:

BETTY PASANJE ..... PETITIONER

- and -

GRAITON PASANJE ..... RESPONDENT

- and -

EVELYN MAMBALA ..... CO-RESPONDENT

Coram: UNYOLO, J.

Chimasula Phiri, Counsel for the Petitioner
Respondent, present, unrepresented
Co-respondent, present, unrepresented
Manda, Court Reporter
Mthukane, Official Interpreter

J U D G M E N T

The petitioner, Betty Pasanje, prays for an order that the marriage between the respondent, Graiton Pasanje, and the co-respondent, Evelyn Mambala, be declared null and void. The petition is not defended. All the respondent said he wished to be heard on was as to the question of costs and he appeared at the trial solely for that purpose.

The facts are few and simple. The petitioner and the respondent joined in matrimony in accordance with customary law in 1972. The actual date is not known. The parties subsequently got the marriage registered at the Mulanje District Council office. This was on the 1st November, 1975, to be precise, and a marriage certificate number 263631 was consequently issued by that office. Needless to point out that the ceremony (if I may call it such) at the said Council office did not in anyway alter the legal status of the marriage; it remained and continued to be a customary law marriage. Be that as it may, many a coupe go for this sort of ceremony. Why they do so is perhaps an interesting subject for sociologists. I do not find it necessary to delve into that question in this judgment. It was in the evidence further that on the 19th November, 1983, the petitioner and the respondent had their marriage celebrated at the C.C.A.P. church in Limbe under the African Marriage (Christian Rites)

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Registration Act. Here again, it is to be observed that the ceremony at the said church did not in any way alter or affect the status of the marriage or involve any other legal consequences.

From the foregoing facts one is left with the impression that this was a steady marriage. Indeed in the interim the couple was blessed with six children; the first of whom was born on the 26th November, 1973, and the youngest on the 17th November, 1982. But on the 4th March, 1985, scarcely two years after the parties went through the church ceremony, the respondent quit the matrimonial home and went to cohabit with the co-respondent. The petitioner was admitted in hospital at the time and it was when she returned home, upon her discharge, that she learnt the respondent had gone away. Subsequently she learnt and confirmed that the respondent and the co-respondent had actually married each other at the office of the Registrar General in Blantyre under the Marriage Act. She produced in evidence, Exhibit 3, the marriage certificate issued by the Registrar General on the 24th September, 1985. It was the petitioner's evidence that although the respondent and the co-respondent went through that ceremony before the Registrar General her own customary law marriage still subsists and was subsisting at the time of the other marriage before the Registrar General. She therefore asks this Court to make an order declaring that marriage (between the respondent and the co-respondent) null and void.

The Court was informed that the petition is brought under the provisions of section 12(1)(d) of the Divorce Act and section 34(1) of the Marriage Act. Right at the outset I raised a preliminary point as to whether the petitioner had a locus standi in this matter and after hearing learned Legal Aid Advocate in argument I allowed him to lead evidence and eventually asked him to address the Court specifically on this question.

I shall examine first the provisions of section 12(1)(d) of the Divorce Act. Actually the whole of section 12(1) deals with and sets out the grounds on which a decree of nullity of marriage may be made by a court. I however think that the section must be read with section 11 of the same Act which provides as follows:

> "A husband or a wife may present a petition to the court praying that his or her marriage may be declared null and void."

And then section 12(1)(d), put together, provides:

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"1. The following are grounds on which a decree of nullity of 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;"

With respect the way I understand the two sections is that the words "husband" and/or "wife" as used therein refer specifically to a husband and/or wife to a marriage celebrated in accordance with the Marriage Act. Put simply, the sections refer only to those situations where the parties are married under the Act and it subsequently occurs to any one of the parties to that marriage that the other party was previously married to a third party and that such previous marriage was in force at the time the marriage under the Act was contracted. And referring to the present case it certainly would be open to the co-respondent knowing, as is common case, that the respondent's marriage with the petitioner was in force at the time she married him under the provisions of the Marriage Act, to petition this court for an order that her said marriage to the respondent be declared null and void. In other words what is contemplated by the two sections is, in my judgment, a petition by a husband or a wife who are married under the Act wherein he or she asks the court that his or her marriage (not a third party's marriage) be declared null and void. It is not, therefore, open to a customary law marriage wife as is the petitioner here who must be considered a stranger to the Marriage Act marriage (if I may call it such) to come to this Court praying that the subsequent marriage should be declared null and void; using the provisions of the two sections herein.

Learned Legal Aid Advocate submitted that taking the case here it would be absurd to think that the law should allow the respondent to desert the petitioner, marry the co-respondent and leave the petitioner without a remedy. With respect, I am not so sure that the petitioner is wholly without a remedy. The petitioner and the respondent were legally married according to custom. It may well be that she has come to the wrong place. In a word, I hold that the petitioner cannot avail herself of the provisions of section 12(1)(d) of the Divorce Act.

I now turn to the provisions of section 34(1) of the Marriage Act. That section reads:

"A marriage may be lawfully celebrated under this Act between a man and the sister or niece of his deceased wife, but save as aforesaid, no marriage in Malawi shall be valid, which, if celebrated in England, would be null and void on the ground of kindred or affinity, or

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> where either of the parties thereto at the time of the celebration of such marriage is married by customary law to any person other than the person with whom such marriage is had."

The section is unambiguous. It makes a clear statement of law and applied to the facts of the case in hand it is evident that the marriage between the respondent and the co-respondent is not valid on the ground that the respondent was married by customary law to the petitioner at the celebration of the subsequent marriage under the Act. The question posed is whether one can bring a nullity suit simply on the basis of and relying on the provisions of the section here. Learned Legal Aid Advocate urged the court to answer this question in the affirmative. He submitted that it would be absurd to have the very clear provisions of the section and then be heard to say that the court cannot make a declaration stating what the section itself says.

With respect I am unable to find any absurdity in this. With regard to nullity suits the law has provided for the machinery under the Divorce Act as to who can bring such suits before a court of law and on what grounds. Indeed I would like to contend that both the Marriage Act and the Divorce Act must be looked at as complementary and as referring to spouses or parties whose marriages were contracted under the Marriage Act. I regret I do not think there are avenues into these Acts to personae such as the petitioner here or her "ankhoswe" or the District Council clerk who issued the certificate upon the registration of the customary law marriage in his office or, for that matter, the minister of religion who celebrated the customary law marriage at Limbe C.C.A.P. church. I do not think that I am being pedantic in my construction of the law here.

Perhaps I should observe that I was referred to previous cases decided in this court such as Namate v. Namate and Bazuka Mhango: Civil Cause No. 671 of 1979, Chithyola v. Chithyola: Civil Cause No. 394 of 1980 and Massa v. Massa and Chuma: Civil Cause No. 457 of 1983. With respect, it seems to me that the pertinent issues that have been raised in the present case were not raised and argued there. In the end, I find that the petitioner has no locus standi in this matter and that her petition is consequently incompetent. I dismiss it.

In ow turn to the question of costs. Although as a general rule costs follow the event, the court has an unfetterred discretion in the matter. I appreciate why the petition was brought and I do not see any good reason why the respondent should not pay the petitioner's costs. She has failed on a technical point. It is also to be noted

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that all the respondent said on this question of costs was simply that in fixing the amount of such costs consideration should be given to his financial position. All in all I think that the justice of the matter demands that the respondent pay the petitioner's costs of the petition. Accordingly I order that the respondent pay the petitioner's said costs, to be agreed if not taxed.

In conclusion I wish to reiterate what I said during the course of the hearing of the petition that the manner in which the respondent and the co-respondent have joined in matrimony in this matter constitutes a criminal offence for which both of them could be prosecuted. I feel duty bound to say this with emphasis.

PRONOUNCED in open Court this 11th day of July, 1986, at Blantyre.

L.E. Unyolo
JUDGE