

HAFIZ AYYUB DURGA v NAJMUNNISSA ISMAIL (1992) S.J. (H.C.)

HIGH COURT MUZYAMBA,
W.M. , J.
14TH JULY, 1992.
1992/HP/D/28

Flynote

Nullification of marriage - Prohibited degrees of consanguinity - Where parties to the marriage are blood cousins - As a basis for nullification

Nullification of marriage - Non consummation of the marriage - As a basis for nullification

Headnote

The parties secretly went through a ceremony of marriage at the office of the Registrar of Marriages, Lusaka. After marriage they discovered that they were blood cousins. As a result they never cohabited and the marriage was never consummated. They filed an undefended petition for nullification of the marriage.

Held:

(i) Where marriage takes place within the prohibited degrees of consanguinity, it is immaterial whether or not the marriage was consummated. It is nevertheless void ab initio

(ii) The parties are blood cousins and therefore fall within the prohibited degrees of relationship and should not have contracted the marriage.

For the Petitioner: M. Sikatana, Veritas Chambers

For the Respondent: Nil

Judgment

This is an undefended petition for nullification of marriage between the parties

The evidence in support of the petition is that on 12th October 1990, the parties secretly went through a ceremony of marriage at the office of the Registrar of Marriages, Lusaka. After marriage they discovered that they were blood cousins.

As a result they never cohabited and the marriage was never consummated.

Paragraph 8 of the petition reads:

"8. Such non-consummation is due to the fact that immediately after the said ceremony both the Petitioner and the Respondent discovered that their biological relationship forbade them from ever getting married as they are under the Marriage Act 1949 of England which is applicable to Zambia under Section 32 of the Laws of Zambia, both the Petitioner and the Respondent are within the prohibited degree of consanguinity."

It would appear from this paragraph that the ground relied upon for nullification of the marriage is non-consummation of the marriage due to the fact that the parties are related by blood.

Sections 11 subsection (1) (a) (i) and 12 sub-sections (a) and (b) of the Matrimonial Causes Act, 1973, provide:-

"11.1 A marriage celebrated after 31st July, 1971 shall be void on the following grounds only that is to say:

(a) that it is not a valid marriage under the provisions of the Marriages Acts 1949 to 1970 that is to say where :

(i) the parties are within the prohibited degrees of relationship.

12. a marriage celebrated after 31st July, 1971 shall be voidable on the following grounds only, that is to say -

(a) that the marriage has not been consummated owing to the capacity of either party to consummate it;

(b) that the marriage has not been consummated owing to the willful refusal of the respondent to consummate it."

It is quite clear from the above sections that marriage within the prohibited degrees of relationship and non-consummation of marriage are two distinct grounds for nullification of marriage. Marriage within the prohibited degrees of relationship renders the marriage void ab initio while non-consummation renders the marriage voidable, It would therefore appear to me that where marriage takes place within the prohibited degrees of relationship, it is immaterial whether or not the marriage was consummated. It is nevertheless void ab initio and there is no need therefore, as in the instance case, to plead non-consummation as well.

Turning to evidence, the Court is satisfied that the parties are blood cousins and therefore fall within the prohibited degrees of relationship and should not have contract the marriage. In that event the marriage is declared null and void ab initio.

For the purposes of making the decree of nullity absolute the Court makes a declaration under section 41 subsections (1)(a) of the said Matrimonial Causes Act, that it is satisfied that there are no children of the family to whom this section applies.

There will be no order for costs. Petition successful, Marriage nullified.