

IN THE FAMILY DIVISION OF THE HIGH COURT IN LAUTOKA
ORIGINAL JURISDICTION

Action No. **23/LTK/0331**

BETWEEN **: FM**

AND **: SFD**

Appearances **: Ms. Vulimainadave of Legal Aid Commission for the Applicant
Respondent in Person**

Date & Place of Judgement **: Monday 06 May 2024 in Lautoka**

Coram **: Justice Mr. Anare Tuilevuka**

J U D G M E N T

Catchwords

Family Law – *APPLICATION FOR AN ORDER FOR NULLITY OF MARRIAGE* – Alleged that arranged marriage void as no real consent was given; marriage was not consummated; wife did not disclose to husband before marriage that she was in a long-term relationship with another man; wife eloped with other man after Registry Marriage but before Traditional Marriage ceremonies; application for an order for nullity of marriage granted.

INTRODUCTION

1. The Applicant, Mr. FM, and the Respondent, Ms. SFD entered into a civil marriage on 31 August 2023 in Lautoka.
2. Mr. FM has filed a Form 2 Application for an Order of Nullity on the ground that he gave “no real consent” to the marriage. He is represented by the Legal Aid Commission.
3. Ms. SFD is unrepresented.
4. Notably, in Part D of the application, only Mr. FM has signed the affidavit.
5. The matter was first called in Court on 25 March 2024. On that occasion, Ms. Sharma of the Legal Aid Commission, said that the reason why Mr. FM seeks an Order to declare the marriage a nullity is because Ms. SFD actually eloped with another boy shortly after the parties had completed their civil registry union and shortly before their scheduled traditional marriage ceremony.
6. The parties civil registry union happened on 31 August 2023. The traditional marriage ceremony was to take place on 13 and 14 October 2023.
7. After the civil registry union, Ms. SFD had continued to live with her parents. Apparently, the arrangement was that she would go and live with Mr. FM after their traditional wedding ceremonies.

8. However, on 14 September 2023, a month before their scheduled traditional marriage ceremonies, Ms. SFD eloped with another man. She has since been living with that other boy and is pregnant with his child.
9. As Mr. FM would come to find out later, Ms. SFD and the other man had been in a long term relationship well before Ms. SFD's and Mr. FM's families had arranged for their union.
10. Under section 32 of the Family Law Act, a party can apply to have the marriage nullified on the ground that the marriage is void. A marriage is void if and only if: -
 - (a) either of the parties is, at the time of the marriage, was lawfully married to some other person.
 - (b) the parties are within a prohibited relationship.
 - (c) the marriage is not a valid marriage under the law of the place where the marriage takes place, by reason of failure to comply with the requirements of the law of that place with respect to the form of solemnization of marriages.
 - (d) the consent thereto of either of the parties is not a real consent because-
 - (i) it was obtained by duress or fraud;
 - (ii) that party is mistaken as to the identity of the other party or as to the nature of the ceremony performed; or
 - (iii) that party is mentally incapable of understanding the nature and effect of the marriage ceremony; or
 - (e) either of the parties is not of marriageable age.
11. I have read the following cases for guidance:

Radhesh v Sushmita [2023] FJHCFD 23; Family Case 0611 SUV of 2018 (4 October 2023)
Abhilash v Kaashvi [2023] FJHCFD 20; Family Case 0127 SUV of 2016 (4 October 2023)
Kasvi v Edwin [2023] FJHCFD 16; Family Case 0397 LTK of 2017 (29 September 2023)
Taahir v Abira [2023] FJHCFD 14; Family Case 0200 LTK of 2019 (29 September 2023)
12. In the first three of these cases, the Court granted an Order declaring the marriage a nullity on the ground that there was no real consent given by the applicant on the ground of fraud. The fraud in these cases lay in the fact that the respondent party had not disclosed to the applicant party at any time leading up to the marriage, or at the time the marriage was solemnized, that he/she was already in a relationship.
13. In **Radhesh**, the respondent wife was in fact was already five weeks pregnant with the child of another man at the time of marriage.
14. In **Taahir**, the respondent wife had simply refused to partake in the consummation of the marriage. Apparently, she had made up her mind all along well before the marriage was solemnized that she would not submit herself to the consummation of the marriage. This she did not disclose to the husband at any time before the marriage.
15. In **Riteshni v Dharmen** [2011] FJHCFD 19; Family Case 429 Ltk of 2009 (20 January 2011), Madam Justice Wati refused to grant an Order for nullity where it was argued *inter alia* by the wife that her consent was obtained through the fraud of the husband who had lied that he was a

businessman, he had a house and that he was an educated person and where she had discovered these lies after legal marriage. Below is an extract from this case where Wati J discussed the various caselaw on the meaning of “fraud” in this context:

11. What constitutes fraud is defined by the various cases.
12. Sir William Scott said in Sullivan v. Sullivan (falsely called Oldacre) [1818] EngR 533; (1818) 2 Hag. Con. 238 at 248; [1818] EngR 533; 161 E.R. 728 at 731-732:-

" I say the strongest case you could establish of the most deliberate plot leading to a marriage the most unseemly in all disproportions of rank, of fortune, of habits of life, and even of age itself, would not enable this court to release [a suitor] from chains which, though forged by others, he had riveted on himself. If he is capable of consent, and has consented, the law does not ask how the consent has been induced. His own consent, however procured, is his own act."
13. Sir Francis leune P in the case of Moss V. Moss (orse. Archer) 118971 P. 263 said:-

"I believe in every case where fraud has been held to be the ground for declaring a marriage null, it has been such fraud as has procured the form without the substance of agreement, and in which the marriage has been annulled, not because of the presence of fraud, but because of the absence of consent."
14. Justice Frederico in In the Marriage of Deniz [1977] FamCA 45; (1977) 31 F. L.R. 114 held that the old cases on fraud and nullity were no longer relevant to Australian law, and he expressed the view that the act had introduced entirely new concepts which were no longer derived from ecclesiastical principles. He said that the legislature must have intended the term "fraud" to have a wider meaning than that recognised in the old cases, otherwise it would be a mere surplusage given the separate provisions on mistake as to the identity of the other party or as to the nature of the ceremony performed and mental incapacity to understand the nature and effect of the ceremony. Unfortunately Justice Frederico did not offer any satisfactory explanation of what this term fraud meant save to say that **"the fraud relied on must be one which goes to the root of the marriage contract."**
15. The facts in In the Marriage of Deniz involved a young girl from Lebanese family in Australia who was induced by a Turkish visitor to Australia to marry him, ostensibly out of love though in fact simply to enable him to gain permission to reside permanently in Australia. The man left the girl soon after the marriage ceremony, to her utter distress, which resulted in her having a nervous breakdown and attempting suicide. The judge in this case had no hesitation in holding the marriage to be void on the ground of fraud in that the girl's consent to the marriage had been induced by a trick and apparently also because **the conduct of the man amounted to a total rejection of the institution of marriage and what it stands for, with the result that there was a total failure of consideration.**
16. The proposition that fraud can cover fraudulent misrepresentation was expressly rejected by Justice McCall in the subsequent case of In the Marriage of Otway [1987] F.L.C. 91-807. Justice McCall expressed the view that the term fraud should be given its established meaning as indicated by the older cases. On the object of the nullity provisions of the Marriage Act, he said:

"In my view the provisions of the Marriage Act were doing little more than putting in statutory form the law as it was then understood, and did not intend to liberalize or expand the meaning of 'fraud'. At best the separation of fraud from mistake and the qualifications attached to mistake in the subparagraph only clarified the fact that an innocent as well as fraudulent mistake could result in the relevant lack of consent to the marriage."

17. Subsequent cases at first instance have left no doubt that the interpretation of 'fraud' in In the Marriage of Otway is to be preferred to that in In the Marriage of Deniz (supra). Some of them are In the Marriage of Soukmani (1989) 96 F. L. R. 388; In the Marriage of Osman and Mourrali (1989) 96 F. L. R. 362; Naj jarin v. Houlayce (1991) 104 F. L. R. 403; and In the Marriage of Hosking [1994] FamCA 87; (1994) 121 F. L. R. 196.
18. Following the above cases set out in paragraph 9 and the case law review in paragraph 12 above, and based on the established facts in this case, I am satisfied that Mr. FM would not have consented to marry Ms. SFD had she told him the truth about her relationship with the other man.

ORDERS

19. Mr. FM's consent to the marriage is void on account of the fraud of Ms. SFD in not disclosing her pre-existing relationship. Accordingly, I declare their marriage annulled and accordingly, hereby grant an Order for Nullity.



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Anare Tuilevuka
JUDGE

06 May 2024