

In the name of Allah, the most Beneficent, the Most Merciful

The Federal Supreme Court
Family Affairs Circuit.
Supreme Court Decision No / 173/2016

Issued by the Supreme Court, Family Law Third Circuit headed by his Excellency Mr. Altyb Abdalgafoor Abdalwahab, as president and each of her Excellency Fadiyah Ahmed Abd Agadir and his Excellency Mustfa Hamd Abdalrahman, the Supreme Court Magistrates

(Presented: - Record of Appeal No 23 /c/ 2015 Omdurman Court of Appeal (Family affairs Circuit,) The record of suit No / 1266 /g/ 2012 - Omdurman North Court)

Applicant: - **Ali Ibrahim Ahmed and others**
Opponent: - **Abu Bakr Ali Abdallah**

Facts

This is an objection submitted to the Supreme Court by Advocate Malik Fath Alrahman Ateeg on behalf of the applicant, against Omdurman Court of Appeal decision No / 000/ 0000/ / 23 which ordered the cancellation of the first instance court decision, and instructed the court to follow instructions stated in the appeal memo.

The decision – the subject matter of the application – is issued on 8/4/2015 and the applicants has taken notice of the decision on 28/5/2015. The applicant filed this objection memo on the 14th /6/2015. Never the less the last day of the time limit to submit the application which was on an official holiday Sunday the 14th of June 2016 , was the last day for the objection application filling.

That means the application was filed within the time limit and hence it was formally be accepted. The reasons for the objection of the application is because the evidence evaluation and weight is exclusively within the power of the First Instance Court. The fact of approval has been firmly confirmed by the third applicant's brother, who is also the son of the opponent. The lawyers, based on the reasons in the memo, asked for the cancellation of the Court of Appeal decision and to uphold the Court of First Instance ruling.

The list of the case facts could be summarized to be: -

The opponent Abubaker Abdallah has filled the suit No /2166/G / 2012 before the court of Omdurman North, by his lawyer Amr Ahmed Haj Ali to terminate the marriage of the Third applicant Mayda Abubaker, who is his legal daughter. He further alleged that the marriage was concluded by the brides uncle, who is the first applicant Ali Ibrahim Ahmed to Ameen Hassan Albadeen the second applicant. The marriage was concluded by the said uncle without authorization by the father, who would have given him power to conclude the marriage. The parties have also hidden the place and date of the marriage from the father because the marriage took place without his consent.

The first applicant in his defense to the suit, admitted all the allegations of the plaintiff in the suit and added that the father (opponent) had prohibited the daughter's marriage. He rejected the second applicant and expelled his relatives. He further added that the son of the opponent was present at the execution of the marriage contract and has told his own father about the same marriage contract. Advocate Malik replied to the suit on behalf of the second and third applicants by admitting the whole statement of claim. He only denied the absence of the fathers knowledge (the opponent), relaying on the fact that the opponents son was present at the execution of the marriage contract. The son has informed his father, more over the advocate said; the opponent has verbally authorized the first applicant to execute the marriage. He also stated that the marriage was consummated and that the father's authority over the daughter should be waived, since the father intentionally stops sustaining and incurring the Daughter living expenses.

The Plaintiff advocate asked the court to recognize the fact that the applicants had admitted clearly that the marriage was concluded without the plaintiff authorization to the first applicant to conclude the marriage. The lawyer finally insisted on the fact that the opponent had no knowledge of the

marriage and strongly denied the father's intentional stopping of sustaining the daughter living expenses.

The first instance court decided to hear the case to clarify through evidence the issue of the authorization of the opponent to the first applicant to execute the marriage. Upon hearing the evidence of the applicants, the Court of First Instance passed its judgment on 11/2/2013 dismissing the suit in the presence of the parties. This ruling was opposed by the opponent there, by filing an appeal before the court of appeal (Omdurman). The appeal court passed its judgment No / 00000/ 260 / 2013 summarily dismissing the appeal.

The opponent, not satisfied with the said decision, levied an objection before the Supreme Court. The Supreme Court issued a decree under No 486 /2013 dated 5/8/2013 cancelling the Court of Appeal decision and referring the case back to the Court of First Instance to rule on the case as per the Supreme Court memo direction. The court was ordered to question the first applicant on the authorization granted to him by the guardian, and to check and verify the truth of this authorization. The court was also requested to verify the date of marriage consummation and the issue of father sustaining his daughters expenses, and then to rule whether that could waive the father's guardianship or not.

The records were referred to the Court of First Instance to act as per the Supreme Court instructions. At the hearing, the first defendant said that the plaintiff (the guardian) did not authorized him to execute the marriage contract. The second defendant stated that he had consummated the marriage on 29/9/2012. However, the first defendant alleged that he has concluded the marriage because the plaintiff had said to his daughter (third defendant) "go to your uncle, to conclude the marriage". He further added that he had conceived this statement from the daughter (the third defendant). The court of first instance asked the defendants to prove the authorization. To that end, the court had heard the first witness, who is the son of the plaintiff and the brother of the third defendant (the third applicant). The witness testified to the effect that, his father objected to the marriage and refused to execute the marriage contract and "said you may execute the marriage as you like, go to your uncle (the third defendant) to execute the marriage contract". He also said, the father (the opponent) refused to allow the daughter to reside with him or to show any signs of happiness in the marriage at his home. He stated more over that his father did not incur any expenses regarding the daughter living since 2004.

The second witness testified that the plaintiff refused to execute the marriage contract at his house, where as the third witness expressed that the plaintiff said to him, "You can do any and everything but away from my home".

The Court of First Instance resolved for the second time to dismiss the case on 9/12 /2014. This decision was not accepted by the father (the opponent), which is why he raised an appeal before Omdurman Appeal Court which passed its decision (the subject matte) of this application, even though it is not accepted by the applicants who filled this objection to this Court.

However, upon examining all the records, papers and decisions I would say that the instructions stated in the supreme Court decision No, 482 /2013 is not adequately followed. These instruction are summarized in two points; the first one relates to the authorization of the guardian to the first applicant - who is the uncle of the daughter (the bride) - to execute her marriage where as the second point relates to the lack of the father sustaining his daughters living expenses ,which when proved, could waive the guardian ship resulting in denying the father the right to terminate the marriage contract according to section 36 of the family law Act 1991 .

The evidence is not enough, not in accordance with required quorum and is based on the statement of the first witness only (the son of the opponent and the brother of the third applicant) whereas the other witnesses did not testify to the fact in issue. More over the court of First Instance did not conduct a full investigation with the witness about the statement of the first applicant that he was authorized by the father (the guardian) to execute the marriage contract outside the father house.

It's crucial to answer the question of whether the contract was executed before the father objection or after that. In case of after the contract would be valid and in case of the after the guardian in such a case would be considered as having revoked his authorization. It's necessary to further investigate

whether the applicant has more evidence to prove this point or not. In case of failure to obtain the witness, the court must give the defendants the choice to ask for the plaintiff oath, applying the Sharia well known rule (evidence shall be submitted by those who claim and the oath shall be directed to those who deny the fact in case of lack of evidence.

Also with regard to the second point, pertaining to the opponents lack of sustaining the living expenses of his daughter raised by the defense lawyer, the evidence has come short of proving this point, as the court has to ask the applicants whether they have further witnesses or if they shall they direct the oath to the opponent according to Shariah rule of evidence.

The third point expressed in the Supreme Court judgment is the one regarding the consummation of marriage by the second and third applicant. The second applicant has stated that the consummation of marriage took place on 29/ 9/2012. This statement was confirmed by the testimony of the first witness (the son of the opponent and the brother of the third applicant) on page 16 of the case record. It proved by admission and enough evidence that the consummation took place on 29/6/2012 and that the opponent filed the case on 29/9/2012 (before the expiration of one year from the date of consummation). Consequently the opponent request to terminate the marriage did not lapse, as the case is filled on time according to section 32 sub section 4 of the family law. It is worth noting that the information disclosed in the court of appeal decision, that the third applicant gave birth to a female child on 23/11/2013 as a result of her marriage to second applicant .The applicant did not object to the birth certificate (defense document). In my opinion, this would not have any effect on the matter and could not lead to denying the opponent right to claim termination of the marriage for the simple reason that the marriage was consummated on 29/9/2012 while the child birth happened after that date. His highness Ahmed Abd Almageed in his Book (The Family Law 1991) part one page 146 has elaborated on the fact of, the legislator clearly expressing that the right of the guardian to invalidate the marriage is not an everlasting right. That right would lapse in two cases; the first one is when the wife becomes pregnant and the second is when the wife gives birth. However, this lapse of time is always subject to the time of filing the guardian claim for invalidation before the expiration of one year from the date of marriage on 29/6/2012. It was certainly proved before us that the opponent has filed the case of invalidating the marriage before the lapse of one year from that date. Therefore, I concur to the Court of Appeal decision cancelling the First Instance Court decision, dismiss this objection summarily and refer the case papers to the Court of First Instance to follow the directive of this court and the Court of Appeal and pass the order if it sees fit and just.

Fadiyah Ahmed Abd Agadir

Supreme Court Magistrate

17/1/2016

Mustfa Hamd Abdalrahman

Supreme Court Magistrate

9/2/2016

Altyb Abdalgafoor Abdalwahab

Supreme Court Magistrate

20/3/2016

Final ordet

Summary dismissal of the objection application

Altyb Abdalgafoor Abdalwahab

Supreme Court Magistrate

Circuit President

20/3/2016