

**IN THE FAMILY DIVISION OF THE HIGH COURT  
SUVA  
ORIGINAL JURISDICTION**

**CASE NUMBER:** 10/SUV/0255

**BETWEEN:** MUSTAFA

**AND:** NAZREEN

**Appearances:** Mr. S. SHAH for the Applicants

**Date/Place of judgment:** Thursday, 13<sup>th</sup> July, 2010 at Suva

**Judgment of:** The Hon. Justice Anjala Wati

**Category:** All identifying information in this judgment have been anonymised or removed and pseudonyms have been used for all persons referred to. Any similarities to any persons is purely coincidental

Anonymised Case Citation: MUSTAFA V. NAZREEN- Fiji Family High Court Case Number:  
10/SUV/0255

## JUDGMENT OF THE COURT

*MARITAL STATUS PROCEEDINGS - APPLICATION FOR AN ORDER FOR NULLITY - application by parties jointly on the ground that the consent of the wife was obtained by fraud and that the wife was also mistaken as to the identity of the husband-evidence establishes both fraud and mistaken identity-application for nullity allowed-no order as to costs.*

Legislation

Family Law Act No. 15 of 2003.

#### Cases/Texts Referred To

*Sullivan v. Sullivan (falsely called Oldacre) (ISIS) 2 Hag. Con. 23S.*

*Moss v. Moss (orse. Archer) [1897] P. 263.*

*In the Marriage of Deniz (1977) 31 F. L.R. 114.*

*In the Marriage of Otway [1987] F.L.C. 91-807.*

*Allardyce (falsely called Gordon) v. Mitchell (falsely called Gordon) (1869) 6 WAV. & A'B. (M.)45.*

*Militante v. Ogniwonijii [1994] Fatn. Law. 17.*

*C. v. C. [1942] N.Z.L.R. 356.*

*In the Marriage of C. and D. (falsely called C.) (1979) 35 F.L.R. 340.*

*Dickey, A, "Family Law" 4<sup>h</sup> Edition (2002) Lawbook Co; Sydney.*

#### Case Background

1. On the 13<sup>th</sup> day of April, 2010, the husband and wife jointly filed an application for an order that their marriage which was solemnised at Nadroga, DR's Office in 2010 be nullified on the ground that the wife did not provide her real consent to the marriage as the same was obtained by fraud and that she was mistaken as to the hue identity of the man.
2. The application was heard on the 13<sup>th</sup> day of July, 2010 and an order for nullity was granted on the same day. The court was to provide the written reasons later.
3. The facts of the case necessitate a written ruling to be delivered in this matter. I now pronounce the written reasons for the order granted on the 13<sup>th</sup> day of July, 2010.

#### The Law

4. The second limb of section 32 (2) (d) (i) of the Family Law Act No. 18 of 2003 states that a marriage is void if the consent of either party to the marriage is not a real consent because it was obtained by fraud.
5. Section 32 (2) (d) (ii) states that a marriage is void if the consent thereto of either of the parties is not a real consent because a party is mistaken as to the identity of the other party to

the marriage.

6. Fraud is not legislatively defined. However the case authorities have attempted to give the definition of fraud.

7. Fraud has been defined to be as follows:-

(a) Fraud must be as to the nature or form of ceremony.

® "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."(Sir William Scott in an old case of Sullivan v. Sullivan (falsely called Oldacre) (1818) 2 Hag. Con. 238 at 248; 161 E.R. 728 at 731-732).

° "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."(Sir Francis Jeune P. in the case of Moss V. Moss (orse. Archer) [1897] P. 263 at 269).

(b) "The fraud relied on must be one which goes to the root of the marriage contract." (Justice Frederico in In the Marriage of Deniz (1977) 31 F. L.R. 114.)

(c) Fraud cannot cover fraudulent misrepresentation. It should be given its established meaning.

• "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." (Justice McCall in the case of In the Marriage of Otway 119871 F.L.C. 91-807).

8. Section 32 (2) (d) (ii) of the Family Law Act No. 18 of 2003 provides that a marriage is void if consent of either party to the marriage was not a real consent because one party was mistaken as to the identity of the other party. I am going to state the law in respect of this head because the evidence of the applicant was also directed towards this ground although he did not specifically mention this ground. There is little judicial guidance on the scope of this provision. However, it does appear that a distinction must be drawn between mistake as to the human identity of a person, and a mistake as to the name, status or other attribute of a party. The better view, based on the ordinary law of contract, seems to be that only the former type of mistake justifies a decree of nullity.

9. It is true that the early Australian case of Allardyce (falsely called Gordon) v. Mitchell (falsely called Gordon) (1869) 6 W.W. & A'B. (M.)45 (See also the curious modern case of Militante v. Ogunwomoju (19941 Fam. Law. 17) does not support the view just presented. In that case a former criminal called James Mitchell deceived a young woman into believing he was one James Gordon, a person whom she knew to exist and to come from a respectable family in Scotland. He subsequently married her, she believing him to be Gordon. In proceedings for nullity, the Chief Justice of Victoria, Sir William Stanwell, had no hesitation in making the decree. He said:-

"Here, it is not merely a mistake of name; it is actually a mistake of identity. The Petitioner contracts with James Gordon, thinks she married James Gordon, and would only have married James Gordon, whereas in truth, and in fact, the ceremony of marriage was performed between her and James Mitchell. There was no contract."

10. The Australian decision did not find favour in New Zealand in the subsequent case of C. v. C. (19421 N.Z.L.R. 356). There a widow was induced by one Samuel Coley into believing that he was Michael Miller, a well known Australian featherweight boxer, and that he had ample financial means and good prospects. On the basis of these representations, the woman married the imposter. Callan, J. Declined to follow Allardyce, describing it as "an oral unconsidered judgment of over 70 years ago". He

preferred to follow the English case of Sullivan v. Sullivan (falsely called Oldacre) (1818) 2. Hag. Con. 238; 161 E.R. 728 and Moss v. Moss (orse. Archer) [1897] P. 263, where it was held that fraudulent misrepresentations as to such matters as a person's rank, family, fortune, age or habits of life would not nullify a marriage so long as each party consented to marry the other person. In the New Zealand case, the judge found that as the petitioner truly consented to marry the human being to whom she was married, the marriage was valid notwithstanding the false representations.

11. The most recent of the few reported cases concerning mistaken identity and nullity is the Australian case of In the Marriage of C. and D. (falsely called C.) (1979) 35 F.L.R. 340. There Bell J. declared the marriage between a woman and a hermaphrodite (intersexual) to be void on the ground that at the time of the marriage the woman believed she was marrying a man and not a person in the biological state of the respondent. If this decision is good law, the test propounded by Callan J. in the New Zealand case must be modified. The question to be asked is now not simply: did the applicant for the decree of nullity truly consent to marry the human being who he or she did marry? Rather, it would appear to be: did the applicant truly consent to marry a person having the fundamental physical characteristics of a person whom he or she did marry?

### The Evidence

12. The husband did not appear in court. The wife appeared and gave evidence to the following effect:-

- Ⓜ The marriage was arranged by her cousin sister from Sigatoka. She was in Suva and the husband was in Sigatoka so she talked to the husband for one month on phone before getting married.
- o After 1 month he called her and said that he wanted to see her so she went to Sigatoka to see him. She had never seen him before.
- o She first went to her sisters' place. The husband came there. He came alone and there he decided to have a civil marriage registered following the next day which was a Monday. On Monday the parties got married.
- After the marriage he took her home and tried to consummate the marriage. They tried many times to

consummate the marriage and his many attempts failed. She realised he could not have sexual intercourse and then she asked him about his problems when he confessed that he was impotent and not able to consummate the marriage.

<sup>0</sup> She then enquired why he got married to her. He confessed that he just wanted a partner like that to be with him but he is impotent and cannot be successful in sexual intercourses.

- She was very hurt because the whole purpose of marriage was destroyed. She felt her future was spoilt and she was helpless. She thought she was marrying a man who had the potential and ability to consummate the marriage. A man is supposed to love his wife, make love, make a woman his wife and look after her. She married the husband with all that expectations. All her expectations and dreams were shattered.

© She would never have married him if she knew his true characteristics. Any woman for that matter will not marry an impotent man.

o She came back to Suva and was depressed. She was still in the process of working out her life and deciding what to do when the husband called and said that he wanted to get out of the marriage. She agreed and both then filed an application for nullity.

### The Determination

13. This marriage was an event which has caused depression to both parties to the marriage. It is a marriage where the husband knew from before the marriage that he could not consummate the marriage and that he was impotent. However he just wanted a woman partner, for reasons undisclosed. He decided to get married and he got married without disclosing to the wife his true characteristics. The wife got married and gave consent to marry a person who was capable of consummating the marriage. Although the husband did not tell her that he was capable of consummating the marriage, he failed to not tell her that he' was incapable of consummating the marriage. This material non-disclosure goes to the root of the contract marriage and affects the form of the marriage as in its true

sense the wife did not get married to a man in his true definition. It thus can be said that the wife's consent was obtained by fraud.

14. The wife was also mistaken as to the true identity of the husband. She thought that she was marrying a sexually capable man but the man was impotent and unable to consummate the marriage. That mistaken identity has affected her consent to marriage.
15. The application for nullity of marriage can be successful on both the grounds of fraud vitiating the consent and mistake as to true identity that vitiates the consent as well. On either ground, this marriage has to be nullified.

#### The Final Orders

16. The application for nullity of marriage is allowed.
17. The marriage solemnised between the parties at Nadroga DR's Office on the 18<sup>th</sup> day of June, 2010 is declared to have been absolutely null and void.
18. There shall be no order for costs.

ANJALA WATI  
JUDGE

25.01.2011