



REPUBLIC OF KENYA

IN THE HIGH COURT

AT MALINDI

MISCELLANEOUS CIVIL APPLICATION NO. 25 OF 2018

(IN THE MATTER OF PROPOSED PETITION BY MA FOR DISSOLUTION OF HER MARRIAGE WITH PHN)

AM.....PETITIONER

VERSUS

PH.....RESPONDENT

RULING

[ORIGINATING SUMMONS DATED 22ND OCTOBER, 2018]

1. In her Originating Summons dated 22nd October, 2018 AM prays for orders as follows:-

“1. That this Honourable court be pleased to grant the Applicant leave to file her Petition for divorce before maturity of time of three years as provided for in law.

2. That the said MA be at liberty to file a petition in the divorce registry at the HIGH COURT OF KENYA MALINDI for the dissolution of her marriage to the said PHN solemnized on 12th July 2017 notwithstanding that the period of three years has not lapsed since such celebration of marriage.

3. That subject to such Orders being made, the annexed draft petition be treated as the petition for divorce upon payment of the requisite fees.

4. That the petitioner be allowed to serve this application together with all attendant pleadings and proceedings through substituted service by effecting service thereof through any of the following modes: By affixing the application, pleadings and other documents incidental to this suit on the main door to the house of the respondent or by handing over the said documents to the caretaker of the respondent’s local residence within [Particulars Withheld] area, by effecting service thereof through the respondent’s known or new email address, through the known postal address of the respondent, through publication of the relevant notice in a newspaper of national circulation in Italy.

5. That pending hearing and determination of the petition for dissolution of marriage the Applicant be and is hereby mandated to make independent investment decisions which are not subject to the Matrimonial Property Act or other marriage related infusions and or connotations and or without inference from the respondent.”

2. The application is supported by the grounds on its face and a supporting affidavit sworn by the Applicant. The application is brought under Section 6(1) of the Matrimonial Causes Act, Cap. 152 and rule 2(1)(2) of the Matrimonial Causes Rules.

3. On 27th November, 2018 I indicated to counsel for the Applicant that this is a matter for a magistrate’s court but he nevertheless proceeded to argue the application before me.

4. The Matrimonial Causes Act, Cap. 152 was repealed by the Marriage Act, 2014 which came into force on 20th May, 2014. Reference to the Matrimonial Causes Act, Cap. 152 in the originating summons is therefore erroneous as that Act no longer exists.

5. Section 2 of the Interpretation and General Provisions Act, Cap. 2 define “rule” to include “rule of court, by-law and regulation.” Section 24 of the same Act provides for the effect of repeal of an Act on subsidiary legislation by stating that:

“Effect of repeal of Act on subsidiary legislation

24. Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.”

6. I am not aware that any rules or regulations have been made under the Marriage Act, 2014 and by virtue of Section 24 of Cap. 2, the Matrimonial Causes Rules made under the repealed Matrimonial Causes Act, are still applicable to matters arising under the Marriage Act, 2014. The rules should however be applied so long as they are in consonance with the Marriage Act being the repealing Act.

7. Section 2 of the Marriage Act, 2014 defines the term “**court**” to mean “**a resident magistrate’s court established under Section 3 of the Magistrates’ Court Act (cap 10).**” That is where jurisdiction lies in matters marriage. The Applicant’s remedy lies not with this court but with a magistrate’s court.

8. In the circumstances this matter is transferred to the Chief Magistrate’s Court at Malindi for hearing and determination.

Dated and Signed at Nairobi this 12th day of April, 2019

W. Korir,

Judge of the High Court

Dated, Countersigned and Delivered at Malindi this 27th day of June 2019

R. Nyakundi,

Judge of the High Court