REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION- MILIMANI COMMERCIAL COURTS

MISCELLANEOUS CASE NO. 50 OF 2016

BETWEEN

E M M H……..…..……..…..APPLICANT

AND

R H…….……..…..…….RESPONDENT

RULING

INTRODUCTION

The **Notice of Motion Application** dated **12th April 2016**, is the subject of this Ruling. E M M H (hereafter 'the Applicant') has filed the said Application and she seeks the following orders:

> ***1) An order of the Court recognizing in Kenya the Decree Absolute issued on the 7th of January 2016 absolutely terminating the marriage of the parties in accordance with the orders of the Family Court at Chelmsford in Matrimonial Cause No. […].***
>
> ***2) An order of the Court recognizing in Kenya the Decree Nisi terminating the parties' marriage issued on the 11th November 2015 in accordance with the orders of the family Court at Chelmsford in Matrimonial Cause No. […].***
>
> ***3) An order of the Court recognizing in Kenya the consent order of the Family Court at Chelmsford in Matrimonial Cause No. […] issued on 14th December 2015 pertaining to none liability of either party to the other of pension sharing, maintenance, secured periodical payments, lump sums and/or matrimonial property.***
>
> ***4) An order of the Court directing the Registrar of Christian Marriages to Register the Decree absolute dated 7th January, 2016 issued by the Family Court at Chelmsford United Kingdom in the Register of Christian Marriages.***
>
> ***5) That the costs of this Application be borne by the Applicant.***

THE APPLICANT'S CASE

In her Affidavit in support sworn on 12th April 2016, the Applicant deponed that she married R H (hereafter 'the Respondent') on 29th September 2007 at Safari Park in Nairobi and that they lived together as a couple both in the United Kingdom and Kenya till the year 2012 when they separated after irreconcilable differences.

It was her contention that subsequently on 30th January 2015, the Respondent, who was then in the United Kingdom, filed for divorce pursuant to the law in that country, under the provision of UK law that allows for divorce on the ground of irreconcilable differences for two years. That the Court of Chelmsford on 7th January 2016 confirmed as absolute the divorce orders of 11th November 2015.

The Applicant also brought to the attention of the Court the fact that they recorded a consent order dated 14th December 2015 pertaining to the non liability of either party to seek for maintenance, secured and periodical payments, lumps sums, pension sharing or matrimonial property.

For the foregoing reasons, the Applicant asserted that she is seeking the aforesaid orders pursuant to **Section 61 (1)** and **(2)** of the **Marriage Act** obligating the Registrar of Christian Marriage to register the marriage solemnized on 29th September 2007 between herself and the Respondent as duly dissolved in the United Kingdom and in Kenya.

On 1st September 2016, Learned Counsel Mr. Odawa, on behalf of the Applicant, informed this Court that the instant application was necessitated by the fact that the said orders could not be registered by Registrar of Marriages as it is a requirement that an advocate from the jurisdiction the Court Order was issued, swears an affidavit and it is presented to the Registrar. The Applicant has since relocated back to Kenya and it would be expensive and cause hardship to procure such an affidavit from a Solicitor or Barrister in UK.

THE RESPONSE

The Respondent has so far not taken part in the instant proceedings and furthermore, no evidence has been placed before this Court to show that he was served.

DETERMINATION

The present Application thus remains an *ex parte* Application and the key issue for determination is whether the orders sought therein ought to be granted. In that regard, the Applicant primarily seeks to have the divorce decree issued by the **Court at Chelmsford in Matrimonial Cause No. […]** recognized and enforced in Kenya. She has specifically sought for an order to compel the Registrar of Marriages have the said decree registered. What then is the law on enforcement and recognition of foreign Judgments and decrees in Kenya?

The **Foreign Judgments (Reciprocal Enforcement) Act, Cap 43,** as revised in 2012, makes provisions for the enforcement and recognition of foreign judgments.

The object of the Act is:

> ***to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith*.**
>
> **Section 18** of the said **Act** provides that:
>
> ***(1) Subject to this section, a judgment of a designated court shall be recognized in any court in Kenya as conclusive between the parties thereto, as to the matter adjudicated upon, in all proceedings (no matter by which of the parties in the designated court they are instituted) on the same cause of action and maybe relied upon by way of defence or counterclaim in those***

proceedings.

(2) …

On the other hand, as regards Marriages and Divorces, the **Marriage Act**, **2014** gives parties the discretionary right to have decrees of annulment of dissolution registered. In that regard **Section 61** provides thus:

(1) Where a marriage celebrated in Kenya is annulled or dissolved by a decree of a foreign Court, any party to the annulled or dissolved marriage may apply to the Registrar to register the decree.

(2) Where the Registrar is satisfied that a decree under this Section should be recognized in Kenya as if the decree was made by a Kenyan Court, the Registrar shall register the decree in a register maintained for the purpose.

(3) An Application under this Section shall include-

(a) A copy of the decree and where the decree is not in an official language, a certified translation of the decree in an official language and in the prescribed form; and

(b) A declaration under the law of the country in which the decree was obtained made to a legal practitioner authorized to witness such a declaration that states the decree is effective in that country as if the marriage had been celebrated in that country.

It is apparent that there are two statutes governing the recognition and enforcement of foreign judgments and decrees in Kenya. However, the Court notes that the Marriage Act, was enacted later on in 2014 and it is the special law governing issues pertaining to marriages and divorce. This Court shall invoke the doctrine of implied repeal in interpreting the provisions of the two statutes and where any conflicts arise as in the instant case. New laws are given preference in case of an inconsistency with the older laws and the Court in ***STREET ESTATES LIMITED VS. MINISTER OF HEALTH*** ***[1934] 1 KB*** the Court observed:

"But it can also do it another way, namely, by enacting a provision clearly inconsistent with the previous Act; without going through them, four pages of MAXWELL ON THE INTERPRETATION OF STATUTES are devoted to cases in which without using the word "repeal" Parliament has repealed a previous provision by enacting a provision inconsistent with it. In those circumstances it seems to me impossible to say that these words...have no effect." **(Emphasis added)**

The position was also acknowledged by the Ugandan Court of Appeal in ***DAVID SEJJAKA NALIMA VS. REBECCA MUSOKE CIVIL APPEAL NO. 12 OF 1985*** where it was held that:

"According to principles of construction if the provisions of a later Act are so inconsistent with or repugnant to those of an earlier Act that the two cannot stand together, the earlier Act stands impliedly repealed by the latter Act. It is immaterial whether both Acts are Penal Acts or both refer to Civil Rights. The former must be taken to be repealed by implication. Another branch of the proposition is that if the provisions are not wholly inconsistent in their application to particular cases, then to that extent the provisions of the former Act are excepted or their operation is excluded with respect to cases falling within the provisions of the Act." **(Emphasis added)**

The foregoing position was re-affirmed by our Court in ***NZIOKA AND 2 OTHERS VS TIOMIN KENYA LTD, MOMBASA CIVIL CASE NO. 97 OF 2001*** where it was noted that:

"...The EMC Act being a more recent Act must be construed as repealing the old Act where there

is inconsistency....where the provision of one statute is so inconsistent with the provisions of a similar but later one, which does not expressly repeal the earlier Act, the courts admit an implied repeal."

Hon. Mumbi J. in *MARTIN WANDERI AND 19 OTHERS VS ENGINEERS REGISTRATION BOARD OF KENYA and 5 OTHERS, Petition 248 of 2012*, opined thus;

"…Suffice to say that the effect of the enactment of the Universities Act after the Engineers Act, with the same powers vested in the Commission for Universities Education to accredit courses for universities, takes away the powers vested in the Board by section 7(1) (l). This is because of the canons of interpretation with regard to the timing of legislation, and the doctrine of implied repeal, which is to the effect that where provisions of one Act of Parliament are inconsistent or repugnant to the provisions of an earlier Act, the later Act abrogates the inconsistency in the earlier one…."

The overall effect is that where Parliament enacts a later statute on a matter that had previously been enacted on and without explicitly repealing the earlier enactment, the implication is that if there is any inconsistency between the earlier and the later enactment, the later enactment prevails. In the circumstances of this case therefore, the provisions of the Marriage Act in terms of the enforcement and recognition of the decree take precedence.

In that regard **Section 67** of the **Marriage Act** makes provisions for the recognition of decrees issued by foreign Courts. The **Section** states that:

Where a foreign court has granted a decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, that decree shall be recognized in Kenya if—

(a) either party is domiciled in the country where that court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings;

(b) being a decree of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them.

The Act thus provides for recognition and enforcement and the procedure for registration of decrees as outlined under **Section 61**, as reproduced elsewhere above. In summary, the requirement for registration is that:

(1) An Application for Registration is made to the Registrar;

(2) The Application is to contain a copy of the decree sought to be registered and a declaration under the law of the country in which the decree was obtained made to a legal practitioner authorized to witness such a declaration that states the decree is effective in that country as if the marriage had been celebrated in that country.

Can this Court then direct or compel the Registrar of Marriages to register the decree of divorce as urged by the Applicant? No. I hold so because; the law bestows upon the Applicant the duty to procure a declaration by a legal practitioner authorized to witness such a declaration that states the decree is effective in that country as if the marriage had been celebrated in that country. The failure to procure such a declaration by an Applicant, in this Court's view, cannot form the basis for seeking declaration to compel the Registrar of Marriages to register such decree. **Section 61 (3)** of the **Marriage Act** is couched in mandatory terms and hence an Applicant must comply with the same before moving to Court to have the Registrar compelled to register any foreign decrees.

In the instant case however, Learned Counsel, on behalf of the Applicant informed the Court that the Applicant made the Application to the Registrar but the Registrar declined to have the same registered on

the basis that no declaration had been issued by a Legal Practitioner as required.

The Court notes that the rationale behind the provision of **Section 61 (3) (b)** of the Marriage Act is aimed at verifying the authenticity and legality of such decrees. However, such a requirement, especially in the context of the Applicant's case has occasioned great inconvenience in that it places a requirement on the Applicant to go back to the U.K in order to obtain a legal practitioner's declaration verifying the decree. Whereas under the **Foreign Judgments (Reciprocal Enforcement) Act**, such verification could be procured through the country's Embassy or High Commission.

The Court further observes that the **Marriage Act, 2014** prescribes that the Registrar ought to register the decree as a precondition to registration. This shows that a parallel procedure of enforcement of foreign judgments and decrees exist. Therefore, there is need to harmonize the two legislative enactments, **Foreign Judgments (Reciprocal Enforcement) Act** and **Marriage Act 2014** for certainty in process and procedures of recognizing foreign divorce decrees. The issue shall be channeled through the Office of the Attorney General and the Law Reform Commission.

In the meantime and while taking into consideration the interests of justice, this Court proposes that for purposes of the right to access justice guaranteed under **Article 48** of the **Constitution**, and right to fair hearing of a dispute provided by **Article 50 (1)** of the **Constitution** without losing sight of **Article 27 (1)** of the **Constitution** which stipulates that:

> ***Every person is equal before the law and has the right to equal protection and equal benefit of the law.***

This Court shall propose interim measures to facilitate the recognition of the divorce decree in line with the Overriding objective under **Sections 1A** and **3A** of the **Civil Procedure Act** that access to justice be expedient in order to have matters disposed.

A formal Application by the Applicant shall be placed before the Registrar of Marriages for consideration and where not possible, the Registrar shall give written reasons as per the stipulations of **Article 47** of the **Constitution**, which the party shall be at liberty to challenge in Court.

The Registrar may consider in the meantime to verify the legality and propriety of the decree in the present case, in the manner that this Court verifies foreign adoption orders, that is, by the Applicants placing them with the relevant Embassies and or High Commissions where these orders emanate from for verification and translation. If the present decree is placed with the British High Commission, upon verification the Legal practitioner therein may swear an affidavit confirming the authenticity of the decree. The Registrar of Marriages may consider the same on its merits in compliance of **Section 61 of the Marriage Act 2014.**

This Court is persuaded to propose these interim measure as the UK where the present decree was issued from is a designated country whose Judgments are enforceable in Kenya. This position was affirmed by the Court of Appeal in ***JAYESH HASMUKH SHAH VS NAVIN HARIA & ANOTHER, CIVIL APPEAL NO. 147 OF 2009*** where it was noted that:

> ***"[1] Enforcement of foreign judgments in Kenya is the subject of The Foreign Judgments (Reciprocal Enforcement) Act (Cap 43 of the Laws of Kenya). The objective of the Act is to make provision for enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya. Under the Act, a judgment creditor in whose favour a foreign judgment from a "designated country" has been made may apply and register the foreign judgment at the High Court of Kenya and such foreign judgment shall, for purposes of execution, be of the same force and effect as a judgment of the High Court of Kenya entered at the date of registration. Subject to exceptions in Section 18 of the Act, a judgment of a "designated court" shall be recognized in any court in Kenya as conclusive between the parties thereto, as to the matter adjudicated upon, in all proceedings (no matter by which of the parties in the designated court they are instituted) on the same cause of action and may be relied upon***

***by way of defense or counterclaim in those proceedings. The designated countries under the Kenyan Foreign Judgments (Reciprocal Enforcement) Act are: Australia, Malawi, Seychelles, Tanzania, Uganda, Zambia, the United Kingdom and Republic of Rwanda*."**

DISPOSITION

Based on the above findings, and in the interest of justice,

1. The Applicant may seek from the UK High Commission; verification and authenticity of the divorce decree and consent from Court at Chelmsford in Matrimonial Cause No. […]

2. The UK High Commission may on reasonable conditions provide an affidavit sworn by legal officer and or practitioner authorized to sign such affidavit on verification and or authenticity of the decree and consent.

3. The Applicant to place a formal request of recognition of the decree and consent with the relevant affidavit from the UK High Commission to the Registrar of Marriages for consideration in compliance with Section 61 of Marriage Act, 2014.

4. The Deputy Registrar to serve a copy of the Ruling to Office of Attorney General - Legislative Drafting Department and Kenya Law Reform Commission on harmonization of the 2 laws in recognition of foreign decrees in matrimonial-divorce matters; Foreign Judgments (Reciprocal Enforcement) Act, 2012 and Marriage Act 2014.

DELIVERED, SIGNED AND DATED IN OPEN COURT ON THIS 16th DAY OF SEPTEMBER, 2016

M.W.MUIGAI

JUDGE

In the presence of;

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