



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO.176 OF 2014

E R.....PETITIONER

VERSUS

E P..... RESPONDENT

RULING

1. The petitioner E R got married to the respondent E P on 3rd September 1997 in the municipality of Victoria Province of Rusuga under the Italian Law. After the said marriage the couple cohabited as husband and wife in Italy 1997-2012 and in Kenya from July 2005 to-date. There is no child of the marriage but the petitioner has O M born on 26th February 1993. The petitioner is a teacher by profession currently working as a stock manager while the respondent is a Radio Video transmission Engineer by profession. Both parties are resident and domiciled in Kenya.
2. The respondent upon entering appearance filed a preliminary objection stating that there is already a divorce proceedings in the Italian Courts at Ragusa and that this court lacks jurisdiction to hear this matter as the matter was conducted by foreigners in Italy and the same has not been registered in Kenya as required under the Marriage Act.
3. When the matter came up for hearing Miss. Okonjo for the respondent argued that the said marriage the petitioner seeks to dissolve was celebrated in Italy and both parties are Italians, adding that the said marriage is registered in Italy hence it falls under the jurisdiction of Italian Courts who are better placed to handle the matter. That the nature of the proceedings are the same. That the marriage was registered in Italy and that the said marriage has not been registered in Kenya as provided in the Marriage Act.
4. Mrs. Akedi in opposition to the said preliminary objection referred the court to Section 6 of the Civil Procedure Act. She relied on the case of *M.M vs N.M DC No. 88 of 2012*, where it was held that the preliminary objection raised had no effect. That the proceedings going on in the court don't bar the court in other country to proceed. She also relied on the case of *Sajjadhusan Hassanali Gulamhussein Khaki and 2 others vs. Anil Bharmal Shah and another Civil Case No. 409 of 2008* where Justice Kimaru whilst considering section 6 of the Civil Procedure Act held that, it was clear that the pendency of a suit in a foreign court involving the same subject matter and the same parties cannot constitute a bar to the court hearing and determining the matter in dispute between the parties. Counsel argued the respondent filed a case in Italy after the petitioner filed a case in Kenya adding that the respondent filing the said cause in Italy was aimed to ensuring that she does not pursue alimony and maintenance from the respondent. She added that the petitioner is not able to get legal representation in Italy as a Russian and

she cannot afford the same and that she is domiciled in Kenya and that this court is best placed to determine the divorce cause. On the 2nd limb of the objection it was argued that registration of a marriage was not a prerequisite for a court to have jurisdiction and it is the place where parties reside that invokes jurisdiction. The petitioner is resident and domiciled in Kenya adding that section 38 and 40 refer to civil marriage as foreign countries. That the marriage was done in accordance to the Laws of Kenya and therefore a valid marriage under section 40. That the said marriage having been contracted in Italy is a civil marriage in this jurisdiction and therefore a valid marriage and this court has jurisdiction to dissolve the same. The petitioner relied on Article 159(2) (a) that states that justice shall be provided to all without delay. The petitioner seeks that the preliminary objection be dismissed. She argued that the Divorce Cause was filed in 2014 hence falls within the marriage Act 2014.

5. Miss Okonjo in response argued that on the issue of alimony it had been agreed that the petitioner will not seek alimony as there is no issue of the marriage. That there is no issue of validity of marriage but that the applicable law in dissolving the said marriage is the Italian Law.

6. I have considered the submissions and the relevant law. There is no dispute that the parties in this divorce cause got married in Italy, in the Municipality of Victoria. Their marriage therefore is a civil marriage. The petition was filed in August 2014 and therefore the applicable law is the Marriage Act. The **Explanation** under **Section 6** of the Civil Procedure Act, provides that **“The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court”**.

7. The law as set out is clear, that the pendency of a suit in a foreign court shall not bar this court from proceeding with a suit filed before this court even if there are on the same issues. It is clear from the correspondence attached that the respondent chose to go and file the suit in Italy after the petitioner filed this one. This limb of the objection therefore fails.

8. On the issue of jurisdiction, I note the marriage between parties is civil marriage. Parliament whilst enacting the law to cover such marriages has at sections 38 and 40 of the Marriage Act provided for what makes such marriage valid in Kenya. The respondent acknowledges that the marriage is valid but argues further that since it was not registered here in Kenya and that therefore the court lacks jurisdiction. I have read the said provisions and there is nothing in them that makes registration of a foreign marriage compulsory for parties who are foreigners who celebrated their marriage in foreign country. In the case of ***M N M –v- P N M [2016] eKLR***, Justice Musyoka held that, *“In personal matters, such as marriage, domicile is critical. Domicile is all about residency. The law of domicile plays an important role in the determination of whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of marriage where the parties have been domiciled within the jurisdiction of that court for the period allowed by the relevant law...the jurisdiction of a family court to entertain a divorce cause is therefore guided by the law of domicile.* The petitioner is domiciled in Kenya. The parties in question are said to have cohabited as husband and wife in Italy between 1997-2012 and in Kenya from July 2005 to the date of filing the divorce petition. Though the respondent is not currently based in Kenya he travels to Kenya now and then for business whilst the petitioner is still domiciled in Kenya. In my view the preliminary objection raised has no merit it's dismissed with costs. It is so ordered.

Dated, signed and delivered this 9th Day of December 2016.

R. E. OUGO

JUDGE

In the presence of:

..... **For the Petitioner**

.....**For the Respondent**

Ms. Charity.....Court Clerk