



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 147 OF 2010**

**A G M .....PETITIONER**

**VERSUS**

**B J M .....1<sup>ST</sup> RESPONDENT**

**I S.....2<sup>ND</sup> RESPONDENT**

**R U L I N G**

1. Before this Court for determination is a Preliminary Objection raised to the application dated 29<sup>th</sup> August, 2014. The Preliminary Objection is dated 6<sup>th</sup> October, 2014.
2. The ground upon which the P.O. has been raised is that this Honourable Court is *functus officio* and therefore has no jurisdiction to entertain this application.
3. The parties filed in their written submissions. The Petitioner's written submissions were filed on 4<sup>th</sup> November, 2014, while those of the 1<sup>st</sup> Respondent filed on 18<sup>th</sup> November, 2014.
4. It is the Petitioner's case that the 1<sup>st</sup> Respondent by her application dated 29<sup>th</sup> August, 2014, seeks to reopen a matter that has since been heard on its merits and finalized. He contends that had the 1<sup>st</sup> Respondent been dissatisfied with the outcome of the suit the right procedure would have been to file an appeal in a superior court. It is submitted that no appeal was filed and the prescribed period has since then expired.
5. The Petitioner Cited the case of **Telcom Kenya Limited v. John Ochanda (2014) eKLR** where the Court quoted with approval **Ngugi v Kinyanjui, (1989) KLR 146**, which held that the law will not allow any dispute between the same parties to be reopened while the judgment still remains on record. It is the Petitioner's contention that the opening of the suit via affidavits sought to defeat the law and justice.
6. It was submitted on behalf of the Petitioner that this Court has no jurisdiction to hear this matter since the same was heard to its full conclusion, and both parties were given their day in court to give evidence with the 1<sup>st</sup> Respondent stating through her counsel that she does not intend to testify or call any witnesses. It is contended that the 1<sup>st</sup> Respondent therefore cannot precipitate a situation and then seek to benefit from the same as this will amount to litigating at her own convenience.
7. The Petitioner contends that the doctrine of *functus officio* seeks to bar a merit based decisional re-engagement with the case once final judgment has been entered and a decree, in this case decree absolute thereon issued. He cited the decision in *Jersey Evening Post Ltd v. Ai Thani (2002) JLR 542* at

550 thus:

**“A Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available”.**

8. The Petitioner has urged the court to dismiss the application arguing that this matter reached its finality and reopening the case shall not be to serve the ends of justice.

9. On behalf of the 1<sup>st</sup> Respondent, it was submitted that Section 77(1) of the Marriage Act provides that a Court may order a person to pay maintenance to a spouse or former spouse if the person has refused or neglected to provide for the spouse or former spouse.

10. It was submitted that the said provisions being statutory in nature override and supersede all the authorities which the Petitioner has attached to support his Preliminary Objection.

11. Further, the 1<sup>st</sup> Respondent contends that the Section is meant to cater for spouses that is when the marriage subsists, and to the former spouses upon divorce and thus the application can be made as set out in Section 77(d) either when granting a decree or after granting a decree of separation or divorce.

12. It is therefore, the Respondent’s case that in the current case the Decree of divorce having been granted there is no legal bar for the court considering and making a decision on the application dated 29<sup>th</sup> August, 2014. The Respondent further submits that the Act provides that any such maintenance, which may be granted at any time, can only lapse as provided in Section 78 and 79 which mainly provide that maintenance may only lapse upon death or re-marriage. She argues that in the current matter none has taken place.

13. She urges the court to find that the Preliminary Objection is devoid of merit and is an abuse of the court process and ought to be dismissed with costs.

14. Having considered the application, the arguments for and against, i

15. t take the view that the main issue for consideration is whether the Preliminary Objection is merited.

It is trite law that preliminary objection should be based on pure points of law. **Law JA** in the case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd (1969) EA 696** rendered himself thus:

**“So far as I’m aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”**

16. Similarly **Sir Charles Newbold** in the above mentioned case of **Mukisa Biscuit** had this to say:

**“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought**

**is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. This improper practice should stop.”**

17. The application to which this Preliminary Objection is opposed is the one dated 29<sup>th</sup> August, 2014 and it seeks maintenance orders. A perusal of the records reveals that a certificate of making decree nisi absolute was issued at Nairobi on 31<sup>st</sup> March, 2014. Does the dissolution of the said marriage render this Court *functus officio* and therefore has no jurisdiction to entertain the said application? I do not think so.

18. This Court is in agreement with the 1<sup>st</sup> Respondent with regard to the position of the law and that there is no legal bar for the court considering and making a decision on the application dated 29<sup>th</sup> August, 2014. Indeed the Marriage Act, 2014 provides for the grounds for granting maintenance orders. It states as follows at Section 77(1):

**“The court may order a person to pay maintenance to a spouse or a former spouse —**

**(a) if the person has refused or neglected to provide for the spouse or former spouse as required by this Act;**

**(b) if the person has deserted the other spouse or former spouse, for as long as the desertion continues;**

**(c) during the course of any matrimonial proceedings;**

**(d) when granting or after granting a decree of separation or divorce; or**

**(e) if, after making a decree of presumption of death,**

**the spouse or former is found to be alive”.**

19. Clearly, the orders that the said application seeks are those that touch on maintenance and this court is enjoined by the above mentioned provisions of the law to deal with them.

This Court therefore is not convinced that the Petitioner has raised a pure point of law that would dispose of the said application at this preliminary stage.

It therefore follows that the said Preliminary Objection is not merited and accordingly fails.

The upshot of the above is that the same is hereby dismissed.

**SIGNED DATED and DELIVERED in open court this 21<sup>st</sup> day of May 2015.**

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**L. A. ACHODE**

**JUDGE**

**In the presence of .....Advocate for the Petitioner**

**In the presence of .....Advocate for the Respondent**