



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
DIVORCE CAUSE NO. 200 OF 2014

K C M MPETITIONER

VERSUS

M A S O.....RESPONDENT

PRELIMINARY OBJECTION

Counsel for the Respondent raised the Preliminary Objection on 7th July, 2015 to the effect that this Court lacks jurisdiction vide **Section 2 of the Marriage Act of 2014** which prescribes the “Court” as the Resident Magistrate’s Court that should hear divorce proceedings. The Respondent relied on the case of Supreme Court of Philippines; **HON. RAMON D. BAGASTING & OTHERS Vs. HON. PEPNO A. RAMINEZ & OTHERS**

On a question of which Law was applicable to a tax ordinance enacted by the Municipal Board of Manila on the process of publishing the ordinance. The Revised Charter and the Local Tax Code presented different methods of interpretation in the manner of publishing the ordinance. It was held that the specific law took precedence over the universal law.

The Respondent through Counsel argued that similarly in the instant case the **Marriage Act 2014** in relation to divorce proceedings ought to take precedence over the original jurisdiction in the High Court as stipulated in **Article 165 (3) of the Constitution 2010**.

The Petitioner through Counsel informed the Court that the petition was filed properly in the High Court for the followings reasons.

- a. The High Court has original jurisdiction under **Section 165(3) of the Constitution of Kenya 2010**. **Section 165(5)** excludes what the High Court cannot hear and the divorce proceedings are not included.
- b. In terms of civil proceedings the present matter is processed in light of **Section 1A & 1B of Civil Procedure Act** that envisages just and expeditious disposal of dispute resolution.
- c. **Article 159(2) (d) of the Constitution** which deals with the issue of determination of disputes on the basis of substance as opposed to technicalities.
- d. The **Marriage Act 2014** defines “Court” as Resident Magistrates Court and the **Civil Procedure Act** defines “Court” as High Court or Subordinate Court in the exercise of its civil jurisdiction and both legislation now take precedence.
- e. The petition outlined case law to demonstrate that there are varied positions with regard to interpretation and applicable law in matter of jurisdiction. Due to lack of uniformity the presiding Court may invoke any of the more persuasive interpretations.

- f. The petitioner relied on the case of **G G W Vs. R M W W D.C NO 72 OF 2002** where Hon. Kubo J. (as he then was) stated with regard to the hearing and determination of marriages under the (repealed) African Christian Marriage and Divorce Act (Cap 5) then filed in the subordinate Court was discriminatory as all other related matters were heard in the High Court.

The learned Judge stated as follows;

“where a subordinate Court is in competent to deal with cases reserved for the High Court, the High Court does in my respectful view by virtue of its unlimited jurisdiction conferred by the Constitution have jurisdiction to hear cases triable in subordinate Courts; if there is a good cause for the High Court to do so and if it can find time for each cases.”

The Judge went on to observe with regard to **Section 11 of the Civil Procedure Act** and **Section 3 of the African Christian Marriage Act 2010**, the import would be;

the provisions are intended

“to stay and cater for orderly management of the cases which come before the Courts so that they are filtered and dealt with at different levels of the judicial system, generally as a matter of division of labour for good and orderly case management”.

This Court finds that in the instant case both the Petitioner and Respondent through their respective Counsel have made persuasive submissions. The cases are not binding to this Court as the Philippines case is from a different jurisdiction, the local case is a decision of a Court of similar jurisdiction. However the Court has taken the submissions under advisement.

The Court has considered the petition filed on 8th October, 2014. The same was filed after the **Marriage Act 2014** which came into force in May, 2014. Therefore at the outset, the matter ought by virtue of **Section 2 of the Act** to be heard by the Magistrate’s Court.

However, the content of the petition contains not only issues regarding the divorce but those that relate to division of matrimonial property which falls within the purview of the High Court. Therefore since the petition raises issues regarding separation and divorce, maintenance and alimony, ownership and distribution of the matrimonial home and division of matrimonial property, these are compelling grounds that merit the instant case to be heard and determined in the High Court.

Instead of seeking the petition to segregate the issues for determination and have each filed in a separate Court, in the interests of justice, convenience of the parties, saving time and legal costs, it is appropriate the cause be ventilated and canvassed in the High Court.

Secondly as deponed in the pleadings there are two (2) other cases related to the instant case filed in the High Court Environment and Land Division for determination. It is only fair the parties’ matters are heard in one forum.

Thirdly, none of the parties will be prejudiced their rights remain safeguarded as the High Court decisions are subject to review and appeal in the Court of Appeal.

The position is reaffirmed by the following legal provisions;

- a. **Section 1A and 1B of Civil Procedure Act**
- b. **Article 159(3) of the Constitution of Kenya 2010**
- c. **Article 165(3) and (5) of the Constitution of Kenya 2010**

FINAL ORDERS

The Court therefore orders that;

- a. The petition for divorce by the Petitioner filed on 8th October, 2014 to proceed for hearing and determination in the High Court and any of the Courts in the Family Division.
- b. The Respondent to file an Answer to Petition and/or cross petition within 30 days from today and serve the same to the Petitioner.
- c. The Respondent and Petitioner reserve the right to appeal the decision.
- d. The parties to obtain a hearing date for the hearing of the petition once pleadings are done on a date to be obtained in the Registry.
- e. Each of the party to bear its own costs.

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JULY 2015.

M. MUIGAI

JUDGE

In the presence of:

Ms. Wangui for the Applicant