



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CONSTITUTION & HUMAN RIGHTS DIVISION

PETITION NO 515 OF 2014

BISHOP MARK KUBAI KARIUKI.....1ST PETITIONER

EVANGELICAL ALLIANCE OF KENYA.....2ND PETITIONER

EAST AFRICA CENTER FOR LAW & JUSTICE.....3RD PETITIONER

VERSUS

THE HON ATTORNEY GENERAL.....1ST RESPONDENT

THE REGISTRAR OF MARRIAGES.....2ND RESPONDENT

UNITED COUNTIES SHEPHERD ASSOCIATION.....INTERESTED PARTY

JUDGMENT

Introduction

1. The petitioners have approached this Court to seek redress with respect to what they see as the violation of their constitutional rights by the provisions of the Marriage Act, No. 4 of 2014, which came into force on 20th May, 2014. The 1st petitioner, Bishop Mark Kubai Kariuki, describes himself as the chairman of the Evangelical Alliance of Kenya, an affiliate body of all the evangelical churches in Kenya. He states that he has brought this petition on his own behalf and on behalf of thousands of ministers of faith in Kenya.

2. The 2nd petitioner is an affiliate body that brings together all the evangelical churches in Kenya. It also brings this petition in a representative capacity, like the 1st petitioner, on behalf of the ministers of faith who are members of the Evangelical Alliance and Christians in Kenya. The 3rd petitioner is a non-governmental organization dealing with provision of legal aid and protection and promotion of human rights in Kenya. It is also stated to have brought this petition on behalf of the petitioners and ministers of faith in Kenya and in the public interest pursuant to the provisions of Article 22 (2) (c) of the Constitution.

3. The petition has been lodged against the office of the Attorney General (hereafter AG) of Kenya whose office is a creation of the Constitution under Article 156 and the Registrar of Marriages (the Registrar) whose office is established under the Marriage Act.

4. The United Counties Shepherds Association, which describes itself as an umbrella body for pastors, church leaders and ministers of faith in Kenya and in Nairobi in particular, was enjoined to this proceedings as an interested party.

Background

5. The facts giving rise to this petition are fairly straight forward. The AG issued a Gazette Notice No 6303 dated 12th September, 2014 requiring the petitioners and other ministers of faith to renew their licenses by the 1st of November 2014. They were also required to: file returns of all marriages celebrated to date from when they were licensed to celebrate marriages; get clearance from the Registrar of Societies that their churches had been duly registered and were regarded to be in good standing; return all unused and partly used marriage certificate books; and apply for new marriage certificate books to be used from the 1st of November, 2014.

6. They were also required to pay Kshs1,000/= to have their licenses renewed to be able to celebrate marriages; return the old marriage certificate books (containing 100 certificates which they had purchased at a cost of Kshs20,000/=) and get new marriage certificate books (containing 50 certificates) at a cost of Kshs25,000/=.

7. Aggrieved by these requirements, the petitioners have filed this petition alleging that the said charges and requirements are in violation of several of their constitutional rights.

The Case for the Petitioners

8. The petitioners' case is set out in their petition dated 22nd October 2014 and in the affidavit in support sworn by the 1st petitioner. They have also filed submissions in support of their case.

9. The petitioners argue that the deadline of 1st November, 2014 that was issued in Gazette Notice No 6303 dated 5th September, 2014 to meet all the requirements was unreasonable and contrary to Article 47 of the Constitution. They are also aggrieved by the requirement that all ministers of faith should pay Kshs1000/= in order to be registered, terming it discriminatory and contrary to Article 27 of the Constitution.

10. The petitioners argue that the requirement by the Registrar of Marriages for Kenyans to pay high amounts of money to have their marriages legalized is unreasonable and unconstitutional, and the requirement that the petitioners and other ministers of faith should be re-registered is illegal.

11. In their submissions, the petitioners contend that their rights under Article 27 of the Constitution are being violated in their being required to pay Kshs1,000/= to renew their licences while other officials who assist the Registrar to celebrate civil, Hindu, Islamic and customary marriages are not required to pay the said amount. They rely on the decision in **Musili Nyeki vs Kenya Wildlife Services [2005] eKLR** to submit that every marriage officer ought to be treated equally. It is also their contention that the 2nd respondent acted in a discriminatory manner by requiring Kenyans who practice the faith of the petitioner and other ministers of faith to get certificates of no impediment before celebrating their marriage while a similar requirement is not imposed on persons celebrating Hindu, Islamic and customary marriages.

12. The petitioners further contend that sections 32 (1) and (2) and 36 (1) and (2) of the Marriage Act do not require persons celebrating civil marriages to get certificates of no impediment, and there is no provision in the Marriage Act requiring Christians to get the said certificate. It is their contention that the 2nd respondent has chosen to ignore clear provisions of the Marriage Act and to levy illegal fees that had the effect of increasing the process of acquiring a marriage certificate from Kshs400/= to Kshs1,900. According to the petitioners, all persons who celebrate marriages in all forms are equal as provided under Article 45 of the Constitution and they should be treated equally.

13. The petitioners also allege violation of their right under Article 47 of the Constitution. They rely on

the decision in **Breen vs Amalgated Engineering Union [1971] All E.R** to submit that the respondents have a duty to act fairly and in a reasonable manner with regard to them and other ministers of faith. Their case was that while they had been required to return their old marriage certificates, they were required to get others at a cost of Kshs20,000 but were not reimbursed the cost of the old certificates.

14. They ask the Court to allow the petition and grant them the following orders:

- a. *That orders of certiorari to remove to this Honourable Court and quash the gazette notice number 6303 of 5th September, 2014.*
- b. *A declaration that the timelines set for compliance with the gazette notice No 6303 and the increased fees for licensing of officials as well as the increased fees for the legalizing marriages is contrary to the legitimate expectation of the petitioners and the public at large.*
- c. *A declaration that the respondent requirement for the petitioner and other ministers of faith to comply with the gazette notice No 6303 in less than 60 days is unreasonable.*
- d. *A declaration that the respondent's requirement that the petitioner and ministers of faith to pay fees to be re-registered is discriminatory against the petitioner and other ministers of faith.*
- e. *A declaration that the 2nd respondent reimburses the 1st petitioner and other ministers of faith for the un-used marriage certificate books they return.*
- f. *A declaration that the respondent's mandatory requirement for persons wanting to celebrate Christians marriages to get clearance certificates from the Registrar of marriages before marriage is discriminatory.*
- g. *A declaration that the respondent's requirement for persons Kenyans to pay high fees to have their marriages legalized is unreasonable.*
- h. *The Honourable Court do make such further orders as it deems just and expedient to meet the ends of justice in this case.*
- i. *The respondent do pay the costs of this petition.*

The Case for the Interested Party

15. The interested party supported the petition. It filed an affidavit sworn by its chairman, Bishop Newton Wanjala on 15th January, 2015. It did not, however, file submissions or appear at the hearing of the matter.

16. Its case as set out in the affidavit of Newton Wanjala is that Gazette Notice No 6303 in various ways contradicts the express provisions of the Marriage Act and should be quashed in its entirety or as the Court may decide. It is its contention that there is no provision in the Marriage Act which requires that all marriages solemnized by the church under the Marriage Act should obtain prior authorization from the office of the Registrar of Marriages through a Registrar's Certificate or a special license as provided in the Gazette Notice.

17. The interested party argues that the respondents appear to have misinterpreted section 25 of the Marriage Act. It contends that the section is very specific on its application, which is to marriages under Part IV of the Act. It submits that the requirement for prior authorisation contained in paragraph (c) of the Gazette Notice is not only unlawful since it is not sanctioned by a statute but also discriminatory to the church since it does not impose a similar or comparable obligation to other faiths like Islam or Hinduism; and neither are people intending to go through a customary marriage subjected to a similar or comparable obligation. In its view, the requirement is also not reasonable and is contrary to Article 27 of the Constitution as it confers arduous obligations on persons intending to have their marriage solemnized in church and not in any other places of worship or through customary marriages, thus treating such persons

unequally before the law, and is thus discriminatory on the basis of religion.

18. The interested party further argues that section 50 of the Marriage Act requires that the Registrar registers all marriages whilst Part IX provides for the registration of marriages; that section 53 requires that a minister of faith officiating a marriage forwards a copy of the certificate of marriage to the Registrar within fourteen days of the celebration of the marriage; but that the section does not require the parties intending to solemnize their marriage in a church to obtain prior authorization from the office of the Registrar of Marriages through a Registrar's certificate or a special license.

19. According to the interested party, it is not correct that the Registrar will require prior notice of a marriage in order to determine if the marriage is void or voidable and determine important aspects like identity, age, presence amongst others yet section 20 of the Marriage Act provides for related powers for ministers of faith conducting Christian marriages to receive, hear and determine objections relating to an impending Christian marriage.

20. It is its contention further that a number of couples will find that it is easier to go through civil marriages than Christian marriages because a civil marriage will be started and completed in the relevant Registrar's office while a Christian marriage will have a long and arduous process; that Article 45 of the Constitution gives every person the right to marry and yet the actions of the respondents limit this constitutional right in a manner not sanctioned by Article 24 of the Constitution as the limitation discriminates against Christians relative to other faiths; is not justifiable in an open and democratic society and is based on misunderstanding and misapplication of the law on the part of the respondents.

21. The interested party argues that in the event that the respondents believe that there is a lacuna in the law as pertains to Christian marriages, the most reasonable thing they ought to have done is to request Parliament to cure the gap and, pending the amendment by Parliament, delay the implementation of the Marriage Act. In its view, if such a gap exists, it is unreasonable to place an unfair load on the church and the sections of the public who may want to solemnize their marriages in church.

22. The interested party further argues that the Registrar has not provided a reason for the increase in the charges for the marriage certificate book other than stating that the said charges were last reviewed over twenty years ago. According to the interested party, this is not a reasonable, good and complete reason because the increase result in a doubling of the charges; and further, that the 2nd respondent did not disclose when exactly the fees were last reviewed and the margin of increase in that previous review. The interested party contends that the increase is not only unreasonable but it is also not expeditious or procedurally fair.

23. The interested party further argues that licensed Christian ministers of faith do not get paid any fees by the Registrar for officiating marriages, unlike ministers of faith from Islam and Hindu faiths who are paid for officiating marriages. It is its contention that the Registrar should be facilitating and not hindering their activities.

24. The interested party urges the Court to quash or review the increased fees and the high fees paid by ministers of faith; and to order that the cost of the returned unused/partly used marriage books be reimbursed to them.

The Case for the Respondents

25. The respondents oppose the petition and have filed a replying affidavit sworn by Ms. Mary Mutaaru, the acting Registrar of Marriages, and written submissions. They argue that the allegation that requiring church ministers of faith to pay yet other ministers of religion are not paying for licensing is discriminatory is untrue and premature as they have not made rules governing the registration and licensing of other ministers of faith. They further contend that the requirement that parties to a Christian marriage clear with the Registrar before their marriage is solemnized is in compliance with the general provisions of the Marriage Act and are intended to establish age and the legal and mental capacity of the parties which is a legal requirement for getting married, hence the need for prior authorization from the

Registrar.

26. The respondents point out that these requirements are in accord with the duties of the Registrar which are spelt out under section 50 of the Marriage Act. Such duties include registering all marriages and issuing all marriage certificates, which can only be possible upon the ministers of faith filing their returns.

27. With respect to the complaint regarding the return of unutilised marriage certificates, the respondents argue that the Marriage Act repeals the marriage statutes under which the old marriage certificates were issued. They submit therefore that granting the orders sought in the petition will, in essence, allow the continued issuance of the old certificates under a new legal regime, which would not only be absurd but would also have the effect of staying the operationalization of the Marriage Act. It is their contention that what the Registrar was doing was to operationalize the Marriage Act through Gazette Notice No 6303 which had been issued about 4 months after commencement of the Act, and was issued strictly in accordance with the law and in the interest of the public.

28. With respect to the charges under the Act, the respondents' case is that the charges were last reviewed over twenty years before. Further, there was no reason for making any refunds to the petitioners as the cancellation of the marriage licenses held by the petitioners and the necessity for new ones was as a result of the operation of the law and not the singular actions of the office of the Registrar. They urged the Court to dismiss the petition with costs.

Determination

29. Having considered the pleadings and submissions of the parties to this matter, it appears to me that the petitioners' claim, which is supported by the interested party, is fairly straightforward and is founded on three grievances: they are aggrieved by the requirements contained in Gazette Notice No. 6303 issued by the Registrar of Marriages that they obtain new marriage certificate books, return the old ones, and pay certain fees in respect of their licences to celebrate marriages. They perceive these requirements as discriminatory against Christians as, in their view, religious leaders from other faiths who celebrate marriage are not subject to the same requirements. They also allege that other officiating officials at the national and county level are not required to pay the amounts indicated in the Gazette Notice. They therefore allege violation of their constitutional rights guaranteed under Articles 27 and 47 of the Constitution, and seek orders to quash the said Gazette Notice. It is with respect to the alleged violation of these two constitutional provisions that I must address myself.

30. Before considering these issues, however, it is useful to consider the powers of the Registrar of Marriages under the Marriage Act, 2014. The petitioners have not challenged the provisions of the Marriage Act, or the powers, role and functions of the Registrar, whose office is established under section 50 of the Marriage Act as follows:

1. ***There shall be a Registrar of Marriages who shall be appointed by the Cabinet Secretary.***
2. ***The Registrar shall –***
 - a. ***Perform civil marriages;***
 - b. ***Register all marriages;***
 - c. ***Issue marriage certificates for all registered marriages;***
 - d. ***Issue certificates of no impediment to persons who intend to marry and who qualify for such a certificate;***
 - e. ***Determine the rules governing customary marriages; and***
 - f. ***Determine objections of notices to marry.***

3. ***The Registrar may appoint such marriage officers at national and county levels, as may be necessary upon such terms and conditions as may be determined by the Public Service Commission for the purposes of this Act.*** (Emphasis added)

31. The Registrar of Marriage thus has the legal mandate to perform civil marriages and oversee the registration of marriages celebrated under other systems of law, as well as to issue certificates of marriage and of no impediment to marriage, and to determine objections to notices of marriage.

32. The Registrar is also given the mandate to appoint marriage officers and issue licences to such ministers of faith to celebrate marriage. Section 52 of the Act, which confers this power, states as follows:

1. ***A minister of faith may apply to the Registrar to be appointed as a marriage officer for the purposes of this Act.***
2. ***The Registrar may appoint a minister of faith who makes an application under subsection (1) as a marriage officer.***
3. ***The Registrar shall issue a person appointed as a marriage officer under this section with a license.***
4. ***A person appointed as a marriage officer under this section may only officiate at marriages celebrated according to the traditions of the faith in which the minister of faith serves.***
5. ***The Registrar may cancel a license issued to a person under this section and shall give written reasons for such withdrawal.***
6. ***A licence granted in respect of marriages under any law in operation before the commencement of this Act shall, if the licence has not been cancelled at the commencement of this Act, be deemed to be a licence granted under this section.***

33. It is thus evident that the Registrar of Marriage, in issuing Gazette Notice No. 6303, was acting within her statutory mandate. What the petitioners and interested party are aggrieved by are the contents of the notice, which they allege violates their rights under Articles 27 and 47 of the Constitution.

Violation of Article 27

34. The constitutional guarantee to equal protection of the law and non-discrimination is contained in Article 27 in the following terms:

1. ***Every person is equal before the law and has the right to equal protection and equal benefit of the law.***
2. ***Equality includes the full and equal enjoyment of all rights and fundamental freedoms.***
3. ...
4. ***The State shall not discriminate directly or indirectly any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.***
5. ***A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4)***

35. In the case of **Peter K. Waweru vs Republic [2006]eKLR**, the Court defined discrimination as follows:

“...Discrimination means affording different treatment to different persons attributable wholly or mainly to their respective description by race, tribe, place of origin or residence or other local

connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions....to which persons of another description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description...discrimination also means unfair treatment or denial of normal privileges to persons because of their race, age, sex...a failure to treat all persons equally where no reasonable distinction can be found between those favoured and those not favoured.”

36. In determining whether the requirements contained in Gazette Notice No. 6303 amount to discrimination, as defined above, against the petitioners and others of the Christian faith, it is necessary to consider the contents of the Gazette Notice against the provisions of the Marriage Act on the basis of which the said Gazette Notice has been issued by the Registrar of Marriage.

37. The Gazette Notice, which was published on 12th September 2014 and not 5th September 2014 as the petitioners pleaded, is in the following terms:

GAZETTE NOTICE NO. 6303

THE MARRIAGE ACT (NO. 4 O/2014)

OFFICE OF THE ATTORNEY -GENERAL AND DEPARTMENT OF JUSTICE

NOTICE

IT IS notified for public information that following the commencement of the Marriage Act, 2014 and in furtherance of section 96 (1) of the Marriage Act:

(a) The Registrar of Marriages intends to recall all marriage books issued under the Marriage Act, Cap 150 and the African Christian Marriage and Divorce Registration Act, Cap 151 (now repealed) and issue new marriage books and registers under the Marriage Act, 2014.

(b) All unused marriage certificates issued under the said Acts will cease to have effect from 1st November, 2014 (operative date).

(c) All marriages to be solemnized by the church under the Marriage Act, 2014 must obtain prior authorization from the Office of the Registrar of Marriages through a Registrar's certificate or a special license as the case may be.

(d) The operative date has been fixed for 1st November, 2014. CONSEQUENTLY,

ALL licensed Ministers of Faith are required to:

(e) Apply to the Registrar of Marriages for renewal of licenses (for existing licensed ministers of faith) or new licenses (for unlicensed ministers of faith).

(f) File returns (copies of marriage certificates) of all marriages celebrated to date to the Registrar of Marriages, Nairobi.

(II) Return to the Registrar of Marriages, Nairobi all marriage certificate books (unused and partly used).

(Ii) Apply for new marriage certificate books ONLY FOR USE FROM 1st November, 2014.

(i) Submit authentic church records documenting all scheduled marriages due to

be conducted before 1st November, 2014 listing exact number of marriage certificates to be retained for that purpose. The records should be supported by copies of registrar certificates/special licenses for the planned marriages.

Note,—All licensed ministers of faith who fail to fulfill the above requirements by 1st November, 2014, will have their existing licenses cancelled.

ALL deputy county commissioners are required to:

File returns of all marriages celebrated to date whose records have not been submitted to our Head Office, Nairobi.

(a) Return to the Registrar of Marriages, Nairobi all marriage certificate books (unused and partly used).

(b) Collect new marriage certificate books ONLY FOR USE FROM 1st November, 2014 from the Registrar of Marriages, Nairobi.

(c) Submit to Registrar of Marriages, Nairobi a register of all scheduled marriages due to be conducted before 1st November, 2014 listing exact number of marriage certificates to be retained for that purpose. The records should be supported by copies of registrar certificates for the planned marriages.

(d) Fulfil the above requirements by 1st November, 2014.

38. The wording of this Gazette Notice indicates that it is directed at Ministers who are licensed to celebrate Christian Marriages, and Deputy County Commissioners celebrating civil marriages. It does not include Ministers of other faiths such as Islam or Hinduism. Does it therefore discriminate against ministers of faith of the Christian religion?

39. Section 96(1) of the Act under the provisions of which the Gazette Notice was issued provides as follows:

(1) A person who, immediately before the date of commencement of this Act, was a Registrar of Marriages under the Marriage Act (Cap. 150) (now repealed) or the African Christian Marriage and Divorce Act (Cap. 151) (now repealed), or an assistant Registrar under the Islamic Marriage and Divorce Registration Act (now repealed), shall, as soon as practicable thereafter, send all registers of marriages and divorces to the Registrar. (Emphasis added)

40. Section 96(1), which is in the transitional provisions of the Act, is thus intended to apply specifically to marriages contracted under the repealed **Marriage Act, the African Christian Marriage and Divorce Act**, and the **Islamic Marriage and Divorce Registration Act**, also repealed. The Gazette Notice, which is issued pursuant to the provisions of this section, was directed at ministers who celebrated marriages under the repealed Marriage Act and the African Christian Marriage and Divorce Act only. It omitted “**assistant Registrars under the Islamic Marriage and Divorce Registration Act (now repealed)**” who, like the ministers under the repealed Marriage Act and the African Christian Marriage Act were also required under section 96(1) to “**send all registers of marriages and divorces to the Registrar.**” In my view, therefore, the petitioners and interested party have a point when they argue that the Gazette Notice contains requirements that are discriminatory against them.

41. The respondent sought to explain this omission by relying on the provisions of section 96(2). This section, which contains the transitional provisions with respect to Hindu, Islamic and customary marriages, provides as follows:

(2) Parties to a marriage contracted under customary law, the Hindu Marriage and Divorce

Act (Cap. 157) (now repealed) or the Islamic Marriage and Divorce Registration Act (now repealed) before commencement of this Act, which is not registered shall apply to the Registrar or County Registrar to assistant Registrar for the registration of that marriage under this Act within three years of the coming to force of this Act.

(3) The parties to a customary marriage shall register such a marriage within three years of the coming to force of this Act.

42. Section 96(2) does not answer the contention that the Gazette Notice is discriminatory against Ministers of faith of the Christian religion. This is because it does not address itself to the same issue as is covered by section 96(1). It is concerned with **parties** whose marriages, celebrated before the commencement of the Marriage Act, **had not been registered**. The Act gives them a period of three years from the commencement of the Marriage Act within which to register their marriages. In the case of customary marriages, for which no system of registration existed prior to the commencement of the Act, a period of three years from the commencement of the Act within which the marriage is to be registered is provided by section 96(3). Indeed, section 96(3) seems to be a repetition of the requirement contained in section 96(2) with respect to customary marriages.

43. In my view, given the provisions of the Marriage Act which I have set out above, in so far as the Gazette Notice omits to include a requirement that Assistant Registrars under the **Islamic Marriage and Divorce Registration Act** (now repealed) return their marriage and divorce registers as required under section 96(1), it does not accord with the requirements of the Act on the basis of which it is issued.

Violation of the Right to Fair Administrative Action Guaranteed Under Article 47

44. The petitioners have also complained that upon being required to return the marriage registers they were using prior to the enactment of the Marriage Act, they were not reimbursed for purchasing the new registers. They have thus alleged a violation of their right to fair administrative action under Article 47 of the Constitution which provides that:

- 1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
- 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***

45. I have already considered the provisions of section 96(1). The requirement for new registers resulted from a change in the law. It required that new registers be procured. I am unable to find a constitutional violation in this requirement. A change in the law that necessitates that parties obtain new documentation cannot be described as a violation of any fundamental rights, and certainly not of the right to fair administrative action. In requiring that the petitioners return the old registers, the Registrar was exercising a statutory function, in accordance with a specific requirement of the law, to wit section 96(1) of the Marriage Act. The petitioner did not place before the Court any material or authority on the basis of which the Court could come to the conclusion that the requirement of returning old registers and to apply for the issuance of new ones under a new legal regime amounts to a violation of their right to fair administrative action.

46. The petitioners are also unhappy about the amount of fees that they are required to pay when applying for licensing as Ministers of faith. They are also aggrieved about the payments required from parties wishing to celebrate Christian marriages for registration and issuance of certificates.

47. The fees payable in respect of licenses and certificates have been prescribed, as I understand it, from regulations made in accordance with section 94 of the Act. This section grants powers to the Cabinet Secretary to make regulations for the better carrying into effect of the provisions of the Act. It states that:

- 1. The Cabinet Secretary may make regulations for the better carrying into effect of this Act.***

2. *Despite subsection (1), regulations may provide for—*
 - a. *forms to be used and fees to be paid in respect of any application or licence made or issued;*
 - b. *The manner in which notices of intention to marry are to be made known;*
 - c. *The form for the giving of any notice required under this Act;*
 - d. *The form of explanation to be given by a person authorised by the Registrar to the parties to an intended marriage in civil form or according to rites recognized by customary law as the case may be before asking them whether the marriage is to be monogamous or polygamous or potentially polygamous;*
 - e. *The forms of licences and marriage certificate to be issued by the Registrar;*
 - f. *The form of statement of particulars relating to marriage to be used by registration officers;*
 - g. *The procedure for registration and the form of returns to be made and the register to be kept under this Act;*
 - h. *The payment of fees under this Act; and*
 - i. *Anything required to be prescribed under this Act.*

48. It is pursuant to these provisions that the regulations and the impugned fees were prescribed by the Cabinet Secretary. The regulations in question are the Marriage (General) Rules, 2014, rule 11 of which provides that the fees payable in respect of each matter provided for in the Act shall be as set out in the schedule to the Regulations. I have not heard the petitioners argue that the said legislative provisions are unconstitutional, nor have I heard them to challenge the constitutionality of the regulations. Their grievance, as I understand it, is that the fees charged are too high, and that they are charged only in respect of Christian Marriages.

49. At the hearing of this matter, Counsel for the respondents submitted that the Gazette Notice had been made to provide only for Christian Marriages as other marriages were required to be registered in three years.

50. However, a reading of the provisions of the Act indicates that all marriages are required to be registered under the provisions of the Act. Part IX of the Marriage Act provides, at sections 53-55, for the registration of the various forms of marriage contracted in Kenya, as well as for marriages solemnised outside the country. Section 53 provides for the registration of Christian marriages as follows:

53. Registration of Christian marriages

(1) Where a marriage is celebrated under Part III of this Act, the person officiating at the marriage shall forward a copy of the certificate of marriage to the Registrar within fourteen days of the celebration of the marriage for the registration of that marriage.

(2) Before the Registrar registers a marriage under subsection (1) the Registrar shall confirm that the marriage complies with the provisions of this Act.

51. Section 54 contains provisions with respect to the registration of civil marriages in the following terms:

(1) Where the Registrar celebrates a marriage under Part IV of this Act, the Registrar shall register the marriage.

(2) Where a marriage officer celebrates a marriage under Part IV, the marriage officer shall record the details of the marriage in the prescribed form and forward the record to the Registrar and the Registrar shall register the marriage.

(3) The Registrar shall issue a certificate of marriage to the parties to a marriage celebrated under Part IV of this Act.

52. Section 55 of the Act contains provisions with respect to the registration of Customary marriages:

(1) Where the parties to a marriage under Part V have completed the necessary rituals for their union to be recognised as a marriage under the customary law of any of the parties both shall apply to the Registrar within six months of their marriage for a certificate and both shall appear in person before the Registrar to be issued with the certificate of marriage.

(2) Where the Registrar is satisfied that the parties to a marriage under Part V have complied with the provisions of this Act, and the parties have appeared before him in person, the Registrar shall register the marriage and issue the parties with a certificate of marriage.

53. At section 56, the Act provides for the registration of Hindu marriages as follows:

(1) Where a person authorised by the Registrar celebrates a marriage under Part VI, that person shall record the details of the marriage in the prescribed form and deliver the record to the Registrar and the Registrar shall register the marriage.

(2) Before the Registrar registers a marriage celebrated under Part VI the Registrar shall confirm that the marriage complies with the provisions of this Act.

(3) The Cabinet Secretary may make rules regarding the registration of marriages under Part VI of this Act.

54. Finally, section 57 sets out the statutory provisions with respect to the registration of Islamic marriages:

(1) Where a Kadhi, Sheikh, Mukhi or Imam authorised by the Registrar celebrates a marriage under Part VII of this Act, the Kadhi, sheikh, Mukhi or imam shall—

(a) record the details of the marriage;

(b) issue the parties to the marriage with a certificate of marriage; and

(c) deliver the record and certificate to the Registrar.

(2) Where the Registrar receives a record and certificate of a marriage celebrated under Part VII and the Registrar is satisfied that the provisions of this Act have been complied with, the Registrar shall register the marriage.

55. It is thus apparent that the Act requires the registration of all marriages celebrated in Kenya. It also empowers the Cabinet Secretary to formulate regulations and rules in respect of the forms and fees for various acts to be performed in accordance with the Act. That being the case, and there being no evidence presented that the regulations are in violation of the Constitution or the powers of the Cabinet Secretary under the Act, it is difficult to impugn the acts of the Cabinet Secretary or the Registrar, save in the single instance with respect to the omission of Assistant Registrars under the repealed **Islamic Marriage and Divorce Registration Act** in Gazette Notice No. 6303 of 2014 so as to comply with the requirements of section 96(1) of the Act.

56. The interested party impugned paragraph (c) of the Gazette Notice on the basis that section 25 of the

Marriage Act does not apply to Christian Marriages but only to civil marriages. However, a reading of section 19(1) and 26 of the Act, which make reference to 'notice of intended marriage' under section 25, indicate that such notices are required in respect of civil and Christian marriages.

57. It is my finding therefore that there has been no violation of the rights of the petitioners in the issuance of Gazette Notice No. 6303 of 2014. What the Registrar has failed to do, by omitting the return of registers by Assistant Registrars under the repealed **Islamic Marriage and Divorce Registration Act**, is issue a notice that accords with the provisions of section 96(1) of the Act. As marriages celebrated under Islamic law are also required to be registered under the Marriage Act, and certificates to be issued in accordance with the provisions of the Act, the omission by the Registrar is likely to adversely affect such marriages. In the circumstances, the Registrar is directed to consider Gazette Notice No. 6303 against the provisions of section 96(1) with respect to Islamic marriages and issue appropriate directions and regulations.

58. With respect to the costs of this petition, each party is directed to meet its own costs.

Dated, Delivered and Signed at Nairobi this 28th day of October 2015

MUMBI NGUGI

JUDGE

Mr. Mbaabu instructed by the firm of Kenneth K Mbaabu for the petitioners

Mr. Moimbo instructed by the State Law Office for the respondent

No appearance for the interested party