REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 237 OF 2014

MARY WANJUHI MUIGAI ……..……..PETITIONER

VERSUS

HON. ATTORNEY GENERAL ……..….1ST RESPONDENT

COMMISSION FOR THE IMPLEMENTATION OF

THE CONSTITUTION ……...2ND RESPONDENT

JUDGMENT

Introduction

1. The petitioner is an adherent of the Baha'i faith. She has lodged her claim against the respondents alleging discrimination against members of the faith in the provisions of the Marriage Act. It is her contention that the Act does not recognize Baha'i religious marriages, thus compelling members of the faith to undergo civil marriages should they wish to have their marriages registered.

2. The petitioner is also dissatisfied with the provisions of the Marriage Act in relation to polygamous marriages. Her contention is that by failing to require the consent of wives before a man can enter into another marriage, the Act violates Article 45 of the Constitution. She is also aggrieved by the provisions in the Act for registration of polygamous marriages, claiming that registration brings a formality that is inconsistent with culture.

3. She therefore seeks, in her Amended Petition dated 12th August 2014, the following orders:

   a. A declaration that the Marriage Act 2014 is unconstitutional in as far as it provides for certification of cultural marriages and without consulting the first or older wives before incorporation of another wife.

   b. A declaration that the Marriage Act 2014 is unconstitutional in as far as it neither recognizes nor provides for Baha'i marriages contrary to Articles 27(4) & (5), 45 (4) and 56(a) of the Constitution. Baha'i religion being one of the independent religions recognized all over the world and has its members in Kenya.

c. ….

d. An order directing the 1st respondent to make amendments to the Marriage Act, 2014 section 6(1) to include Baha'i marriages as one of the faith based marriages in Kenya.

e. That the court do order that registration and certification of cultural marriages is stopped by the natural process of culture and those marriages should be conducted respecting the dignity and unique of all the cultures in Kenya.

e. Any other or further orders as this Honourable Court shall deem just.

4. The Amended Petition is supported by several affidavits. The first three are by Julius Waitiki Sadera, Lucy Wanjiku Sadera and Samson Ole Sadera all sworn on 8th August 2014. All three appear to be intended to address the petitioner's contention that the law should not provide for the registration of cultural or traditional marriages. Waitiki Sadera's affidavit is to the effect that in Maa tradition, a marriage is sanctified by the beliefs and customs of the Maa people and does not require certification by any legal system. Lucy Wanjiku Sadera's affidavit states that she was married to a Bernard Kesire Sadera(deceased) in accordance with the Maa customs. She states that her marriage is firm and guaranteed without any formal registration, and she is part of the Sadera family. She states that she has sworn the affidavit in support of the petition against certification of customary marriages.

5. Samson Ole Sadera's affidavit reiterates the averments by Waitiki Sadera and Wanjiku Sadera to the effect that Maa marriages are sanctified by the beliefs and customs of the Maa people. He adds that among the Maa, it is the elders who have the duty to pick life partners for young people, and once decisions are made, the young people are not required to give their opinions on the matter.

6. With respect to the alleged discrimination against Baha'i adherents, the petitioner has filed an affidavit which she has sworn, together with one George Gitau Wainaina on 12th August 2014. It is not so stated expressly, but it appears from the contents of the affidavit and the annexed Marriage Certificate that the petitioner and the said George Gitau Wainaina are husband and wife, having solemnized their marriage in a civil ceremony and in a Baha'i religious ceremony.

7. They state that they are members of the Baha'i faith in Kenya, and that their civil marriage was conducted on 7th October 2011 at the Registrar of Marriages offices where they were issued with the certificate of marriage. They then proceeded, on the same day, to have a Baha'i marriage conducted in the presence of one of the members of the Nairobi Baha'i Local Spiritual Assembly. They were also issued with a certificate of Baha'i marriage.

8. They aver that it was necessary to undergo a civil marriage in order to have their marital status formally recognized as Baha'i marriages are not recognized in Kenya. They contend that this is what any Baha'i couple wishing to have its marriage recognized in Kenya would have to do, and in their view, this renders the Baha'i community secondary citizen status in Kenya. The petitioner has attached Baha'i certificates of marriage in respect of several couples whom they aver have married under the Baha'i faith but whose marriages are not recognized in Kenya.

9. The petition is also supported by an affidavit sworn by Alfred Ogallo Mango, who describes himself as an architect and an affiliate of the Baha'i faith. He too, deposes that he was married under the Baha'i faith on 18th December 2006, but his marriage is legally unknown as Baha'i marriages are not recognized in Kenya. He therefore supports the prayer for orders that Baha'i marriages should be recognized under the Marriage Act. The petitioner contends that Baha'i Marriages are monogalistic unions, recognized in various jurisdictions in the world including Uganda in East Africa and the United States.

10. The 1st respondent opposed the petition and filed extensive grounds of opposition dated 4th July

2014.

11. The petitioner, who is an Advocate of the High Court of Kenya, presented her case, while the case for the 1st respondent, the Attorney General, was presented by Learned State Counsel, Mr. Mohamed. The 2nd respondent, the Commission on the Implementation of the Constitution, did not appear or participate in the proceedings in any way.

The Petitioner's Case

12. The petitioner's case is in two limbs. The first challenges the registration of customary marriages, while the second addresses the alleged discrimination against Baha'i marriages by the provisions of the Marriage Act.

13. With respect to the first limb of her case, Ms. Muigai submits at paragraphs 19 and 20 that:

> ***[19]. The Act purports to legislate culture and therefore bringing aboard a formality that is inconsistent with culture. That culture is organic dynamic and arises from the natural dictates of environment and seeking to legislate such natural sprout process is in essence purporting to control it and put a lid on its natural evolution.***
>
> ***[20] That provisions of law for registration and certification of cultural marriages is attempting to convert such cultural marriages into western and/or eastern types of formal marriages.***

14. It is also her contention that by providing for registration and certification of polygamous marriages with no consent by the existing wife or wives, the Marriage Act violates Articles 45(3) that provides that parties to a marriage are equal before, during and after marriage; as well as Article 27(3) that provides that women and men have equal right to equal treatment, including the right to equal opportunities in cultural and social spheres.

15. On the second limb of her case, Ms. Muigai alleges that by not providing for registration of Baha'i marriages, separation, divorce, custody and maintenance of children, the Marriage Act violates Articles 27(4) and (5), as well as Article 45(4) and 56(a) with respect to the duty of the state to put in place programmes to ensure that marginalized groups participate in and are represented in government and other spheres of life.

16. In her written submissions dated 12th March 2015, Ms. Muigai goes into some detail with regard to the communication between herself and the Commission on the Implementation of the Constitution(CIC) regarding recognition of Baha'i marriages, and the failure of the CIC to recognize the said marriages or to participate in this petition. She also makes reference to correspondence annexed to her affidavit sworn on 19th May 2014 in support of her original petition. The gist of the correspondence is that the Baha'i faith is an established, stand-alone religion, not a denomination or branch of any other, with customs and rituals for carrying out marriages between its members, and should have been accorded recognition in the Marriage Act.

17. With regard to the registration of cultural marriages, the petitioner argues that the provisions for registration can only apply to the educated 'elite' women in big cities and towns in Kenya, and that the majority of women have no choice in marriages, which are arranged by elders. She poses the questions, with regard to a polygamous marriage, which of the wives is equal to the man, what constitutes a matrimonial home, and which of the wives a man should consult before "borrowing". She makes reference to the affidavits, which I summarized above, in which the parties state that spouses were never consulted when marriages were being contracted, and asks the Court to allow the petition and grant the orders sought therein.

18. In her oral highlighting of her submissions, Ms. Muigai submitted that there had been a violation

of Article 20(3)(b), and that freedom of conscience would fall within the said Article. She submitted further that Article 21 places a duty on public officers and institutions to address the needs of vulnerable groups, and the Baha'i is a minority religious groups, and when public institutions refuse or fail to acknowledge the rights of such minority groups, they fail their constitutional duty.

19. Ms. Muigai countered the AG's argument that general provisions are sufficient to provide for minority groups, contending that such provisions were not sufficient. She observed that section 6 of the Marriage Act enumerates the types of marriages recognized in Kenya but does not include the Baha'i religious marriage ceremonies, which should have been included in the Act.

20. She also reiterated her contention that the Marriage Act has also failed to uphold the equality provisions in Article 45 by providing for polygamous marriages without the consent of the existing wives, and in her view, there is no equality in marriage in the Marriage Act, which therefore violates Article 45.

21. She asked the Court to find that there is no prejudice if there is recognition of Baha'i marriages; and further, that the Court should find that it is unconstitutional not to provide for a wife in a potentially polygamous marriage to consent to a subsequent marriage.

The Response

22. The AG filed Grounds of Opposition dated 4th July 2014 which also doubled as his submissions. In the said grounds, the AG submits that the definition of faith in section 2 of the Marriage Act is all inclusive and carries with it all associations professing any faith or any system of religious beliefs. It is his contention, further, that under section 52(1), (2) and (4) of the Marriage Act, which is not restricted to Christian, Hindu and Islamic marriages, a Minister of faith may apply to the Registrar of Marriages to be appointed as a marriage officer. Once appointed, he may only officiate at marriages celebrated according to the traditions of the faith in which he serves.

23. The import of this submission, as I understand it, is that section 52 of the Marriage Act applies to all faiths, including the Baha'i faith, and there is nothing to prevent a minister of faith in the Baha'i religion from making an application to the Registrar under section 52. He points out that there is no evidence presented by the petitioner to show that any Minister of the Baha'i faith made an application to the Registrar of Marriage under section 52 of the Act to be appointed as a marriage officer and the application was declined.

24. The AG further argues that under section 59(2) of the Marriage Act, a marriage may be proven in Kenya if it was celebrated in a public place of worship but its registration was not required, by an entry in any register maintained at the public place of worship or a certified copy of such an entry. According to the AG, this provision makes it possible for any marriage not registered under the Act to be recognized provided that it meets the threshold provided for under the provisions of the section.

25. While conceding that the Act, at section 6, only provides for the registration of Christian, Hindu, Islamic, customary and civil marriage the AG submits that a proper and purposive reading of the Act, particularly of sections 2, 52(1), (2) and (4) and 93(2), as well as the side note to section 93, leads to the conclusion that the Act provides for marriages of all religious faiths. It is his submission therefore that in accordance with these provisions, Baha'i marriages may be registered under the Act.

26. The AG further observes that under section 93(2) and 94 of the Marriage Act, the Cabinet Secretary may make regulations for the better carrying into effect of the Act with respect to the "celebration of any marriage." Further, that section 93(2) and 94 are wide in scope and application and should he interpreted liberally and purposively in accordance with the letter and spirit of the Act. The AG's submission further is that the powers of the Cabinet Secretary under section 93(2) and 94 of the Marriage Act are consistent with Article 94(5) of the Constitution and are

constitutional. He relies on the decision of Majanja J in **Richard Dickson Ogenda & 2 Others vs the Hon Attorney General & 4 Others Nairobi High Court Petition 70 of 2014** in support.

27. According to the AG, sections 2, 93(2) and 94(1) of the Act are intended to prevent litigation of this kind by providing for a general frame of law under which any religion that is formed or is yet to be formed will fall under the provisions of the Act and make it possible for marriages celebrated under such system of religious beliefs to be registered under the Act. He invites the Court to take judicial notice of the fact that due to the numerous faiths existing in the country, it is not feasible to include all such faiths and religious beliefs in the Act, hence the inclusion of the definition of faith under section 2 and section 93 of the Act. In his view, the rules contemplated under section 93(2) for the celebration of any marriage are intended to address the petitioner's concerns regarding faiths that have not been expressly specified in the Act.

28. The AG's case therefore is that the Marriage Act is not discriminatory against Baha'i marriages or any other marriages celebrated under other systems of religious beliefs. This is because the Act provides for their registration and recognition under the Act, the provisions of section 6 of the Act notwithstanding. It is also his case that the provisions of the Act make it possible for parties in a marriage celebrated under the Baha'i faith to benefit from the provisions of the Act with regard to matters concerning separation, divorce, custody and maintenance of children.

29. Mr. Mohamed submitted that there is no proof of discrimination against the Baha'i faith, as it falls within the definition of faith in section 2 of the Act. He reiterated that the Act must be read in a purpose manner, noting that it is impossible to enumerate all faiths in a single Act, and the definition of 'faith' covers all faiths not set out in section 6.

30. The AG also takes the view that the second limb of the petitioner's case has no merit. He submits that the Preamble to the Constitution affirms that the people of Kenya are proud of, among other things, their ethnic and cultural diversity, while Article 11 recognizes culture as the foundation of the nation and as the cumulative civilization of the Kenyan people and nation. He notes that under Article 45(4), Parliament is empowered to enact legislation that recognizes marriages concluded under any tradition or system of personal or family law to the extent that any such marriages or systems of law are consistent with the Constitution.

31. As a result of these constitutional provisions, according to the AG, the Marriage Act recognizes polygamy, which is a cultural rite practiced by Kenyan communities, and provides for such marriages; that customarily law and customary rites are recognized by the Constitution unless they are shown to be inconsistent with the Constitution, and the petitioner has the onus of proving that polygamous marriages or potentially polygamous marriages conducted in accordance with the customs and traditions of a people are unconstitutional.

32. It is the AG's case that polygamous marriages or potentially polygamous marriages do not in any way infringe on the entitlement to equal rights of parties at the time of the marriage, during the marriage and at the dissolution of the marriage; and further, that no evidence has been presented to the Court to justify the assertion that the Marriage act offends Articles 27 and 45.

33. The AG terms this petition an attack on the customs and traditions of Kenyan communities which are recognized and protected under the Constitution, and submits that the petition does not in any way promote the values and principles of the Constitution contained in the Preamble and Articles 11 and 174 on fostering national unity and recognition of cultural diversity of the Kenyan nation.

34. According to the AG, the Marriage Act does not contain any provisions that treat polygamous marriages different from other marriages, nor does it contain any provisions that oblige or require any person to enter into a potentially polygamous or polygamous marriage. It is his submission that every person is free to choose a civil or Christian marriage, which are monogamous, or a customary marriage which is polygamous or potentially polygamous. In his view, entering a potentially polygamous marriage is a conscious choice made by both parties, who are adult, and

who know and embrace the consequences of such a marriage.

35. It is his contention further that a female person entering a polygamous marriage does so out of her own volition and choice with full knowledge of the attendant legal status and consequences of a polygamous marriage including the fact that the man may marry another person during the subsistence of their marriage. The exercise of this choice with full knowledge of the fact that the husband has the legal capacity to remarry is not unconstitutional. It was his submission therefore that it cannot be argued that the fact that a man can remarry and have the marriage registered impedes on the right of equality of men and women during marriage. Rather, the Act promotes and protects the rights of men and women to choose freely and consciously, or according to their cultural beliefs or religious faith, which marriage to celebrate amongst the marriage systems recognized by the Act and under the Constitution.

36. The AG was also of the view that the issue of which of the systems of marriage recognized under the Marriage Act, whether monogamous or polygamous or potentially polygamous marriages is suitable, constitutional, valid or desirable is not for the Court but for the people, exercising their direct sovereignty under Article 1 of the Constitution, to decide. It is not a justiciable issue on which the Court can grant relief, particularly in view of the fact that it is a religious issue and (practiced by people who profess the Islamic faith.

37. In his oral submissions, Mr. Mohamed contended that with regard to polygamous marriages, Article 45(2) talks of free will between parties, and parties enter freely into polygamous marriages and it cannot therefore be said that there is violation of Article 45.

38. Mr. Mohamed further submitted that there was a disconnect between the prayers sought in the petition and the submissions, and to seek such prayers without proof was radical and should not be acceded to.

39. Counsel further submitted that Article 27 protects certain classes of people, but that none of the grounds set out therein had been established in this petition with respect to the petitioner. In his view, the petitioner had not met the test set in **Anarita Karimi Njeru vs R (No. 1) (1979) KLR 154** on the principles in constitutional petitions, and he asked the Court to dismiss the petition.

Determination

40. I have considered the respective cases of the parties, the petitioner raises two main issues. The first relates to the non-inclusion of the Baha'i faith in section 6 of the Marriage Act, and the other relates to the registration of polygamous marriages, and the alleged discrimination against women in the failure by the Act to require that the first or earlier wives consent before their spouse can take a second wife.

41. In dealing with these issues which seek to challenge the constitutionality of the Marriage Act, I will start with a consideration of the applicable constitutional principles.

Applicable Constitutional Principles

42. Article 259 of the Constitution contains in-built principles on the interpretation of constitutional issues by the Court. It requires that the Court, in considering the constitutionality of any issue before it, interprets the Constitution in a manner that promotes its purposes, values and principles, advances the rule of law, human rights and fundamental freedoms in the Bill of Rights, and that contributes to good governance.

43. At Article 159(2) (e), the Constitution require the Court, in exercising judicial authority, to do so in a manner that protects and promotes the purpose and principles of the Constitution.

44. As submitted by the AG, the Court is also required, in interpreting the Constitution, to give it a

liberal and purposive interpretation. At paragraph 51 of its decision in **Re The Matter of the Interim Independent Electoral Commission Constitutional Application No 2 of 2011**, the Supreme Court of Kenya adopted the words of Mohamed A J in the Namibian case of **S. vs Acheson, 1991 (2) S.A. 805** (at p.813) where he stated that:

> ***"The Constitution of a nation is not simply a statute which mechanically defines the structures of government and the relationship between the government and the governed. It is a 'mirror reflecting the national soul'; the identification of ideals and …. aspirations of a nation; the articulation of the values bonding its people and disciplining its government. The spirit and the tenor of the Constitution must, therefore, preside and permeate the processes of judicial interpretation and judicial discretion."***

45. The Court is also required to be guided by the principle that the provisions of the Constitution must be read as an integrated whole, without any one particular provision destroying the other but each sustaining the other - see **Tinyefuza vs Attorney General of Uganda Constitutional Petition No. 1 of 1997 (1997 UGCC 3)**.

46. The petitioner challenges the provisions of the Marriage Act on the basis that they violate the rights of members of the Baha'i faith such as herself which are guaranteed under Article 27 of the Constitution, as well as under Article 56 with respect to the rights of minority and marginalized groups. She also alleges a violation Article 45, specifically with respect to the right to equality of men and women in polygamous marriages. In considering these issues. I am further guided by the principle enunciated in the case of **Ndyanabo vs Attorney General [2001] EA 495.** This principle is to the effect that there is a general presumption that every Act of Parliament is constitutional, and that the burden of proof to the contrary lies on any person who alleges that an Act of Parliament is unconstitutional.

47. With regard to statutes which are alleged to contain limitations of rights contained in the Bill of Rights, the Constitution itself qualifies the presumption of constitutionality by providing in Article 24 that any limitation of rights must meet the criteria set in the said Article. Article 24 requires that any limitation of rights must be by law, and in a manner that is justifiable in a free and democratic society.

48. I also bear in mind that in determining whether an Act of Parliament is unconstitutional, the Court must consider the objects and purpose of the legislation: see **Murang'a Bar Operators and Another vs Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 [2011] eKLR** and **Samuel G. Momanyi vs Attorney General and Another High Court Petition No. 341 of 2011.**

49. Finally, I take guidance from the words of the United States Supreme Court in **U.S vs Butler, 297 U.S. 1[1936]** in which the Court expressed itself as follows:

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. <u>The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy.</u> Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."***

The Marriage Act

50. Before undertaking an analysis of the issues raised in this matter, it is useful to consider the provisions of the Marriage Act impugned in this petition, and the purposes for which the Act was

enacted.

51. The Act, No. 4 of 2014, received Presidential assent on 29th April 2014 and had a commencement date of 20th May 2014. It is expressed to be ***"An Act of Parliament to amend and consolidate the various laws relating to marriage and divorce and for connected purposes."***

52. Section 2 of the Act defines the term "faith" as follows:

> ***"faith" means an association of a religious nature and, in the case of any system of religious beliefs which is divided into denominations, sects or schools, any such denomination, sect or school;***

53. "Marriage" is defined at section 3 of the Act as follows:

> ***(1) Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.***
>
> ***(2) Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.***
>
> ***(3) All marriages registered under this Act have the same legal status.***
>
> ***(4) Subject to subsection (2), the parties to an Islamic marriage shall only have the rights granted under Islamic law.***

54. Section 6 of the Act sets out the kinds of marriages registrable under the Act. It states as follows:

> ***(1) A marriage may be registered under this Act if it is celebrated—***
>
> ***(a) in accordance with the rites of a Christian denomination;***
>
> ***(b) as a civil marriage;***
>
> ***(c) in accordance with the customary rites relating to any of the communities in Kenya;***
>
> ***(d) in accordance with the Hindu rites and ceremonies; and***
>
> ***(e) in accordance with Islamic law.***
>
> ***(2) A Christian, Hindu or civil marriage is monogamous.***
>
> ***(3) A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.***

55. Such marriages as are faith based shall, under the Act, be celebrated by a licensed minister of faith. Section 52 provides as follows with respect to the licensing of ministers of faith:

A minister of faith may apply to the Registrar to be appointed as a marriage officer for the purposes of this Act.

The Registrar may appoint a minister of faith who makes an application under subsection (1) as a marriage officer.

The Registrar shall issue a person appointed as a marriage officer under this section with a license.

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.

56. The Act also makes provision with respect to the formulation of rules for the celebration of marriages. These rules are provided for under sections 93 and 94 of the Act. Section 93, titled "***Celebration of other marriages",*** provides as follows:

1. ***A marriage recognised under section 6 may be celebrated in accordance to the rules made by the Cabinet Secretary.***
2. ***The Cabinet Secretary may make rules for the celebration of any marriage.***

57. What appears to be the intent behind these provisions, read together, is to have all marriages entered into in Kenya registered and regulated by law. The petitioner, however, questions the inclusiveness of the provisions of the Act and alleges that it leaves out those whose faith is not enumerated in the Act. I therefore turn to consider the first of the two issues raised in the petition: whether the Act discriminates against members of the Baha'i faith such as the petitioner.

Whether the Act Discriminates Against Members of the Baha'i Faith

58. The core of the petitioner's grievance is that section 6 of the Act does not mention the Baha'i faith as one of the faiths whose marriages may be registered under the Act. She is correct in this assertion. Section 6 specifically refers to Christian, civil, customary, Hindu and Islamic marriages. This provision seems to lend itself to the rule of statutory interpretation that ***"expressio unius est exclusio alterius*** ". This rule is defined in Black's Law Dictionary as ***"A maxim of statutory interpretation meaning that the expression of one thing is the exclusion of another***"; that mention of one thing implies exclusion of another, and further, that ***"When certain persons or things are specified in a law, contract, or will, an intention to exclude all others from its operation may be inferred***."

59. This would imply that the provisions of the Marriage Act were intended to apply to the marriages enumerated in the section. Yet, it cannot have been the intention to restrict registration of marriages to these five, for that would run counter to the provisions of Article 32 of the Constitution, which provides that:

> ***32. (1) Every person has the right to freedom of conscience, religion, thought, belief and opinion.***
>
> ***(2) Every person has the right, either individually or in community with others, in public or in private, to manifest any religion or belief.***

60. It would also run afoul of the non-discrimination provisions in Article 27(4), which provides that:

> ***(4) The State shall not discriminate directly or indirectly against 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.***

61. The respondent argues, citing sections 52 and 93 of the Act, that there was no intention to exclude the Baha'i faith: just that it was not possible to enumerate all religions in the Act. I am inclined to agree with this submission. I note that section 52 of the Act allows ministers of faith to apply to

the Registrar (of Marriages) to be appointed marriage officers for the purposes of the Act. The section does not limit applications to ministers of the faiths set out in section 6. Further, there was no evidence that there had been an application by any minister of the Baha'i faith for appointment as a marriage officer, and that such application had been rejected.

62. Regrettably, none of the parties placed before the Court material on the nature and number of religions in the world, and to which, conceivably, any number of Kenyans, in the exercise of their freedom of religion, may subscribe to. A little research will, however, probably demonstrate that there are adherents of Baha'i, Buddhist, Christianity, Hinduism, Islam, Jainism, Judaism, Sikhism, and Zoroastrianism, to name but a few, in Kenya, and that they have a right to practice their faith in accordance with Article 32, and to celebrate marriages in accordance with their faith.

63. That being the case, it would appear to me that the intention behind section 6 of the Marriage Act was not to exclude the Baha'i or any other faith based marriage, but was a result of a failure on the part of the drafters of the Act to use language that would cover not only the main religions practiced in Kenya, as well as the systems of marriage that parties may be married under, but those practiced by religious minorities.

64. In my view therefore, the provisions of section 6 are not discriminatory against the petitioner or other members of the Baha'i faith, or any other faith not mentioned in the said section. It must be recognized that at times, the legislature may fail, in the process of enacting legislation, to consider every specific application of the legislation. In my view, this is one such instance. The provisions of section 6 of the Marriage Act must be read to include every marriage celebrated in accordance with the faith of a religion duly registered in Kenya, and with respect to which the Cabinet Secretary is required to make rules under section 93 of the Act.

65. In this regard, I believe that the principle of reading in into the provisions of the Act words that clarify that the Act is intended to apply to all faiths recognized in Kenya would cure the shortcoming that the petitioner identifies in the Act. In **High Court Petition No. 64 of 2014- The Kenya Magistrates & Judges Association -vs- The Judges & Magistrates Vetting Board**, this Court considered the principle as applied in other jurisdictions. It stated as follows:

> ***[68.] In the Canadian case of Schachter vs Canada, [1992] 2 S.C.R. 679 the Court observed as follows:***
>
> > ***"Generally speaking, when only a part of a statute or provision violates the Constitution, only the offending portion should be declared to be of no force or effect. The doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.***
> >
> > ***In the case of reading in, the inconsistency is defined as what the statute wrongly excludes rather than what it wrongly includes. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in rather than reading down."***
>
> ***[69.] In the case of The State vs Samuel Manamela, Case CCT 25/99, the Constitutional Court of South Africa (Madala, Sachs and Yacoob JJ) considered the circumstances under which a Court could read-in provisions into a statute. It cited with approval the decision of the Court in the case of National Coalition for Gay and Lesbian Equality and Others -v- Minister of Home Affairs and Others***

(CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999) in which the Court had adopted the principle of reading-in and stated as follows:

[56] The principles applicable to "reading in" as a remedy for unconstitutionality are set out in the Gay and Lesbian Immigration judgment. …

> ***"[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible…."***

[75] In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading-in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. …"

[76]…

[70.] Like the Court in Schachter vs Canada, the Court in National Coalition for Gay and Lesbian Equality and Others vs Minister of Home Affairs was concerned with the exclusion of certain groups from certain benefits accorded by the state, in the Schachter case, exclusion of adoptive parents from child benefits, and in the Gay and Lesbian case, exclusion of partners in same sex unions from benefits available to spouses in heterosexual unions."

66. In the present case, as is evident from the submissions of the Attorney General, there was no intention to exclude any religious faith recognized under the laws of Kenya. The omission in section 6 of general words that would cover such faiths is what needs to be rectified. As is evident from the provisions of section 93 set out earlier in this judgment, the Act contemplated the registration of marriages other than those specifically provided for under the Act and provided for the formulated of rules for celebration of "other marriages"
67. In my view therefore, the principle of reading in words into section 6 would remedy the omission that is patent in the provisions of the statute.

Whether the Registration of Polygamous Marriages Violates the Equality Provisions on Marriage Under Section 45

68. The petitioner has two, mutually contradictory positions on the question of polygamous and customary marriages. As is evident from the pleadings set out elsewhere above, she takes the view that customary marriages should not be registered. This is because, in her view, the provisions of the Marriage Act with respect to customary marriages purport to legislate culture, in the process bringing into such marriages a formality that is inconsistent with culture. As I understand her submissions, customary marriages must be left unregulated, as they arise from culture, which is organic and dynamic. To legislate it is to control it and put a lid on its natural evolution.

69. On the other hand, the petitioner contends that by providing for registration and certification of polygamous marriages without the consent of the existing wife or wives, the Marriage Act violates Articles 45(3) that provides that parties to a marriage are equal before, during and after marriage. It is also her case that such registration also violates Article 27(3) which provides that women and

men have the right to equal treatment.

70. Can men and women ever be equal, within the meaning contemplated in the Constitution, within a polygamous marriage? In my view, to talk of equality of men and women within a polygamous situation is a bit of an oxy-moronic phrase, if one may coin the term. Equality would presuppose that a woman has the same right as the man to take on a second spouse during the subsistence of the marriage, the practice defined as polyandry. This is not recognized in any of the cultures of the people of Kenya, so it must be accepted that polygamy precludes equality between men and women.

71. It is noteworthy that in many cultures in Kenya, polygamy was accepted. It was not, however, subject to registration, and in the event of the demise of a husband, as a perusal of many decisions in the Family Division will reveal, the Court was often required to hear evidence to establish whether the women who claimed to be wives of the deceased were indeed wives and entitled to inheritance from his estate. This, in my view, was the reason why the registration of customary marriages was necessary-to bring some degree of certainty to a system of marriage practiced by many, yet was outside the reach of the law.

72. Is it a good thing to recognize and register polygamous marriages? It may be argued that the liberty given to a man to marry as many wives as he wants, without consultations with their wives, is a violation of our Constitution at Article 45(3) as well as Article 16(1) of the Universal Declaration of Human Rights which provides that:

> ***"Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution."***

73. Similarly, in **Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000**), at paragraph 24, the Committee states that:

> ***"…It should also be noted that equality of treatment with regard to the right to marry implies that polygamy is incompatible with this principle. Polygamy violates the dignity of women. It is an inadmissible discrimination against women. Consequently, it should be definitely abolished wherever it continues to exist.***

74. Indeed, the United Nations Human Rights Committee has repeatedly taken a strong stance against polygamy, not just because of the serious and financial consequences for a plural wife and her dependents, but also because it contravenes a woman's right to equality, and has adverse emotional and psychological consequences for women. See for instance the **Concluding observations of the Committee on the Elimination of Discrimination against Women by the UN Committee on the Elimination of Discrimination Against Women (CEDAW) 5 April 2011** in which the committee urged Kenya to bring all marriage laws ***"under the prohibition of polygamy."***

75. Polygamy cannot therefore be said to promote equality between men and women, and if measured against the clear provisions of the Constitution and international conventions to which Kenya is a party, is clearly unconstitutional and a form of discrimination against women. However, it is a practice that has been accepted in Kenyan society. Registration of polygamous marriages appears to have been accepted, even by women, as the lesser evil, and has been recommended in various reports, including the 1968 **Report of the Commission on the Law of Marriage and Divorce in Kenya.** In its report, the Commission noted the difficulty of proving customary marriages, stating that:

> ***"We believe also that the fact that customary marriages are not registered leads to difficulty in proving such marriages, particularly when matrimonial proceedings are taken***

in an area other than that in which the parties were married".

76. The Commission therefore recommended that:

> ***"…all marriages be required to be registered and that there be a single system of registration applying to all persons, regardless of race, religion or community."***

77. While this Court accepts that permitting polygamous marriages without the consent of a previous wife or wives is not consistent with the Constitution, and that indeed the practice of polygamy is in itself not consistent with the equality principles in the Constitution, it also recognizes that there are situations and practices that it cannot regulate, and that must be left to the wishes and dictates of the people, through their duly elected representatives, as well as to the individual choices of those adults contracting marriages, and who willingly enter into polygamous or potentially polygamous marriages.

78. In the circumstances, it is my finding that the present petition is merited to the extent that is detailed above. My responses to the two issues that it raises are as follows:

i. ***That section 6 of the Marriage Act must be read as including all marriages celebrated under all religious faiths duly recognized and registered in Kenya.***

ii. ***That the practice of polygamy and registration of polygamous marriages without the consent of the previous wife or wives is inconsistent with the equality provisions of the Constitution.***

lxxix. With regard to costs, and bearing in mind the nature of this petition, I direct that each party shall bear its own costs of the petition.

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

MUMBI NGUGI

JUDGE

Ms. Muigai, petitioner in person

Mr. Mohamed instructed by the State Law Office for the 1st respondent

No appearance for the 2nd respondent