



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

ORIGINATING SUMMONS NO. 21 OF 2015

IN THE MATTER OF: SECTION 66 OF THE MARRIAGE ACT, 2014

IN THE MATTER OF: RULE 2 OF THE MATRIMONIAL CAUSES RULES

**IN THE MATTER OF: AN APPLICATION FOR LEAVE TO PRESENT DIVORCE
PETITION BEFORE THREE (3) YEARS HAVE PASSED**

BETWEEN

B M G APPLICANT

AND

E C RESPONDENT

RULING

By an Exparte Originating Summons dated 28th July 2015, the Applicant, B M G is seeking leave of this Court to commence divorce proceedings for dissolution of a marriage solemnized less than three years preceding the filing of the intended divorce petition. The Originating Summons is supported by an Affidavit sworn by Mrs. Kipsang, learned Counsel for the Applicant on 28th July 2015.

The Originating Summons which was filed under certificate of urgency was certified urgent and fixed for *exparte* hearing on 10th September 2015.

This is an application for leave to file a Petition for Divorce before the lapse of 3 years since the celebration of the marriage. The Application was canvassed before me on 10th September 2015 by Mrs. Kipsang and she made submissions on behalf of her client, the Applicant. Mrs. Kipsang submitted that the Applicant and the Respondent entered into a civil marriage on 31st December 2013. A copy of the marriage certificate annexed to the said Supporting Affidavit confirms this fact. The Applicant and the Respondent cohabited as man and wife in Ukunda for 1 month until the respondent returned to Italy, her native country. The Respondent has since failed to return to her matrimonial home and there is no likelihood that she will do so. The Respondent returned to Kenya sometime in 2014 and attempted to obtain Kenyan residency status using the Applicant's name and her status as his wife without his knowledge or consent. The Respondent has abandoned the applicant and her matrimonial home and has failed to take up her duties and as a wife. This conduct by the Respondent towards the Applicant Mrs. Kipsang submitted, amounts to cruelty and extreme depravity. Efforts to reconcile the parties have been futile and the marriage has irretrievably broken down and hence the need to seek leave to file a Petition

for Divorce before the lapse of the statutory period of 3 years since the celebration of the marriage.

I have carefully perused the application before me and the supporting affidavit. I have also carefully considered the submissions made before me by learned counsel for the Applicant. The Originating Summons Application is brought *inter alia* under Section 66 (1) and (2)(c) of the Marriage Act 2014 which provides:

1. **A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.**
2. **A party to a marriage celebrated under Part IV may only petition the Court for the separation of the parties or the dissolution of the marriage on the following grounds-**
 - a. ...
 - b. ...
 - c. **Exceptional depravity by the other spouse;**

The Application is also brought under Rule 2 (1) of the Matrimonial Causes Rules which provides:

An application for leave to present a petition for divorce before three years have passed since the date of the marriage shall be made by originating summons in form 1 in the Appendix.

Having carefully read and considered the above provisions, this Court takes the following view:

- a. The Marriage Act 2014 unlike the repealed Matrimonial Causes Act does not give power to this Court to allow a petition for divorce to be presented before three years have passed. Section 66 clear states that a party to a marriage **may not** petition the Court for dissolution of the marriage unless 3 years have elapsed since the celebration of the marriage. There is no proviso to this section as there was in Section 6 in the repealed Matrimonial Causes Act empowering a judge on application, to allow a petition to be presented before 3 years have passed.
- b. Rule 2 of the Matrimonial Causes Rules which the Applicant relies on to buttress his application, was made under the repealed Matrimonial Causes Act to give effect to the proviso in Section 6 thereof. Section 6 (1) provided:

No petition for divorce shall be presented to the Court unless at the date of the presentation of the petition three years have passed since the date of the marriage:

Provided that a judge of the court may, upon application being made to him in accordance with rules made under this Act allow a petition to be presented before three years have passed...

- c. The Applicant seeks to rely on rules contained in subsidiary legislation made under a repealed Act of Parliament. On the effect of the repeal of an Act on subsidiary legislation, the Interpretation and General Provisions Act provides at Section 24:

Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.

From the above provision, it is clear that subsidiary legislation shall only remain in force if it is not inconsistent with the repealing Act. It is my view that in the absence of a specific provision in the Marriage Act 2014 to allow a petition for dissolution of marriage to be presented before three years have passed, then Rule 2 of the Matrimonial Causes Rules is inconsistent with the Marriage Act 2014 and cannot therefore remain in force pending the promulgation of rules under the Marriage Act 2014. The

same cannot therefore be relied upon.

Section 66 of the Marriage Act, does not grant the Court powers to grant leave to present a petition for dissolution of a marriage unless three years have elapsed since the celebration of the marriage. It appears that when passing the Marriage Act 2014, Parliament was of the view that marriage is a serious institution and parties should not be allowed to enter into and out of it trivially or on a whim. Had Parliament wanted to give to the Courts power to allow the filing of divorce petitions before the expiry of 3 years, it would have done so. It chose not to.

From the record, the Applicant and the Respondent entered into marriage on 31st December 2013 barely 2 years ago. While it may be true that the Applicant has by reason of the Respondent's conduct been subjected to extreme cruelty and depravity, the law has not opened a window for him to present a petition for the dissolution of his marriage before three years have elapsed since the celebration of the marriage.

Consequently, it is the finding of this court that this Originating Summons has no basis in law and is therefore dismissed with no order as to costs.

DATED, SIGNED and DELIVERED at MOMBASA this 22nd October 2015.

M. THANDE

JUDGE

In the presence of: -

..... for the Applicant

..... Court Assistant