

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO.73 OF 2014

P U D.....PETITIONER

VERSUS

R U P.....RESPONDENT

R U L I N G

The Petitioner petitioned this court seeking to be divorced from the Respondent. The Petitioner alleges that the Respondent has committed matrimonial offences of cruelty and adultery. Contemporaneous with filing the petition for divorce, the Petitioner filed an application under certificate of urgency pursuant to the provisions of **Section 30** of the **Matrimonial Causes Act** and **Rule 3(3)** of the **Matrimonial Causes Rules** seeking several orders from this court. He has sought an order that he be granted custody of the child of the marriage. He has also prayed that the Respondent be ordered to vacate the matrimonial home. The grounds in support of the application are stated on the face of the application.

In essence, it is the Petitioner's case that the Respondent has subjected him to physical abuse. The Petitioner exhibited a medical report to the affidavit in support of the application showing the injuries that he had sustained allegedly upon being assaulted by the Respondent. The Petitioner was apprehensive that if the orders craved for were not granted, the Respondent would harm him and the child of the marriage. The Petitioner was of the view that he should be separated from the Respondent by the Respondent being ordered to vacate from the matrimonial home. In the submission made before court by Miss Lumumba, Learned Counsel for the Petitioner, she stated that the Petitioner was willing to provide for the upkeep of the Respondent in the event that the court will allow the application.

The Respondent was served with the application. She did not file any papers in opposition to the application. She did not attend court on the date that the application was scheduled to be heard. This court therefore heard the application in the absence of the Respondent having been satisfied that indeed the Respondent had been duly served. The first issue for determination by this court is whether this court has jurisdiction, in the first instance, to make an order regarding custody of a child. **Sections 73** and **118** of the **Children Act** grant jurisdiction in the first instance, to the Children's Court to hear and determine all disputes relating to the custody and maintenance of children. The **Children Act** is a latter **Act** to the **Matrimonial Causes Act** which took effect from 1st January 1941. The **Children Act** was assented to on 31st December 2001. The Petitioner cannot therefore rely on **Section 30** of the **Matrimonial Causes Act** to invoke the jurisdiction of this court in the first instance in a dispute involving the custody and maintenance of a child. The Petitioner will therefore have to present his case on custody and maintenance of the child before the Children's Court. It is that court that has jurisdiction in the first instance to hear and determine the dispute.

As regard the second prayer wherein the Petitioner seeks the eviction of the Respondent from the matrimonial home, this court is of the opinion that the Petitioner has not placed sufficient material to enable this court grant such drastic orders against the Respondent. If indeed the Petitioner is apprehensive that his physical wellbeing will be threatened if he continues to reside in the matrimonial home, there is nothing easier than for him to get another house to reside in. The Petitioner is the breadwinner of the family. The Respondent is a housewife. The Petitioner has the financial means to get another house to live in. Although the Petitioner offered to rent another house for the Respondent to reside if the court granted the eviction order, this court is of the view that commonsense demands that the Petitioner himself rents another residential house. In the premises therefore, this court finds no merit with the Petitioner's

application. The application is hereby dismissed but with no orders as to costs. The Petitioner will move the Children's Court to determine his case regarding to the custody and maintenance of the child of the marriage. It is so ordered.

DATED IN NAIROBI THIS 2ND DAY OF APRIL, 2014

L. KIMARU

JUDGE