



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Divorce Cause 37 of 2011**

**W. A. H. .... PETITIONER**

**VERSUS**

**J. W. M. .... RESPONDENT**

**RULING**

(1) The Petitioner and the Respondent are respectively husband and wife who solemnized their marriage at the Registrar's Office in Mombasa under the Marriage Act, Cap 150 of the Laws of Kenya on 7<sup>th</sup> April 2004, after which they have since lived in Germany. They are both domiciled in Germany and reside in Am Schlagbaum D-45326 in the Federal German Republic. They have three issues of the marriage born in June 2007, December 2009 and in January 2011.

(2) The Petitioner seeks to be divorced from the Respondent on the grounds of desertion and adultery. He prays that his property and pension be excluded from any claim by the Respondent and that the custody of the three children be granted to him with unlimited access to the Respondent. In her Answer to the Petition, the Respondent denies the allegations of desertion or adultery and accuses the Petitioner of adultery.

(3) In her pleadings, the Respondent gave notice of a Preliminary Objection to the Petition on the grounds that another divorce case NO. AZ101 F416/M has been instituted in the Law Court of Essen in Germany where both parties reside. She however did not dispute the jurisdiction of the Court and she prayed that the Petitioner's Petition be dismissed with costs.

(4) At the hearing of the Preliminary Objection, Mr. Were for the Respondent argued, however, that this court lacks jurisdiction to hear the Petition because:

- i. The parties reside in Germany together with their children.
- ii. The children are of tender age and reside in Germany rendering the Respondent somewhat immobile.
- iii. The cost of proceeding in Kenya when both parties reside in Germany is unnecessary.
- iv. Section 4 of the Matrimonial Causes Act barred the Petition by the Petitioner who was not domiciled in Kenya.

(5) The Petitioner's counsel, Mrs. Kipsang, has argued that this court has jurisdiction because:

- i. The marriage was solemnized in Kenya.
- ii. The parties have matrimonial property in Maua, Kenya (a matrimonial property case has been filed

being Msa HCCC No. [...]).

- iii. The divorce suit in Germany was filed subsequent to the suit in Kenya.
- iv. Section 4 of the Matrimonial Causes Act did not affect the Petitioner who was in Kenya under an Alien certificate when Petition was filed.
- v. The case in Germany relates only to the custody of the children.
- vi. Section 5 of the Matrimonial Causes Act does not apply to the present case.

(6) The issue for determination is whether the Court has jurisdiction to entertain the Petitioner's Petition herein. In accordance with the authority of **Mukisa Biscuits Manufacturing Co. Ltd. v. West End Distributors Ltd. (1969) EA 696**, a Preliminary Objection is argued as a pure point of law on the basis that the facts pleaded by the Plaintiff/Petitioner are admitted. It cannot be raised where facts have to be established or where only exercise of discretion is sought. Furthermore, the Preliminary Objection must dispose the entire dispute.

(7) Despite opportunity given by the court on two adjournments, the Respondent did not supply the particulars and proceedings in the alleged divorce case AZ101 F416/M. The Petitioner's answer to this allegation was that the German case related only to the custody of children. The objection that the present proceedings were barred by reason of the alleged German divorce case required determination of the true facts relating to existence and status of the case and could not therefore be the basis of a Preliminary Objection.

(8) The strongest objection by the Respondent is that the parties are domiciled in Germany and that therefore section 4 of the Matrimonial Causes Act bars the Petition for dissolution of marriage. Section 4 of the Matrimonial Causes Act provides as follows:

***“Nothing contained in this Act shall authorize -***

***(a) the making of any decree of dissolution of marriage or of nullity of marriage unless the petitioner is domiciled in Kenya at the time when the petition is presented;***

***(b) the grant of any other relief under this Act, unless one of the parties to the suit has, at the time when the petition is presented, his or her usual residence in Kenya or unless the marriage was solemnized in Kenya.***

As is clear from section 4 (b) of the Act, there is no bar to the grant of any other relief [apart from divorce and nullity of marriage] under the Act where **“one of the parties to the suit has, at the time when the Petition is presented, his or her usual residence in Kenya or ... the marriage was solemnized in Kenya.”** Therefore, in this case, while section 4 (a) of the Act bars the making of a decree for dissolution or nullity of marriage, the court may **“grant any other relief under this Act”** under subsection 4 (b), including the custody orders sought in the Petition together with any order for Separation in lieu of the divorce which the court may grant under section 17 of the Act. Indeed, the Petitioner prays in the Petition that:

(a) That the said marriage between the Petitioner and the Respondent be dissolved and the Petitioner be separated from the Respondent forthwith.

It is unclear whether the Petitioner sought separation in the alternative or the word **“separated”** refers to the physical distance between the parties upon divorce. Be that as it may, the Petitioner is at liberty to seek leave to amend or file a Supplemental Petition, as appropriate, under rule 14 of the Matrimonial Causes Rules. Rule 14 (1) of the Matrimonial Causes Rules provides that a Petition may be amended, and a Supplemental Petition filed, after service of the Petition, with leave of the court. The Petitioner may seek to amend the Petition to clarify the Prayers sought in the Petition.

Section 17 (1) of the Matrimonial Causes Act provides:

***“A Petition for judicial separation may be presented to the court by either the husband or the wife on any grounds on which a Petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, and the provisions of this Act relating to the duty of the court on the presentation of a Petition for divorce, and the circumstances in which such a Petition shall or may be granted or dismissed, shall apply to a Petition for judicial separation.”***

The court has power to make orders with respect to custody of children in any proceeding for divorce, nullity of marriage or judicial separation, under section 30 of the Matrimonial Causes Act.

Accordingly, section 4 of the Matrimonial Causes Act is not an absolute bar to a Petition by a person who is not domiciled in Kenya if the marriage was solemnized in Kenya and the Petition seeks relief other than divorce or nullity of marriage.

(9) I have noted the decision of the Court in **Karl Hey v. Sally Wandera Hey (2009) eKLR** where the Court found that although the Petitioner lacked domicile the Petition would stand since he had proved that he had close connection with the country, coupled with the fact that the issue of jurisdiction had been brought up rather late in the proceedings.

(10) The Petitioner herein has claimed an interest in some landed properties which are the subject of the HCCC No. 84/2012. The objection to jurisdiction on the ground of domicile under section 4 of the Matrimonial Causes Act was raised late during the scheduled hearing of the Petition. However, I do not accept that the conduct of parties would be an estoppel against statutory provisions. I would rather accept as determinant the constitutional principle of access to justice for all under Article 48 of the Constitution without discrimination as to domicile and years of residency in Kenya.

(11) In upholding the constitutional principle against discrimination in the case of **J.S.W. v. S.R.W. (2012) eKLR**, GBM Kariuki, J (as he then was) allowed a Petition by a husband who was a resident of Kenya but was neither domiciled in Kenya or a citizen and held:

***“Although the Petitioner is a husband who is neither domiciled in Kenya nor a Kenyan citizen but is otherwise ordinarily resident in Kenya, and notwithstanding sections 4 and 5 of the Matrimonial Causes Act, I hold the view that he is entitled to Petition for divorce in Kenya. It is my view also that section 5 (1) of the Matrimonial Causes Act is discriminatory of husbands who although ordinarily resident in Kenya for a period of 3 years cannot file a divorce Petition unless the marriage was solemnized in Kenya or are domiciled in Kenya. It is to this extent section 5 of the matrimonial Causes Act is inconsistent with the Constitution.”***

I agree with learned Judge's rationale for his decision that **“while Article 27 of the Constitution has enshrined the right of every person to equal protection and equal benefit of the law, Article 20 (4) of the Constitution enjoins the court to promote the values that underlie an open and democratic society, based, inter alia, on equality and freedom.”**

(12) Accordingly, for the reasons set out above, and in upholding the constitutional principles of equal benefit and protection of the law and access to justice and taking into account the Petitioner's immovable properties the subject of the proceedings in HCCC No. [...] and noting that the Petition also seeks reliefs, other than dissolution or nullity of marriage, which are permissible under section 4 (b) of the Matrimonial Causes Act and further noting the Petitioner's right to seek to amend the Petition or file a supplemental Petition, I decline to uphold the Respondent's Preliminary Objection and direct that the Petition proceeds to hearing on a date to be fixed in consultation with the parties. Costs of the Preliminary Objection to abide the result of the Petition.

**Dated and delivered this 19<sup>th</sup> day of February 2013.**

**EDWARD M. MURIITHI**  
**JUDGE**

In the presence of:

Mrs. Kipsang for the Petitioner

N/A for the Respondent

Miss Linda Osundwa - Court Clerk