



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 206 OF 2012**

**BETWEEN**

**I W K.....PETITIONER**

**AND**

**E G N.....RESPONDENT**

**RULING**

The petitioner contracted marriage with the respondent on 3<sup>rd</sup> August 2012. On 7<sup>th</sup> November 2012 she lodged a petition for dissolution of the marriage. When notice to appear and a copy of the petition were served on the respondent, he filed a notice of preliminary objection on the grounds that the petition offended section 6 of the Matrimonial Causes Act.

The petitioner in response to the said notice of preliminary objection filed an Originating Summons dated 8<sup>th</sup> February 2013 asking for leave to file a petition for dissolution of the marriage contracted on 3<sup>rd</sup> August 2012 notwithstanding that three years had not lapsed. At the hearing of the Originating Summons on 2<sup>nd</sup> May 2013, it was urged that the said summons was intended to have the petition dated 6<sup>th</sup> November 2012 and filed in court on 7<sup>th</sup> November 2012 regularised.

Section 6 of the Matrimonial Causes Act states that no petition for divorce shall be presented to court unless at the date of the presentation of the petition three years have lapsed since the date of the marriage. A proviso to section 6 of the Matrimonial Causes Act envisages the grant of leave to file a petition before the three years have lapsed. The proviso is given effect by rule 2 of the Matrimonial Causes Rules which provides for the filing of an application for leave to present a petition before three years have expired since the celebration of marriage.

The question is, can a petition filed before the three years have elapsed be regularised by the filing of an application under rule 2 of the Matrimonial Causes Rules thereafter? I think not. The law is clear that a petition should be filed for dissolution of marriage after three years have lapsed, except where leave has been granted. There is nothing in the law to provide that where a petition is filed contrary to section 6 of the Matrimonial Causes Act the same can be cured by belatedly filing an application under rule 2 of the Matrimonial Causes Rules. In my view such a petition, filed in contravention of section 6, is as dead as a dodo. It cannot possibly be revived in any way.

My conclusion is that the petition for divorce dated 8<sup>th</sup> February 2013 was incompetent *ab initio*. It did not exist as a petition. It cannot therefore be resurrected. The Originating Summons dated 8<sup>th</sup> February 2013 serves no purpose at all. It is incompetent and misconceived. I strike it out and award costs to the respondent. The petition dated 6<sup>th</sup> November 2012 suffers a similar fate. The respondent shall have costs of the divorce cause too.

**SIGNED DATED and DELIVERED in open court this 15TH day of July, 2013.**

**W. MUSYOKA**

**JUDGE**