



**REPUBLIC OF KENYA**  
**COURT OF KENYA AT NAIROBI**  
**DIVORCE CAUSE 122 OF 2006**

M S A.....PETITIONER

VERSUS

P K A.....RESPONDENT

**R U L I N G**

On 3<sup>rd</sup> July 2013, the Respondent filed an application pursuant to the provisions of **Section 25(2) and (3)** of the **Matrimonial Causes Act** and **Section 9** of the **Hindu Marriage Act** seeking orders of this court to compel the Petitioner to pay her maintenance to the sum of Kshs.367,100/- per month with effect from 13<sup>th</sup> November 2009. The Respondent further prayed for an order of the court to compel the Petitioner to pay her an annual sum of Kshs.1,288,000/- for overseas and local travel, insurance and work permit. The grounds in support of the application are stated on the face of the application. The application is supported by the annexed affidavit of the Respondent. It is supported by a further affidavit sworn by the Respondent on 16<sup>th</sup> September 2013. The application is opposed. The Petitioner filed a preliminary objection to the application. The Petitioner further filed a replying affidavit in opposition to the application.

Having perused the pleadings filed by the parties in support of their respective positions, this court directed the parties to dispose of the preliminary objection first because it raised an issue of jurisdiction of this court. This court heard oral rival submission made by Mr. Ochieng-Oduor for the Petitioner and by Miss Matasi for the Respondent. There are certain facts that were not in dispute in the application. It was not disputed that this court in a judgment delivered on 3<sup>rd</sup> July 2009 (Onyancha J) declared the marriage that was celebrated between the Petitioner and the Respondent on 25<sup>th</sup> September 1995 to be null and void. The marriage was therefore nullified under **Section 11(i)(a)** of the **Hindu Marriage and Divorce Act**. At the material part of the judgment, the learned judge had this to say:

***“The facts and circumstances which led and produced the long marital cohabitation and representation to society of existence of a marriage between the parties herein arise from and thrive in an illegal, bigamous and void contract of marriage. A possible presumed marriage from those circumstances cannot be enforceable by this court as that would amount to aiding a party who entered a contract which is illegal, immoral and contrary to public policy.”***

The Respondent was aggrieved by the decision and has duly filed an appeal to the Court of Appeal. Pending the hearing and determination of that appeal, the Respondent filed an application under **Rule 5(2)(b)** of the **Court of Appeal Rules**, seeking *inter alia*, an order that the Court of Appeal stays the decree and judgment of this court. In particular, the Respondent asked the Court of Appeal to grant her an order restraining the Petitioner from evicting her from the matrimonial home. After considering the application, the Court of Appeal declined to stay the decree and judgment of this court but allowed the Respondent application to continue to reside in the matrimonial home pending the hearing and determination of the appeal. As regards the issue of maintenance, the Court of Appeal made no orders.

According to the Respondent, the Petitioner should be compelled to pay her maintenance pending the hearing of her appeal to the court of appeal challenging the decision of this court. On his part, the Petitioner argued that since there exists no marriage between the Petitioner and the Respondent, the same having been declared null and void, this court had no jurisdiction to grant the orders sought in the

application. **Section 9** of the **Hindu Marriage and Divorce Act** states that the **Matrimonial Causes Act** shall apply in relation to marriages celebrated under the **Act** subject to the provisions of that **Act**. Under **Section 25(2)** of the **Matrimonial Causes Act**, this court has jurisdiction, even after a decree for divorce or nullity has been issued, to direct that a wife be paid such sum as the court may deem reasonable. **Section 25(3)** of the **Act** amplifies the above Section. The preliminary objection raised by the Petitioner essentially relates to the question whether this court can make any pronouncement regarding maintenance during the pendency of the appeal before the Court of Appeal, and secondly, where this court made a determination that the marriage between the Petitioner and the Respondent was a nullity on the grounds of immorality and being contrary to public policy.

This court's view of the matters in dispute is simple. In so far as there is a pending appeal before the Court of Appeal where the issues regarding the validity or otherwise of the marriage, this court cannot make ancillary reliefs dependent on the presumption that that marriage is infact in existence. This court having made a pronouncement that the marriage was a nullity, immoral and contrary to public policy, it cannot on the other hand make orders which would in effect perpetrate the immorality and acts contrary to public policy. The Respondent's application before this court for maintenance therefore cannot be entertained until the Court of Appeal has rendered its decision. The preliminary objection raised by the Petitioner therefore has merit. The hearing of the Respondent's application dated 3<sup>rd</sup> July 2013 is hereby stayed pending the hearing and determination of the appeal before the Court of Appeal regarding the validity of the marriage between the Petitioner and the Respondent. There shall be no orders as to costs.

**DATED AT NAIROBI THIS 26<sup>th</sup> DAY OF SEPTEMBER, 2013**

**L. KIMARU**

**JUDGE**