



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
DIVORCE CAUSE NO: 132 OF 2011**

**D.M.MPETITIONER
VERSUS
G.O.O.....RESPONDENT**

RULING

In the course of writing the judgement in this divorce cause, the court has noted that, the petitioner has stated that there are two issues of marriage namely;

1. **S. T. O– (10 years 11 months)**
2. **K. D. O. (7 years)**

The above notwithstanding the petitioner has neither sought orders in relation to their care and custody nor has she submitted how parental responsibility is to be exercised after the divorce, yet she is already involved in an adulterous union wherein a third child has been born.

Although the power vested in this court under **Section 30** of the **Matrimonial Causes Act (Chapter 152 of Laws of Kenya)** to make just provision with respect to custody and maintenance is discretionary, I am of the considered view that the court has the legal and constitutional duty to safeguard the rights of children affected by divorce, in terms of **Article 53(1) and (2) of the Constitution as read with Sections (4) 24(1) and 24(5) of the Children’s Act No.8 of 2011. Article 53 of the Constitution provides, inter alia, as follows:-**

53(1) Every child has the right-

- (a) To a name and nationality from birth;***
- (b) To free and compulsory basic education;***
- (c) To basic, nutrition, shelter and health care;***
- (d) To be protected from abuse, neglect, harmful cultural practices, all forms of violence, inhuman treatment and punishment and hazardous or exploitative labour;***
- (e) To parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not, and***
- (f)***

(2) A child’s best interests are of paramount Important in every matter concerning the child.”

Section 24(1) of the **Children's Act** provides as follows

“Where a child’s father and mother were married to each other at the time of his birth, they shall have parental responsibility for the child and neither the mother nor the father of the child shall have a superior right or claim against the other in exercise of such parental responsibility”.

Section 24(5) provides as follows:-

“A person who has parental responsibility for a child at any time shall not cease to have that responsibility for the child”

Whereas **Section 27** of the **Matrimonial Causes Act** provides for the transmission of parental responsibility upon the demise of one parent, no such provision exists as regards divorce. This court therefore is compelled to intervene in cases where no application for the custody and maintenance of the issues of a threatened marriage has been made, as is apparent in these proceedings.

In view of the above I am not in a position to render a judgement in the divorce cause and the same is hereby stayed to give the petitioner time to take appropriate measures in the interests of the two issues of marriage sought to be dissolved.

It may necessary, in my view, for the Hon. Chief Justice to invoke his power under **Section 29** of the **Matrimonial Causes Act** and make the necessary regulations in this regard. A copy of this ruling will be forwarded to the office of Hon. Chief Justice and the Rules Committee for consideration and appropriate action.

DATED, SIGNED and DELIVERED at NAIROBI this 22ND DAY OF March 2012.

M.G. MUGO
JUDGE

In the presence of:

D. M. M in person.

No appearance for the respondent.