



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**(MILIMANI LAW COURTS )**

**PETITION 8 OF 2012**

E.O.....PETITIONER  
AND

THE ATTORNEY GENERAL .....1<sup>ST</sup> RESPONDENT

THE CHIEF MAGISTRATE AT NAIROBI

MILIMANI COMMERCIAL COURTS.....2<sup>ND</sup> RESPONDENT

AND

H.E.A.....INTERESTED PARTY

**JUDGMENT**

**Introduction**

1. This matter arises out of a divorce petition filed by the interested party H.E.A against the petitioner namely, Chief Magistrate (Milimani Commercial Court) *Divorce Cause No. 497 of 2011, H.E.A v E.O.* It concerns the constitutionality of the provisions of the *Marriage Act (Chapter 150 of the Laws of Kenya)*, *African Christian Marriage and Divorce Act (Chapter 151 of the Laws of Kenya)* and the *Matrimonial Causes Act (Chapter 152 of the Laws of Kenya)* in so far as these statutes refer to the race and religion of the parties as a basis of the court jurisdiction.

**The Petitioner's Case**

2. The parties were married under the provisions of the *Marriage Act* and the petitioner avers that he wishes to file a Divorce Petition and/or a cross petition against the interested party at the High Court but is ostensibly barred from doing so by the provisions of **section 3, 14 and 15** of the *African Christian Marriage and Divorce Act* as read with **section 3** of the *Matrimonial Cause Act*. The effect of these provisions is that they do not permit African Christians to file a divorce petition in the High Court.

3. The petitioner contends that these provisions, read together, are unconstitutional, null and void to the extent that they infringe on his constitutional rights under **Article 27** which prohibits discrimination on account of race or religion.

4. The pertinent provisions referred to are as follows:

***The African Christian Marriage and Divorce Act***

**Section 3**

*(5) This Act shall apply only to marriages of Africans one or both of whom profess the Christian religion and to the dissolution of such marriages.*

*(6) Nothing herein contained shall prevent any African marrying under the Marriage Act, but if one or both parties to a marriage under the Act are Africans professing the Christian religion the provisions of this Act relating to dissolution of marriage shall apply to such marriage as if it were a marriage under this Act.*

**Section 14**

*Subordinate Courts of the first class shall have the same jurisdiction, in the case of marriages solemnized or contracted or the Native Christian Marriage Act (now repealed), as is vested in the High Court by virtue of the Matrimonial Causes Act.*

**Section 15**

*An appeal shall lie from the decrees or from any part of the decrees and from orders, or subordinate courts under section 14 of this Act to the High Court.*

***The Matrimonial Causes Act***

**Section 3**

*Subject to the provisions of the African Christian Marriage and Divorce Act, the jurisdiction under this Act shall only be exercised by the High Court (hereinafter called “the Court”) and such jurisdiction shall, subject to the provisions of this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England.*

5. In the petition dated 17<sup>th</sup> January 2012, the petitioner seeks the following reliefs;

*(a) A declaration that Sections 3, 14 and 15 of the African Christian Marriage and Divorce Act, Cap 151 Laws of Kenya as read with Section 3 of the Matrimonial Causes Act are unconstitutional null and void to the extent that they infringe on the Constitutional rights of the petitioner and other Africans of the Christian religion guaranteed under Article 27 of the Constitution not to be discriminated upon on account of race or religion.*

*(b) A declaration the act of the 2<sup>nd</sup> respondent admitting Divorce Cause No. 497 of 2011 and purporting to proceed with the same is a perpetuation of the unconstitutionality that is inherent in sections 1, 14 and 15 of the African Christian Marriage and Divorce Act, Cap 15 laws of Kenya as read with section 3 of the Matrimonial Causes Act;*

*(c) An order directing the 1<sup>st</sup> respondent to take necessary steps to advise the government of the need to amend sections 3, 14 and 15 of the African Christian Marriage and Divorce Act, Cap 151 laws of Kenya as read with section 3 of the Matrimonial Cases Act to bring the provisions into conformity with the Constitution;*

*(d) The costs hereof be provided for,*

*(e) Any other relief that the Honourable Court may deem fit to grant.*

## The Submissions

6. When this matter came up for directions on 27<sup>th</sup> March 2012, I drew attention to the case of ***George Wainaina v Rose Wainaina Nairobi Divorce Cause (2008) 1 KLR (G &F) 88*** where Justice Kubo had held that impugned provisions were unconstitutional and therefore this petition was unnecessary. I requested counsel for the petitioner to address me on the effect of that decision on these proceedings.

7. Mr Akata submitted *Wainaina's case* was not conclusive as to the constitutionality of the ***African Christian Marriage and Divorce Act*** and the ***Matrimonial Causes Act***. The issue of constitutionality was not necessary for the determination of the matter at hand and the conclusions of the judge were *obiter dicta*. Counsel contended that in making his observation the court considered the ***Faith Nyawira Ngatia Karungaru v Wilson Ngatia Karungaru Nairobi Divorce Cause No. 181 of 2000 (unreported)*** where Justice Waweru stated that the provision may be unconstitutional but the matter has to be the subject of express proceedings to enforce fundamental rights and freedoms under the Constitution.

8. Mr Ataka also observed that Justice Kubo issued a directive to the Attorney General to ensure that amendments were made to the statutes. In counsel's view, the directive was not a mandatory order of the court and the Attorney General has no obligation to act. In the circumstances, counsel submitted that there must be an express finding that the provisions impugned were unconstitutional.

9. The petition was opposed by Ms Sijeny, counsel for the interested party, who submitted that the subordinate court has jurisdiction to determine the divorce cause before it. Since the parties were married under the Marriage Act, the interested party had the option to file the petition in either the High Court or the Magistrates Court.

10. Counsel for the respondents, Ms Makori left the issue for determination for the court.

## Analysis and Disposition

11. In the case of ***Faith Nyawira Ngatia Karungaru v Wilson Ngatia Karungaru (Supra)***, Justice Waweru held that divorce causes in respect of marriage contracted under the ***Marriage Act*** in which the parties were African and who professed the Christian faith, were triable in the first instance, in the subordinate court of the first class and the High Court had only appellate jurisdiction. Though the ***Matrimonial Causes Act*** refers to the race of the parties, the position is that a party married under the ***Marriage Act*** may file the petition for divorce either in the High Court or the Subordinate Court.

12. In the circumstances, there is no constitutional issue or breach of the petitioner's rights. The petitioner may file a cross petition to the petition in the Subordinate court and proceed with the matter in accordance with the law.

13. I am of the firm view that the sentiments expressed by Justice Kubo were not merely *obiter* remarks but a specific determination of the issue of the constitutionality of the impugned provisions. In the *Wainaina Case* the Judge stated as follows, "***The provisions of sections 3, 14 and 15 of the African Christian Marriage and Divorce Act, which section 3 of the Matrimonial Causes Act acknowledges as the ruling statute for matrimonial causes between African Christians in that the said provisions do in the first instance shut African Christians out of the High Court and confine them to subordinate courts for their matrimonial causes and allow them access to the High Court only on appeal. It is not apparent why this is so. Such segregation falls squarely within the definition of the expression "discriminatory" given in subsection (3) of section 82 of the Constitution ..... At first sight the discrimination entailed in sections 3, 14 and 15 of the African Christian marriage and Divorce Act would appear permissible under subsection 4(b) of the Constitution quoted above but closer scrutiny persuades me otherwise. There is nowhere in the said subsection where discrimination is permitted. And I can find no similar racially discriminatory provisions in equivalent statutes, like the Hindu Marriage and Divorce Act (Cap 157) of the Mohammedan Marriage, Divorce and Succession Act (Cap 156). If the African Christians ask that their matrimonial causes be handled by subordinate courts, for whatever reason, it could be said that the discrimination is self-inflicted and they should not***

***be heard to complain. But there is no evidence before me that African Christians asked to be so treated. It seems to me that the provisions contained in section 3, 14 and 15 of the African Christian Marriage and Divorce Act, as read with section 3 of the Matrimonial Causes Act, are in breach of the Constitutional provisions barring discrimination on racial grounds, are obsolete and out of step with present day Kenya and in need of urgent review. The Attorney General may wish to take appropriate corrective measures. To that end, I order that a copy of this ruling be served on the Attorney General for his consideration and action as soon as appropriate.”***

14. The findings of the learned Judge on the discriminatory nature of the statutory provisions was not merely *obiter* by was the *ratio* of the decision. The Judge had directed the counsel for the petitioner to show cause why the matter should not have been filed in the Subordinate Court and in coming to the conclusion the he could determine the matter the Judge considered the discriminatory provisions of the statute as part of the decision.

15. Justice Kubo also emphasised this position in the case of ***Rose Nyokabi Muturi v Raphael Charles Muturi Nairobi Divorce Cause No. 143 of 2001 (Unreported)*** when the judge stated, “***The bottom line of my above analysis is that the provisions of sections 3, 14 and 15 of the African Christian Marriage and Divorce Act, as read with section 3 of the Matrimonial Causes Act, offend against our Constitutional provisions barring discrimination on racial grounds and that those provisions are unconstitutional and call for early review by the authorities with power to effect appropriate legislative corrective measures. A call to that end was made in Wainaina’s case (supra).***”

16. The remarks by the Justice Kubo that the Attorney General should take steps to amend the statutes were superfluous. Once a finding or declaration of unconstitutionality is made, it takes effect immediately unless otherwise stated. Such a declaration does not the need action by the Attorney General to effect amendments to the statute. The only step the Attorney General would take would be to formally remove the offensive words or references to in the statute so that it accords with the court’s decision. Whether the Attorney General takes such a step or not does not affect the constitutionality of the statute.

17. The decision in ***Wainaina Case*** had the effect of declaring **section 13, 14 and 15** of the ***African Christian Marriage and Divorce Act*** as read with **section 3** of the ***Matrimonial Causes Act*** in breach of **section 82** of the former Constitution. Those sections were therefore declared null and void to the extent that they referred to race of the parties as a basis for the court’s jurisdiction.

## **Conclusion**

18. For the avoidance of doubt the Subordinate Court has jurisdiction to determine a marriage entered into both by Africans under the ***Marriage Act*** and the ***African Christian Marriage and Divorce Act*** under the ***Matrimonial Causes Act***.

19. I find that the petition lacks merit and it is hereby dismissed with no order as to costs.

**DATED and DELIVERED at NAIROBI** this 19<sup>th</sup> day of April 2012.

**D.S. MAJANJA**

**JUDGE**

Mr V. Ataka instructed by Prof. Otieno Odek, Prof. Ojienda and Wanyama Advocates for the petitioner

Ms Makori, Litigation Counsel, instructed by the State Law Office for the respondent.

Ms J. Sijeny, instructed by Sijeny and Company Advocates for the interested party.