



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 458 of 2012

K M.....PETITIONER

AND

THE ATTORNEY GENERAL.....RESPONDENT

AND

T W M.....INTERESTED PARTY

JUDGMENT

1. The facts underlying this petition are not in dispute and are as follows. The petitioner and interested party were married under the *African Christian Marriage and Divorce Act (Chapter 151 of the Laws of Kenya)* on 9th August 2003 and they have one child.
2. Their marriage has since broken down and there are proceedings between the parties in various courts. In the Children's Court there is *Children Court Case No. 1322 of 2011*. There is a divorce cause at the Milimani Chief Magistrates Court being *Divorce Petition Cause No. 474 of 2011* and a Matrimonial Property cause in the High Court being *HCCC No. 70 of 2011 (OS)*. All these cases are still pending before the respective courts.
3. What led to the petition herein is that the interested party moved the subordinate court under **Rules 3(2) and 40** of the *Matrimonial Causes Rules* and **Section 25** of the *Matrimonial Causes Act (Chapter 152 of the Laws of Kenya)* seeking monthly maintenance in the sum of Kshs.150,000 per month for her husband, the petitioner.
4. The petitioner has now moved the court for a declaration that **section 25** of the *Matrimonial Causes Act* is unconstitutional since it only provides for payment of alimony by wives and husbands. In the circumstances, it is a violation of **Article 27** which prohibits discrimination and **Article 45** which provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.
5. Counsel for the petitioner asserts that the court should issue conservatory order as the petitioner's case will be prejudiced in the event the court declares this provision unconstitutional.
6. Dr Kuria, S.C., counsel for the interested party, opposes the application on the ground that this matter is moot as the facts of the case do not support the relief sought as the petitioner has not sought maintenance. Counsel also avers that on the facts of the case, the petitioner cannot possibly seek

maintenance as he earns a better salary than the interested party.

7. Dr Kuria, SC, also submitted that this matter should be struck out as an abuse of the court process. Counsel relied on the learned article authored by I. Jacobs titled ***'Inherent Jurisdiction of the Court'*** [1970] CLP 21 as authority for the proposition that the court has the inherent jurisdiction to deal with the matter summarily as it raises no cause of action.

8. I agree with Dr Kuria, that on the facts of the case, the petitioner has not made out any case for conservatory relief or indeed any relief as against the interested party who is entitled to apply for maintenance and as against her no relief has been sought in the petition.

9. I have taken into account what has been stated and in my view the only issue for determination which can easily be disposed off is whether **section 25** of the ***Matrimonial Causes Act*** is discriminatory or contrary to **Article 27** which provides for equality and outlaws discrimination and **Article 45(3)** which provides for equality of parties within a marriage. It is correct to state that it indeed the provision is discriminatory, in so far as it permits the only the wife to apply for maintenance on account of her status.

10. However, **section 7(1)** of the **Sixth Schedule** to the Constitution provides a solution to the petitioners grievance in that it provides as follows; **"All law in force immediately before the effective date continues in force and shall be construed with alterations, adaptations, qualification and exceptions necessary to bring it into conformity with the Constitution."**

11. An application of **section 7(1)** of the **Sixth Schedule** to the Constitution entitles the court to read into the Act words that would bring the Act in conformity with the Constitution. In the circumstances, **section 25** of the ***Matrimonial Cause Act*** which applies to the wife is now to be read as **"spouse"** to bring it in conformity with **Articles 27** and **45** of the Constitution and **section 25** of the Act shall be read with all the necessary alteration to make it gender neutral.

12. Save for the finding I have made in the circumstances of the case, I decline to award the declarations sought in the petition.

13. Since the petitioner had attempted to stay the subordinate court proceedings in a matter where there was no cause of action against the interested party, I award costs of the application and petition to the interested party.

DATED and DELIVERED at NAIROBI this 15th day of November 2012

D.S. MAJANJA
JUDGE

Mr N. Kamwendwa instructed by N. M. Kamwendwa and Company Advocates for the petitioner.

Dr G. K. Kuria, S.C., instructed by Kamau Kuria and Kiraitu Advocates for the interested party.