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

**Divorce Case 16 of 2008**

**CPB ……. PETITIONER**

**VERSUS**

**CB ……....…… RESPONDENT**

**RULING**

The parties herein are married under the African Christian Marriage and Divorce Act (Cap 151).

The Respondent has filed the Answer to the Petition, which is dated 27th March, 2008. In the Answer, he has not demurred as to the validity of the marriage or the jurisdiction of this court to hear and determine this petition. On the contrary, in paragraph 1 of the Answer, the fact of solemnization of the marriage, the cohabitation of the couple and birth of two children are accepted. In paragraph 8 (a) of the Answer he has conceded that as the marriage is "**broken down beyond repair**" the prayer of dissolution of marriage was not opposed.

In the petition, apart from the prayers for dissolution, the Petitioner has also prayed for custody and control of the two children, for maintenance for herself and the children of marriage.

After the close of the pleadings the Registrar issued Certificate of a defended cause on 14th July, 2008 because the pleadings were in order.

Thereafter the cause was fixed for hearing on 20th November, 2008. On that day the Respondent through his Advocates filed Notice of Preliminary Objection. It raised two grounds:

1. **That the Petitioner is not and has never been resident in Kenya and in any event has not been resident in Kenya in the three years immediately preceding presentation of the petition.**

2. **That in any event this honourable court lacks the jurisdiction to hear and determine this petition.**

However, at the time of hearing of the said Notice he added further grounds on the validity of the marriage.

So far as the first point is concerned, I find that first of all the issue is a matter of fact and unless the Petitioner has alleged that

**(a) She is not domiciled in Kenya (Sec.4(a) of the matrimonial causes Act) or**

**(b) she has not been ordinarily resident for a period of three years immediately preceding the commencement of the proceedings.**

The same has to be determined after evidence is led.

None of these facts is present. The Petitioner has specifically stated that she is domiciled in Kenya, and that fact is conceded by the Respondent in his Answer, (paragraph 1 thereof).

The Petitioner has also prayed for other prayers apart from that of dissolution and the fact of irreconcilable marriage is in any event conceded. If so, the Petitioner is at present rightly before the court as per section 4(b) of the Matrimonial Causes Act.

I shall thus reject the first objection.

The second point of validity of the marriage on the ground that the Respondent is not an African as he is an American Citizen is, in my view, not a valid point to be taken at this juncture. The word African, in my view, does not connote the citizenship of any country. The basis of my opinion is very simple, logistical, and historical.

The act was an ordinance and came into operation on 17th December, 1931 when the indigenous citizens of this country were embracing Christianity due to the insurgence of colonial rule. Before the advent of this Act, the indigenous people were following their personal customary laws to solemnize the marriage, and the purpose of the Act was to encourage them to enter into monogamous matrimony. The Marriage Act was already in force as from 29th November, 1902. One can easily frown on the enactment of this Act with its differential treatment. The Section which can be abhorred is Section 3 of the Act – viz:

"**3(1) This Act shall apply only to the marriages of Africans one or both of whom profess the Christian religion and to the dissolution of such marriage."**

As if that one was not enough, Section 3(2) provides; viz:

"**3(2) Nothing herein contained shall prevent any African marrying under the Marriage Act, but if one or both parties to a marriage under that Act are Africans professing the Christian religion the provisions of this Act relating to the dissolution of marriage shall apply to such marriage <u>as if it were a marriage under this Act</u>".**

Considering this provision, although an option is given to an African to get married under the Marriage Act (Cap 150), he/she has still to go back to the provisions of this Act to get a decree of dissolution, and not under the Matrimonial Causes Act, under which all other marriages except those by an African can be dissolved.

The definition of '***marriage***' under the Matrimonial Causes Act (Cap 152) is all encompassing which stipulates "**marriage means the voluntary union of one man and one woman for life to the exclusion of all others**". The definition thus covers the marriages celebrated under this Act.

I once again lament that Section 3 of the Matrimonial Causes Act refer to the Act and makes exception for the provisions thereof while giving jurisdiction to the High Court under Cap 152.

This distinction unfortunately is still in our laws despite long years of independence.

This court relying on Section 3 of the Constitution could have easily declared the Section 3 of the Act (Cap 151) as unconstitutional as it contravenes provisions of Section 82(1) of the constitution and does not fall within the exceptions provided in Section 82(4) thereof.

However, looking to the drastic effect of such decision, on all the marriages so for celebrated and

those that can be celebrated, hereafter, I withhold my intention and pause this question to the Parliament with plea to repeal the discriminatory provisions in the Laws of marriage which are derogatory to the dignity of Africans. In my view the citizens of this country are all Kenyans.

That leaves me with the issue whether I have the jurisdiction to hear this matter, in view of the provisions of Section 14 and 15 of the Act.

I shall quote section 14:

"**Subordinate courts of the first class shall have the <u>same</u> jurisdiction, in the case of marriages solemnized or contracted under this Act or the Native Christian Marriage Act (now repealed) as is vested in the High court by virtue of the Matrimonial Causes Act**."

Comparing these provisions with those of Section 3 of the Matrimonial Causes Act, in my considered view the jurisdiction of the subordinate court of first class is not exclusive. No exclusionary word is used in Section 14 unlike Section 3 of the Matrimonial Causes Act (Cap.152).

Section 15 also, in my opinion cannot bar this court to hear and determine this cause, and more so, when there are other prayers apart from the dissolution of the marriage.

It can also be noticed that as per the current structure of the Judiciary we do not have cadre of subordinate courts of the first class, though Judicature Act has provided for the transition. All these observations point to the impracticability and inappropriate place of the Act in our laws.

Lastly but not the least, the Constitution gives this court unlimited jurisdiction in all civil and criminal matters.

I thus reject the grounds raised in Notice of Preliminary objection dated 19th November, 2008. There shall be no order on costs.

I shall take this opportunity to forward this ruling to the Hon. Attorney General and the Chairman of Law Reform Commission for their appropriate actions.

Dated and signed at Nairobi this 12th day of March, 2009.

**K.H. RAWAL**

**JUDGE**

**12.3.09**