REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
DIVORCE CAUSE NO.143 OF 2001

ROSE NYOKABI MUTURI……. PETITIONER

VERSUS

RAPHAEL CHARLES MUTURI…… RESPONDENT

RULING

The parties herein are wife and husband, respectively, having contracted a statutory marriage on 01.05.76 at Isiolo Catholic Church in Isiolo District, Kenya under the African Christian Marriage and divorce Act (Cap.151).

On 03.08.01 the petitioner filed petition praying for:-

a) An order for judicial separation.

b) Maintenance for herself and the child of the marriage and/or a secured provision.

c) A permanent injunction restraining the respondent whether by himself, or his agents from assaulting, molesting or in any other manner howsoever harassing the petitioner or interfering with her peaceful residence in the matrimonial home L.R. No[particulars withheld] Nairobi West Mai Mahiu Road.

d) The respondent to be condemned with costs of this suit.

The petition was based on the ground of cruelty.

On 10.09.01 the respondent filed notice of preliminary objection on the ground that the High Court lacks jurisdiction to hear and determine "this application and the entire petition on which it is founded." However, notwithstanding the respondent's aforesaid preliminary objection, he did on 21.09.01 file answer to the petition filed by the petitioner.

For a variety of reasons, which need not occupy the court here, neither the respondent's preliminary objection nor the petitioner's petition was heard until 11.11.04 when the cause came before me.

The petitioner was represented by learned counsel, Ms J. Thongori while the respondent was represented by learned counsel, Mr. P.O. Mungla at the hearing on 11.11.04.

Respondent's counsel took up the preliminary objection alluded to above and elaborated on it as under. He observed that the marriage in question was celebrated under the African Christian Marriage and Divorce Act. Firstly, he drew attention to section 3 of the Matrimonial Causes Act (Cap.152). The title to this Act is framed as:

"An Act to consolidate and amend the law relating to matrimonial causes."

The Act came into force on 01.01.41. Respondent's counsel submitted that the Act applies to all matrimonial disputes and provides the general substantive and procedural law on matrimonial causes. He noted, however, that section 3 of the Matrimonial Causes Act, which essentially provides that jurisdiction under the said Act shall only be exercised by the Supreme Court (High Court), is subject to the African Christian Marriage and Divorce Act. The full text of section 3 of the Matrimonial Causes Act is as follows:

> ***"3. Subject to the provisions of the African Christian Marriage and Divorce Act, jurisdiction under this Act shall only be exercised by the Supreme Court (hereinafter called "the court") and such jurisdiction shall, subject to the provisions of this Act, be exercised in accordance with the law in matrimonial proceedings in the High Court of Justice in England.'***

Respondent's counsel noted that under the African Christian Marriage and Divorce Act, the court conferred with jurisdiction to try disputes arising from marriages contracted under the said Act is a court of the first class, i.e. a subordinate court, and submitted that the High Court comes in on appeal in respect of such disputes after they have initially been dealt with by a court of the first class. Counsel submitted that the High Court has no original jurisdiction to entertain matrimonial disputes arising from marriages between African Christians contracted under the African Christian Marriage and Divorce Act and that the High Court has only appellate jurisdiction in such cases under section 38 of the Matrimonial Causes Act. Finally, respondents' counsel contended that if the High Court assumes original jurisdiction in the said matters, the respondent herein would be denied the first tier of appeal, which, I understood counsel to say, would be unlawful. Respondents' counsel urged that the petitioner's petition be declared incompetent on account of having been filed in a court without jurisdiction and that the said petition be struck out. Petitioner's counsel opposed the respondent's preliminary objection and submitted that section 3 of the Matrimonial Causes Act does not bar the filing of cases arising from marriages under the African Christian Marriage and Divorce Act in the High Court. She submitted that if section 3 of the Matrimonial Causes Act was intended to do that, it would have done so expressly.

Petitioner's counsel drew attention to section 14 of the African Christian Marriage and Divorce Act and observed that it does not say subordinate courts will have exclusive jurisdiction in respect of marriages under the said Act but merely extends the provisions of the Matrimonial Causes Act conferring on the High Court, jurisdiction over matrimonial causes generally to courts of the first class in respect of matrimonial causes arising from marriages contracted by African Christians under the African Christian Marriage and Divorce Act. Petitioner's counsel added that the African Christian Marriage and Divorce Act does not even define "court" while the Matrimonial Causes Act defines "the court" at section 3 thereof to mean Supreme Court, which currently translates into the High Court. Counsel submitted that any conclusion that the High Court is not a "court" as envisaged in the African Christian Marriage and Divorce Act is erroneous.

Furthermore, petitioner's counsel pointed out that prior to the year 2003, the High Court entertained cases filed under the African Christian Marriage and Divorce Act without reservation. Petitioner's counsel noted that the marriage under discussion was contracted by the parties on 01.05.76; that this cause was filed in 2001 when there was no distinction between marriages celebrated under the Marriage Act (Cap. 150) and those celebrated under the African Christian Marriage and Divorce Act (Cap. 151); and that the respondent submitted to the jurisdiction of the High Court by filing his answer to the petition and by continuing to attend to other matters in this cause. Counsel pointed out that the parties are advanced in age, the petitioner being 54 years old while the respondent is 59 years of age. Petitioner's counsel submitted that if the court finds it has no jurisdiction, the parties would be prejudiced. It was petitioner's counsel's view that the African Christian Marriage and Divorce Act permits the use of two jurisdictions, i.e. the High Court and subordinate courts over matrimonial causes. Nevertheless, petitioner's counsel finally submitted that if this court agrees with the respondent's preliminary objection, the court should transfer the cause to the lower court but should not strive the petition out.

In reply, respondent's counsel submitted that jurisdiction is conferred by statute and parties cannot

consent to jurisdiction. Counsel pointed out that the preliminary objection is dated 07.09.01 while the petition was filed a month before, i.e. on 03.08.01. Counsel contended, therefore, that the preliminary objection was taken up at the earliest opportunity possible, only that the matter has taken time to be heard. He noted, though, that the matter has not progressed substantively but urged that even if it had, once the court finds it had no jurisdiction, it had no choice but to state that the matter was not filed in the proper court, in which case the court must find that the petition is incompetent. Additionally, respondent's counsel contended that if the court has no jurisdiction, it cannot even transfer the cause to any other court! Respondent's counsel drew attention to the fact that the African Christian Marriage and Divorce Act came into operation on 17.12.31; that it remains the law and it matters not that the High Court had previously entertained matters arising under the said Act. Counsel reiterated that jurisdiction under the Matrimonial Causes Act is subject to jurisdiction as expressed in the African Christian Marriage and Divorce Act where the concerned parties are African Christians as is the case here and appeal lies from a subordinate court of the first class to the High Court.

Respondent's counsel urged that this court can only do justice as known to the law, which in this case is the African Christian Marriage and Divorce Act, and that the court should uphold the preliminary objection and strike the petition out.

For avoidance of doubt, I consider it appropriate at the outset to restate what a true preliminary objection entails. I am of the view that the law on this point was well settled by the Court of Appeal for Eastern Africa in Mukisa Biscuit Manufacturing Co. Ltd – vs – West End Distributors Ltd [1969] EA 696. At paragraphs D – E on page 700, Law, J.A. said of a preliminary objection as follows:

> ***"… a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."***

And at letters A-B on page 701, Sir Charles Newbold, P defined a preliminary objection as follows:

> ***"A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is urged on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion."***

I respectfully adopt the above formulation or definition of a preliminary objection by the learned Judges of Appeal in the Mukisa Biscuit case.

Sections 14 and 15 of the African Christian Marriage and Divorce Act provide:

> ***"14. Subordinate courts of the first class shall have the same 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.***
>
> ***15. An appeal shall lie from the decrees or from any part of the decrees, and from the orders, of subordinate courts under section 14 of this Act to the High Court."***

These two sections plus section 3 of the Act, as read with section 3 of the Matrimonial Causes Act, do indeed make clear provisions to the effect that matrimonial causes arising from marriages contracted by African Christians under the African Christian Marriage and Divorce Act must in the first instance go before subordinate courts of the first class. To that extent respondent's counsel appears to have a formidable argument against the High Court exercising original jurisdiction over matrimonial disputes arising from marriages contracted by African Christians under the African Christian Marriage and Divorce Act. And an additional supportive ground to that line of thinking seems to be afforded if one considers the provisions of section 11 of the Civil Procedure Act (Cap. 21) whose essence is that every

suit must be instituted in the court of the lowest grade competent to try it. These arguments, however, run into problems when Constitutional considerations come into play. I had occasion to address these issues recently in High Court Divorce Cause No. 72 of 2002, George Gitau Wainaina –vs- Rose Margaret Wangari Wainaina whose ruling was delivered on 18.11.04.

The question I posed in Wainaina's case (supra) was this: Do the provisions of the African Christian Marriage and Divorce Act oust the unlimited civil jurisdiction conferred on the High Court under section 60 (1) of the Constitution of Kenya? I said I did not think so at the time and this is still my view. I said then and wish to reiterate here as follows:

> ***"… I am of the view that provisions such as found in section11 of the Civil Procedure Act and in section 3 of the African Christian Marriage and Divorce Act are intended to cater for orderly management of cases which come before the courts so that they are filtered and dealt with at different levels of the Judicial System, generally as a matter of division of labour for good and orderly case management.***
>
> ***While a subordinate court is incompetent to deal with cases reserved for the High Court, the High Court does, in my respectful view, by virtue of its unlimited jurisdiction conferred by the Constitution, have jurisdiction to try cases triable by subordinate courts if there is good cause for the High Court to do so and if it can find time for such cases."***

Interestingly, there is a passage reproduced at letter D on page 699 of the Mukisa Biscuit case (supra) ascribed to the then President Charles Newbold of the Court of Appeal for Eastern Africa as follows:

> ***"Now I think that any rule which purposes to take away the inherent jurisdiction of the courts should be looked at very carefully before it is construed in such manner."***

That is precisely my point in invoking the provisions of section 60 (1) of the Constitution in dealing with the situation raised in the present proceedings.

But by far the greatest obstacle to the respondent's position is the issue of the discriminatory nature of sections 3, 14 and 15 of the African Christian Marriage and Divorce Act, as read with section 3 of the Matrimonial Causes Act, vis-a-vis section 82 (3) of the Constitution of Kenya which bars discrimination on racial grounds, which is what sections 3, 14 and 15 of the African Christian Marriage and Divorce Act in fact do, whether intentionally or unwittingly. For ease of reference, section 82 (3) of the Constitution provides:

> ***'82. (3) In this section the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, tribe, place of origin or residence or other local connection, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.'***

In arriving at the conclusion that sections 3, 14 and 15 of the African Christian Marriage and Divorce Act are discriminatory of African Christians on racial grounds, I was not unmindful of the provisions of subsection (4) of section 82 of the Constitution vis-à-vis subsection (1) of the same Constitution. Subsection (1) basically provides that no law shall make any provision that is discriminatory either of itself or in its effect. The subsection is, however, subject, inter alia, to subsection (4). And subsection (4) provides as follows:

> ***"82. (4) Subsection (1) shall not apply to any law so far as that law makes provision –***
>
> ***(b) with respect to adoption, marriage, divorce, burial, devolution of property on death or other matters of personal law."***

The thrust or effect sections 3, 14 and 15 of the African Christian Marriage and Divorce Act is to confine or restrict Christians who are Africans to subordinate courts initially in so far as their matrimonial causes are concerned while Christians of other races can access the High Court direct. I stated in Wainaina's case (supra) that I was not aware if this segregation was the wish of African Christians and that the rationale for such segregation was not apparent to me. I am still in the same position.

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).

In the present case, I take cognizance of the fact that the case was filed and accepted by the High Court way back in 2001 and that the High Court can, if it deems it appropriate, exercise its unlimited original civil jurisdiction to hear and determine this cause, which has been long-standing before it. I do deem it appropriate that the substantive cause be heard and determined on merit by the High Court which is already seized of the same. Accordingly, the preliminary objection is hereby dismissed and the main cause may be fixed for hearing and determination before the High Court. Unless changes are effected to the African Christian Marriage and Divorce Act, however, the Family Division Registry in the High Court at Nairobi has already been instructed not to accept fresh such causes for filing there and that the said causes should be referred for filing and trial before appropriate subordinate courts.

There has hitherto been uncertainty on the issue of where original jurisdiction lies over the causes in question and respondent's counsel cannot be blamed for having sought to have the matter clarified. In the premise, costs of the objection application shall be in the cause.

Orders accordingly.

Delivered at Nairobi this 6th day of December, 2004.

B.P. KUBO

JUDGE