Cooper Attorneys & Consultancy v Attorney General & another; Law Society of Kenya & another (Interested Parties); In Africa (ISLA) & another (Amicus Curiae) (Petition E075 of 2022) [2025] KEHC 4927 (KLR) (Constitutional and Human Rights) (24 April 2025) (Judgment)

Neutral citation: [2025] KEHC 4927 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION E075 OF 2022

LN MUGAMBI, J

APRIL 24, 2025

BETWEEN

COOPER ATTORNEYS & CONSULTANCY ..... PETITIONER

AND

ATTORNEY GENERAL ..... 1ST RESPONDENT

NATIONAL ASSEMBLY ..... 2ND RESPONDENT

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

LEGAL AID CLINIC ..... INTERESTED PARTY

AND

IN AFRICA (ISLA) ..... AMICUS CURIAE

FEDERATION OF WOMEN LAWYERS (FIDA) KENYA ..... AMICUS CURIAE

JUDGMENT

Introduction.

1. The petition dated February 18, 2022 is supported by the petitioner's Executive Director, Akusala A. Boniface affidavit of even date.

2. The gist of this petition is that Part X of the *Marriage Act* which sets out the prerequisite of dissolution of a marriage is unlawful as it does not provide for marriage dissolution by consent of the parties. As such, Part X is argued to be in contravention of Articles 2, 10, 36, 45 and 259 of *the Constitution*.

3. The petitioner in light of the aboe seeks the following relief against the respondents:

    i. A declaratory order that Part X of the *Marriage Act* contravenes the provision of Article 2, 10, 36, 45, and 259 of *the Constitution* and is thus unconstitutional.

    ii. A declaratory order that parties to a marriage are at liberty to terminate their marriage by consent of parties thereto, and upon filing the consent in Court, a decree shall issue to be filed with the Registrar of Marriage, and the marriage shall be deemed dissolved.

    iii. A mandatory injunction, to issue against the 2nd respondent to compel it to amend the *Marriage Act* No. 4 of 2014 and the Matrimonial Causes Act Cap 152 to enable parties to a marriage of whichever regime to terminate marriage by consent.

    iv. Any other relief the court deems fit to grant.

    v. Costs of this petition be borne by the respondents.

Petitioner's Case.

4. The petitioner states that Section 3(1) of the *Marriage Act* defines marriage as a voluntary union between a man and a woman either in a monogamous or polygamous set up. On the flipside, the petitioner states that Part X of the *Marriage Act* stipulates the grounds for divorce and conditions to be met before a party can petition for divorce.

5. The petitioner avers that the requirements set out under Part X of the *Marriage Act*, attract aggressiveness and convolution even where both parties are willing to end the marriage. It is asserted that the provisions of this Part are a sharp contrast to those of Section 3(1) of the Act where parties are allowed to voluntarily enter the marriage union.

6. The petitioner decries that in view of this Part, parties at the end of their marriage are subjected to a fault - based litigation system which sees the parties degrade and tarnish each other's reputation in a bid to apportion blame on the other party. In addition, it is averred that the cost of the divorce proceedings and fault –based system, has seen parties in abusive marriages choose to remain therein so as to evade their private disputes being publicized and incurring the cost.

7. It is averred regrettably that the children of such parties have to bear the shame and public humiliation of their parents' litigation battle in Court which affects their mental health and distorts their belief in the institution of marriage.

8. Furthermore, due to the combative nature of divorce proceedings, it is argued that relations between the parties is damaged and matters such as co-parenting and property distribution become a matter of life and death. This in the end prevents the parties from co-existing peacefully. The petitioner also notes of incidents where a party to the union ends the partner's life deeming it less acrimonious as litigation.

9. The petitioner in light of this urges the Court to consider the aspirations of the people of Kenya as envisaged in *the Constitution* and the necessity to ensure that the right to join a marriage corresponds with an equal right of exit, without additional constraints.

10. It is further asserted that *the Constitution* guarantees every citizen the right to enter an association of any kind, participate in the activities and right of exit at their own pleasure, which ought to apply to marriage as well.

11. In sum, the petitioner makes known that the aim of this petition is to make the end of a marriage and the exit out of it less acrimonious and antagonistic while maintaining civility and low costs.

1st Respondent's Case.

12. The 1st Respondent in response filed its grounds of opposition dated 27th June 2022 on the ground that:

    i. The petition does not disclose any unconstitutionality of any impugned Sections of the *Marriage Act*.

    ii. It is in the public interest that all the declarations and orders sought in the petition be declined as public interest far outweighs narrow private interest.

    iii. All Acts of Parliament are presumed to be constitutional unless otherwise as was captured in the case of Council of County Governors v Inspector General of National Police Service & 3 others [2015] eKLR.

    iv. The petitioner has failed to demonstrate with precision how the respondents violated their constitutional rights and the harm they have suffered as a result of the violation.

    v. The Court is under a duty to examine the objects and purport of the *Marriage Act* in particular part X, the act or omission and to read the provisions of the *Marriage Act*, the conduct or omission so far as is possible, in conformity with *the Constitution*. The intentions of the drafter must be ascertained.

    vi. The petition has not been well pleaded for reasons that there is no mention of specific sections and or provisions of the said Part X of the *Marriage Act* 2014 and how the said sections have been violated. There is also no demonstration of the harm occasioned as a result of the purported violation.

    vii. There is no factual matrix leading to a legal controversy for the Court's determination. The Petition is therefore speculative in nature.

    viii. The petition is hypothetical in nature as there is no demonstration of how the impugned Part X of the *Marriage Act* infringes upon the rights guaranteed by *the Constitution*.

    ix. The law also provides for dissolution of marriage where it is established that the marriage in question is irretrievably broken.

    x. In event *the Constitution* under Article 45 (3) 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.

    xi. *The Constitution* acknowledges the family as a fundamental unit of society and the necessary basis of social order, and that parties to a marriage shall enjoy the recognition and protection of the State.

    xii. Pursuant to Article 94(5) of *the Constitution* no person or body other than Parliament has the power to make provision having the force of law in Kenya except under the authority conferred by this Constitution or by legislation. The legislative authority of the State is vested in Parliament.

    xiii. The prayers sought in particular the prayer for mandatory injunction cannot issue for it is against the principle of separation of power.

xiv. In the matter of Apollo Mboya v Attorney General & 2 others [2018] eKLR, the High Court held that:

"The existence of separation of powers is the safeguard created by *the Constitution*. Parliament passes a Bill. The Executive Assents to it and it becomes law. The Court interprets the law and determines how it should be applied and whether or not it conforms to *the Constitution*."

xv. The Court as an independent arbiter of *the Constitution* has fidelity to *the Constitution* and has to be guided by the letter and spirit of *the Constitution*. In interpreting a statute, the Court should give life to the intention of the lawmaker instead of stifling it.

xvi. The petitioner has not established a prima facie case for an injunction in the nature of Mandamus to compel the National Assembly to amend the *Marriage Act* No. 4 of 2014 and the Matrimonial Causes Act Cap 152 to enable parties to a marriage of whichever regime to terminate their marriage by consent.

xvii. The petitioner ought to have petitioned Parliament for the appropriate orders for it is Parliament that has the legal authority to make and amend laws.

xviii. The petition is frivolous, vexatious and an abuse of the court process and does not particularize andor raise a cause of action against the respondents.

2nd Respondent's Case.

13. In like fashion, the 2nd respondent filed grounds of opposition dated 18th May 2022 on the premise that:

i. The petition and application lack merit as the 2nd respondent fully complied with *the Constitution* and the law during the enactment of the *Marriage Act*, 2014.

ii. The National Assembly's mandate to enact, amend and repeal laws is derived from *the Constitution*. The Petitioner's prayers therefore threaten the legislative role of Parliament specifically, the National Assembly under Article 1(1), 94 and 95 of *the Constitution*.

iii. The petition has not met the principles of presumption of constitutionality of a statute set out in Susan Wambui Kaguru & 7 Others v. Attorney General & Another [2013] eKLR; Timothy Njoya vs Attorney General & Another [2014] eKLR and Ndynabo v Attorney General of Tanzania [2001] EA 495 where it was held that an Act of Parliament is constitutional and that the burden to prove otherwise is on the person who alleges unconstitutionality has not been rebutted by the petitioner.

iv. The petition herein has not been pleaded with precision as required under Rule 10 of Mutunga Rules. The petition is ambiguous and has failed to provide adequate particulars of the claims relating to the alleged violations of *the Constitution*. Therefore, the petition has not met the standard enunciated in Anarita Karimi Njeru -vs- The Republic (1979) eKLR.

v. Whereas the petitioner claims contravention of Articles 10, 36 and 45, he has not stated with specificity the manner of contravention contrary to Rule 10 of Mutunga Rules.

vi. The petitioner has failed to provide with specificity and clarity required of a petition, the nature of violation against their fundamental rights and freedoms, neither have they evidenced the alleged unconstitutionality of the impugned provisions, for the following reasons:

vii. As per the principle established in the case of Anarita Karimi Njeru -vs- The Republic (1979) eKLR which principle was later restated by the Court of Appeal in the case of Mumo Matemo

-vs- Trusted Society of Human Rights Alliance & 5 others (2013) eKLR, a constitutional petition should set out with a degree of precision the petitioner's complaint, the provisions infringed and the manner in which they are alleged to be infringed in relation to them.

viii. Save for quoting various provisions of *the Constitution* in their pleadings, the petitioner herein has not furnished this Court with any grounds or evidence to support or prove his claim of unconstitutionality. At the very least, the petitioner should have provided sufficient particulars to which the respondents could reply.

ix. The lack of precision and particularity in the petition has thereby made it difficult for the 2nd respondent to ascertain the allegations of infringement made against them thus making it very difficult for the 2nd respondent to respond to the Petition against it.

x. Looking at the petitioner's pleadings as well as the evidence adduced, it is clear that the petitioner has not met the requirements of a Constitution petition and the petitioner seeks to invoke constitutional remedies in a matter where he has not clearly raised constitutional issues for the Court's determination.

xi. It cannot be argued that the regulation of divorce in the law impedes on the rights of citizens. Rather, the Act promotes and protects the rights of men and women should they choose to terminate a marriage.

xii. Further, a statute cannot be unconstitutional merely because it does not meet the interest of the petitioner and at the expense of the will of the majority of society.

xiii. The rights claimed by the petitioner may be limited in terms of Article 24 of *the Constitution*. The only rights that cannot be limited are those set out in Article 25 of *the Constitution*.

xiv. The limitations, if any, imposed by the impugned sections is not in conflict with *the Constitution* and serves to ensure the process of divorce is done in a lawful manner while protecting the rights, freedoms and interests of each party.

xv. The petitioner has failed to demonstrate that Part X of the *Marriage Act* is unconstitutional. There is no constitutional, legal or factual justification in support of the petitioner's assertion that the provisions regulating the termination of a marriage limit fundamental rights and freedoms.

xvi. The purpose and intent of the impugned provision rests on strong policy considerations including the need to ensure that marriage is not a trial and error game and that divorce of a marriage is undertaken lawfully. To this end, the impugned provision is not in violation of any of the petitioner's constitutional rights.

xvii. The court should restrain from intruding into the policy and legislative realm of other arms of Government, especially where that mandate is exercised legally and procedurally.

1st Interested Party's Case.

14. The 1st interested party's response and submissions are not in the Court file or Court Online Platform (CTS).

2nd Interested Party's Case.

15. In support of the petition, the 2nd interested party filed its replying affidavit by the Head of Administrative Justice, Shisanya Edwin Amboso sworn on 27th June 2022.

16. Echoing the petitioner's assertion, the 2nd interested party avers that those who desire to enter a marriage union must also be allowed in the same measure to exit the union without any restrictions or qualifications. It is stated thus that the 2nd respondent in line with its mandate under Article 1(1), 94 and 95 of *the Constitution* is obliged to enact, amend and repeal statutes that have become inconsistent with *the Constitution*.

17. On the other hand, he avers that this Court is mandated under Article 165(3)(d)(i) of *the Constitution* to determine questions in respect of interpretation of *the Constitution*. Consequently, he asserts that this Court has a duty to advice Parliament when a law is inconsistent with *the Constitution*.

18. Bearing this in mind, the 2nd interested party contends that Part X of the *Marriage Act* is one of the laws that has evolved and currently in contravention of Articles 10, 28, 29(d), 36 and 45 of *the Constitution*. The Court is urged therefore to lay the impugned law against *the Constitution* to determine whether the law is inconsistent with it.

19. In this case, it is argued that the law violates human dignity as requires the party filing for divorce to prove the grounds of divorce which in turn subjects the party to psychological torture owing to the reality such proceedings. In his view, the question before this Court is whether there is or may be a less confrontational means through which parties' desirous to divorce can use to terminate their marriage.

20. The 2nd interested party is convinced that the 2nd respondent in amending Part X of the *Marriage Act* will see a significant reduction in the number of divorce cases. Moreover, the same will see an end of publicization of the divorce proceedings as air the parties' dirty linen in public and promotes the need to falsely accuse each other so as to obtain the grounds for divorce, in the end creating enmity.

Petitioner's Submissions.

21. The petitioner through Saluny Advocates LLP filed submissions dated 8th May 2023. Counsel discussed the following issues: whether Part X of the *Marriage Act* contravenes the provisions of Article 2, 10, 36, 45 and 259 of *the Constitution* and thus unconstitutional and whether the 2nd respondent has a constitutional duty to amend Acts of Parliament, in particular, the *Marriage Act* No. 4 of 2014 and the Matrimonial Causes Act Cap 152.

22. In making these submissions, Counsel relied in the constitutional underpinning under Articles 10, 22, 23, 25, 28, 29, 31, 36 and 45; Articles 5, 12, 20 of the Universal Declaration of Human Right 1948 and Articles 7 and 17 of the International Covenant on Civil and Political Rights. Like dependence was placed in Tukero ole Kina -vs- Attorney General & another [2019] eKLR where it was held that:

> " Armed with the meticulous exposition above, I am confident, and it is thus my finding that it is the duty of this court to scrutinize allegations of rights infringement. This duty is germane to the edicts of constitutional interpretation and is no way a usurpation of the mandate of parliament. Where the purpose or the effect of an impugned provision goes against the grain of *the Constitution*, or where there is no discernible link between the legislation and the purpose, then the Court cannot shirk its constitutional fiat to call the offending provision into question."

23. Counsel referring to the averments in the petitioner's affidavit submitted that the impugned Part is centered on a fault –based system. Meaning each party seeks to exonerate themselves from culpability by demonstrating that the other party actually caused the marriage to fail painting themselves as faultless, while the other party is to blame.

24. It was stressed that at the end of the day, the parties end up degrading and tearing up each other's reputation in a bid to apportion blame to the other party and the children of the union if any, have to bear the shame and public humiliation of their parent's legal battles in Court. In addition, their relations are damaged and matters of importance such as co-parenting compromised.

25. Consequently, Counsel submitted that the same latitude of entering marriage should be exercised at the end of a marriage to avert these concerns. It was asserted thus that the operation of the impugned Part is in contravention of Articles 10, 25, 28, 29, 31, 36 and 45 of *the Constitution*.

26. Counsel urged the Court to be guided by the opine in Interim Independent Electoral Commission [2011] eKLR and Apollo -vs- Attorney General & 2 others [2018] eKLR, where the Court outlined the principles of statutory and constitutional interpretation. Similar dependence was placed in William Musembi & 13 Others -vs- Moi Education Centre Co. Ltd & 3 Others [2014] eKLR.

1st Respondent's Submissions.

27. State Counsel, Christopher Marwa on behalf of the 1st respondent field submissions dated 16th September 2022 and set out the issue for discourse as: whether Part X of the *Marriage Act* 2014 is unconstitutional.

28. To begin with, Counsel submitted that the petitioner had not disclosed any unconstitutionality of the impugned Part. It was also underscored that the petition had not established any specific sections or provisions of the impugned Part and how they have been violated.

29. In this regard, Counsel submitted that the Court should be guided by Article 2(4), 10(2) and 259 of *the Constitution*. Equally Counsel relied in Hambardda Wakhana v Union of India Air [1960] AIR 554 where the Supreme Court of India held that:

> "In examining the constitutionality of a statute it must be assumed the Legislature understands and appreciates the needs of the people and the law it enacts are directed to problems which are made manifest by experience and the elected representatives assembled in a Legislature enacts laws which they consider to be reasonable for the purpose for which they are enacted. Presumption is therefore in favour of the constitutionality of an enactment."

30. Similar dependence was placed in Ndyanabo v Attorney General [2001] E. A 495.

31. Counsel similarly submitted that in answering this question, the Court should examine the objects and purposes of the *Marriage Act* and specifically the impugned Part. Moreover, Counsel contended that there was no factual matrix leading up to a legal controversy for the Court's determination hence petition deemed speculative.

32. Counsel recapped that *the Constitution* under Article 45(3) of *the Constitution* acknowledges the family as a fundamental unit of the society necessary for social order hence its recognition and protection in law.

33. In view of the foregoing, Counsel submitted that it is only fair to have the institution of marriage protected as opposed to the petitioner's argument since in doing so, many families will be destroyed. Reliance was placed in Murang'a Bar Operators and Another vs Minister of State for Provincial

Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 where it was held that:

> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

34. On the other hand, Counsel submitted that the doctrine of separation of powers calls the Courts to refrain from unduly interfering with Parliament's constitutional mandate. Consequently, Counsel stated that the orders sought by the petitioner should not issue. To buttress this point dependence was placed in United States v. Butler, 297 U.S. 1 (1936) where it was held that:

> "When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of *the Constitution* which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of *the Constitution*; and, having done that, its duty ends."

35. Equal dependence was placed in Commission for The Implementation of *the Constitution* vs. National Assembly of Kenya & 2 Others [2013] eKLR, and the Matter of the Speaker of the Senate & another [2013] eKLR.

2nd Respondent's Submissions

36. The 2nd respondent's Counsel, S.M. Mwenda filed submissions dated 13th October 2023 and underscored the pertinent issues as: whether the petitioner has sufficiently demonstrated the unconstitutionality of Part X of the *Marriage Act* and whether the provisions of Part X of the *Marriage Act* contravene Articles 2, 10, 36, 45, and 259 of *the Constitution*, specifically in relation to the right to human dignity for parties seeking to dissolve a marriage.

37. In the first issue, Counsel answered in the negative. Counsel submitted that the petition lacks specificity regarding the alleged violations and the harm occasioned as a result. It was noted that the petition does not have any factual context that gave rise to a legal dispute for determination. Reliance was placed in Mumo Matemo -vs- Trusted Society of Human Rights Alliance & 5 others [2013] eKLR where the Court of Appeal held that:

> "(44) We wish to reaffirm the principle holding on this question in Anarita Karimi Njeru (supra). In view of this, we find that the petition before the High Court did not meet the threshold established in that case. At the very least, the 1st Respondent should have seen the need to amend the petition so as to provide sufficient particulars to which the respondents could reply. Viewed thus, the petition fell short of the very substantive test to which the High Court made

reference to. In view of the substantive nature of these short comings, it was not enough for the superior court below to lament that the petition before it was not the "epitome of precise, comprehensive or elegant drafting, without remedy by the 1st respondent."

38. In addition, Counsel echoed that all statutes enjoy the presumption of constitutionality and a party claiming otherwise bears the onus of proving so. Dependence was placed in Kenya Human Rights Commission v Attorney General & another [2018] eKLR where it was held that:

> " 47. There is a general but rebuttable presumption that a statute or statutory provision is constitutional and the burden is on the person alleging unconstitutionality to prove that the statute or its provision is constitutionally invalid. This is because it is assumed that the legislature as the peoples' representative understands problems people they represent face and, therefore enact legislations intended to solve those problems. In Ndynabo v Attorney General of Tanzania [2001] EA 495 it was held that an Act of Parliament is constitutional, and that the burden is on the person who contends otherwise to prove the contrary."

39. Likewise, Counsel submitted that the purpose and effect of a statutory provision must be considered in assessing its constitutionality as held in Kenya Human Rights Commission (supra). Equally, that this interpretation must be in line with the principles set out under Article 259 of *the Constitution* as observed in Institute of Social Accountability & another v National Assembly & 4 others [2015] eKLR.

40. Moving to the next issue, Counsel submitted that the legal framework governing divorce in Kenya, as enshrined in the *Marriage Act*, is a comprehensive and just system that ensures the protection of the interests of parties involved, safeguards the sanctity of marriage, and upholds the principles enshrined in *the Constitution* thus in harmony with *the Constitution*. Furthermore, Article 45(2) of *the Constitution* reiterated in Section 3(1) of the *Marriage Act* provides that marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.

41. Counsel stressed that contrary to the petitioner's proposition the law provides a framework to regulate the entry into marriages as well as its exit to safeguard the rights and interests of all parties engaged in the marital relationship. Accordingly, the petitioner's proposal is said may have detrimental societal consequences, potentially destabilizing families while opening the legal system to abuse.

42. Counsel noted that the State's positive obligation to protect the family unit has been recognized in various decisions including the European Court of Human Rights decision in Babiarz v. Poland (application no. 195510) ECHR[2016]. Likewise, National Assembly of Kenya v Kina & another (Civil Appeal 166 of 2019) [2022] KECA 548 (KLR) and EG & 7 others v Attorney General; DKM & 9 others (Interested Parties)[2019] eKLR.

43. Further from this, Counsel made known that the question posed by the petitioner is one that is now currently before the National Assembly, in the Marriage (Amendment) Bill 2023.Considering this, Counsel submitted that this Court should refrain from interfering with the legislative function of the

2nd respondent as provided in the doctrine of separation of powers. Reliance was placed in S B M & another v Attorney General [2022] KEHC 13920 (KLR) where it was held that:

> " The purpose of separation of powers is to protect the liberty of the individual by making tyrannical and arbitrary state action more difficult. In our own constitution under chapter 8, 9 & 10 power is divided between the executive, legislature and the judiciary branches with each arm checking the other, save for the characteristics of independence to facilitate functionality a kind of oversight for sustainability of the rule of law. This consideration points at some level of prerequisite of legitimate functional independence. There would be therefore danger in approaching the interpretation of *the constitution* as part of the duty of the court to encroach into the realm of the legislature or executive without compelling and substantive cause. Those are the competing demands that must be present and as so permitted the suitability of any petition challenging the constitutionality of our statute or its provisions as enacted by the legislature."

Joint Amici Brief.

44. Counsel, Beatrice Njeri for these parties filed the amicus brief dated 24th June 2022. The brief focused on the following areas: the historical evolution of the fault-based divorce system to no fault; regional and international comparative law and application in other jurisdictions.

45. Counsel submitted that Kenya's system is heavily influenced by English law. It was pointed out that while the impugned Part is worded in neutral terms the historical underpinnings are founded in gender stereotypes which informed the law. First to maintain the patriarchal dominance and subjugation of women and second women being inferior to be protected.

46. In England divorce proceedings commenced in 1700 where parties would petition Parliament for divorce on the ground of aggravated adultery. In the matter, a woman would have to prove her husband had committed the act in order to petition for divorce.

47. The Matrimonial Causes Act was later on enacted in 1857 and a court established therein to determine these matters. The Act outlined the causes of divorce as primarily, aggravated adultery, cruelty and desertion. Thereafter the Divorce Reform Act 1969 went on to allow and add another ground being that the marriage had broken down irretrievably. This introduced the idea of consent in divorce. However a party would still have to prove the particulars of the ground.

48. Today, divorce in England is governed by the Dissolution and Separation Act, 2020. This Act compared to the former does not require parties to prove the particulars of a marriage that has broken down irretrievably.

49. In Kenya, the marriage institution was initially governed by customary laws. After 1920, Kenya through the reception Clause, introduced application of British Acts of Parliament and Common Law in Kenya. These laws from then governed the institution of marriage.

50. Upon attaining independence in 1963 and desirous to change the laws, a Commission on the law of marriage and divorce was formed. On consensual divorce, the Commission recommended that it was not favourable adding that divorce should not be easy. This would give way to attempts to reconciliation before divorce proceedings commence. The Commission made other numerous recommendations as captured in the brief.

51. In time, the *Marriage Act* was enacted in 2014.This Act consolidates all laws on marriage and divorce. A new ground was added therein under Section 66(2)(e) of the Act being irretrievable breakdown of

marriage. This was with a view of expanding the grounds upon which a divorce would be sought. Off essence to note is that a party must still prove this element. Accordingly, Counsel stated that Kenya is mainly a fault-based divorce regime.

52. It is stated that the Courts have on numerous occasions sought to interpret this ground. The Court of Appeal in JSM V ENB (2015)eKLR observed as follows:

> " As regards irretrievable breakdown of the marriage, it is apt to point out that this ground of divorce was introduced by section 66(2) (e) of the *Marriage Act*, 2014 and was not recognized in the repealed Matrimonial Causes Act. In most of the jurisdictions that have embraced it as a ground for divorce, irretrievable breakdown of the marriage is understood to mean the situation where one or both spouses are no longer able or willing to live together and as a result the husband and wife relationship is irreversibly destroyed with no hope of resumption of spousal duties... What factors may a court take into account in determining whether a marriage has irretrievably broken down under that provision? Without in any way limiting the considerations, we are of the view that they would include: the length of the period of physical separation; the levels of antagonism, resentment or mistrust between the parties; the concern of the parties for the emotional needs of each other; commitment of the parties to the marriage; chances of the parties resuming their spousal duties; chances of the marriage ever working again; among others. These considerations would be, in our view, a good indicator whether the marriage can be saved or whether the same has irredeemably broken down."

53. Additional interpretations by the Courts in this matter can be seen in C.W.L V H.N.(2014) eKLR, W.E.L v J.M H (2014) eKLR, C.W.C v J.P.C(2017) eKLR , K.A.S v M.M.K(2016) eKLR and J.M.M. v J.M.N (2015) eKLR which were cited in support.

54. According to the amicus the fault based divorce system is inconsistent with the human rights to establish a family as envisaged under Article 45(2) of *the Constitution* and Article 16 of Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

55. It was submitted that various Courts in the matter have determined that the right to family includes the right to leave a marriage as seen in Re Estate of Jecinter Njoki Okoth (Deceased) (2020)eKLR. Similar sentiments have also been registered in the United States case in Boddie v. Connecticut 401 U.S. 371(1971) , Babiarz v Poland Application Bo.195510, Airey v Ireland 9th October 1979 and S.K.C v FKK (2021) eKLR.

56. For that reason, it is emphasized that there is need to reform the law in view of dissolution of marriage. This is so as to protect and remove gender discriminatory provisions and guarantee the right to equal protection of the marital laws and ensure the right to dignity.

57. On the comparative analysis it was submitted that a number of countries had now shifted from the 'fault' based system to a 'no fault' system. This has occurred in countries such as: England and Australia while Canada, Hong Kong and Germany allow operation of both systems.

58. In sum, Counsel urged the Court in determining this matter to consider the applicable international law standards as relates to the right to equality, the right to found a family and the State's obligations to ensure protection from discrimination.

Analysis and Determination

59. It is my view that the issues that arise for determination in this matter are as follows:

i. Whether Part X of the *Marriage Act* is unconstitutional for being in contravention of Articles 10, 25, 28, 29, 31, 36 and 45 of *the Constitution*.

ii. Whether the petitioner is entitled to the relief sought.

60. Under Article 165 (3) (d) (i) this Court has a Constitutional duty to determine the question of whether any law is inconsistent with or is in contravention of *the Constitution*. The contention by the respondents that the petition is speculative because the court cannot be invited to determine the matter without a factual matrix leading up to the petition is, therefore, a legal fallacy. The Petition is premised on the constitutional validity of specific provisions of a live statute and not an imaginary one; hence is not speculative or hypothetical.

61. In interpreting *the Constitution*, Court is guided by the provisions of Article 259(1) and principles that have developed through judicial precedents. Article 259 (1) requires the Court to interpret *the Constitution* in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law and contributes to good governance.

62. In the Center for Rights Education and Awareness & Another v John Harun Mwau & 6 others [2012] eKLR the Court of Appeal reiterated these principles and guided further as follows:

> "a. It should be interpreted in a manner that promotes its purposes, values and principles; advances rule of law, human rights and fundamental freedoms and permits development of the law and contributes to good governance as provided by Article 259.
>
> b. The spirit and tenor of *the Constitution* must preside and permeate the process of judicial interpretation and judicial discretion.
>
> c. It must be interpreted broadly, liberally and purposively so as to avoid "the austerity of tabulated legalism."
>
> d. The entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other as to effectuate the great purpose of the instrument (the harmonization principle)."

63. The presumption of constitutionality of the statutes is also another tenet of constitutional interpretation that Courts have recognized as was eloquently explained by the Court of Appeal of Tanzania in the case of Ndyanabo (supra) where it held as follows:

> "Until the contrary is proved, legislation is presumed to be constitutional. It is a sound principle of constitutional construction that, if possible, legislation should receive such a construction as will make it operative and not inoperative"

64. The principle of purpose and effect discussed in Geoffrey Andare v Attorney General & 2 others [2016] KEHC 7592 (KLR) has also been underscored by Courts in matters involving interpretation of *the Constitution*. In this case, the Court observed thus:

> "It has also been held that in determining the constitutionality of a statute, a court must be guided by the object and purpose of the impugned statute, which object and purpose can be discerned from the legislation itself. The Supreme Court of Canada in R vs Big M Drug Mart Ltd., [1985] 1 S.C.R. 295 enunciated this principle as follows:

> "Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realized through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's object and its ultimate impact, are clearly linked, if not indivisible. Intended and achieved effects have been looked to for guidance in assessing the legislation's object and thus the validity."

65. This principle was applied by the Constitutional Court of Uganda in Olum and another vs Attorney General [2002] 2 EA, where the Court stated thus:

> " To determine the constitutionality of a section of a statute or Act of Parliament, the court has to consider the purpose and effect of the impugned statute or section thereof. If its purpose does not infringe a right guaranteed by *the constitution*, the court has to go further and examine the effect of the implementation. If either its purpose or the effect of its implementation infringes a right guaranteed by *the constitution*, the impugned statute or section thereof shall be declared unconstitutional..."

66. In the Council of County Governors v Attorney General & another [2017] KEHC 6395 (KLR) held thus:

> " A law which violates *the constitution* is void. In such cases, the Court has to examine as to what factors the court should weigh while determining the constitutionality of a statute. The court should examine the provisions of the statute in light of the provisions of *the Constitution*. When the constitutionality of a law is challenged on grounds that it infringes *the constitution*, what the court has to consider is the "direct and inevitable effect" of such law. Further, in order to examine the constitutionality or otherwise of statute or any of its provisions, one of the most relevant considerations is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach.
>
> Thus, the history behind the enactment in question should be borne in mind. Thus, any interpretation of these provisions should bear in mind the history, the desires and aspirations of the Kenyans on whom *the Constitution* vests the sovereign power, bearing in mind that sovereign power is only delegated to the institutions which exercise it and that the said institutions which include Parliament, the national executive and executive structures in the county governments, and the judiciary must exercise this power only in accordance with *the Constitution*."

67. Bearing in mind the above principles, it is now my singular duty to determine whether Part X of the *Marriage Act* is unconstitutional. The Petitioner impugns this law on the basis that it only permits dissolution of the marriage only if the conditions set out in the law are established hence denies the parties to a marriage the right to end a marriage by mutual consent yet under Section 3 (1) of the Act, marriage is defined as voluntary union between man and woman. That the present fault-based law sets the parties against each other and parties may thus be forced to remain in abusive relationships due to the combative nature of divorce proceedings.

68. That the acrimony brought about by the nature of divorce proceedings often damages peaceful co-existence and arrangements such as co-parenting and property distribution have become a matter of life and death.

69. The respondents insisted that the Act is constitutionally sound.

70. I will first summarize Part X of the *Marriage Act*. This is the part that deals with the dissolution of marriage by defining the factors that might lead to dissolution of marriage. The factors include:

    a. adultery committed by a party to the marriage

    b. cruelty, whether mental or physical inflicted by the other party

    c. desertion by either party for at least 3 years

    d. exceptional depravity by the other party

    e. the irretrievable breakdown of the marriage; which among others include spouse willfully neglecting the other spouse for at least two years immediately preceding the date of presentation of the petition; the spouses have been separated for at least two years, whether voluntary or by decree of the court; a spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition; a spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more; a spouse suffers from incurable insanity, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; any other ground as the court may deem appropriate.

71. It is *the Constitution* that sets out its founding values. Article 45 of *the Constitution* of Kenya recognizes the family unit as the foundation of the society. Marriage is a critical mentioned and safeguarded in the constitutional provisions relating to family. It States at Article 45 as follows:

    Family

    (2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.

    (3) 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.

    (4) Parliament shall enact legislation that recognises—

        a. marriages concluded under any tradition, or system of religious, personal or family law; and

        b. any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this Constitution

72. The society's interest in marriages is to ensure their success and not their failure as it considered that marriage is the basis of the stability of the family unit which is in turn the foundation of the social order. This can be confirmed by the fact that the constitutional recognition marriage is provided for under the family protection clause.

73. The society intervention to safeguard marriages is therefore seen through the law that regulates marriages. It ensures that even when there are challenges between couples in a marriage, there is an opportunity for possible interventions to rescue the marriage from collapse; for instance, by disallowing instant divorce. The law prescribes a period of separation to give a chance for reuniting the couples through counselling, reconciliation, mediation and any other form of intervention.

74. Acceding to the consensual principle as a ground of dissolution of marriage that the petitioner is advocating will erode the leverage the society has created in order to preserve the institution of marriage which is key to the society's own survival.

75. Discarding societal stake in marriage will be an affront to the spirit of Article 45 of *the Constitution*. The argument that the failure to allow consensual divorce violates article 36 of *the Constitution* is my view ill-conceived. Article 36 should not be read in isolation without incorporating Article 45. *The Constitution* has to be read harmoniously with every provision sustaining each other. The interest of the society in marriage deserves to be safeguarded as well as well as that of the parties to the marriage. The interest of the society is further affirmed by the fact that in many societies, Kenya included, marriage is a cerebrated communal affair, it does not just involve the parties to the marriage, it brings together the immediate family, extended family, friends, clan or the religious groups and even the government.

76. Parliament's enactment of the *Marriage Act* pursuant to Article 45 (3) should thus be viewed from the foregoing background. In providing for the grounds for dissolution of marriage in Part X of the *Marriage Act*; Parliament is stepping up to protect a cherished societal institution from being destroyed by impulsive urges of individuals. The formulation of grounds of divorce is aimed to protect marriages from ignominy of casual dissolution. It underscores the society's interest that dissolution of marriage is a solemn matter which cannot be left to the casual wish of individuals.

77. I am not persuaded that failure to recognize mutual consent as a ground for dissolving a marriage invalidates Part X of the *Marriage Act* as being unconstitutional. It instead safeguards the interest of the society in the institution of marriage. In view of the above reasons, this Court declines to issue the prayer 'that parties to a marriage are at liberty to terminate their marriage by consent of parties thereto, and upon filing the consent in Court, a decree shall issue to be filed with the Registrar of Marriage, and the marriage shall be deemed dissolved.' That position is not constitutionally tenable as far this court is concerned.

78. Besides the above reasons, this Court finds the prayer (iii) of the Petition to be an invitation to infringe on the doctrine of separation of powers by the Court. In the said prayer, the Petitioner prays for 'A mandatory injunction against the 2nd respondent to compel it to amend the *Marriage Act* No. 4 of 2014 and the Matrimonial Causes Act Cap 152 to enable parties to a marriage of whichever regime to terminate marriage by consent.'

79. The 2nd Respondent is the National Assembly. Under Article 94 (1), *the Constitution* vests the legislative authority of the Republic on Parliament and Article 94 (5) makes it clear that 'No person or body, other than Parliament, has the power to make provision having the force of law in Kenya except under authority conferred by this Constitution or by legislation.'

80. This Court has no authority to direct Parliament to legislate in any particular way but can only stop parliament for legislating in an unconstitutional manner.

81. The Petitioner in prayer (iii) wants this Court to specifically compel Parliament to amend and include a specific provision in the *Marriage Act*; a feat that is constitutionally inconceivable as far the Court is concerned.

82. In view of the foregoing reasons, I find no merit in this Petition and hereby dismiss the same in its entirety.

83. I make no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 24TH DAY OF APRIL, 2025.

L N MUGAMBI

JUDGE