



**HJC v IWN (Divorce Miscellaneous Cause E026 of 2023)
[2023] KEHC 18607 (KLR) (19 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18607 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
DIVORCE MISCELLANEOUS CAUSE E026 OF 2023
JRA WANANDA, J
JUNE 19, 2023**

BETWEEN

HJC APPLICANT

AND

IWN PETITIONER

RULING

1. Before Court is the Applicant’s ex parte Notice of Motion dated May 30, 2023 filed on the same date. The prayers sought are as follows:
 - i. [Spent]
 - ii. The Honourable Court recognized and adopts the dissolution of marriage decree given to the Applicant and the Respondent in the Republic of Germany in the Local Court of Wiesbaden before Single Judge Grunewald-German on the 18th of February 2020.
 - iii. Any further orders that the Court may deem fit.
2. The Application is filed through Messrs Martim & Co Advocates and is stated to be brought under “Section 61 of the Marriage Act and all other enabling provisions of the law”. The grounds of the Application are that the said Court in Germany had issued a divorce decree on the marriage of the parties, the Applicant is on a short visit to Kenya where he is required to obtain a certificate of no impediment to contract a new marriage, Section 61 of the Marriage Act provides for marriages celebrated in Kenya and dissolved by foreign Courts to be recognized in Kenya and the Decree be registered, the marriage is over and has duly been dissolved, the Applicant has a right to move on with his life, there is known reason in law impeding the registration of the said divorce decree.
3. In his Supporting Affidavit, the Applicant reiterated the above matters and exhibited a copy of the dissolution of marriage decree and a copy of his flight booking.



4. Pursuant to my directions, the Applicant filed a Supplementary Affidavit on June 12, 2023 in which as I had directed, he exhibited a copy of his passport, an original copy of the dissolution of marriage Judgment in German and certified translation, a copy of the marriage certificate and certification from the Ministry of Foreign Affairs. From the certificate of marriage, the parties contracted in Mombasa within the Republic of Kenya on December 16, 2015.
5. I also directed that although the Application is ordinarily ex parte, the same be served upon the Respondent. However, when the Applicant’s Counsel appeared before me on June 12, 2023, he informed me that they could not trace the Respondent’s contact address including email and were therefore unable to serve.
6. The Applicant has relied on the decisions of Maureen Odero J made in *IWN v HJC* [2021] eKLR and W Musyoka J made in *MNM v PNM* [2016] eKLR.

Analysis & Determination

7. In my view, the issue that arises for determination in this matter is “whether this Court should recognize and adopt the dissolution of marriage decree cited by the Applicant and alleged to have been given in the Republic of Germany”.
8. As aforesaid, the Application is brought under Section 61 of the *Marriage Act*. Generally, however, matters of recognition and adoption of Judgments or Court Orders from foreign jurisdictions in Kenya are governed under the *Foreign Judgments (Reciprocal Enforcement) Act*, Cap 43. On this issue, Muigai J in *EMMH v RH* [2016] eKLR stated as follows:

“The Foreign Judgments (Reciprocal Enforcement) Act, Cap 43, as revised in 2012, makes provisions for the enforcement and recognition of foreign judgments.

The object of the Act is:

to make new provision in Kenya for the enforcement of judgments given in countries outside Kenya which accord reciprocal treatment to judgments given in Kenya and for other purposes in connection therewith.

Section 18 of the said Act provides that:

- (1) Subject to this section, a judgment of a designated court shall be recognized in any court in Kenya as conclusive between the parties thereto, as to the matter adjudicated upon, in all proceedings (no matter by which of the parties in the designated court they are instituted) on the same cause of action and maybe relied upon by way of defence or counterclaim in those proceedings.

- (2)

On the other hand, as regards Marriages and Divorces, the Marriage Act, 2014 gives parties the discretionary right to have decrees of annulment of dissolution registered. In that regard Section 61 provides thus:

- (1) Where a marriage celebrated in Kenya is annulled or dissolved by a decree of a foreign Court, any party to the annulled or dissolved marriage may apply to the Registrar to register the decree.



- (2) Where the Registrar is satisfied that a decree under this Section should be recognized in Kenya as if the decree was made by a Kenyan Court, the Registrar shall register the decree in a register maintained for the purpose.
- (3) An Application under this Section shall include-
 - (a) A copy of the decree and where the decree is not in an official language, a certified translation of the decree in an official language and in the prescribed form; and
 - (b) A declaration under the law of the country in which the decree was obtained made to a legal practitioner authorized to witness such a declaration that states the decree is effective in that country as if the marriage had been celebrated in that country.

It is apparent that there are two statutes governing the recognition and enforcement of foreign judgments and decrees in Kenya. However, the Court notes that the Marriage Act, was enacted later on in 2014 and it is the special law governing issues pertaining to marriages and divorce. This Court shall invoke the doctrine of implied repeal in interpreting the provisions of the two statutes and where any conflicts arise as in the instant case. New laws are given preference in case of an inconsistency with the older laws

9. On the same issue, Onyiego J in *PM v VM* [2018] eKLR stated as follows:

“5. I have considered the application herein, affidavit in support and oral submissions by counsel for the applicant. Recognition of foreign judgments is provided under Section 9 of the Civil Procedure Act and Sections 3 and 13 of the Foreign Judgments (Reciprocal Enforcement) Act Cap 43. Under Section 3 of the Foreign Judgments and Reciprocal Act, divorce and separation proceedings are not listed as among those recognized for entry of such foreign judgments before any superior court in Kenya.

.....

8. However, the applicant would find solace under Section 67 of the Marriage Act which permits recognition of foreign judgments. The said section provides:

“where a foreign court has granted a decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, that decree shall be recognized in Kenya if:

- (a) Either party is domiciled in the country where that court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings.
 - (b) Being a divorce of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them”.
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11. It should however be borne in mind that recognition of foreign judgments is not the same as registration. Whereas the provisions of foreign judgments (reciprocal enforcement) Act only regulates registration of foreign judgments, it implies that judgments arising out of matrimonial cause are registrable not for enforcement purposes given that matrimonial causes are declaratory in nature for dissolution of a marriage which is a personal right with no orders for enforcement unlike commercial transactions.
12. However, foreign annulment and dissolution of marriage are now registrable under Section 61 of the Marriage Act 2014. Registration of such orders is a preserve of the registrar of marriages and not the courts. For clarity purposes and avoidance of doubt, I wish to reproduce Section 61 of the Marriage Act 2014 which provides that:

Sub-Section (1) – “where a marriage celebrated in Kenya is annulled or dissolved by a decree of a foreign court, any party to the annulled or dissolved marriage may apply to the registrar to register the decree”.

13. While handling a similar case in which he recognized foreign judgment entered in USA in the case of *MNM vs PNM* (2016) eKLR, Justice Musyoka had this to say:

“foreign annulments and dissolution of marriages are now registrable under Section 61 of the Marriage Act, 2014. However, unlike the provisions in the foreign judgments (reciprocal enforcement) Act, which envisages adoption of such orders by the courts, the registration envisioned in Section 61 of the Marriage Act 2014 is by the registrar of marriages”.

The honourable court went further to say:

“...it was suggested that foreign judgments in matrimonial cause are not recognized in Kenya. That cannot be the correct position”.

14. It is therefore clear that under the Marriage Act 2014, foreign judgments annulling marriages or generally dealing with matrimonial proceedings are recognized in Kenya and the prayers herein are properly sought and therefore allowed

10. Similarly, Musyoka J in *MNM v PNM* [2016] eKLR stated as follows:

- “21. The appellant sought to persuade the court that the decree of the Florida court ought not to be recognized in Kenya. The provisions of the Foreign Judgments (Reciprocal Enforcement) Act were cited in that regard. It was suggested that foreign judgments in matrimonial causes are not recognized in Kenya. That cannot be the correct position. The Foreign Judgments (Reciprocal Enforcement) Act only regulates registration of foreign judgments, and its effect is that such judgments in matrimonial causes are not registrable. That is not the same as saying that such judgments are not recognized. Registration



is necessary under the Foreign Judgments (Reciprocal Enforcement) Act for enforcement purposes. A decree for dissolution of marriage is not for enforcement, and therefore there really is no need for it to be registered under the Foreign Judgments (Reciprocal Enforcement) Act, for a divorce decree amounts to a mere declaration that a marriage has been dissolved.

22. Foreign annulments and dissolution of marriages are now registrable under section 61 of the Marriage Act, 2014. However, unlike the provisions in the Foreign Judgments (Reciprocal Enforcement) Act, which envisage adoption of such orders by the courts, the registration envisioned in section 61 of the Marriage Act, 2014, is by the Registrar of Marriages.

11. Finally, Maureen Odero J in *IWN v HJC* [2021] eKLR stated as follows:

“(6) I have considered the present application as well as the Affidavit in Support. I have also perused the case of PM –VS- VM [2018] eKLR which authority was filed in support of the Application.

- (7) Section 67 of the Marriage Act 2014 provides for the recognition of Divorce Decrees issued by Foreign Courts as follows:-

“Where a foreign court has granted a Decree in matrimonial proceedings whether arising out of a marriage celebrated in Kenya or elsewhere, that decree shall be recognized in Kenya if;

- (a) Either party is domiciled in the country where that Court has jurisdiction or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings.
- (b) Being a Divorce of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them.”

- (8) Under the above provision of law, the requirement that there be reciprocity in the recognition and registration of foreign judgments as provided under the Foreign Judgments (Reciprocal Enforcement Act) 1984 is not mandatory.

- (9) From its wording Section 67 envisages the recognition of all foreign judgments relating to matrimonial proceedings without there being the need to demonstrate reciprocity. All that is required is that there be evidence to show that either party was domiciled in the country where the Decree was made and that the Court which issued the Decree had jurisdiction to do so. Secondly it must be shown that the Decree of annulment, divorce or separation was effective in the country of domicile.

- (10) From the material availed to Court the Divorce Decree in question was issued in Germany. (A copy of the Decree is Annexure ‘IN’ to the Notice of Motion dated 21st February 2021). This Court has no reason to doubt that the Court in Germany had requisite jurisdiction to issue the said Decree. The Applicant averred that after the solemnization of the marriage in Mombasa, she moved to live with her spouse in Germany where the couple resided for over five (5) years



and were therefore ‘domiciled’ in Germany. To that extent the divorce orders issued in Germany are recognizable by the Kenya Courts.

- (11) It must be noted that recognition foreign judgments is not the same as Registration. Whilst the provisions of the Foreign Judgments (reciprocal enforcement) Act only regulates the registration of foreign Judgments, the implication is that Judgments arising out of matrimonial causes be registered not for enforcement purposes since matrimonial causes are declaratory in nature but for dissolution of the marriage which is a personal right. Foreign annulment and dissolution of marriage are now registrable under Section 61 of the Marriage Act 2014. Registration of such orders is a preserve of the Registrar of Marriages and not the Courts. For clarity purposes and avoidance of doubt, I wish to reproduce Section 61 of the Marriage Act 2014 which provides that:-

“Sub-Section (1) – “where a marriage celebrated in Kenya is annulled or dissolved by a Decree of a foreign Court, any party to the annulled or dissolved marriage may apply to the Registrar to register the Decree.”

- (12) In handling a similar case in which he recognized foreign judgment entered in USA in the case of MNM vs PNM (2016) eKLR Hon Justice Musyoka stated as follows:-

“Foreign annulments and dissolution of marriages are now registrable under Section 61 of the Marriage Act, 2014. However, unlike the provisions in the foreign judgments (reciprocal enforcement) Act, which envisages adoption of such orders by the courts, the registration envisioned in Section 61 of the Marriage Act 2014 is by the Registrar of Marriages.”

The Honourable Court went further to say:-

“... it was suggested that foreign judgments in matrimonial cause are not recognized in Kenya. That cannot be the correct position.”

- (13) Finally, I find that under the Marriage Act 2014 Foreign Judgments annulling marriages or dealing generally with matrimonial proceedings are recognized in Kenya. Accordingly, I find merit in the present application and the same is allowed as prayed.”

12. A consideration of the above holdings, read in totality, convinces me to form the view that although the Applicant brought the present Application under Section 61 of the *Marriage Act*, he ought to have in fact come under Section 67 thereof. Under the *Marriage Act 2014*, “Recognition” of a foreign Judgment and “registration” of such Judgment mean two different things. Section 61 deals with “registration” by the Registrar of Marriages of Divorce Judgments or Orders from foreign Courts. That is an exclusive preserve of the Registrar and in which the Court has no role whatsoever. It is Section 67 that deals with “recognition” of such Judgments and it is this role that the Court can be involved in. However, I will invoke Article 159(2) of the *Constitution* and consider substantive justice as opposed to procedural technicalities and excuse the omission.



13. Regarding the ingredients set out at Section 67(a) and (b) required to be met by the Applicant, I have no reason to doubt that either Applicant or the Respondent is domiciled in the country where that court has jurisdiction (Germany) or had been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings; or being a decree of annulment, divorce or separation, it is effective in the country of domicile of the parties or either of them.
14. In the circumstances, I allow the Application in terms of prayer 2 thereof.

Final Orders

15. In the premises, I order as follows:
 - i. The Honourable Court hereby recognizes and adopts the dissolution of marriage decree given to the Applicant and the Respondent in the Republic of Germany in the Local Court of Wiesbaden before Single Judge Grunewald-German on the 18th of February 2020.
 - ii. I make no order on costs.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 19TH DAY OF JUNE 2023

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WANANDA J. R. ANURO

JUDGE

