



**PK v SMK (Civil Appeal E068 of 2022)
[2023] KEHC 21762 (KLR) (Family) (7 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 21762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
CIVIL APPEAL E068 OF 2022
PM NYAUNDI, J
JULY 7, 2023**

BETWEEN

PK APPELLANT

AND

SMK RESPONDENT

*(An Appeal from the Ruling and Order of the Honourable M. W Murage,
Chief Magistrates Court, Milimani Commercial Courts Nairobi in
Divorce Cause No.1159 of 2021 delivered on 29th day of June 2022)*

JUDGMENT

1. Vide Memorandum of Appeal dated July 19, 2022, the appellant challenges the decision of the court in Chief Magistrates Court Milimani Commercial Courts Nairobi Divorce Cause No. E1159 of 2021 on 5 grounds as follows-
 1. The Learned Trial Magistrate erred in failing to appreciate the law in respect of the subject matter.
 2. The Learned Trial Magistrate erred in law and in fact in failing to appreciate that the only issue before the court was whether the court has jurisdiction to hear and determine the Petition for Divorce.
 3. The Learned Magistrate erred in law in failing to appreciate that the law provides that the pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such a suit in such foreign court.
 4. The Learned Magistrate erred in law and in fact by disregarding the Appellant's submissions and the well- established case law.



5. The Learned Magistrate erred in law and in fact in prejudging that inconsistent decrees in the Divorce Cause in India and the Divorce cause in Kenya despite both parties admitting that the marriage has irretrievably broken down and actively seeking dissolution.
2. Both parties agreed to canvass the Application by oral arguments and relied on the Record of Appeal Dated December 16, 2022 and Supplementary Record dated March 24, 2023, filed by the Respondent. Both parties relied on the submissions made in the trial court. The matter proceeded for hearing on June 22, 2023
3. The Appeal turns on the interpretation the trial court made of section 6 of the *Civil Procedure Act* and in particular the explanatory note.
4. Section 6 of the *Civil Procedure Act*, provides

Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation. —The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

5. In the impugned ruling the Magistrate stated that,

‘...This court has jurisdiction to dissolve the marriage celebrated in India but two suits cannot be maintained. That is to say one in India and another one in Kenya in respect to the same matters. What if the court in india do not grant the divorce while this court grants divorce (sic). Will the Petitioner remain divorced while in Kenya and married while in India? I agree with the respondent that the divorce case in India ought to be conducted first.
6. The court then proceeded to direct that the suit be stayed pending the outcome of the divorce cause filed earlier in India.
7. Having reviewed the record of Appeal, supplementary record, rival submissions, the relevant law and authorities cited by the parties, I derive the following as the issues for determination,
 - a. whether the Learned Magistrate erred in the interpretation of section 6 of the Act
 - b. Who should pay costs?
8. A plain reading of the relevant provisions of section 6 of the *Civil Procedure Act* indicates that there are two directives to courts regarding matters that are found to be Sub judice. Where both matters are in Kenyan Courts the Court has no option but to stay the latter matter.
9. Where one of the matters is in a foreign court, the Kenyan Court ‘is not precluded’ from trying, (which I understand to mean) proceeding with the matter. This interpretation is settled by numerous decisions by Kenyan Courts and the Appellant has relied on *PAW-M v CMAW-M* [2010] eKLR, in which the Learned Judge cited with approval the Court of Appeal decision in *James Owens v Margaret Owens* 1959 EALR 909.



10. It would seem that in arriving at the decision to stay the Kenyan matter, the court sought to resolve the dilemma of contradicting decisions being arrived at by the courts in different Countries. This question was well answered in the case of *Owens* cited above where the court guided that-

On Appeal it was held that there was no danger of inconsistent decrees being made, since if either court decreed the dissolution of the marriage, the proceedings in the other court would be brought to an end on grounds that the marriage had already been dissolved.

11. In arriving at my decision, I am not constrained by the anti-suit injunction issued by the court in India as firstly it was an ex parte interim order and secondly the court itself at paragraph 18 wrestled with the question of whether or not it could have jurisdictional authority over a foreign court. I have therefore deliberately declined to be fettered by the anti-suit injunction of the Indian court and instead apply the Kenya law which is clear in import and effect.
12. Accordingly, I will allow the Appeal having found that the Learned Magistrate erred in finding that 'two suits cannot be maintained' and proceeding to stay the Divorce Cause in Kenya pending the outcome of the divorce cause filed in India.
13. Consequently, it is ordered that
- a. The Ruling and Order of the Honourable M. W. Murage, Chief Magistrates Court Milimani Commercial Courts Nairobi in Divorce Cause No. E1159 of 2021 delivered on 29th day of June 2022 is set aside.
 - b. Subject to confirmation that the Divorce Cause in India has not been determined, Divorce Cause No. E1159 of 2021 be heard and determined
 - c. The matter is remitted back to the trial court for parties to take directions on the hearing of the Petition
 - d. Each party will bear their own costs

It is so ordered

SIGNED, DATED AND DELIVERED VIRTUALLY AT NAIROBI THIS 7TH DAY OF JULY 2023.

P M NYAUNDI

JUDGE

In the presence of:

Ms Thongori SC for the Appellant

Mr. Waweru h/b for Mr. Rugo for the Respondent.

Karani Court Assistant

