REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION MILIMANI

DIVORCE CAUSE NO. 1 OF 2019

MKBB.....................................PETITIONER

VERSUS

ALB......................................RESPONDENT

JUDGMENT

1. By a petition dated 15th November 2018 and filed on 16th January 2019, the petitioner herein petitioned this court seeking orders dissolving her marriage to the respondent. Service of the petition upon the respondent was effected on 1st March 2019. He subsequently entered appearance on 20th September 2019.

2. Having failed to file an answer to petition or cross-petition, the pleadings were certified as being in order on 14th March 2019 and the same proceeded to hearing as undefended suit.

3. Briefly, the petitioner and respondent celebrated their marriage on 19th May 1973 at Great Barrington, Massachusetts. The couple then lived and cohabited in Kenya from the date of marriage till the year 2005 when their marriage irretrievably broke down and ceased living together as wife and husband. They were blessed with two children now adults namely: JVKB born on 13th June 1979 and ATB born 5th February 1981.

3. The main ground cited for divorce is that the parties who are still residents in Kenya have been living separately since 2005 and that their marriage has irretrievably broken down. During the hearing, the petitioner basically adopted the content of the petition.

4. I have considered the petition herein and the petitioner's testimony which is not opposed. The only issue for determination is whether this court can determine a divorce petition for dissolution of a foreign marriage and whether the petitioner has satisfied threshold for Divorce under the Kenyan Legal System.

5. Assumption of jurisdiction is guided by either the Constitution or Statute. Jurisdiction is everything and the moment the court seized of the matter discovers that it has no jurisdiction, the same should step aside and down the tools (***See where* Owners of Motor Vessel 'Lillian S' v Caltex Oil(LTD)(1989)eKLR**.

6. The assumption of jurisdiction to determine a petition and dissolve a marriage celebrated in a foreign country can be derived from Sections 38 and 40 of the Marriage Act 2014. Section 38 does provide that –

> **"A marriage celebrated in a foreign country otherwise than in accordance with Section 37 is valid if;**
>
> **(a) It was contracted in accordance with the law of that country and is consistent with the Laws of Kenya.**
>
> **(b) At the time of the marriage the parties had capacity to marriage under the law of that country and is consistent with the Laws of Kenya.**
>
> **(c) Either of the parties is at the time of the marriage domiciled in Kenya, both parties had capacity to marry under this Act, and**
>
> **(d) ....**

Section 40 further provides that:

> **“a civil marriage contracted in a foreign country shall be recognized as valid marriage if –**
>
> **(a) it is contracted in accordance with the law of that country**
>
> **(b) it is consistent with the provisions of this part; and the**
>
> **(c) the parties have the capacity to marry.**

7. The key consideration therefore in determining jurisdiction is the place of domicile of the parties for the period allowed or relevant prior to the institution of the divorce proceedings.

8. In arriving at this finding, I am further guided by the holding of J. Musyoka in the case of **M. N. M. v P.N.M. (2016) eKLR** where it was held that:

> **“In personal matters such as marriage domicile is critical about residence. The law of domicile prays an important role in determination of whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of a marriage where parties have been domiciled within the jurisdiction of that country for the period allowed by the relevant law …The jurisdiction of a Family court to entertain a divorce cause is therefore guided by the law of domicile.”**

9. Considering that the couple has been domiciled in Kenya since 1973, the law applicable in determining their divorce is both the Kenyan Law or that of their Country of origin in case the petition was filed there. Guided by the above quoted provisions and case law, it is my holding that this court is properly seized of this matter.

10. Has the marriage irretrievably broken down? According to the petitioner, they have been staying separately since 2005. It is now 14 years down the line. Pursuant to Section 66(6) (d) of the Marriage Act, the parties have been living separately beyond 2 years the minimum statutory requirement mandated to justify irretrievable breakdown of marriage.

11. The bedrock of any stable marriage is love and companionship. Where a couple has been living separately for 14 years, there is no love in place. Marriage is a voluntary union which is anchored on love. Love cannot be transmitted through osmosis. Where it has ceased like in this case, it is only fair that the court unties or breaks the chains of bondage to set free people to be able to search for love elsewhere unrestricted.

12. I am therefore satisfied that a prolonged period of separation is a ground for divorce. Accordingly, it is holding that the marriage herein has irretrievably broken down and the same is therefore dissolved.

A decree nisi to issue and the same shall be declared absolute after 30 days.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26Th DAY OF SEPTEMBER, 2019.

J. N. ONYIEGO

JUDGE