



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI**  
**DIVORCE CAUSE NO. 240 OF 2014**

**J T O ..... PETITIONER**

**VERSUS**

**B M N .....RESPONDENT**

**RULING**

1. The petitioner has filed this petition dated 9th December 2014 seeking the dissolution of his marriage to the respondent. He avers that they underwent a statutory marriage on the 21st of November 2012 under the Marriage Act at the office of the Registrar of Marriages at Nakuru. The parties since the celebration of the said marriage have cohabited in Nairobi. There is one living issue of the marriage A L T born on 19th May 2012. The petitioner informs the court that there are pending proceedings between the petitioner and respondent in Nairobi Children Case no. 1438 of 2013 B M N vs J T O concerning the issue of the marriage A L T.

2. The petitioner alleges that since the celebration of the said marriage the respondent has been guilty of acts of cruelty towards him and the child of the marriage. He particularized the acts of cruelty as follows that the respondent exhibited unprovoked violent behavior towards the petitioner and she threw a coffee cup at him. That the respondent denied him access to the child of the marriage that she filed a false complaint of assault with the police, which made them prefer false charges against him. That she compelled the petitioner to move out of the matrimonial home after demonstrating against him disrespect, hatred ill will and malice and habitually disparaging his ethnic background. That the respondent locked him outside for hours forcing him to look for alternative accommodation. That the respondent denied him clean articles forcing him to go work with unclean clothes and had ordered the house help not to clean or press his clothes or prepare his meals compelling him to sleep hungry. That the respondent denied the petitioner to sleep in the matrimonial bed and excluded him from the matrimonial bedroom and to spite him she would invite her mother to live for long periods of time denying him comfort in his own home. The petitioner prays for;

**i. A declaration that Section 66 of the Marriage Act is void and of no effect for being inconsistent with Article 27 of the Constitution of Kenya, 2010.**

**ii. A declaration that the petitioner has an inalienable constitutional right to petition for a decree for separation or divorce.**

**iii. That the marriage celebrated on 21st November, 2012 between the petitioner and the respondent be dissolved.**

3. The respondent raised a Preliminary Objection stating that the petition is incompetent as it offends Section 66 of the Marriage Act, which provides that no divorce petition should be filed before the lapse of

3 years. The marriage was celebrated on 22/11/12 and the petition filed on 11/12/14, which was just 2 years and a month after the celebration of the same, which is not in line with provisions of Section 66. That the petitioner has not even sought court's leave to bring the said petition as such the court should strike it out with cost. On this, the respondent relied on the case of **KLB vs CR and CC vs DJMN 2 of 2006**

4. In reply to the said application, the respondent argued that a Preliminary Objection must be purely on a point of law as set out in the case of **Mukhisa Biscuit**. It is argued that Section 66 of the Marriage Act violates Article 27 of the Constitution adding that the Act requires the parties stay in a marriage until 3 years have lapsed further that there is no provision in the Marriage Act that states that if you want to dissolve a marriage you have to seek leave adding that those were the rules in the Matrimonial Causes Act which was repealed and as such it is absurd and no court is under obligation to be constrained by it. Adding that there is no law or provision that for one to challenge a specific Section as unconstitutional the petitioner ought to have filed a petition. He argued there is no statute provision or judicial authority that the same ought to be filed as a separate petition. He adds that Article 157 allows him to file a suit and in the same suit challenge a section to be unconstitutional. He argues that Section 66 does not sit well with the provisions of Article 27 1, 2, 3, 4, 6 & 7 of the Constitution. He argues that being forced to stay in a marriage for 3 years was discriminatory. A marriage is a social event sub article 45(b).

5. I find that the petitioner in his petition has sought to raise a constitutional issue. I further note that the same is raised as a prayer was not pleaded as a substantive issue in the pleadings. Further, the petitioner other than merely mentioning that the said section is discriminatory has not provided or given adequate particulars of the claims relating to the alleged violations of Article 27 and Article 45 of the Constitution of Kenya, 2010. Accordingly, I find that his allegation has not been properly raised before this court and the same does not meet the standards enunciated in the **Anarita Karimi Njeru v The Republic (1976-1980) KLR 1272**.

6. I am guided by the Court of appeal case of **TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE VS. AG. & 2 OTHERS [2012] eKLR** regarding the decision in Anarita Karimi Njeru is very apt. The Judges said -

*“We do not purport to overrule Anarita Karimi Njeru as we think it lays down an important rule of constitutional adjudication; a person claiming constitutional infringement must **give sufficient notice of the violations to allow her adversary to adequately prepare her case and to save the court from embarrassment on issues that are not appropriately phrased as justiciable controversies. (Emphasis mine)** However, we are of the opinion that the proper test under the new Constitution is whether a Petition as stated raises issues which are too insubstantial and so attenuated that a court of law properly directing itself to the issue cannot fashion an appropriate remedy due to the inability to concretely fathom the constitutional violation alleged.*

*The test does not demand mathematical precision in drawing constitutional Petitions. Neither does it require talismanic formalism in identifying the specific constitutional provisions which are alleged to have been violated. The test is a substantive one and inquires whether the complaints against the Respondents in a constitutional petition are fashioned in a way that gives proper notice to the Respondents about the nature of the claims being made so that they can adequately prepare their case.”*

7. The respondent has raised a preliminary objection that the petitioner's petition is premature. A Preliminary Objection is purely on a point of law. The principles in **Mukhisa Biscuit Manufacturers Ltd. vs. West End Distributors Ltd. [1969] E.A. 696** – the Court of Appeal said:-

*“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued 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.*

*The improper raising of points by way of Preliminary Objection does nothing but unnecessarily the costs and on occasion, confirms the issues. This improper practice must stop,” as per Sir Charles New Bold.*

As per the provisions of Section 66 of the Marriage Act which provides that, “(1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.”

The petitioner and respondent got married on 21st November 2012 while the petitioner petitioned for a divorce 9th December 2014 barely 2 years after celebrating the same. This goes contrary to Section 66 of the Marriage Act as such I find that the Preliminary Objection has merit and uphold the same. The petitioner’s petition is subsequently struck out for failing to comply with Section 66 of the said provision of the law. No orders as to cost. It is so ordered.

**Dated, signed and delivered this 23rd day of *February*, 2017.**

**R. E. OUGO**

**JUDGE**

In the presence of;

**Absent For the Petitioner**

**Absent For the Respondent**

**MS. Charity Court Clerk**