



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 88 OF 2014**

**M M.....PETITIONER**

**VERSUS**

**N A.....RESPONDENT**

**JUDGMENT**

**APPLICANT'S CASE**

This is a judgment for the petition dated 25<sup>th</sup> April 2014 where the Petitioner prays for orders that the marriage between the Petitioner and the Respondent solemnized in [particulars withheld] France on 3<sup>rd</sup> September, 1994 as per the certificate of marriage attached to the petition; be dissolved and the Respondent be ordered to pay costs of this suit. The Petitioner relied on the following grounds:

- **Desertion by the Respondent from Petitioner since 2011.**
- **Particulars of adultery by the Respondent with B G O**
- **Particulars of cruelty detailed in paragraph 9 of the Petition.**

The Petitioner and Respondent lived and cohabited in France, Italy and Burkina Faso. They have one child of the marriage L M born on 21<sup>st</sup> September 1997. The Petitioner and Respondent have been residents in Kenya from 2011 until the Petitioner relocated to Cairo Egypt.

The Petitioner averred that during the pendency of divorce proceedings, the Respondent sent him unsavory and threatening emails this is evidenced by the bundle attached as **MM1** to the application. She jeopardized the Petitioner's professional standing by sending disparaging and undignified emails to the Italian Consulate in Cairo where he works and resides now. The Respondent also requested withdrawal of his passport as evidenced by email marked **MM2** attached to the application. The Respondent influenced their son L M to write similar emails to the Italian Consulate in Cairo annexed is an email marked **MM3** attached to the application.

This Court delivered Ruling on this issue on 16th August 2016

On 8th December 2016 the matter proceeded for hearing. The Petitioner gave oral testimony relying on the Petition filed in Court. He stated that they had their son in 1997, they lived in France, Italy, Ethiopia, Burkina Faso and Kenya where they separated again after they had reconciled. The Respondent left for Mombasa with her boyfriend and who she lives with to date.

He hired an Investigator who confirmed this position. The Respondent was cruel to him, she changed after they had their son, she harassed the family that adopted her, the Petitioner both at home and at work,

sent the e-mails and had his passport withdrawn.

He lived with their son L and paid school fees and expenses; the Respondent took him away to live with her. He paid school fees and he completed school in 2016. He undertook to pay [particulars withheld] University education upto completion and he will deal with L directly and pay the College fees and expenses directly to L as he is an adult. He sought dissolution of the marriage as he will retire at 67 years as he is 64 years now.

### **RESPONDENT'S CASE**

The divorce proceedings were held *ex parte*, the Respondent did not attend Court despite service of hearing notice as per the summons issued through Deputy Registrar Family Division.

The Respondent instead filed an application on 5th December 2016; attached Ruling from Children Court **Children Case Number 416 of 2014 of 8th October 2014** that ordered the Respondent/Petitioner to pay 10,000 dollars annually to the education of the child. In the application; the Respondent sought enforcement of this Court's Ruling of 16th August 2016 and sought this Court to dismiss the petition for divorce.

Secondly, from the Court record; she raised the question of this Court's jurisdiction in hearing the divorce proceedings as there is a similar case on separation and divorce between the same parties in Italy. There is a pending case in Sulmona, Italy initiated in July 2013 regarding divorce proceedings and another case in France which automatically grants divorce after two years of separation. They separated for two years by 15<sup>th</sup> February 2013. Due to this, the Respondent believes that the Petitioner did not want to divorce her according to any European law. The Petitioner left Kenya on 1<sup>st</sup> August 2015 without informing her and her son and he is now employed by the [particulars withheld] of Cairo-Egypt as Team Leader of the joint [particulars withheld] Program for a gross annual income of 182,534,18 Euros as evidenced by **Exhibit 4**. The Petitioner failed to comply with orders as to Alimony awarded by the High Court at Sulmona, Italy herein attached as **Provvedimenti Presidenziali Tribunale Sulmona**. In the last ten years, the Petitioner failed to respect court orders issued both in France and in Italy regarding child custody and maintenance by paying less, late or not at all thereby forcing her and her son to repeatedly ask the intervention of the embassy both in Kenya and in Egypt which is evidenced by Exhibits 5a and 5b addressed to the Italian Consulate of Cairo.

Thirdly, the Respondent deposed that the Petitioner has shown disrespect for Kenyan Courts and uses them to obstruct proceedings in Europe and escape financial obligations. The Petitioner has not complied with the Children court orders to provide for their son.

Finally, the Respondent deposed that if the Court intended to proceed with the divorce proceedings herein; then she would not attend Court or participate in the proceedings and will contest this Court's judgment as invalid in Europe.

### **DETERMINATION**

From the facts summarized above, it is clear that the marriage between the Applicant and the Respondent has irretrievably broken down. Both Petitioner and Respondent have lived separately from 2009 and from the evidence on record they do not wish to reconcile or salvage the marriage.

The Petitioner has relocated to Egypt and the Respondent has objected to this Court's hearing of the divorce proceedings due to lack of jurisdiction. On 2nd march 2014, **R.G.A.C 919/2013** in Sulmona Court of Law in Italy had granted parties separation with orders that the Petitioner herein pays alimony to the Respondent 1,500 Euros and 1,000 Euros for child support.

The Respondent relies on the above case to prevent this Court from hearing and determination of the same. The Respondent raised the same issue as a Preliminary Objection in the this Court on 24th February 2015; that the issues raised in the present suit are also the subject matter in the divorce

proceedings in Italy.

Hon Justice W. Musyoka in the Ruling of 25th September 2015 relied on **Section 6 of the Civil Procedure Act**, which provides;

*"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. 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 are in issue in such suit in such foreign court."*

This court has the jurisdiction to hear this matter as a fresh suit. Therefore i reiterate the same position and that is why the matter proceeded for hearing.

The pertinent issue presented to this Court is whether the High Court has legal basis to grant dissolution of marriage or divorce in instances where both parties are non Kenyans and/or resident in Kenya?

The **Marriage Act** was assented to on 29th April 2014 and commenced on 20th May 2014. the instant petition was filed on 25th April 2014; therefore the petition rightly is in the High Court as it was filed before the advent of the **Marriage Act No4 of 2014** which donates jurisdiction to hear and determine divorce matters to the Magistrates' Courts. **Section 6 of the Act** recognizes under Christian, Civil, Customary, Hindu and Islamic marriages and prescribes registration and dissolution processes.

Foreign marriages are recognized as civil marriages under the Act and are valid on condition they are in compliance with conditions set out in **Section 40 of the Act** which provides that the marriage is;

- (a) contracted in accordance with the law of that country**
- (b) consistent with provisions of this part**
- (c) the parties have capacity to marry under this Act.**

The section does not define foreign marriage. However a reading of **Sections 37, 38 & 39 together with Section 40 of the Act** focus on marriages by Kenyans abroad or a Kenyan abroad or foreigners contracting a marriage based on our laws and presided over by an agent of the Registrar of Marriages abroad.

The grounds for dissolving a civil marriage is **prescribed by Section 66 (2) of the Act**

*A party to a marriage celebrated under Part IV may only petition for separation and dissolution of the marriage on the following grounds;*

- a) adultery by the other spouse*
- b) cruelty by the other spouse*
- c) exceptional depravity by the other spouse*
- d) desertion by the other spouse for 3 years*
- e) the irretrievable breakdown of the marriage*

Although the Respondent did not attend Court and rebut or controvert the Petitioner's testimony; the Court finds that the allegations are founded, the Respondent was cruel to the Petitioner.

However, the instant case, the Petitioner is an Italian by citizenship and Respondent is a French citizen. They were married on 3rd September 1994 in [particulars withheld] France as per the marriage certificate attached to Petition. Their son was born in France on 21st September 1997 and now aged 19 years old. They relocated to Kenya in 2011 and the Petitioner relocated to Cairo Egypt and left behind the Respondent and their son.

This Court has perused the Marriage Act and it does not provide for dissolution foreign marriage except those conducted in compliance with Sections 37, 38 & 39 & 40 of the Act. The gist is that foreign marriage envisaged under the Act are marriages by Kenyan citizens abroad in High Commissions, Embassies and/or by authorized representative of the Registrar of Marriages or foreigners who contract a marriage in accordance with Kenyan Law. The conclusion is that this Court lacks the legal basis to validly dissolve the marriage in the instant case. The Petition for dissolution of marriage is not granted.

In addition, the Court reiterates its position vide Ruling of 16th August 2016. The petitioner seeks redress and protection of his rights from the same Court whose orders it has shunned. It is on record that the Petitioner has not fulfilled his financial obligation especially to the child of the marriage; to pay school fees and expenses and ensure his upkeep. He has not come to Court with clean hands. By an attachment of their son's letter to the Respondent's affidavit; he states he was admitted to University of Utrecht in Netherlands and cannot further his studies due to lack of fees and is currently engaged in odd jobs and then pursue a scholarship. Although during the trial, the Applicant /Petitioner promised to pay all college/University fees for their son; he has made no attempt to make good his promise.

Finally, it is also on record that after the family settled in Kenya in 2011, the Petitioner thereafter relocated to Egypt where he resides and works for a living. It is then an abuse of the Kenyan Court process to pursue divorce proceedings in a country where one is not domiciled or resident.

For these reasons; the Court finds that though the evidence on record confirms that the marriage between the Petitioner and Respondent has irretrievably broken down, this Court lacks legal basis to grant dissolution of marriage or divorce in this marriage.

The petition is hereby dismissed.

**DELIVERED SIGNED & DATED IN OPEN COURT ON 16TH JUNE 2017.**

**M.W.MUIGAI**

**JUDGE**

**IN THE PRESENCE OF:**

.....  
.....