



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT KAKAMEGA**  
**DIVORCE CAUSE NO.3 OF 2014**

**J.A.K.....PETITIONER**

**AND**

**S. M. O.....RESPONDENT**

**JUDGMENT**

1. On 20<sup>th</sup> December, 2009 **J.A.K** (the petitioner), then a bachelor, was joined in holy matrimony with **S.M.O.** (the respondent), then a spinster, at the Friends Church ‘**Quakers**’, Nairobi. The parties then lived as a husband and wife but problems seem to have stocked their relationship necessitating this petition.
2. In his petition dated 24<sup>th</sup> February 2014 and filed in court on 27<sup>th</sup> February, 2014, the petitioner sought dissolution of his marriage to the respondent on grounds of cruelty, mistreatment and neglect saying that the respondent had neglected her marital duties and obligations as a wife to the petitioner.
3. Service on the respondent was ordered by means of advertisement in the newspapers which was duly done but the respondent never entered appearance or filed defence. Directions were then given that the cause proceeds as undefended.
4. This cause came up for hearing on 16<sup>th</sup> February 2016 when the petitioner testified. The petitioner told the court that he got married to the respondent on 20<sup>th</sup> February 2009 at the Friends Church ‘**Quakers**’ Nairobi after which he and the respondent cohabited as husband and wife at Nairobi’s Donholm estate, before shifting base to Vihiga. He told the court that their marriage was not blessed with any issue. He produced a certified copy of marriage certificate, letter from the church where their marriage was solemnised and a certified copy of the marriage register as PEx 1, 2 and 3 respectively.
5. The petitioner further testified that after solemnisation of the marriage their marriage did not blossom as he expected. He told the court that the respondent was emotional most of the time which affected their marriage negatively. The petitioner told the court that in August 2010, the respondent left the matrimonial home to unknown place and without letting him where she was going. He testified that upto now he has not heard from the respondent and he has no idea where she is. It was the petitioner’s evidence that he has not heard from the respondent for about five (5) years now. He prayed for dissolution of his marriage to the respondent.
6. I have considered the petition herein, the evidence and also perused the record. The marriage herein was a Christian marriage solemnised in church pursuant to the provisions of the **African Christian**

**Marriage and Divorce Act, Cap 151**, laws of Kenya. That Act has since been repealed and replaced with the Marriage Act (No.4) of 2014 which has amended and consolidated various laws relating to marriage and Divorce in this country.

7. Before the repeal of Cap 151, there was a debate within the High Court whether or not the court (High Court) had jurisdiction to hear divorce causes where marriage was solemnised under Cap 151. There were those who held the view that the High Court had jurisdiction to hear these causes while others held the opposite view. The debate revolved around **section 3** of the Matrimonial Causes Act (Cap 152) and **sections 14** and **15** of Cap 151. For the record, **section 3** of cap 152 provided as follows:-

**S.3 “Subject to the provisions of the African Christian Marriage and Divorce Act, jurisdiction under this Act shall only be exercised by the Supreme Court (read the High Court) and such jurisdiction shall subject to the provisions of this Act, be exercised in accordance with the law in matrimonial proceedings in the High Court of justice in England.”**

8. **Section 14** of the African Christian Marriage and Divorce Act on the other hand provided as follows:-

**S.14 “Subordinate courts of the first class shall have the same jurisdiction. In the case of marriages solemnized or contracted under this Act or the Native Christian Marriage Act (now repealed) as is vested in the high Court by virtue of the Matrimonial Causes Act.”**

9. **Section 15** of the same Act provided as follows:-

**S.15 “An appeal shall lie from the decrees or from any part of the decrees and from the orders, of subordinate courts under section 14 of this Act to the High Court.”**

Litigation ensued on the meaning and import of those provisions and whether the High Court had jurisdiction to hear divorce causes contracted under Cap 151.

10. In two decisions, namely **G.G.W v R.M.W Divorcé Cause No. 72 of 2002** and **RM v RCM Divorce Cause No. 143 of 2001, Kubo, J** held that the High Court in exercise of its original civil jurisdiction had power to hear those causes although he appreciated the fact that such causes should ideally be initiated in the subordinate courts.

11. From those decisions, a number of High Court registries were instructed not to accept in their registries causes where marriage was contracted under the African Christian Marriage and Divorce Act.

12. The issue resurfaced again in the case of **ENM v PM [2013] eKLR, (Nairobi Divorce Cause No.37 of 2012)** where **Musyoka J** held that provisions of **section 14** of Cap 151 as read with **section 3** of Cap 152 vested jurisdiction in the subordinate court where marriage was contracted under African Christian Marriage and Divorce Act, thus moving away from the position held by **Kubo, J**.

13. The African Christian Marriage and Divorce Act (Cap 151) has since been repealed and replaced with the Marriage Act (No.4) of 2014. **Section 2** of the new Marriage Act defines Court to mean “a resident magistrate’s court established under **section 3** of the magistrates’ Court Act (Cap 10) (now **section 3** of the Magistrate’s Court Act (No.26) of 2015.)

14. Under **section 65** of the Marriage Act, a party who contracted or celebrated a marriage under Part III of the Act (Christian Marriage) may petition the court for dissolution of the marriage on the grounds specified under that section which are more or less the same as those for dissolution of marriage in the former Act. The court referred to in that section is the subordinate court. This means that just like the repealed Act, a petition for dissolution of Christian Marriage should be filed in the subordinate court.

15. The issue of jurisdiction of the High Court to hear petitions for dissolution of marriage contracted

under cap 151 became the subject of discussion before **Muigai J** in the case of **I.N.K. v P.J.K.N. & Another** [2015] eKLR. The Nairobi Divorce Cause No.197 of 2013) where the learned Judge had occasion to deal with **section 2** of the Marriage Act (2014) vis-à-vis the Constitution on the jurisdiction of the high Court to hear petitions that should have been heard by the subordinate court as defined by **section 2** of the Marriage Act 2014. The learned Judge was of the opinion that taking into account **Article 165** of the Constitution on the jurisdiction of the high Court juxtaposed with **section 2** of the Marriage Act, 2014, **the High Court had competent jurisdiction to hear and determine the petition before it.**

16. The above discourse has been necessitated by the fact that parties herein contracted their marriage under the repealed Cap 151 but the petition for dissolution of that marriage was filed and proceedings taken before this Court. This court has a duty to determine whether or not it has the necessary jurisdiction to render itself on the matter.

17. The jurisdiction of the High Court is provided for in **Article 165(3)(a)** of the Constitution of Kenya 2010 which gives the High Court **Unlimited**

### **Original Jurisdiction in Criminal and Civil Matters**

18. That is to say, according to the Constitution, the High Court has jurisdiction to hear any matter of a civil nature that is placed before it. That is why the jurisdiction is original and unlimited.

19. From the constitutional perspective, there are only two limitations to the High Court's jurisdiction. These are found at **Article 165(2)** where the High Court does not have jurisdiction to deal with matters reserved for the Supreme Court, and **Article 165(5)(b)** in cases of matters reserved for the Courts of equal status. Save for the above twin limitations, there is no other limitation imposed on the High Court's: Jurisdiction to deal with civil matters.

20. The Authors of Halsbury's Laws of England in Vol.24 5<sup>th</sup> Edition at paragraph 623 says of jurisdiction as follows –

**“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or Commission under which the court is constituted and may be extended or restricted by the like means, if no restriction or limit is imposed, the jurisdiction is said to be unlimited”.**

21. To my mind, the Marriages Act, 2014 gives jurisdiction to the subordinate courts to her disputes such as the one before me, but cannot be said to limit or oust the jurisdiction of the High Court which from the constitutional stand point, has unlimited original jurisdiction in matters of this nature.

22. The petition for dissolution of marriage is a dispute of a civil nature and, in my view, it is not if the High Court has jurisdiction, but rather whether it should assume jurisdiction and determine such matters. Should this Court assume jurisdiction and determine this cause? I have taken cognizance of the fact that the cause was filed on 27<sup>th</sup> February 2014 and all along has proceeded before this cause. The cause is also not opposed and evidence was taken before the high Court and the issue of jurisdiction was not one of the issues placed before it for determination. If the court declines jurisdiction, it would mean the petitioner continues to be bound in a relationship which from the evidence on record has come to nought. The fairest to do in the circumstances of this case is for this Court to determine the dispute herein rather than send it down to the subordinate courts, thereby occasioning the petitioner more hardship and expenses in having an undefended cause determined. However parties should note that the appropriate court to her such petitions is the subordinate court.

23. I have considered the evidence on record and the fact that the petitioner and the respondent have not been together for the last five years since the respondent left the matrimonial home. There is also no issue of marriage binding these two together. It would appear that the marriage between the two has

broken down irretrievably and the only option remaining is for the court to sever the marriage and set the two free.

24. For the above reasons, I allow the petition and declare the marriage solemnized between the petitioner and the respondent dissolved on grounds of cruelty and desertion. A decree Nisi do issue, to be made absolute after six months. There will be no order as to costs.

**Dated and delivered at Kakamega this 10<sup>th</sup> March, 2016.**

**E.C. MWITA**

**JUDGE**