



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
FAMILY DIVISION
DIVORCE CAUSE NO. 8 OF 2015

J.M.O.....PETITIONER

VERSUS

C.K.O.....RESPONDENT

RULING

1. The couple herein got married on 6th September 1980 at St, Andrews Presbyterian Church in Nairobi under the **Marriage Act (Cap. 150)**, which has been repealed. Under **section 3** of the **Matrimonial Causes Act (Cap 152** (now repealed)) jurisdiction under **Cap. 150** was to be exercised only by the High Court. This petition for the dissolution of the marriage between the petitioner and respondent was filed on 15th January 2015. This was after the enactment of the **Marriage Act 2014** under which “**court**” means the resident magistrate’s court under **section 3** of the **Magistrates’ Courts Act (Cap. 10)**.

2. Under **section 98** of the **Marriage Act 2014**:

“(1) A subsisting marriage which under any written or custody law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.

(2) Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act.”

This marriage, although contracted under the now repealed **Marriage Act (Cap 150)**, is valid. These proceedings were commenced after the repeal of the **Act**. They are proceeding under the **Marriage Act 2014**, and therefore under **section 2** the court that has jurisdiction to hear and determine the dispute is the resident magistrate’s court under **section 3** of the **Magistrate’s Courts Act (Cap 10)**. The consequence is that the respondent’s complaint that this court lacks jurisdiction to hear and determine the petition for the dissolution of the marriage is merited.

3. In the petition was the prayer that the court takes judicial notice of the assets the couple acquired during the subsistence of the marriage and considers it to be matrimonial property which should be sold and the proceeds shared equally. The property was indicated in the motion accompanying the petition to be as follows:-

- a. matrimonial house situated on Karen-Langata LR *[particulars withheld]*;
- b. apartment in Kileleshwa – Nairobi No. *[particulars withheld]* in Sapphire Park situate on L R No. *[particulars withheld]*;
- c. motor vehicle Volkswagen Polo Classic Reg No. *[particulars withheld]*;
- d. Isukha/Lubao/*[particulars withheld]* measuring approx. 2.05 HA;
- e. *[particulars withheld]* Enterprises Limited (Reg. No. *[particulars withheld]*); and
- f. Money in the joint names of the parties at Commercial Bank of Africa, *[particulars withheld]* Branch Nairobi A/C No. *[particulars withheld]*.

Even without asking for the valuation of these properties, it is quite clear that when one considers the two houses in the upmarket areas in Nairobi the value is well in excess of Kshs. 7 million. The dispute relating to matrimonial property cannot therefore be heard and determined by the subordinate court.

4. The petitioner took the position that under **Article 165(3)(a)** of the Constitution of Kenya 2010 the High Court has unlimited original jurisdiction in criminal and civil matters, and therefore that this dispute is properly before this court. However, the extent of the jurisdiction of the High Court may not only be that which is conferred or limited by the Constitution but also that which the Constitution or any other law may by express provisions or by necessary implication or limit (**Narok County Council v. Trans Mara County Council & Another Civil Appeal No. 25 of 2000**). The jurisdiction of the High Court can be ousted by the Act of Parliament. For instance, in the **Marriage Act 2014** Parliament has legislated that divorce cases under it be heard and determined in the first instance by a resident magistrate's court. That means that High Court cannot be the first point of call for a petitioner seeking divorce.

5. The petitioner sought to rely on the decision in **J.K.M. V C.O.O. [2014]eKLR** to say that the High Court is the one entitled, on account of **Article 165(3)(a)** of the Constitution, to hear and determine this dispute. In the case, the petitioner filed a petition seeking to be divorced from the respondent. Also sought was the custody of the three children of the marriage, and maintenance and the upkeep of the said children. There was an application filed in the petition seeking interim orders in relation to the custody and maintenance of the children. The respondent filed a notice of preliminary objection. He objected to the entire suit on the ground, among others, that the prayers sought regarding the custody and maintenance of the children should in the first instance be adjudicated upon by the Children Court under the **Children Act 2001**. The Court relied on **sections 73 and 118** of the **Children Act** and stated as follows:-

“It is the Children’s Court which has jurisdiction in the first instance to consider all questions relating to the custody and maintenance of children.”

The authority helps the respondent’s case.

6. In the premises therefore, the preliminary objection dated 26th January 2015 by the respondent partially succeeds. The petitioner is directed to present her petition for divorce in the resident magistrate’s court. She will appropriately amend her suit to claim matrimonial property before this Court.

7. This being a family dispute, I make no order as to costs.

DATED and DELIVERED at NAIROBI this 8th day of July 2015

A.O. MUCHELULE

JUDGE