REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MATRIMONIAL CAUSE NO. 4 OF 2011

E H……..……..……PLAINTIFF

VERSUS

A B S…….....…….……DEFENDANT

RULING

The respondent herein **A B S H** filed in court this Preliminary Objection dated 15th September, 2011 in the following terms

"TAKE NOTICE that the respondent herein intends to take a Preliminary Objection to the effect that the petitioner and the respondent were not domicile in Kenya at the time when the petition was presented to this Honourable Court and as provided in section 4 of the Matrimonial Causes Act by reason of the lack of requisite domicile, this Honourable Court is not authorized to make a decree of dissolution of marriage and therefore ought not to entertain this petition."

On this basis the respondent prayed that the petition be struck out with costs.

The petitioner **E H** has filed this petition seeking the dissolution of his marriage to the respondent. The couple had gotten married on 16th May, 1992 in Nairobi under the Marriage Act Cap 150. They lived together in Mombasa until the year 1999 when they moved to Spain where they set up their matrimonial home. The petitioner is a citizen of Switzerland whilst the respondent is a citizen of Kenya. The court directed that, the preliminary objection be disposed of through *vive voce* evidence and both parties did testify before the court.

From the evidence it transpired that at the time of the marriage the couple both lived in Kenya. Thereafter in the year 2000 they moved to Spain where they set up a home. They did not however severe ties with Kenya completely. They would come to Kenya during the winter for six (6) months and return to Spain for six (6) months during the summer. In the year 2008 the couple purchased a property in Nyali and they would live there whenever they came to Kenya. In January, 2011 whilst in Kenya on a tourist visa, the petitioner filed for divorce in the High Court in Mombasa.

The issue here is one of *'Domicile'*. The concise English Dictionary defines *'Domicile'* as *"the country in which a person has a permanent resident"*. The Oxford Dictionary of Law goes further to define Domicile as follows:

"The country that a person treats as his permanent home and to which he has the closest legal

attachment. A person cannot be without a domicile and cannot have two domiciles at once. He acquires at birth a domicile of origin…….A domicile of choice is acquired by making a home in a country with the intention that it should be a permanent base. It may be acquired at any time after a person becomes 16 and can be replaced at will by a new domicile of choice." *[my own emphasis]*

The applicant argued that the petitioner was not domicile in Kenya at the time when this petition was filed therefore this court has no jurisdiction to entertain the same. Section 4 of the Matrimonial Causes Act (now repealed) provided as follows

"Nothing in this Act contained shall authorize

a. **The making of any decree of dissolution of marriage and nullity of marriage unless the petitioner is domiciled in Kenya at the time when the petition is presented.**

b. **The grant of any other relief under this Act unless one of the parties to the suit has at the time, when the petition is being presented, his or her usual residence in Kenya or unless the marriage was solemnized in Kenya."** *[my emphasis]*

Therefore even under this repealed Act, the court under section 4(b) did have jurisdiction to entertain a petition for grant of any relief under the Act where the marriage had been solemnized in Kenya. In this case both parties are in agreement that this marriage was solemnized in Kenya. In the case of **W.A.H. Vs. J.W.N. 2013 eKLR** Hon. Justice Muriithi held that

"Accordingly section 4 of the Matrimonial Causes Act is not an absolute bar to a petition by a person who is not domiciled in Kenya if the marriage was solemnized in Kenya and the petition seeks relief other than divorce of nullity of marriage."

In his petition filed on 28th January, 2011 aside from a decree of divorce, the petitioner also sought other reliefs i.e. *"Half share of matrimonial property in Kenya."* This petition would therefore fall squarely within the ambit of section 4(b) of the Matrimonial Causes Act and the High Court in Kenya would have requisite jurisdiction to entertain the same.

As stated earlier Cap 152 has now been repealed by the enactment of the Marriage Act, 2014, which came into force on 20th May, 2014. Section 98(2) of the Marriage Act, 2014 provides for the continuity of matrimonial causes under the new Act and states

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

Therefore the current proceedings having been commenced under Cap 152 are to be continued in accordance with the provisions of the new Marriage Act. I have carefully perused the new Marriage Act, 2014 and find that no where does it make express reference to domicile as a prerequisite for petitioning for divorce. In other words I found no provisions identical or similar to section 4 of the old Cap 152. The implication therefore would be that under the new Act domicile is **not** a bar to the court having jurisdiction to entertain a matter.

Blacks Law Dictionary (8th edition) refers to domicile as

"the place at which a person has been physically present and that the person regards as home. A person's true, fixed principal and permanent home, to which that person intends to return and remain even though currently residing elsewhere ……"

Domicile of choice on the other hand is defined as

"domicile established by physical presence within a state or territory coupled with the intention to make it home……"

Although the applicant argued that the petitioner was not domiciled in Kenya the fact of the matter is that the couple did have a home in Nyali – Mombasa and they did spend at least six (6) months each year in Kenya. There is evidence that the petitioner sold his house in Spain and there is evidence that he holds bank accounts in Kenya. It is therefore clear that the petitioner was a *'resident'* in Kenya. Kenya could be described as his domicile of choice.

In the present case the petitioner was residing in Kenya for work when he met and married the respondent in 1992. They initially established a home in Kenya. Even after moving to Spain in the year 2000 the petitioner maintained his domicile in Kenya by returning and residing in the country for six (6) months of each year. Therefore I find that the petitioner's Kenyan domicile was never severed. For this reason coupled with the fact that the marriage was celebrated in Kenya I find that this court has jurisdiction to hear and determine this petition. The respondent's objection is dismissed with costs to the petitioner.

Dated and delivered in Mombasa this 5th day of September, 2014.

M. ODERO

JUDGE

In the presence of:

Mr. Ndegwa h/b for Petitioner

Ms. Kasamani h/b for Respondent

Court Clerk Mutisya