



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MISC. APPLICATION NO 114 OF 2014**  
**K I M.....PETITIONER**  
**VERSUS**  
**D K N.....RESPONDENT**  
**RULING**  
**PRELIMINARY OBJECTION**

The petitioner filed a petition on 16<sup>th</sup> June, 2014 for divorce on grounds of nullity of the marriage and details contained in the annexed affidavit. The Respondent on being served with the petition filed an answer to petition under protest on 15<sup>th</sup> September, 2014 he raised what she felt were the reasons for the breakdown for the marriage. Respondent raised a preliminary objection that should be heard and determined before the substantive matter in cause is heard.

The preliminary objection filed on 16<sup>th</sup> September, 2014 is to the effect;

- a. That the High Court lacks jurisdiction to hear the matter.
- b. That the petition is fatally defective incompetent and bad in law.

The reasons given by the Respondent/ Applicant are;

- a. The Marriage Act which came into force 20<sup>th</sup> May, 2013 describes “Court” in section 2 as Magistrates Court Act, Magistrate Court. Under Section 3 of the Magistrate’s Court Act, Magistrate’s Court includes, RM, SRM, PM, SPM and CM. Therefore the petition therein should have been filed in the Magistrates Court.
- b. The petition is premised in the Matrimonial Cause Act Cap 152 yet then Act was repealed by the Marriage Act and there is now in place the Matrimonial Property Act of 2013. The petition was filed on 16<sup>th</sup> June, 2014 and the Marriage Act 2013 was already in force. The petition is incompetent and should be dismissed.
- c. The petition is vague; the Petitioner is not clear whether he seeks annulment of marriage or divorce. Divorce should be sought after three (3) years of marriage yet in this case, the three (3) years are not over. The petitioner has not sought leave to apply for divorce before three (3) years are over. Seemingly, the reasons or grounds for divorce given to warrant the divorce of the marriage.

The Respondent/Petitioner indicated as follows to the preliminary objection;

1. That the petitioner gave instructions to file the petition in December, 2013 and Matrimonial Causes Act was still in force 6<sup>th</sup> June, 2014 whilst the new law came in force.
2. Although in the new Act, the Marriage Act of 2013/2014 defines 'Court' as Magistrates Court, Article 165 of the Constitution gives the High Court original jurisdiction to hear and determine Civil and Criminal cases.
3. The petitioner lodged the petition because the marriage was contracted under the Marriage Act Cap 150 instead of the African Christian and Marriage Act Cap 151 and therefore the matter was within the purview of the Matrimonial Cause Act Cap 152 whose matters are dealt within the High Court only.
4. The petition is not defective; it was filed in the relevant old law that was repealed. The fact that there is new law and the petition seeks leave to amend the petition. The Respondent has not and will not suffer any prejudice.
5. For the future there is need to have clarity on whether as the laws stands matrimonial matters be heard in Magistrates Court and the succession matters remain in the High Court.

The Court has considered the issues raised with regard to the preliminary objection on the matter of law. The preliminary objection goes to the root of and substance of the matter before Court for determination.

The Court has perused the new Marriage Act, 2013, it commenced on 20<sup>th</sup> May, 2014 and the matter herein was filed on 16<sup>th</sup> June, 2014. The Petitioner has explained that she relied on the matrimonial Causes Act even if repealed as the marriage was contracted under the Old Law. This Court finds that although ignorance of the law is not a defence, the new Act inspite of repealing the existing laws that facilitated the marriage does not provide transitional provisions to illuminate on the precise mode of filing hearing and determining marriage disputes arising today while the actual marriages were contracted under the old Law.

Whereas the Court is convinced the preliminary objection has indicated the challenge of the new law *vis a vis* the marriage contracted within the old Law, of the Court is persuaded that Article 165(3) of the Constitution suffices to vest the High Court with unlimited Jurisdiction to hear and determine Civil and Criminal cases. The matter clearly requires clarity on the transitional provisions but in the meantime, matters canvassed under the Old/repealed Matrimonial Causes Act which was within the purview of this Court shall continue to be heard and determined in the High Court until clarification and /or amendment takes place.

The Court orders as follows;

1. The preliminary Objection is raised in light of lack of clear guidelines on the transition process in matrimonial matters.
2. The High Court shall proceed with matters under the repealed Matrimonial Causes Act Cap 152.
3. The Petitioner is granted leave to amend the petition and serve within 14 days
4. Date to be obtained in the Registry.
5. Each party to bear its own costs

M/s Wafula holding brief for Ms. Ndungu for the Respondent and in the absence of the Applicant.

**DATED AND SIGNED AT NAIROBI THIS 6<sup>TH</sup> DAY OF OCTOBER , 2014**

**MARGARET MUIGAI**

**JUDGE**