



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
DIVORCE CAUSE NO.9 OF 2014

V K N PETITIONER

VERSUS

A O A RESPONDENT

JUDGMENT

1. The cause herein was commenced on 7th March 2014 by way of a petition for separation, dissolution of marriage and costs. The respondent has raised a preliminary objection by a notice dated 27th March 2014, citing lack of jurisdiction and alleging that the petitioner's application offends the provisions of **Rules 4 (5) of the Matrimonial Causes Act**.
2. When the matter came before me on 3rd March 2014, it was agreed that the preliminary objection be argued by way of written submissions.
3. **Section 14 of the African Christian Marriage and Divorce Act** provides:-

“Subordinate courts of the first class 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in the case of marriages solemnized or contracted under this Act or the Native Christian Marriage Act (now repealed) as is vested in the High Court by virtue of the Matrimonial Causes Act.”

Section 3 of the **Matrimonial Causes Act** provides:-

“Subject to the provisions of the African Christian Marriage and Divorce Act, jurisdiction under the Act shall only be exercised by the High Court and such jurisdiction shall, subject to the provisions in this Act, be exercised in accordance with the law applied in matrimonial process in the High Court of Justice in England.”

4. In **EWM -vs- PM [2013] e KLR** Musyoka J observed:-

“The provisions cited by Sections 3 of the Matrimonial causes Act and section 14 of the African Christian Marriage vest jurisdiction in the subordinate court of the first class with respect to marriages contracted under the African Christian Marriage and Divorce Act. Section 14 of the said Act is in mandatory terms and therefore it confers exclusive jurisdiction on the lower court so far as matrimonial causes in respect of marriages contracted under the African Marriages and Divorce Act are concerns on the High Court by virtue of Section 15, appellate jurisdiction over appeals from decrees and orders of the subordinate court arising from the exercise of jurisdiction by the said subordinate courts under Section 14 of the said Act.”

5. The petitioner counters this argument by citing the decision of Kubo J in **George Githau**

Wainaina -vs- Rose Margaret Wangari Wainaina [2004] e KLR, where it was held that the High Court has unlimited original jurisdiction and it can therefore “**try cases triable by the subordinate courts if there is good case for the High Court to do so if it can find time for such cases.**” It was also held that **Section 14** of the said Act and **Section 3** of the **Matrimonial Causes Act** are discriminatory.

6. Notwithstanding the decision by Kubo J in **Rose Margaret Wainaina** (Supra) the position stated in **Section 14** and **15** of the **African Marriage and Divorce Act** and **Section 3** of the **Matrimonial Causes Act** remains the Law in Kenya on the jurisdiction of the subordinate courts with respect to matrimonial causes for marriages contracted under the **African Christian Marriage and Divorce Act**. That decision has created a situation which has resulted in the High Court and the lower courts exercising parallel and concurrent jurisdiction over causes emanating from marriages celebrated under the African Christian Marriage and Divorce Act. This is unpalatable as it creates distortion and confusion. The High Court is vested with both original and appellate jurisdiction so far as those causes are concerned. There is a possibility that a person whose marriage was celebrated under the African Christian Marriage and Divorce Act and who seeks relief at the High Court may end up without a right of appeal in view of **Section 15** of the said Act which provides for a right of appeal to the High Court. The decision in **George Gitau Wainaina -vs- Rose Margaret Wangari Wainaina** did not create a right of appeal from the High Court to the Court of Appeal. Needless to say a right of appeal is statutory. It cannot be created by a court.
7. Lastly Musyoka J observed:-

“Kubo J in George Gitau Wainaina -vs- Rose Margaret Wangari Wainaina, was sitting as a High Court Judge. He was exercising a jurisdiction concurrent to mine. His decision in that matter does not bind me. The authority in it is merely persuasive. With respect, I am not persuaded and to that extent, I find that the separation cause relating to the marriage celebrated between EWM and PM ought to have been commenced at the subordinate court. Jurisdiction are causes arising from marriage celebrated under the African Christian and divorce Act is vested in that court and in view of Section 15 of the said Act, the High Court has no original jurisdiction to entertain such causes.”

8. In **MJBN -vs- LLMNG [2009] e KLR** the High Court sitting in Eldoret had a contrary view when Karanja J held:-

“Ideally, the petition should have been filed in the magistrate's court at Kisumu. However, on the jurisdictional aspect, the courts (High Court) have developed a trend of acting in ignorance of Section 3 of the Matrimonial Causes Act and section 14 of the African Christian marriage and Divorce Act by upholding the supremacy of the constitution in dissolving and nullifying marriages contracted under the African Christian Marriage and Divorce Act. See Caroline Dian Jones -vs- Thomas Lyle Jones – Divorce Cause No.118 of 2003 – High Court Nairobi, Sarah Elizabeth Dam Borough -vs- David John Dam Borough - Divorce Cause No.82 of 2005 High Court Nairobi.”

9. The trend is repeated in the cases of **Claire Wanjiku Mwangi -vs- Femin Mabani & another – Divorce Cause No.211 of 2001 – High Court Nairobi, J. Betty Kamande Kitiro -v-s Maurice Ndambuki – Divorce Cause No.68 of 2004 – High Court Nairobi** and **Wainaina -vs- Wainaina [2008] e KLR**.
10. The justice of this case prevails upon this court to adopt and develop the existing trend until such time that the African Christian Marriage and Divorce Act is thrown into the legal dust bins.
11. With the above conflicting yet persuasive authorities, the only thing that remains constant is the fact that the African Christian Marriage and Divorce Act remains in force and the same Act under **Section 14** clearly stipulates which court has jurisdiction in the issue of dissolution of the marriage contracted under the Act. In appreciating this view, I am not saying that the High Court lacks jurisdiction in this case but as Musyoka J noted correctly in **EWM case** (supra) the High Court has no original jurisdiction to entertain marriages contracted under the African Christian Marriage and Divorce Act.

12. In the circumstances therefore, the preliminary objection by the respondent dated 27th March 2014 succeeds on the following terms:-

1. *The divorce Petition be and is hereby transferred to the Kisii Chief Magistrate's Court. No pleading will be struck out and it will be up to the honourable Chief Magistrate to determine how the petition will be argued as the pleading shall remain intact. Mention before CM Kisii on 27/10/2014.*
2. *No order as to costs.*

Delivered, dated and signed at Kisii this 9th day of October, 2014

R.N. SITATI

JUDGE

In the presence of:-

Mr. Rioba (present) for Petitioner

Mr. Momanyi Aunga (present) for Respondent

Mr. Mobisa - Court Assistant