



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

DIVORCE CAUSE NO.167 OF 2011

J S M.....PETITIONER

VERSUS

D I S.....RESPONDENT

RULING

There are two applications in this divorce cause that require determination by this court. The first application was filed by the Respondent pursuant to the provisions of **Rules 3, 13(3) & (4)** of the **Matrimonial Cause Rules** seeking orders of this court to stay proceedings in this cause pending hearing and determination of the Separation and Maintenance Cause pending before the Chief Magistrate's Court, Nairobi (**Separation and Maintenance Cause No.15 of 2007**). The Respondent is of the view that the issues raised in this petition are substantially the same issues raised in the Separation and Maintenance Cause. The application is supported by the annexed affidavit of the Respondent. On his part, the Petitioner filed an application pursuant to **Rules 3(1) & (3)** of the **Matrimonial Causes Rules** seeking orders from this court to have the Separation and Maintenance Cause pending before the Chief Magistrate's Court, Nairobi transferred to this court for hearing and final determination. The Petitioner is of the view that since the issues raised in the Separation and Maintenance Cause are the same issues that are being canvassed in this divorce cause, the court should consolidate the two causes to enable it deliver substantial justice. The application is supported by the annexed affidavit of the Petitioner. Both applications are opposed.

Prior to the hearing of the application, Mrs. Wambugu counsel for the Respondent and Miss Munge counsel for the Petitioner agreed to file written submissions in respect of the two applications. The submissions were dully filed. This court later heard oral rival arguments made by Mrs. Wambugu for the Respondent and by Miss Munge for the Petitioner. This court has read the pleadings filed by the parties in support of their respective applications. It has also considered the submission made by counsel. Certain facts are not in dispute in this case. It is not disputed that the Respondent lodged a complaint before the Chief Magistrate's Court under The **Subordinate Courts (Separation and Maintenance Act)**. That **Act** specifically grants jurisdiction to "**a subordinate court of first class**" (**Section 2**) to deal with any issue relating to separation and maintenance of a wife by a husband. According to the Respondent, she was compelled to file the complaint because the Petitioner had subjected her to persistent cruelty and neglect. The Respondent therefore prayed that the court orders that she no longer be bound to cohabit with the Petitioner. She further prayed to be paid monthly maintenance for her upkeep. From the submission made, after interlocutory orders were issued, that cause is still pending hearing and determination before the Chief Magistrate's Court.

In 2011, the Petitioner herein lodged the present petition seeking to be divorced from the Respondent, *inter alia*, on the grounds that the Respondent had treated him with cruelty, had committed adultery and had deserted from the matrimonial home since 2005. The marriage was celebrated under the **Marriage Act**. It was when the Respondent was served with the petition for divorce that it provoked her to file the application seeking to stay the proceedings herein pending the hearing and determination of the Separation and Maintenance Cause. On his part, the Petitioner is of the view that all the issues regarding the marriage should be canvassed and determined by this court.

As a Family Court, this court appreciates that the dispute between the Petitioner and the Respondent is

essentially a matrimonial dispute which has to be resolved one way or the other. Whereas the complaint filed by the Respondent before the Chief Magistrate's Court seeks temporary relief in the nature of judicial separation, the Petitioner has in this cause sought to be divorced from the Respondent. The real question that this court is being asked to determine in this application is which cause should be given priority. In the considered opinion of this court, while there was still the possibility that the parties to this cause would be reconciled, the **Separation and Maintenance Cause** was the appropriate avenue by which the parties would ventilate their dispute. However, the game changer was the decision by the Petitioner to lodge the petition for divorce before this court. By filing the petition, the Petitioner clearly indicated his preference that he no longer wished to remain married to the Respondent. It is this court's view that it is the petition for divorce that ought to be given priority in the circumstances. This is because this court will be able to determine all the matters in dispute with finality in one cause. The Chief Magistrate's Court has no jurisdiction to grant a petition for divorce where the marriage was celebrated under the **Marriage Act**. I think it will also serve the ends of justice for the matters in dispute between the Petitioner and the Respondent to be determined in one forum.

In the premises therefore, the application lodged by the Respondent seeking to stay these proceedings pending the hearing and determination of the Separation and Maintenance Cause at the Chief Magistrate's Court, Nairobi cannot be allowed. It is hereby dismissed but with no orders as to costs. Similarly too, the application filed by the Petitioner seeking the transfer of the Separation and Maintenance Cause to this court lacks merit and is similarly dismissed. This court has no jurisdiction, in the first instance, to hear and determine such a case. There shall be no orders as to costs. For the expeditious disposal of this petition, this court hereby issues the following directions:

- I. The Respondent is ordered to file and serve an answer to the petition within fifteen (15) days of today's date. If the Respondent so desires, she is at liberty to raise any issue of maintenance in the reply. Such maintenance shall be considered by the court under the **Matrimonial Causes Act**.
- II. The proceedings before the Chief Magistrate's Court are stayed pending the hearing and determination of this petition for divorce.

**DATED AT NAIROBI THIS 8<sup>TH</sup> DAY OF OCTOBER, 2013**

**L. KIMARU**

**JUDGE**