



EMM v PMK (Divorce Cause E023 of 2023) [2024] KEMC 11 (KLR) (15 May 2024) (Judgment)

Neutral citation: [2024] KEMC 11 (KLR)

**REPUBLIC OF KENYA
IN THE MACHAKOS LAW COURTS
DIVORCE CAUSE E023 OF 2023
CN ONDIEKI, PM
MAY 15, 2024**

BETWEEN

EMM PETITIONER

AND

PMK RESPONDENT

Customary marriages that have not been registered are voidable and liable to annulment.

The petitioner filed for divorce from the respondent from a marriage contracted under Kamba Customary Law citing grounds of cruelty and acts of exceptional depravity. The matter raised pertinent issues regarding the requirement to register customary marriages contracted before commencement of the Marriage Act (Cap 150). The court held that section 59 read with sections 3, 12(e), and 96 (2) & (3) of the Marriage Act provided that the parties bore the burden of exhibiting either a certificate of marriage or a certified copy of the certificate of marriage or an entry in a register of marriages maintained by the Registrar of Marriages or a certified copy of an entry in a register of marriages maintained by the Registrar of Marriages or an entry in a register of marriages maintained by the proper authority. The net legal effect of the provisions above was an ouster of application of the principles in Hottensiah Wanjiku Yawe vs. Public Trustee [1976] eKLR. Thus, all parties to a customary marriage who had not registered their marriage with effect from August 1, 2020, could only petition for annulment and not dissolution as they were considered voidable.

Reported by Caroline Kennedy and John Ribia

Law of Evidence – burden of proof - standard of proof – burden of proof vis-à-vis standard of proof – burden of proof in divorce causes – standard of proof in divorce causes that alleged adultery - what was the burden and standard of proof in divorce causes – who bore the standard of proof in divorce causes where adultery was alleged – Evidence Act (Cap 80) sections 107 and 108; Kamweru vs. Kamweru [2003] 2 EA 484; S.C.C. vs. M.K.C [2014] eKLR.

Family Law – marriages - customary marriage – divorce under customary marriage - Kamba customary marriage – proof of such marriage – whether a valid customary marriage contracted in accordance with the marriage rites of the Akamba community and compliant with the Marriage Act, 2014 amenable to divorce had been established by either parties or both – Marriage Act (Cap 150) section 6; Constitution of Kenya, article 45(4).



Family Law – marriages - dissolution of marriage – dissolution of customary marriage – grounds for dissolution of customary marriage – whether a customary marriage that was not registered by the deadline set by the Marriage Act of July 31, 2020 was voidable and liable for dissolution. – Marriage Act (Cap 150) section 69.

Statutes – interpretation of statutes – Marriage Act (Cap 150) sections 3, 12(e), 59 and 96 (2) and (3) – provisions that required all customary marriages to be registered by July 31, 2020 what was the legal aftermath of failure to register a customary marriage by July 31, 2020 with effect from August 1, 2020 in relation to divorce proceedings – whether a party to a customary marriage which was not registered by July 31, 2020 with effect from August 1, 2020 could properly so, petition a court for dissolution of such a marriage - what was the legal effect of section 59 as read with sections 3, 12(e), and 96 (2) & and (3) of the Marriage Act, 2014.

Words and Phrases – voidable – definition – valid until annulled; a contract capable of being affirmed or rejected at the option of one of the parties, valid act that may be voided rather than an invalid act that maybe ratified – Black’s Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition, page 1709.

Words and Phrases – voidable marriage – definition – a marriage that is initially invalid but that remains in effect unless terminated by Court order – Black’s Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern by Henry Campbell Black, M. A., Ninth Edition, page 1062.

Brief facts

The petitioner contracted a marriage with the respondent in June 1987 as per Kamba Customary Law, within Machakos County in the Republic of Kenya. The parties lived as husband and wife at their matrimonial home at Katelembo until 2018 when several issues wore down the union. The petitioner alleged that the respondent was a person of ungovernable temper and had been committing acts of cruelty through physical and emotional violence. The respondent had attempted to stab the petitioner using a knife in May, 2018 and had frequently threatened to kill the petitioner. The petitioner further alleged that she was forced to move out of the matrimonial home in December, 2018 together with the children and that the respondent had since sold the land upon which the matrimonial home stood.

It was also alleged that the respondent had committed acts of exceptional depravity since 2018 through failure to maintain and educate their two children, denial of conjugal rights and desertion for 5 years. The petitioner attempted to salvage the marriage including use of traditional dispute resolution mechanisms with her brother and aid of elders but failed due to rejection by the respondent.

Consequently, the petitioner filed the present divorce petition.

Issues

- i. Who bore the burden of proof in divorce causes?
- ii. What was the standard of proof in divorce causes where adultery was alleged?
- iii. Whether a valid customary marriage contracted in accordance with the marriage rites of the Akamba community and compliant with the Marriage Act, 2014 amenable to divorce, had been established by either parties or both.
- iv. Whether a customary marriage that was not registered by the deadline set by the Marriage Act of July 31, 2020 was voidable and liable for dissolution.
- v. What was the legal aftermath of failure to register a customary marriage by July 31, 2020 with effect from August 1, 2020 in relation to divorce proceedings?
- vi. Whether a party to a customary marriage which was not registered by July 31, 2020 with effect from August 1, 2020 could properly so, petition a court for dissolution of such a marriage?
- vii. What was the legal effect of section 59 read with sections 3, 12(e), and 96 (2) and (3) of the Marriage Act, 2014, on the Court of Appeal for East Africa’s decision in *Hottensiah Wanjiku Yawe vs. Public Trustee* [1976] eKLR, which enunciated the principles and manner of proving a customary marriage?
- viii. Whether a court could grant orders for dissolution of a customary marriage in a divorce petition.



Held

1. In relation to customary marriages, the Marriage Act (Cap 150) that was enacted in 2014 (the Act) heralded a revolution. The Act enacted a mandatory requirement that parties to a customary marriage contracted after the Act came into force, ought to apply for registration thereof within 6 months from the date of celebration of the marriage. Second, concerning valid customary marriages which pre-existed the Act, a framework for fixing a cut-off date for registration thereof, was enacted. The Act reduced divorce trajectories from two to one namely a divorce petition. A divorce Petition presupposed a valid marriage.
2. In civil cases, broadly, the necessity of proof lay with the person who would fail if no proof was adduced. The obligation started with the claimant who must discharge the burden of proof placed on their shoulders to the required standard which was on a balance of probabilities guided by sections 107, 108 and 109 of the Evidence Act. The same applied to divorce causes.
3. The burden of proof in divorce causes was on the person alleging adultery as there existed a presumption of innocence. As for the standard of proof, it was that the court must be satisfied on the evidence. The standard of strictness used in criminal cases could not be applied in divorce causes. A suit for divorce was a civil matter and not a criminal proceeding thus the analogies and precedents of criminal law had no authority in a divorce court. Although the word standard was equated to being satisfied as to be sure, the same had been equated as standard of proof for civil cases.
4. Section 10 of The Matrimonial Causes Act (Cap 152) (repealed), set out the standard of proof required to prove a matrimonial offence. However, the Marriage Act, 2014, did not re-enact a similar provision. In the absence of a special standard prescribed by statute specifically for divorce causes, the ordinary standard of proof for civil cases prevailed. However, in *S.C.C. vs. M.K.C* [2014] eKLR and case law from the High Court subsequent to the Marriage Act, even after the repeal of the Matrimonial Causes Act, the standard of proof remained that of section 10 of the Matrimonial Causes Act (repealed).
5. The ground of adultery, just like fraud in civil cases, had an elevated standard for proof above balance of probabilities but below beyond reasonable doubt. The evidence required to establish adultery must be more than mere suspicion and opportunity. The evidence of a guilty inclination or passion was undisclosed, but even the evidence of a single witness could suffice to establish adultery.
6. Unlike a question of fact over which parties were the true custodians, a court of law being a guardian of the law, could not turn a blind eye to a question of law necessarily emerging from the facts and evidence presented by the parties in case committed to the court for determination.
7. Section 3 of the Marriage Act, 2014, defined marriage as the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act. The definition was premised on article 45(2) of the Constitution which sanctions and circumscribed the ingredients of a legal marriage in Kenya. There were five recognised forms of marriage in Kenya as per section 6 of the Marriage Act, 2014 (civil, customary, Christian, Hindu, and Islamic). All marriages enjoyed the same legal status. The parties to any recognised form of marriage were entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage as per article 45(3) of the Constitution.
8. Before the Marriage Act, a party to a customary marriage did not need to approach the court for divorce. A party who was desirous of divorce had two conclusive but alternate trajectories at their disposal:
 - a. securing a divorce by invoking the divorce rites of community under which he customary marriage was contracted; or
 - b. in exceptional circumstances, approaching a court of law seeking a divorce decree.
9. In relation to the first option, within the Akamba community, a wife needed only to return *mbui ya ulee* (bridal rejection goat) to the parents of the husband, to mark a conclusive divorce, notwithstanding the fact that full dowry could not be returned. The second option was applicable in exceptional



- circumstances. Some of the notable exceptional circumstances were whenever the desirous party was frustrated or the attempt to divorce under the said rites was rejected or rendered insurmountable or impossible.
10. After the Marriage Act came into force, the trajectories available for divorce of a customary marriage were reduced from two to only one; a court action as per section 69 of the Act. In respect to customary marriages, the provision marked a fundamental shift from the varied and uncodified divorce grounds based on marriage customary laws of individual communities, to standardized and statute-based grounds that were common to all communities.
 11. The Marriage Act brought a transformative approach to the manner of proving a customary marriage. Before 2014, proof of customary marriage required a petitioner to invoke the principles in *Hottensiah Wanjiku Yawe vs. Public Trustee* [1976] eKLR (the *Hottensiah* case). The principles were:
 1. the onus of proving customary law marriage was generally on the party who claimed;
 2. the standard of proof was the usual one for a civil action (on a balance of probabilities);
 3. evidence as to the formalities required for a customary law marriage must be proved to that standard;
 4. long cohabitation as a man and a wife gave rise to a presumption of marriage in favour of the party asserting it;
 5. only cogent evidence to the contrary could rebut the presumption; and
 6. if specific ceremonies and rituals were not fully accomplished, that did not invalidate such a marriage.
 12. In an emphatic paradigm shift, in the advent of the Marriage Act, as per section 59 read with sections 3, 12(e), and 96 (2) & (3) of the Marriage Act, it mattered not whether the customary marriage was contracted before or after the Marriage Act came into force, the petitioner bore the burden of exhibiting either a certificate of marriage or a certified copy of the certificate of marriage or an entry in a register of marriages maintained by the Registrar of Marriages or a certified copy of an entry in a register of marriages maintained by the Registrar of Marriages or an entry in a register of marriages maintained by the proper authority.
 13. Section 3 of the Marriage Act, 2014 provided that a valid marriage of any type was subject to three conditions namely:
 1. a union of the opposite sex
 2. voluntarily; and
 3. registered.
 14. Section 59 of the Marriage Act, 2014 restricted the acceptable nature of evidence to prove a marriage contemplated under the Act. Section 96 of the Marriage Act, 2014 on the other hand transited all marriages which were contracted before the Act to the regime under the Act. It required that parties to a marriage contracted under customary law before commencement of the Act, shall apply to the Registrar for registration of their marriage under the Act within three years of the Act coming into force. Section 12(e) then provides for the consequence of failure to register such a marriage which is to render it voidable.
 15. The Marriage Act, 2014, did not define the term voidable as applied in the Act. Voidable meant valid until annulled; a contract capable of being affirmed or rejected at the option of one of the parties, valid act that may be voided rather than an invalid act that maybe ratified. A voidable marriage was also defined to mean a marriage that was initially invalid but that remained in effect unless terminated by a court order. For instance, a marriage was voidable if either party was underage or otherwise legally incompetent, or if one party used fraud, duress, or force to induce the other party to enter the marriage. The legal imperfection in such a marriage could be inquired into only during the lives of both spouses, in a proceeding to obtain a judgment declaring it void. A voidable marriage could be ratified once the impediment to a legal marriage had been removed.



16. A voidable marriage was also one that would be regarded by every court as valid subsisting marriage until a decree annulling it had been pronounced by a court of competent jurisdiction. A party desirous of approaching the court in circumstances where the marriage was deemed voidable by section 12(e) of the Marriage Act, 2014, must do so by petition for annulment under section 73, as opposed to a petition for dissolution of the marriage under section 69.
17. Although the customary marriage between the petitioner and the respondent was said to have been contracted in June of 1987 which was before the Marriage Act, 2014 came into force, onus was on both parties to exhibit either a certificate of marriage or a certified copy of the certificate of marriage or an entry in a register of marriages maintained by the Registrar of Marriages or a certified copy of an entry in a register of marriages maintained by the Registrar of Marriages or an entry in a register of marriages maintained by the proper authority, in tandem with section 59 read with sections 3, 12(e), and 96(2), and (3) of the Marriage Act.
18. Neither the petitioner nor the respondent exhibited the documentary evidence contemplated by section 59 of the Marriage Act. Although the petitioner asserted and the respondent admitted that they were married in accordance with the customary rites of the Akamba community, by dint of section 12(e) of the Marriage Act, the purported marriage was rendered voidable effective August 1, 2020.
19. As the marriage was voidable, both parties were deprived of the right to petition or cross-petition for divorce or dissolution of the purported marriage. It, however, did not bar either party from filing a petition for annulment of the said marriage. Although section 73(2)(a) of the Marriage Act limited the period of presentation of such a petition to one from the date of celebration of the marriage, on October 19, 2022, the provision was declared unconstitutional on account of unreasonably impeding access to justice in *SBM & another vs. Attorney General* (Constitutional Petition 21 of 2021) [2022] KEHC 13920 (KLR).
20. Due to failure to meet the test of sections 59 read with sections 3, 12(e), and 96(2), and (3) of the Marriage Act, neither the petitioner nor the respondent had persuaded the court that the subject marriage was neither void nor voidable, as to entitle any of them to petition for divorce.
21. The net legal effect of section 59 read with sections 3, 12(e), and 96(2), and (3) of the Marriage Act, 2014 was to oust the application of the principles which were enunciated in the *Hottensiah* case. There was doubt as to whether the *Hottensiah* principles remain good law for purposes of proof of a customary marriage and that it could be inferred that the tenure of the *Hottensiah* principles expired on July 31, 2020.
22. The matter involved a point of law which was public in nature and transcended the circumstances of the parties, so as to have a more general significance, as to make it a matter of general public importance under article 163(4) (b) of the Constitution as construed by the Supreme Court of Kenya. On the wider scale, it could translate that all parties to a customary marriage who had not registered their marriage with effect from August 1, 2020, could only petition for annulment and not dissolution.
23. Article 159(2)(d) of the Constitution provided that justice shall be administered without undue regard to procedural technicalities. While the instant matter was a procedural issue which the court would have wished and proceeded to determine the petition for divorce as if it was presented as a petition for nullification, the Marriage Act barred it from doing so as the grounds for divorce were a world apart from the grounds for nullification. Further, the said grounds for nullification of marriage were completely absent in both the petition and cross-petition presented. Failure to file a petition for nullification, although a procedural matter, could not be properly so be construed as an undue technicality, since the route of choice was dictated by the distinct grounds for divorce and nullification.
24. Both the petition and cross-petition seeking dissolution of the asserted customary marriage, were incompetent. Subsequently, the question on whether a ground for dissolution of a customary marriage had been established was rendered moot.



25. In consideration of the circumstances unique to the petition and cross-petition, including but not limited to the fact that it was a family matter, there was good cause to depart from the general proposition of the law that costs followed the event.

Petition and cross petition stuck out.

Orders

Each party to bear their own costs.

Citations

Cases

Kenya

1. *AK v AWK* Civil Appeal 31 of 2000 [2000] eKLR - (Mentioned)
2. *Aramat, Lemanken v Harun Meitamei Lempaka & 2 others* Civil Appeal 276 of 2013; [2014] KECA 692 (KLR) - (Mentioned)
3. *CWN v AN* Civil Appeal 8 of 2017; [2019] KEHC 867 (KLR) - (Mentioned)
4. *Dhanani, Binita Niraj v Niraj Chandulal Dhanani* Divorce Cause 131 of 2004; [2005] KEHC 2511 (KLR) - (Mentioned)
5. *DM v JM* [2008] 1 KLR 5 - (Mentioned)
6. *In re Estate of Chuba Bakari Hamisi (Deceased)* Succession Cause 436 of 2004; [2022] KEHC 2609 (KLR) - (Mentioned)
7. *Kimelil, Joswa Kibet v Kabon Tamining Bargor & another* Succession Cause 42 of 2019; [2019] KEHC 1097 (KLR) - (Mentioned)
8. *Mathai, Wangari v Mwangi Mathai* Civil Appeal 21 of 1979; [1980] KECA 4 (KLR) - (Mentioned)
9. *Munini, Anna & another v Margaret Nzambii* Civil Case 751 of 1977; [1984] KEHC 22 (KLR) - (Followed)
10. *N v N* [2008] 1 KLR (G&F) 16 - (Mentioned)
11. *Njoki v Mutheru* Civil Appeal 71 of 1984; [1985] KECA 32 (KLR); [2008] KLR (G& F) 288 - (Followed)
12. *PKM v AWK & another* [2018] eKLR - (Mentioned)
13. *SBM & another v Attorney General* (Constitutional Petition 21 of 2021) [2022] KEHC 13920 (KLR) (19 October 2022) (Judgment - (Mentioned)
14. *SCC v MKC* Succession Cause 16 of 2012; [2014] KEHC 6070 (KLR) - (Mentioned)
15. *Steyn, Hermanus Phillipus v Giovanni Gneccchi-Ruscione* Application 4 of 2012; [2013] KESC 11 (KLR) - (Followed)
16. *Yawe, Hottensiah Wanjiku v Public Trustee* Civil Appeal 13 of 1976; [1976] KECA 1 (KLR) - (Applied)

United Kingdom

1. *Blyth v Blyth* (1996) HC 643 - (Explained)
2. *De Reneville v. De Reneville* (1948) P 100 - (Applied)

Regional Court

Kamweru v Kamweru [2003] 2 EA 484 - (Mentioned)

Texts

1. Garner, BA., (Ed) (2009), *Black's Law Dictionary* St Paul Minnesota: West Group 9th Edn pp 1062, 1709
2. Rayden, W., (Ed) (1979), *Rayden's Practice and Law of Divorce* London: Butterworths 10th Edn p 176 para 109

Statutes

Kenya

1. African Christian Marriage and Divorce Act (Repealed) (cap 151) In general- (Cited)



2. Constitution of Kenya articles 45 (2) (3) (4);159(2)(d); 163 (4) (b)- (Interpreted)
3. Evidence Act (cap 80) sections 107; 108' 109- (Interpreted)
4. Hindu Marriage and Divorce Act, (Repealed) (cap 157) In general- (Cited)
5. Marriage (Customary Marriage) Rules, 2017 (cap 150 Sub Leg) In general- (Interpreted)
6. Marriage Act (cap 150) sections 3, 6, 12(e); 25; 50; 55 (1); 59; 69; 73; 96- (Interpreted)
7. Marriage Act (Repealed) (cap 150) In general- (Cited)
8. Matrimonial Causes Act (Repealed) (cap 159) section 10 - (Interpreted)
9. Mohammedan marriages and Divorce Act (Repealed) (cap 155) In general- (Cited)

Advocates

Mr. Langalanga h/b for *Mr. Maweu* for the petitioner

Mr. Makau Mutua h/b for *Ms. Muthini* for the respondent

JUDGMENT

Part I: Introduction

1. In relation to customary marriages, the [Marriage Act, 2014](#), heralded a revolution. First, the [Act](#) enacted a mandatory requirement that parties to a customary marriage contracted after the [Act](#) came into force, ought to apply for registration thereof within 6 months from the date of celebration of the marriage.¹ Second, concerning valid customary marriages which pre-existed the [Act](#), a framework for fixing a cut-off date for registration thereof, was enacted.² Third, the [Act](#) reduced divorce trajectories from two to one namely a divorce Petition.
2. Needless to reaffirm, a divorce petition presupposes a valid marriage, and this necessarily so, presents the first question to interrogate in a divorce Petition. In determining whether a valid customary marriage – according with the marriage rites of the Akamba community and compliant with the [Marriage Act, 2014](#) - amenable to divorce, has been established by the petitioner or the respondent or both, this court will necessarily tackle three momentous precipitant juridical questions. First, what is the legal aftermath of failure to register a customary marriage by July 31, 2020 - with effect from August 1, 2020 - in relation to divorce proceedings? Second, whether a party to a customary marriage which was not registered by July 31, 2020 – with effect from August 1, 2020 - can properly so, petition a court for dissolution of such a marriage. Third, this decision presents an opportunity to interrogate the net legal effect of section 59 read with sections 3, 12(e), and 96 (2) & (3) of the [Marriage Act, 2014](#) on the Court of Appeal for East Africa's decision in [Hottensiah Wanjiku Yawe vs. Public Trustee](#) [1976] eKLR, which enunciated the principles and manner of proving a customary marriage.

Part II: The Petitioner's Case

3. In her divorce petition dated June 8, 2023 and filed on even date – through the Firm of C.M. Maweu Advocates - the petitioner seeks the following orders:
 - (a) That the marriage between the petitioner and respondent be dissolved.
 - (b) That the costs of this petition be borne by the respondent.
 - (c) Any other relief this honourable court deem fit to grant.

¹ See section 55(1) of the Act.

² See section 96 thereof.



4. It is averred that the petitioner contracted a marriage with the respondent in June 1987, in accordance with the Kamba Customary Law on marriage, within Machakos County in the Republic of Kenya. The petitioner avers that they lived as husband and wife after the said celebration at their matrimonial home at Katelembo until December 2018. The petitioner avers that they have five issues of the said marriage. The petitioner avers that the respondent is a person of ungovernable temper and has been committing acts of cruelty through physical and emotional violence, and that in May 2018, the respondent attempted to stab the petitioner using a knife and that he has frequently threatened to kill the petitioner. The petitioner avers that she was forced to move out of their matrimonial home in December 2018 to Kenol where she rented a house and puts up with the children. It is further averred that the respondent has since sold the land upon which their matrimonial stands. In addition to cruelty, it is averred that the respondent has since 2018 committed acts of exceptional depravity by failing to maintain and educate his two children and denying the petitioner her conjugal rights and that the respondent deserted the petitioner for 5 years. The petitioner avers that she tried to salvage the marriage and in 2023, in company of her brother R W M, she visited the respondent's home in Kamuthanga with elders but negotiations were not fruitful.
5. It is averred that the petitioner's attempt to return mbui ya ulee to mark divorce between the petitioner and the respondent, was frustrated by rejection by the respondent, necessitating this petition.
6. In her answer to the cross-petition dated August 21, 2023 and filed on August 22, 2023, the petitioner reiterated the substance of the Petition.
7. In the hearing of this petition, PW1, the petitioner called two witnesses. She adopted her witness statement dated June 8, 2023, which was filed together with the Petition as her evidence-in-chief. The said statement rehashes the substance of the averments made in this Petition and this Court thus finds it superfluous to regurgitate. The Petitioner exhibited birther certificates, witness statement of her brother, and a letter from the Chief in charge of Katheka-Kai Location, dated January 15, 2019 as Exhibits 1, 2 and 3 respectively.
8. In cross-examination of PW1, she stated that they have separated for 5 years. She stated that the Respondent forced her to move away from their matrimonial home. She stated that there were several attempts on diverse dates at reconciliation but it failed.
9. PW2, R W M, told this court that he is the Petitioner's brother. He adopted his witness statement dated June 8, 2023, which was filed together with the Petition, as his evidence-in-chief. In the said statement, he states that as the secretary of Mbaa Vula family, together with elders, they attempted several times to reconcile the petitioner and respondent in vain.
10. In cross-examination of PW2, he stated that in his last ditch attempts, he organized a meeting but the Respondent refused to show up.
11. The petitioner elected not to file written Submissions.

Part III: The Respondent's Case

12. In his Answer to Petition and Cross-Petition dated August 2, 2023 and filed on August 3, 2023—through the Firm of Edith Nzisa & Company Advocates - the respondent admits that they were married under Kamba Customary Law and that they are thus husband and wife, but denied all other material averments in the Petition.
13. In his Cross-Petition, the respondent avers that the petitioner has frequently been cruel to him by leaving her matrimonial home in 2018 without provocation while the respondent was away at work,



and by gossiping that he has extra-marital affairs. The respondent avers that the petitioner has on several occasions deserted her matrimonial home. The respondent prays for Judgment that the Petition be dismissed and the Cross-Petition be granted.

14. In the hearing of the respondent's case, the respondent was the only witness and he adopted his witness statement dated July 19, 2023 as his evidence-in-chief. The statement rehashes the substance of the Petition and the Cross-Petition, rendering it unnecessary to regurgitate.
15. In cross-examination, the respondent stated that the petitioner is his wife. He states that the petitioner is very hostile to him. He denied that he has ever assaulted the petitioner.
16. The respondent too elected not to file written submissions.

Part IV: Questions for Determination

17. Distilled for determination - gleaned from the Petition, the Answer to the Petition, the Cross-Petition and the Answer to the Cross-Petition - are three principal questions as follows:
 - i. First, whether a valid customary marriage - in accordance with the marriage rites of the Akamba community and compliant with the Marriage Act, 2014 - amenable to divorce, has been established by the petitioner or respondent or both. In this connection, three precipitant juridical questions will be tackled, *videlicet*:
 - (i) What is the legal aftermath of failure to register a customary marriage by July 31, 2020 - with effect from August 1, 2020 - in relation to divorce proceedings?
 - (ii) Whether a party to a customary marriage which was not registered by July 31, 2020 - with effect from August 1, 2020 - can properly so, petition a Court for dissolution of such a marriage.
 - (iii) The net legal effect of section 59 read with sections 3, 12(e), and 96 (2) & (3) of the Marriage Act, 2014, on the Court of Appeal for East Africa's decision in *Hottensiah Wanjiku Yawe vs. Public Trustee* [1976] eKLR, which enunciated the principles and manner of proving a customary marriage.
 - ii. Second, whether a ground for dissolution of a customary marriage, has been established by the petitioner or the respondent or both.
 - iii. Third, whether costs should be awarded to either the petitioner or the respondent.

Part V: Analysis of the Law; Examination of Facts; Evaluation of Evidence and Determination

18. In civil cases, broadly, the *onus probandi* is always on the person who brings a claim in a dispute, originally expressed as *semper necessitas probandi incumbit ei qui agit* (the necessity of proof always lies with the person who will fail if no proof is adduced). The legal burden of proof lies in him who will fail if no evidence is adduced to that end. The obligation first starts with the claimant who must discharge the burden of proof placed on his/her/its shoulders to the required standard namely preponderance of probabilities. See sections 107, 108 and 109 of the *Evidence Act*.
19. And so is the burden in divorce causes. In this connection, the seminal works of *Rayden's Practice and Law of Divorce*, 10th Edition, paragraph 109 page 176, states that

“The burden of proof is throughout on the person alleging adultery there being a presumption of innocence. Reference to the statute shows that the standard of proof is that



the court must be "satisfied on the evidence." The Act makes no distinction between the standards of proof of adultery and that of any other ground of divorce but this has not in the past been reflected in the cases, which have required the same strict proof in respect of adultery as is required in a criminal case before an accused person is found guilty, that is, that the tribunal must be satisfied beyond all reasonable doubt. But it has been held that a suit for divorce is a civil and not a criminal proceeding and that the analogies and precedents of criminal law have no authority in the Divorce Court, which is a civil tribunal. It is wrong therefore to apply an analogy of criminal law and to say that adultery must be proved with the same strictness as is required in a criminal case. As far as the standard of proof is concerned, adultery, like any other ground for divorce, may be proved by preponderance of probability."

20. The said postulation in *Rayden's Practice and Law of Divorce* (supra), has been embraced in decisional laws in Kenya including but not limited to *Wangari Mathai vs. Mwangi Mathai* (1980) KLR 154, per Chesoni, J. (as he then was); *Kamweru vs. Kamweru* [2003] 2 EA 484 (also reported as *AK vs. AWK* [2000] eKLR), per JE Gicheru, AB Shah and E O'Kubasu, JJA (as they then were); *N v N* [2008] 1 KLR 16 (G&F), per Madan, J. (as he then was); *SCC vs. MKC* [2014] eKLR, per G.W. Ngenye, J.; *PKM vs. AWK & another* [2018] eKLR, per MW Muigai, J.; *DM vs JM* (2008) 1 KLR 5, per Chesoni, J. (as he then was); *CWN vs. AN* [2019] eKLR, per F. Muchemi, J.; *PKM vs AWK & another* [2018] eKLR, per MW Muigai, J., et alia.
21. And what is the standard of proof for divorce causes? Although the words used for this standard is "being satisfied as to be sure", the same has been equated to the same standard of proof for civil cases. It will be recalled that in *Blyth vs Blyth* (1996) HC 643, Lord Denning, while addressing his mind to the standard of proof for adultery, held that divorce proceedings, just like their kin civil proceedings, should be proved by the ordinary standard of balance or preponderance of probability. An attempt by Bosire, J. (as he then was) in *Kamweru vs. Kamweru*, to construe the standard set by Chesoni, J. (as he then was) in *Wangari Mathai vs. Mwangi Mathai* (1980) KLR 154, that the court should be satisfied as to be sure to translate that allegations of adultery ought to be proved beyond reasonable doubt (the standard ordinarily prescribed for criminal offences) was rejected by the Court of Appeal in *Kamweru vs. Kamweru* [2003] 2 EA 484, by JE Gicheru, AB Shah and E O'Kubasu, JJA (as they then were). In the said *Kamweru* case, the Court of Appeal construed the standard of the court being satisfied to be sure to connote that a court should be satisfied on preponderance of probabilities and not certainty as held by Bosire, J. Put differently, whereas certainty is equivalent to proof beyond reasonable doubt, being satisfied as to be sure is equivalent to proof on a balance of probabilities.

"Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the courtought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established..." , said the Court of Appeal.

22. Before I depart from this discussion of the standard, I find it instructive to note that in the *Kamweru* case, the Court of Appeal was interpreting the then section 10 of the *Matrimonial Causes Act* (Cap.152 of the Laws of Kenya), which has since been repealed by the Marriage Act, 2014}. The said section 10, set out the standard of proof required to prove a matrimonial offence. The section stated as follows:

" 10



- (1) On a Petition for divorce it shall be the duty of the court to inquire, so far as it reasonably can, into the facts alleged, and whether there has been any connivance or condonation on the part of the petitioner and whether any collusion exists between the parties, and also to inquire into any counter-charge which is against the petitioner.
- (2) If the court is satisfied on the evidence that:
 - (a) The case for the petitioner has been proved; and
 - (b) Where the ground of the Petition is adultery, the petitioner has not in any manner been accessory to, or connived at, or condoned, the adultery, or where the ground of Petition is cruelty the petitioner has not in any manner condoned the cruelty, and
 - (c) The Petition is not presented or prosecuted in collusion with the respondent or either of the respondents, the court shall pronounce a Decree of divorce, but if the court is not satisfied with respect to any of the aforesaid matters it shall dismiss the Petition.”

23. In this connection, it should be underlined that the *Marriage Act, 2014*, did not re-enact a like provision. In the premises, in the absence of a special standard prescribed by statute specifically for divorce causes, I am of the persuasion that the ordinary standard of proof for civil cases prevails. In *SCC vs MK.C* [2014] eKLR, which has also been widely cited in approval, GW Ngenye, J adopted the standard laid in the *Kamweru* case. My reading of the body of decisional law subsequent to the *Marriage Act, 2014*, reveals that even after the repeal of the *Matrimonial Causes Act* (which effectively repealed section 10 therein), the standard of proof as enunciated by the Court of Appeal in the *Kamweru* case, has been retained to this day. For instance, see *PKM vs. AWK & another* [2018] eKLR, per M.W. Muigai, J.
24. However, limited to the ground of adultery and just like fraud in civil cases, it seems to me that the standard for proof thereof has been slightly elevated above balance of probabilities but below beyond reasonable doubt. While applying the same standard of proof (of being satisfied as to be sure) in the context of the ground of adultery in *DM vs. JM* (2008) 1 KLR 5, Chesoni, J. (as he then was) held “... that the evidence required to establish adultery must be more than the mere suspicion and opportunity: evidence of a guilty inclination or passion was undisclosed, nevertheless the evidence of a single witness might suffice to establish adultery.” Even a single witness is sufficient to prove adultery, as long as the Court is satisfied as to be sure.
25. This court now embarks on analysis and determination of each of the three questions, in turn.

(i) Whether a valid customary marriage - in accordance with the marriage rites of the Akamba community and compliant with the Marriage Act, 2014 - amenable to divorce, has been established by the petitioner or respondent or both. In this connection, three precipitant juridical questions will be tackled, videlicet:

- (i) What is the legal aftermath of failure to register a customary marriage by July 31, 2020- with effect from August 1, 2020- in relation to divorce proceedings?



- (ii) Whether a party to a customary marriage which was not registered by July 31, 2020– with effect from August 1, 2020- can properly so, petition a Court for dissolution of such a marriage.
 - (iii) The net legal effect of section 59 read with sections 3, 12(e), and 96 (2) & (3) of the Marriage Act, 2014, on the Court of Appeal for East Africa’s decision in [Hottensiah Wanjiku Yawe vs. Public Trustee](#) [1976] eKLR, which enunciated the principles and manner of proving a customary marriage.
26. Although none of the parties raised the three legal questions, it’s now a settled principle of judicial practice and law that unlike a question of fact over which parties are the true custodians, a Court of law being a guardian of the law, cannot turn a blind eye to a question of law necessarily emerging from the facts and evidence presented by the parties in case committed to the Court for determination. See et alia, the Supreme Court of Kenya holding in [Lemanken Aramat vs. Harun Meitamei Lempaka & 2 others](#) [2014] eKLR.
27. Section 3 of the Marriage Act, 2014, defines marriage in the following terms

“(3)

- (1) Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.”

This definition is carefully woven around article 45(2) of the [Constitution](#) which sanctions and circumscribes the ingredients of a legal marriage in Kenya. It reads as follows

- “(2) Every adult has the right to marry a person of the opposite sex, based on the free consent of the parties.”

28. Legally recognized in Kenya are five forms of marriages. Article 45(4) thereof reads as follows:

“(4) Parliament shall enact legislation that recognises—

- (a) marriages concluded under any tradition, or system of religious, personal or family law; and
- (b) any system of personal and family law under any tradition, or adhered to by persons professing a particular religion, to the extent that any such marriages or systems of law are consistent with this [Constitution](#).”

In accord with article 45(4) of the [Constitution](#), there are five varieties of marriage namely Christian, civil, African customary, Hindu and Islamic. Section 6 of the Marriage Act} sets out the said varieties as follows:

- “(1) A marriage may be registered under this [Act](#) if it is celebrated in accordance with the rites of a Christian denomination;
- (b) as a civil marriage;
- (c) in accordance with the customary rites relating to any of the communities in Kenya;
- (d) in accordance with the Hindu rites and ceremonies; and



(e) in accordance with Islamic law.

(2) A Christian, Hindu or civil marriage is monogamous.

(3) A marriage celebrated under customary law or Islamic law is presumed to be polygamous or potentially polygamous.”

29. Notwithstanding the varied forms of marriages, all marriages enjoy the same legal status and, in this connection, parties to any form of marriage afore-described are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage. Article 45(3) of the Constitution makes provision as follows:

“(3) Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage.”

This Constitutional position is rehashed by section 3(2) and (3) of the Marriage Act which reads as follows:

“(2) Parties to a marriage have equal rights and obligations at the time of the marriage, during the marriage and at the dissolution of the marriage.

(3) All marriages registered under this Act} have the same legal status.”

30. Before I proceed to dispose this question, I find it instructive to underline three issues of far-reaching legal significance, relating to customary marriages.

31. First, before the Marriage Act, 2014 was enacted and came into force, a party to a customary marriage, needed not approach the Court for divorce. A party who was desirous of divorce had two conclusive but alternate trajectories at his/her disposal to wit, securing a divorce by invoking the divorce rites of community under which he customary marriage was contracted or in exceptional circumstances, approaching a Court of law seeking a divorce decree. Where the first option was the norm, the second option was the exception. In relation to the first option, within the Akamba community, a wife needed only to return mbui ya ulee to the parents of the husband, to mark a conclusive divorce, notwithstanding the fact that full dowry may not be returned. The second option was applicable in exceptional circumstances. Some of the notable exceptional circumstances where a party to a customary marriage needed to approach a Court of law seeking a divorce decree, is whenever the desirous party was frustrated or the attempt to divorce under the said rites was rejected or rendered insurmountable or impossible.

32. Second, after the Marriage Act, 2014, came into force, the trajectories available for divorce of a customary marriage were reduced from two to only one namely a Court action. See section 69 of the Act.

33. Third, the Marriage Act, 2014, in respect to customary marriages, marked a fundamental shift from the varied and uncodified divorce grounds based on marriage customary laws of individual communities, to standardized and codified (statutory) grounds common to all communities. See section 69 of the Act.

34. Fourth, perhaps the most significant, it is instructive to underline that the Marriage Act, 2014, brought a transformative approach to the manner of proving a customary marriage. Before the Marriage Act, 2014 came into force, in proving a customary marriage, the petitioner was required to invoke the principles which were enunciated by the Court of Appeal for East Africa (per Wambuzi P, Mustafa



VP and Musoke JA (as they then were) in *Hottensiah Wanjiku Yawe vs. Public Trustee* [1976] eKLR (hereinafter “the or Hottensiah case”). It will be recalled that in the Hottensiah case, the said Court laid down the following principles:

- (a) First, the onus of proving customary law marriage is generally on the party who claims;
- (b) Second, the standard of proof is the usual one for a civil action (on a balance of probabilities);
- (c) Third, evidence as to the formalities required for a customary law marriage must be proved to that standard; (d) Fourth, long cohabitation as a man and a wife gives rise to a presumption of marriage in favour of the party asserting it;
- (e) Fifth, only cogent evidence to the contrary can rebut the presumption; and
- (f) Sixth, if specific ceremonies and rituals are not fully accomplished, this does not invalidate such a marriage.

It will be recalled that later in 1984, the High Court (A.A. Kneller, J.) decided *Anna Munini & another vs. Margaret Nzambi* [1984] eKLR, applying the *Hottensiah principles*. A year later, in 1985, the Court of Appeal (Madan, Kneller & Nyarangi JJA), as they then were) decided *Mary Njoki vs. John Kinyanjui Mutheru* [1985] eKLR, deploying the principles in *Hottensiah Wanjiku Yawe vs. Public Trustee* [1976] eKLR. See also *Joswa Kibet Kimelil vs. Kabon Taming Bargar & another* [2019] eKLR; and In *re Estate of Chuba Bakari Hamisi (Deceased)* [2022] eKLR.

35. However, in an emphatic paradigm shift, in the advent of the *Marriage Act, 2014* -on August 1, 2020³ - it matters not whether the customary marriage was contracted before or after the *Marriage Act, 2014* came into force, and it can be discerned from section 59 read with sections 3, 12(e), and 96 (2) & (3) of the Marriage Act, that the petitioner bears the burden of exhibiting either a certificate of marriage or a certified copy of the certificate of marriage or an entry in a register of marriages maintained by the Registrar of Marriages or a certified copy of an entry in a register of marriages maintained by the Registrar of Marriages or an entry in a register of marriages maintained by the proper authority. The said section 3 defines a marriage in the following terms:

“3.

- (1) Marriage is the voluntary union of a man and a woman whether in a monogamous or polygamous union and registered in accordance with this Act.”

Gathering from the said section 3, a valid marriage (of any type) is therefore fastened to three conditions namely:

- (i) a union of the opposite sex;
- (ii) voluntarily; and
- (iii) registered.

Section 59 of the *Marriage Act, 2014* restricts the acceptable nature of evidence to prove a marriage contemplated under the Act.

³ Although the Marriage Act, 2014, came into force on 20th May 2014, when the *Marriage (Customary Marriage) Rules, 2017* (which were published in Legal Notice No. 46 of 3rd April 2017), came into force on 1st August 2017, and by dint of the Notice published by the Attorney General in Gazette Notice No. 5345, of 9th June 2017, which was published invoking section 96(3) of the Act which empowers the Cabinet Secretary in charge (the Attorney General in this case) to extend the period of registration - effectively extending the registration period contemplated under section 96(2) &(3) by three years, ending on 31st July 2020. It follows that with effect from 1st August 2020, any customary which had not been registered by 31st July 2020 was rendered voidable by operation of section 12(e) of the Marriage Act, 2014.



It provides that

- “(1) A marriage may be proven in Kenya by—
- (a) a certificate of marriage issued under this Act or any other written law;
 - (b) a certified copy of a certificate of marriage issued under this Act or any other written law;
 - (c) an entry in a register of marriages maintained under this Act or any other written law;
 - (d) a certified copy of an entry in a register of marriages maintained under this Act or any other written law; or
 - (e) an entry in a register of marriages maintained by the proper authority of the Khoja Shia, Ith’nasheri, Shia imam, Ismaili or Bohra communities, or a certified copy of such an entry.
- (2) Despite subsection (1), a marriage may be proven in Kenya if it was celebrated in a public place of worship but its registration was not required, by an entry in any register maintained at that public place of worship or a certified copy of such an entry.”

And section 96 of the *Marriage Act, 2014* transits all marriages which were contracted before the Act to the regime under the Act. It requires that parties to a marriage contracted under customary law before commencement of the Act, shall apply to the Registrar for registration of their marriage under the Act within three years of the coming into force of the Act}. It provides that

- “(1) A person who, immediately before the date of commencement of this Act, was a Registrar of Marriages under the Marriage Act (Cap. 150) (now repealed) or the *African Christian Marriage and Divorce Act* (Cap. 151) (now repealed), or an assistant Registrar under the Islamic Marriage and Divorce Registration Act (Cap. 155) (now repealed), shall, as soon as practicable thereafter, send all registers of marriages and divorces to the Registrar.
- (2) Parties to a marriage contracted under customary law, the *Hindu Marriage and Divorce Act* (Cap. 157) (now repealed) or the Islamic Marriage and Divorce Registration Act (now repealed) before commencement of this Act, which is not registered shall apply to the Registrar or County Registrar to assistant Registrar for the registration of that marriage under this Act within three years of the coming to force of this Act.
- (3) The parties to a customary marriage shall register such a marriage within three years of the coming to force of this Act.
- (4) The Cabinet Secretary may extend the registration period under this section by notice in the Gazette.”

Section 12(e) then provides for the consequence of failure to register such a marriage which is to render it voidable. Section 12 of the Marriage Act provides that

“Subject to section 50, a marriage is voidable if—

- (a) at the date of the marriage—
 - (i) either party was and has ever since remained incapable of consummating it;



- (ii) either party was and has ever since remained subject to recurrent attacks of insanity;
- (b) there was a failure to give notice of intention to marry under section 25;
- (c) notice of objection to the intended marriage having been given was not withdrawn or dismissed;
- (d) the fact that a person officiating the marriage was not lawfully entitled to officiate;
- (e) failure to register the marriage.”

36. The *Marriage Act, 2014*, does not define the term voidable as applied in the Act. This court, thus, resorts to secondary sources of law. *The Black’s Law Dictionary (Black’s Law Dictionary, Definitions of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern* by Henry Campbell Black, M. A., Ninth Edition), at page 1709, defines “voidable” as follows:

“...Valid until annulled; esp., (of a contract) capable of being affirmed or rejected at the option of one of the parties. This term describes a valid act that may be voided rather than an invalid act that maybe ratified.”

The same dictionary, at page 1062, defines a “voidable marriage” to mean

“...A marriage that is initially invalid but that remains in effect unless terminated by Court order. For example, a marriage is voidable if either party is underage or otherwise legally incompetent, or if one party used fraud, duress, or force to induce the other party to enter the marriage. The legal imperfection in such a marriage can be inquired into only during the lives of both spouses, in a proceeding to obtain a judgment declaring it void. A voidable marriage can be ratified once the impediment to a legal marriage has been removed.”

And in *De Reneville vs. De Reneville* (1948) P 100, at page 111, Lord Green, MR, defined a voidable marriage as follows:

“a voidable marriage is one that will be regarded by every Court as valid subsisting marriage until a decree annulling it has been pronounced by a Court of competent jurisdiction.”

This definition has in several decisions of the superior Courts accepted as a true reflection of the law. See for instance *Binita Niraj Dhanani vs. Niraj Chandulal Dhanani* [2005] eKLR, per PJ Kamau, J.

37. The tenor of the said definition of voidable marriages in the said dictionary, *De Reneville vs. De Reneville* (1948) P 100, *Binita Niraj Dhanani vs. Niraj Chandulal Dhanani* [2005] eKLR, it follows that a party desirous of approaching the Court in circumstances where the marriage is deemed voidable by section 12(e) of the *Marriage Act, 2014*, must do so by petitioning for annulment under section 73 thereof, as opposed to petitioning for dissolution of the marriage under section 69 thereof.

38. Turning to the primary issue before me, although the customary marriage between the petitioner and the respondent is said to have been contracted in June of 1987 – certainly before the *Marriage Act, 2014* came into force – it follows that on the shoulders of both the petitioner and the respondent (having filed a Cross-Petition) lies the onus of exhibiting either a certificate of marriage or a certified copy of the certificate of marriage or an entry in a register of marriages maintained by the Registrar of Marriages or a certified copy of an entry in a register of marriages maintained by the Registrar of Marriages or



an entry in a register of marriages maintained by the proper authority, in tandem with section 59 read with sections 3, 12(e), and 96 (2) & (3) of the [Marriage Act, 2014](#).

39. The crunch of the first and second preliminary questions turns on the legal ramification of section 12(e) of the [Marriage Act, 2014](#). Turning to the evidence adduced by both parties, this court finds that neither the petitioner nor the respondent, exhibited the documentary evidence contemplated by section 59 of the [Marriage Act, 2014](#). Although the Petitioner asserted and the Respondent admitted that they were so married in accordance with the customary rites of the Akamba community, by force of section 12(e) of the [Marriage Act, 2014](#), it follows that purported marriage was rendered voidable effective August 1, 2020.⁴
40. It further follows that with effect from August 1, 2020, having been rendered voidable, both the petitioner and the respondent were deprived of the right to Petition or Cross-Petition for divorce (dissolution of the purported marriage). It, however, does not disentitle either party from filing a Petition for annulment of the said marriage. In this connection, I hasten to add that perhaps it will be prudent to highlight that although section 73(2) (a) of the [Marriage Act, 2014](#), limits the period of presentation of such a Petition to one from the date of celebration of the marriage, on October 19, 2022, this provision was declared unconstitutional on account of unreasonably impeding access to justice. See [SBM & another vs. Attorney General](#) (Constitutional Petition 21 of 2021) [2022] KEHC 13920 (KLR) (19 October 2022) (Judgment), per R.N. Nyakundi, J.
41. Having failed to surmount the test of sections 59 read with sections 3, 12(e), and 96 (2) & (3) of the [Marriage Act, 2014](#), leads this Court to the Hobson's choice, that neither the petitioner nor the respondent has generated persuasion in my mind that the subject marriage is neither void nor voidable, as to entitle any of them to petition for divorce. This Court so concludes.
42. In relation to the third preliminary question - from the foregoing analysis and audit of the law - it now emerges and this Court reaches the conclusion, that the net legal effect of section 59 read with sections 3, 12(e), and 96 (2) & (3) of the [Marriage Act, 2014](#), is to oust the application of the principles which were enunciated in the [Hottensiah](#) case – which enunciated the principles and manner of proving a customary marriage – plus the subsequent decisions which adopted the [Hottensiah principles](#). It further follows, as discernible from the foregoing analysis and I venture to reach the conclusion, that effective August 1, 2020, it's now decidedly doubtful whether the [Hortensia principles](#) remain good law for purposes of proving a customary marriage. Connected to this, it would then be safe to infer that the tenure of the [Hottensiah principles](#) expired on July 31, 2020.
43. Perhaps it will be important to observe that this matter, consequently, involves a point of law which is public in nature and transcends the circumstances of the parties herein, so as to have a more general significance, as to make it a matter of general public importance under article 163(4) (b) of the [Constitution](#) as construed by the Supreme Court of Kenya in *inter alia*, [Hermanus Phillipus Steyn vs. Giovanni Gnechi-Ruscone](#) [2013]eKLR. This matter involves a point of law which is public in nature and transcends the circumstances of the parties herein, since it on the wider scale translates that all parties to a customary marriage who have not registered their marriage with effect from August 1, 2020, can only petition for annulment and not dissolution.
44. Alive to the commandment enshrined in article 159(2)(d) of the [Constitution](#) that justice shall be administered without undue regard to procedural technicalities, and this being a procedural issue, this court would have wished and proceeded to determine this Petition for Divorce as if it was presented as a Petition for Nullification, but for the unassailable position - of the [Marriage Act, 2014](#) - that the grounds for divorce are a world apart from the grounds for nullification, and further, that the said

⁴ See 3 *supra*.



grounds for nullification of marriage are completely absent in both the Petition and Cross-Petition herein. In this connection, the failure to file a Petition for Nullification – although a procedural matter - cannot be properly so be construed as an undue technicality, since the route of choice is dictated by the distinct grounds for divorce and nullification.

45. Ultimately, this Court reaches a conclusion that both the Petition and Cross-Petition seeking dissolution of the asserted customary marriage, are incompetent.

(ii) Whether a ground for dissolution of a customary marriage, has been established by the petitioner or the respondent or both

46. The first question having fallen on its face, it follows that the second question is rendered moot.

(iii) Whether costs should be awarded to either the petitioner or respondent

47. Upon considering circumstances unique to this Petition and Cross-Petition, including but not limited to the fact that this a family matter, this Court has found a good cause to depart from the general proposition of the law that costs follow the event.

Part VI: Disposition

48. In the upshot, both the Petition and Cross-Petition having been found incompetent, are struck out. However, either party is at liberty to file a Petition or Cross-Petition for annulment of the same marriage. Each party shall bear her/his own costs.

49. Orders accordingly.

DELIVERED, SIGNED AND DATED IN OPEN COURT AT MACHAKOS LAW COURTS THIS 15TH DAY OF MAY 2024

.....

C.N. ONDIEKI

PRINCIPAL MAGISTRATE

Mr. Langalanga holding brief for Mr. Maweu for the Petitioner

Mr. Makau Mutua holding brief for Ms. Muthini for the Respondent

Mr. Ndonge- Court Assistant

