



**SK v MK (Matrimonial Cause E032 of 2025)  
[2025] KEHC 15371 (KLR) (Family) (31 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15371 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
FAMILY  
MATRIMONIAL CAUSE E032 OF 2025  
H NAMISI, J  
OCTOBER 31, 2025**

**BETWEEN**

**SK ..... APPLICANT**

**AND**

**MK ..... RESPONDENT**

**RULING**

1. Before the Court is Notice of Motion dated 3 April 2025 seeking the following orders:
  - i. That the Divorce Cause E348 OF 2025 at Chief Magistrate Milimani Commercial Court be put on stay pending hearing and determination of this suit;
  - ii. That on the alternative, Divorce Cause E348 OF 2025 at Chief Magistrate Milimani Commercial Court be transferred to this court and be heard together with this petition;
  - iii. That this petition raises substantive issues of interpretation of the law and public interest, hence the same be referred to Chief Justice for empanelling of a bench to hear the same.
  
2. The Application is accompanied by an extremely lengthy Certificate of Urgency and premised on more than 17 grounds, which closely resemble those set out in the Petition. The Application, which was filed simultaneously with the Petition, states that it is supported by an Affidavit sworn by the Applicant. The Supporting Affidavit sworn on 3 April 2025 states the following at paragraph 2:
 

“That from the onset and for clarity, this affidavit is meant to support my claims on declaration of the rights sought in the Petition.....”
  
3. A plain reading of that averment means that there is no Affidavit in support of the Application.



4. The Applicant filed a Further Supporting Affidavit for stay Orders sworn on 4 June 2025 as well as an Amended Supplementary Affidavit sworn on 11 July 2025. It is noteworthy that the latter was filed without leave of Court. The same is hereby expunged from the record.
5. The Respondent has filed a Replying Affidavit to oppose the Application.
6. The Application was canvassed by way of written submissions. The Applicant filed Supplementary Written Submissions dated 6 July 2025 without leave of court. The same is hereby expunged from the record.
7. The Applicant's case is founded on the assertion that he and the Respondent have been in a continuous *luhya* customary marriage since their cohabitation began in September 2008. He depones that this union, which has subsisted for over 16 years, has been blessed with 3 children and has seen the joint acquisition of several properties, which he lists in detail. To substantiate the existence of this customary marriage, the Applicant has annexed several documents, including a joint sworn Affidavit of Marriage dated 10 May 2021, evidence of the Respondent's inclusion as his spouse on various medical insurance schemes, and evidence of a dowry payment ceremony conducted on 28 January 2023, which is supported by the Affidavits from their respective parents.
8. The catalyst for the present Application is the institution of Divorce Cause No. E348 of 2025 by the Respondent in the Chief Magistrate's Court. The Applicant expresses bewilderment that the Respondent seeks an annulment of their long-standing union rather than its dissolution. He contends that this course of action is a cover procedural technicality designed to render their 16-year marriage a nullity, thereby unconstitutionally denying him his equal rights to matrimonial property and the recognition of his family rights.
9. The gravamen of the Applicant's case is a constitutional challenge to several provisions of the [Marriage Act](#). Flowing from this constitutional challenge is the Applicant's apprehension that the Magistrate's Court, which lacks jurisdiction to interpret [The Constitution](#) or declare statutes unconstitutional, will be constrained to apply the impugned sections of the [Marriage Act](#) as they are written.
10. The Applicant indicated to the Court that he has since abandoned prayer 2 seeking transfer of the suit filed in the Chief Magistrate's Court.
11. The Respondent mounts a spirited opposition to the Application. Her primary argument is that the entire Petition is vexatious, malicious and calculated abuse of the court process. She characterizes it as a strategy designed to delay and frustrate the hearing of the Divorce Cause and, by extension, the determination of a separate suit she has filed for the division of matrimonial property, namely OS No. E021 of 2025.
12. The Respondent contends that the Applicant has improperly cloaked what is essentially a private matrimonial dispute in a beautiful veil of public interest in order to settle personal vendettas. It is the Respondent's submission that if the Applicant genuinely intended to challenge the constitutionality of the [Marriage Act](#) in the public interest, the proper course would have been to institute proceedings against the Honourable Attorney General and the National Assembly, as the bodies responsible for the enactment of legislation rather than against her as a private citizen.
13. The Respondent further submits that the Applicant has failed to demonstrate how any of his constitutional rights have been violated. She argues that the Applicant has not adduced any evidence to show that he ever attempted to register their customary marriage in compliance with the Act and was subsequently denied registration by the Registrar of Marriages. She posits that in the absence of such evidence, the claim for infringement remains abstract and unsubstantiated.



## Analysis & Determination

14. I have carefully considered the Application, Affidavits and submissions filed by both parties.
15. The Applicant seeks an order to stay the proceedings in the Chief Magistrates Court pending the hearing and determination of this Petition. The principles governing the grant of conservatory orders are well-established in our jurisprudence. As articulated by the Supreme Court in *Gatirau Peter Munya v. Dickson Mwenda Kithinji & 2 Others*, SC Application No. 5 of 2014; eKLR, an applicant must demonstrate that he has an arguable appeal (or in this case, a prima facie case) and that unless the stay is granted, the appeal (or petition) would be rendered nugatory. The Court must also consider where the public interest lies.
16. The question then begs: does the Applicant have a prima facie case herein? To answer this, it is important to consider whether the Petition filed herein can lie against the Respondent. The Applicant's ultimate goal is to have sections of an Act of Parliament to be declared as unconstitutional. In such instances, certain parties become essential for the case to be properly constituted. While the Petition can be brought against a private person whose actions expose the law's unconstitutionality, a Court cannot declare a law invalid without hearing from the bodies responsible for creating and defending the law. This is a principle of fairness and justice. In this instance, the Petition is filed against a private person who did not enact the *Marriage Act*: she is merely a user of the legal framework provided by the state. It would be unjust to ask her to defend the constitutionality of a national statute on behalf of the entire government.
17. Further, this Court remains acutely aware of the high threshold that must be met in a grant of an order for stay of proceedings. In the case of *Global Tours & Travel Limited v Five Continents Travel Limited* [2015] eKLR it was held:

“... Whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests of justice to order a stay of proceedings, and if it is, on what terms it should be granted. In deciding whether to order a stay the court should essentially weigh the pros and cons of granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought timeously.”
18. This was reinforced in *Kenya Wildlife Service v James Mutembei* [2019] KEHC 10478 (KLR), where Hon. Gikonyo, J described a stay of proceedings as a serious, grave and fundamental interruption in the right that a party has to conduct his litigation and a power that ought to be exercised sparingly, and only in exceptional circumstances. The applicant for such a stay must demonstrate compelling reasons why the proceedings should be halted.
19. The Applicant has failed to demonstrate how his rights will be infringed or he will be prejudiced if the Divorce Cause proceeds to its logical conclusion as he proceeds with this Petition. In my view, the hearing and determination of the divorce proceedings will not affect the Applicant's right to prosecute the Petition which seeks to have sections of the *Marriage Act* declared unconstitutional. The two matters can proceed concurrently.



20. For that reason, I hereby dismiss the Notice of Motion dated 3 April 2025. Costs shall be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 31 DAY OF OCTOBER 2025.**

**HELENE R. NAMISI**

**JUDGE OF THE HIGH COURT**

Delivered on virtual platform in the presence of:

For the Applicant: Present in person

For the Respondent: Mr. Amati

Court Assistant: Lucy Mwangi

