**JMK v HWM (Divorce Cause E040 of 2023)**
**[2025] KEMC 344 (KLR) (30 October 2025) (Judgment)**

Neutral citation: [2025] KEMC 344 (KLR)

**REPUBLIC OF KENYA**

**IN THE NAKURU LAW COURTS**

**DIVORCE CAUSE E040 OF 2023**

**PA NDEGE, SPM**

**OCTOBER 30, 2025**

**BETWEEN**

**JMK ..... PETITIONER**

**AND**

**HWM ..... RESPONDENT**

## JUDGMENT

1. The Petitioner, vide his Petition dated 14th February 2023, moved this court seeking the dissolution of the marriage between him and the Respondent, solemnized and contracted under Kikuyu customary law, and the costs of this suit.

2. In his Petition, the Petitioner argues that as a result of the Respondent's arrogance, denial of the petitioner's conjugal rights and general cruelty, the marriage herein has irretrievably broken down. That the basis upon which they came together as a couple no longer exists and that the Respondent has tacitly expressed desire to get rid of the Petitioner so that she be left with property. The Petitioner further states that all attempts at reconciliation has been futile.

3. The Respondent filed a Response to the Petition and a Cross Petition dated November 8, 2023. In her defence, she admitted paragraphs 1, 2, 3 and 4 of the Petition, essentially admitting the existence of the Kikuyu customary marriage between her and the Petitioner. She then raised some issues concerning the properties herein, basically admitting that property tussle has been at the centre of their differences herein. She then accused the Petitioner of desertion. She alternatively, in her Cross-Petition, pleaded that the court does find that the marriage herein has irretrievably broken down and prayed for the dismissal of the Petitioner herein, and in the alternative, the court does find that the marriage has broken down due to Petitioner's desertion. She also prayed for costs of the suit.

4. Both parties herein testified in their respective cases. The Petitioner relied on his statement filed herein, while the Respondent reiterated the contents of her pleadings. Parties then filed and, I do believe,

exchanged their written submissions. The hearing and the submissions were however dominated by the issue of whether there was a valid Kikuyu customary marriage herein. This is despite express admission by both parties in their pleadings herein that there was a valid Kikuyu Customary marriage that both pleaded had irretrievably broken down and sought to be dissolved.

5. I find 2 issues for determination herein. They are firstly, whether the Kikuyu customary marriage herein is valid by virtue of the provisions of the *Marriage Act*, 2014; and secondly, if the marriage is valid, whether there are grounds to dissolve the same?

**Whether the Kikuyu customary marriage herein is valid for purposes of the *Marriage Act*, 2014**

6. The *Marriage Act*, 2014 defines marriage under section 3 (1) thereof in the following words: - '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. [emphasis added].'

7. Regarding customary marriages, section 43 of the Act defines a 'customary marriage' as one celebrated according to the customs of the communities of one or both parties. It specifies that if dowry is essential for proving a marriage under customary law, the payment of a token amount shall suffice as proof. Section 44 requires parties to a customary marriage to notify the Registrar within three months of completing the relevant ceremonies. Additionally, under section 55, parties must within six months of completion of the customary rituals, apply to the Registrar for registration of the marriage and issuance of a certificate thereof.

8. Learned counsel for the Petitioner while arguing that the Kikuyu customary marriage admitted herein was a valid one, urged the court to presume that all the requirements for a valid customary marriage had been met. Learned counsel for the Respondent on the other hand submitted that the absence of a marriage certificate herein invalidates the marriage.

9. Whereas I do agree that the marriage herein appears unregistered, it is important to note that the requirements for notice to the Registrar under section 44 and the subsequent application for registration under section 55 of the Act apply only to customary marriages contracted after the *Marriage Act*, 2014 came into effect on May 20, 2014. For marriages contracted prior to the commencement of the Act, section 96 governs the registration of such marriages.

10. Section 96 (2) and (3) which is the transitional provision of the Act mandates parties to a customary marriage contracted prior to the commencement of the Act, such as the present one, to apply for registration within three years of the Act coming into effect, initially, by May 20, 2017. However, following the promulgation of the Marriage (Customary Marriage) Rules 2017, which came in force vide Gazette Notice Number XXXX of June 9, 2017, this period was extended by an additional three years' period, allowing all marriages contracted prior to May 20, 2014 to be registered by August 1, 2020.

11. In view of the above, what then would be the status of a customary marriage validly contracted prior to the enactment of the *Marriage Act*, 2014, but not registered under the Act by the August 1, 2020 deadline? Would such a marriage be invalid for want of registration as argued by the learned counsel for the Respondent? In my view, this cannot be the correct position in law.

12. Section 98 of the Act which is the savings provisions of the Act is explicit that it protects all valid marriages (customary marriages included) existing prior to the commencement of the Act. The section states that: - '98. (1)A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.'

13. From the above, it is clear that it was not the intention of the Act to invalidate marriages contracted prior to the Act coming into force, non-registration of such marriages under the Act notwithstanding. A contrary interpretation, would in my view lead to an absurdity and be against public interest. I am indeed bound by the decision of Lady Justice H.N. Namisi, who in JTO v AP (Appeal E128 of 2022) [2024] KEHC 10464 (KLR), stated that:

> " 27. Turning back to the issue at hand, it would be ludicrous to inform two individuals who have lived together for the better part of their adult lives, gone through the rituals of a supposed marriage, held themselves out as husband and wife, borne 3 children and generally suffered and enjoyed the ebbs and lows of life together, that their union is not considered a marriage simply because they failed to register the same and get a certificate. Consequently, due to this lack of registration, the doors of the court are closed to them at the point when they wish to bring their union to an end..."

14. It would obviously yield to an absurd result and therefore an unintended consequence of the legislation, if Sections 3 of the *Marriage Act*, 2014 as read together with Section 96(2) and (3) of the same Act were to be interpreted to mean that all unregistered marriages validly contracted prior to the commencement of the Act (May 20, 2024) became invalid after August 1, 2020 solely due to the failure by the parties to register them under the Act.

15. In Centre for Rights Education and Awareness & another v John Harun Mwau & 6 others [2012] eKLR, the Court of Appeal emphasized on the rule against absurdity in statutory interpretation when it stated that:

> "...These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise....."

16. In light of the above and guided by the established principle that the law must serve the public interest and that a statute should not be interpreted to produce absurd results, I find and hold that the Kikuyu customary marriage admitted by the parties herein that existed as from 1987, or thereabouts, and which both parties herein want dissolve in these cross-petitions was not invalidated merely because it was not registered by August 1, 2020 by the parties, as stipulated under sections 96(2) and (3) of the *Marriage Act*, 2014 as read together with the Marriage (Customary Marriage) Rules 2017.

17. To reach a contrary conclusion in my view would obviously be against public interest and run afoul of Article 45 of *the Constitution* which recognizes the family as the natural and fundamental unit of the society which should at all times be recognized and protected by the State.

18. In any event the fact of marriage was not contested. Both parties explicitly admitted in their respective pleadings that they are married under the Kikuyu Customary law as from 1987. Consequently, it is therefore in my view not necessary for this court to resort to section 59(1) of the Act on the proof of marriage. This provision of the law would in my view only become useful in instances where there is a dispute as to the fact of marriage.

19. In this case, the fact of marriage has been admitted by both parties in their pleadings. It is trite that parties are bound by their pleadings and can only succeed or fail in their cases or defence within the confines of the pleadings. Pleadings generally contain facts and having expressly admitted the existence of this Kikuyu customary marriage in their pleadings, Section 61 of the *Evidence Act*, provides as follows in relation to admitted facts; -

> "No fact need be proved in any civil proceeding which the parties thereto or their agents agree to admit at the hearing, or which before the hearing they agree, by writing under their hands, to admit, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings: Provided that the court may in its discretion require the facts admitted to be proved otherwise than by such admissions." [Emphasis, added]

20. Both parties in their pleadings wants this marriage dissolved and I therefore do not see any need for them to prove the existence of a marriage that both want dissolve. I furthermore find no need to presume a marriage that has been admitted to still be in existence.

**Whether the grounds for divorce have been established**

21. For customary marriages, Section 68 of the *Marriage Act*, 2014 provides that parties may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage. The Section provides as follows; -

    (1) The parties to marriage celebrated under Part V may undergo a process of conciliation or customary dispute resolution before the court may determine a petition for the dissolution of the marriage.

    (2) The process of mediation or traditional dispute resolution in subsection (1) shall conform to the principles of *the Constitution*.

    (3) The person who takes the parties to a marriage celebrated under Part V through the process of conciliation or traditional dispute resolution shall prepare a report of the process for the court.

22. Section 69(1) of the *Marriage Act*, 2014 lists the following as grounds for which a party to customary law marriage may seek a dissolution of that marriage; -

    a. adultery:

    b. cruelty;

    c. desertion;

    d. deceptional depravity;

    e. irretrievable breakdown of the marriage; or

    f. any valid ground under the customary law of the petitioner.

23. The Petition, as can deduced from the pleadings is based on cruelty and irretrievability of the broken marriage herein. In her Response to the Petition and Cross-Petition, it is clear that Respondent alleges desertion and also irretrievability of the marriage on the part of the Petitioner. There are further serious property disputes among the parties herein that has compounded their union or relationship.

24. This court has carefully considered the pleadings filed by the parties to these divorce proceedings. From the facts of this case, it was clear that the marriage between the Petitioner and the Respondent has indeed irretrievably broken down with no possibility of salvage. The accusations by the Petitioner of cruelty, disrespect and denial of conjugal rights by the Respondent have been weighed against the Respondent's contempt to this relationship, terming it as non-marriage. There are also serious property disputes between the parties herein that has seriously affected their relationship to the extent that this marriage cannot be salvaged. They have since separated as the Petitioner fears for his life while claiming that the Respondent chased him away and it is evidently clear that the parties herein are no longer interested in the marriage. It is apparent that the Petitioner and the Respondent have since gone their separate ways. In the premises therefore, this Court will therefore grant the Petition for divorce as per the Petition herein, while dismissing the Cross-Petition herein. It is therefore the Petitioner divorcing the Respondent, and as per the Petition, and not the other way round. This is because the evidence tendered herein, it is clear that the Respondent has no respect to the union herein which she contemptuously terms as no-marriage.

25. The Kikuyu customary marriage herein entered into in 1987 is hereby dissolved. Decree nisi dissolving the said marriage is hereby issued. The decree nisi shall be made absolute 30 days from the date of this judgment. There shall be no order as to costs.

It is hereby so ordered.

**SIGNED DATED AND DELIVERED IN VIRTUAL COURT 30TH...DAY OF OCTOBER 2025**

**ALOYCE-PETER-NDEGE**

**SENIOR PRINCIPAL MAGISTRATE**

In the presence of:

Janet..... – Court Assistant

Kimotho h/b Wairimu..... for the Petitioner

Maina h/b N. Njoroge..... for the Respondent.