IN THE COURT OF APPEAL

AT MOMBASA

(CORAM: VISRAM, KARANJA & KOOME JJ.A)

CIVIL APPEAL NO. 56 OF 2017

BETWEEN

A B H.....APPELLANT

AND

E H.....RESPONDENT

(Being an appeal from the Ruling and Orders of the High Court of Kenya at Mombasa (Odero, J.) dated 5th September, 2014

in

HC Matrimonial Cause No. 4 of 2011)

****

JUDGMENT OF THE COURT

1. By a Petition lodged in the High Court of Kenya at Mombasa on 28th January, 2011, the respondent sought dissolution of his marriage to the appellant as well as one a half share of all their matrimonial property in Kenya. The appellant's response to the petition came by way of a Preliminary Objection dated 15th September, 2011 and an affidavit sworn on 20th September, 2011. For purposes of this appeal, what shall fall for consideration is the outcome of the Preliminary Objection and the consequences thereof.

2. The parties are a married having celebrated their union in Kenya on 16th June, 1992 and which was duly registered under the repealed Marriage Act (Cap 150 laws of Kenya). In her Notice of Preliminary Objection aforesaid, the appellant herein contended as follows:

> ***"TAKE NOTICE that the respondent herein intends to take a Preliminary Objection to the effect that the Petitioner and the Respondent were not domicile (sic) in Kenya at the time when the Petition was presented to this Honourable Court and as provided in section 4 of the Matrimonial Causes Act by reason of the lack of requisite domicile, this Honourable Court is not authorized to make a decree of dissolution of marriage and therefore ought not to entertain this Petition.***
>
> ***The respondent therefore prays that the Petition be struck out and costs be awarded to the respondent"***

3. Following the trial court's directions, the Preliminary Objection was ventilated through *viva voce* evidence, with each party giving evidence in support of their respective positions. Thereafter, written submissions were filed and the matter slated for ruling.

4. The appellant's testimony was that she was a Kenyan citizen and had always been resident in the country prior to her marriage to the respondent, whom she met and married as aforesaid. He was working in Kenya at the time but thereafter, the couple moved to Spain in the year 2000 where they lived and would only come to Kenya in the winter for 6 months at a time. She however sought to clarify that though their marriage certificate bore a Mombasa address and even though they had stayed in Kenya for the first 7 years of matrimony and also later purchased a house in Nyali Mombasa, they never intended to reside in Kenya permanently. She termed the house in Nyali a holiday home; a temporary abode they would occupy while escaping the harsh European winters. She added that during all his stays in Kenya, the respondent always visited on a tourist visa.

5. On the other hand, the respondent averred that he was a resident of Shanzu Mombasa but holds Swiss citizenship. At the time of filing the divorce petition, he was residing in Kenya under a tourist visa which was due to expire on 30th March, 2011. According to him therefore, at the time he lodged the petition on 28th January, 2011, he was legally in the country and was even staying at their house in Nyali. He

contended that they had lived in the Nyali residence since sometime between 2006- 2008. Upon cross examination, he indicated that upon marriage, the couple moved to Spain and stayed there continuously for five years; at a property he had purchased prior to the marriage in the hope that it would be his matrimonial home; that since 2010, he was always resident in Spain, save for the winter months when he would come to Kenya for a visit.

6. He stated that he had no interest in the Nyali residence and that he saw no reason why they should fight over it. He admitted that while in Spain, he had taken a certificate of registration for the appellant; by virtue of which the appellant was recognized as a citizen of the European Union with effect from 17th September, 2010. He however asserted that the reason he took out the said registration was merely to enable the appellant to be in a position to invite her sister to Spain.

7. Appearing for the appellant (the respondent before the High Court) learned counsel, **Mrs. Gudka** through her written submissions, argued that the petition ought to be dismissed as the trial court lacked jurisdiction by virtue of **section 4** of the repealed Matrimonial Causes Act (the Act). She pointed out that in this case, even though the petition sought dissolution of marriage and division of property, the respondent had already conceded that he had no interest in the Nyali residence, which left divorce as the sole issue for determination.

8. Further, that from the wording of the petition, it was apparent that the same was lodged in Kenya on the basis that the parties are domiciled in Kenya. However, since the respondent was by his own admission only present in the country under a tourist visa, he cannot be said to have been domiciled in the country and thus, his petition offended the provisions of **section 4** aforesaid. She also submitted that the respondent never took any steps towards cementing his Kenyan domicile and that his limited stays in the country therefore never constituted domicile. Consequently, that the respondent had failed to prove that he was domiciled in Kenya at the time he presented his petition and on that basis, the same should be struck out for want of jurisdiction.

9. Responding to the objection, learned counsel for the respondent, submitted that under **section 4(b)** of the Act, the petition was rightly before the court because under the said section, the court was empowered to grant any relief as long as the marriage in question was solemnized in Kenya. Such having been the case herein and given the fact that the two thereafter resided in Mombasa, the court had the jurisdiction to determine the same. In addition, counsel pointed out that **section 4(a)** was inapplicable to this case since the same was only concerned with cases where the only relief sought was a decree for divorce. In this case however, the applicable provision was **section 4(b)** which gave the court authority to grant additional reliefs. In this regard, he pointed out that in addition to dissolution of the marriage, the respondent had also sought division of the matrimonial property and as such the court's jurisdiction should be pegged not on **section 4(a)** but on **section 4(b)**. In support of this contention, he cited the decision of **Muriithi J.** In **W.A.H. v. J.W.M [2013] eKLR**.

10. In addition, counsel stated that as per the Act, no stipulation has been made regarding the period within which the petitioner is required to be domiciled in Kenya prior to the filing of the petition. That in any event, the only time stipulation under the Act is under **section 5**; which is only concerned with wives married to Kenyan men and requires such wives to have been resident in the country for three (3) years prior to the petition; which was not the case herein. Not only was the petitioner herein the husband, but that even if **section 5** were to be applied, he would nonetheless be found to have been resident in Kenya 3 years prior to the petition. The court was urged to make a finding that the respondent's domicile of choice was Kenya; given that he had bought a house in Nyali, sold his horses in Spain, moved his dogs to Kenya and had continued to reside in the country since December, 2011. As such, nothing served to oust the jurisdiction of the court and the preliminary objection ought to be dismissed with costs.

11. By a ruling delivered on 5th September, 2014, the learned Judge **Odero, J.** saw no merit in the appellant's preliminary objection and dismissed it with costs. That ruling is what provoked the present appeal, which is based on some prolix and highly argumentative grounds of appeal.

12. In a nutshell, however, the appellant contends that the learned Judge erred by; failing to find the issue of the respondent's domicile impacted the jurisdiction of court; failing to find at the time the petition was filed, the respondent was domiciled in Spain not Kenya; failing to find the onus was upon the respondent to displace by way of evidence of clear intent, the rebuttable presumption that there was a continuation of his domicile of origin (in Spain) in favour of his domicile of choice (Kenya); failing to make a finding on whether the respondent had abandoned his domicile of origin; failing to analyze the evidence before her; finding the respondent had sold his house in Spain, yet according to his testimony, he had merely put it up for sale; holding that the court had jurisdiction under **section 4(b)** of the Act notwithstanding evidence to the contrary; finding that the jurisdiction of the court was also salvaged under the Marriage Act under which, domicile is not a pre requisite for petitioning for divorce and lastly; failing to properly analyze the applicable law.

13. In both her written and oral submissions before this Court, learned counsel for the appellant, **Mrs. Gudka** framed the sole issue for determination as whether the superior court below had the jurisdiction to hear the divorce petition. The petition she said, is premised on the basis that the parties are domiciled in Kenya; an averment that was hotly contested by the appellant. According to the provisions of **section 4 (a)** of the Act, the law stipulated that the court has no power to grant an order for dissolution of the marriage under the Act unless the petitioner was domiciled in Kenya at the time the petition is presented in court. Counsel was quick to point out that even though the respondent had purported to seek refuge under **section 4(b)**, the same was inapplicable; since no other relief could obtain herein given that the respondent had attested to his abandonment of his pursuit for additional relief. In other words, that even though the respondent had sought the dissolution of marriage as well as division of matrimonial property, he subsequently indicated his disinterest in the Nyali residence, thus effectively abandoning the second limb of his claim. Consequently, what was left for determination in the petition was the prayer for dissolution of marriage and the jurisdiction of court as regards that prayer was ousted by the respondent's want of domicile.

14. In so far as domicile was concerned, she contended, the respondent had to prove that not only was he resident in the country at the time of lodging his petition, but that he intended to remain in Kenya. The appellant maintained that the respondent had failed to do so and the court thus erred in arrogating itself jurisdiction it did not have. Counsel was emphatic that given the respondent's testimony that he was a Swiss national who occasionally came to work and for visits, it was incumbent upon the trial court to direct its mind to the principle that abandonment of a domicile of origin in favour of a domicile of choice is a serious matter which demands a high standard of proof. In this case, she said, nowhere in the respondent's brief testimony was it ever averred that he had acquired a Kenyan domicile. To the contrary, what was stated with greater clarity was that he had set up a home in Spain and was only an occasional visitor to Kenya dependent on his tourist visa.

15. Counsel added that having houses and residences in Kenya cannot be equated to domicile. In this case, what the respondent had was residence, not domicile and the court erred in failing to find as much. Further, to this she said, the trial Judge also failed to take into account the fact that the parties had lived in Spain for the first five years of their marriage. With regard to the claim that additional relief had been sought; and that the same served to confer jurisdiction under **section 4(b)**, counsel submitted that division of matrimonial property was a claim alien to the Act and even if the same were to stand, the respondent had in the course of his testimony effectively abandoned that prayer. Lastly, the learned Judge was faulted for finding that **section 98 (2)** of the Marriage Act 2014 enabled the petition to be heard by the trial court. In this regard, it was contended that the Judge failed to appreciate the fact that **section 98 (2)** could only apply to proceedings that had been properly instituted under the Act which was not the case herein.

16. Opposing the appeal was learned counsel for the respondent, **Mr. Wafula** who urged this Court to find the appeal herein improper, as nothing empowered the appellant to appeal as of right. Elaborating further, Mr. Wafula submitted that matters that can be appealed upon as of right are enumerated under **section 75** of the Civil Procedure Act and **Order 43** of the Civil Procedure Rules; and the Ruling on the Preliminary Objection herein does not fall within such matters. Consequently, that the only way the appellant could successfully lodge the present appeal was if she first obtained leave of court and having never sought such leave, the appeal was improper and fatally defective.

17. Turning to the merits of the appeal, counsel submitted that residence and domicile are distinct concepts. In this case he said, the respondent had not only demonstrated his residence in the country, but that Kenya was his domicile as well. In this regard, counsel pointed out that the respondent had shown that he lived in Kenya every six months, had several bank accounts in the country and had even sold his house in Spain to come and live in Kenya permanently. Citing the case of **Mukisa Biscuits Manufacturing Co. Ltd v. Westend Distributors Ltd [1969] E.A 696**; counsel contended that a preliminary objection can only be successfully raised on a point of law; it cannot be raised where the issue to be determined is dependent on disputed facts, as was the case herein. Consequently, this Court was urged to resist the invitation to deal with issues of fact in a Preliminary Objection and instead find the preliminary objection to have been rightly dismissed.

18. With regard to the place of **section 98** of the Marriage Act; counsel submitted that the same was properly appreciated by the trial court and that under the Marriage Act, the issue of domicile was specifically left out. As such, the same should not be imputed in the present proceedings. In conclusion, he stated that the trial court was vested with jurisdiction over the matter under **section 4(b)** of the Act and consequently, the appeal is without merit and should be dismissed with costs.

19. The duty of this court in a first appeal was re stated in the case of **Abok James Odera t/a A.J Odera & Associates v John Patrick Machira t/a Machira & Co. Advocates [2013] eKLR,** as follows:-

> ***"This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."***

20. We have considered the entire record, the submissions by learned counsel and the relevant law. Having done so, we have discerned the following two germane issues for our determination:-

> **a) Whether the appeal as presented is properly before this Court and if so;**
>
> **b) Whether the trial court had jurisdiction to determine the petition.**

On the first issue, the respondent challenged the propriety of this appeal on the basis that no leave to appeal was ever sought or obtained; despite the fact that an appeal against the dismissal of a preliminary objection does not lie as of right. Consequently, it was contended, the appeal is improper, fatally defective and should be struck out at the outset. The respondent placed reliance on **section 75** of the Civil Procedure Act and **Order 43 rule 1(3)** of the Civil Procedure Rules for this proposition and posited that since this was an appeal from a Ruling on a Preliminary Objection it was imperative for leave to be obtained before the appellant filed this appeal. We were therefore urged to dismiss this appeal for want of the said leave.

21. In her rejoinder however, counsel for the appellant submitted that leave in this case was unnecessary, in light of the provisions of **section 38** of the Act which stated as follows:-

> ***"Any decree nisi in a suit for dissolution or nullity of marriage may be appealed from within 30 days after the date of the making of thereof, and all other decrees and orders made by the court in proceedings under this Act shall be enforced, and may be appealed from, as if they were decrees or orders made by the court in the exercise of its civil jurisdiction"*** [Emphasis added].

Nowhere does this rule impose on an intending appellant the pre-requisite to obtain leave before moving this Court on appeal against an order such as the one before us. Moreover, **Section 75** of the Civil Procedure Act, while making reference to the right of appeal under other statutes like the Arbitration Act does not make any reference whatsoever to appeals arising from the Act. For purposes of clarity, the same provides as follows:

Orders from which appeal lies are:

> ***"75(1) An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted:***
>
> ***(a) an order superseding an arbitration where the award has not been completed within the period allowed by the court;***

(b) an order on an award stated in the form of a special case;

(c) an order modifying or correcting an award;

(d) an order staying or refusing to stay a suit where there is an agreement to refer to arbitration;

(e) an order filing or refusing to file an award in an arbitration without the intervention of the court;

(f) an order under section 64;

(g) an order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;

(h) any order made under rules from which an appeal is expressly allowed by rules.

(2) No appeal shall lie from any order passed in appeal under this section."

22. On the other hand, **Order 43 Rule 1** lists all the orders that are appealable as of right under **section 1(h)** of **section 75** above. We hold the view that as **section 75** does not apply to matters under the Act, equally, **Rule 43** would not apply. It was not therefore necessary for the appellant to obtain leave to appeal before filing this appeal. That determines the first issue for determination.

23. We now come to the substantive issue in this appeal which is whether the High Court had jurisdiction to hear the appellant's petition in view of **section 4** of the Act. **Section 4** provides as follows:

"Nothing in this Act contained shall authorize

(a) The making of any decree of dissolution of marriage and nullity of marriage unless the petitioner is domiciled in Kenya at the time when the petition is presented.

(b) The grant of any other relief under this Act unless one of the parties to the suit has at the time, when the petition is being presented, his or her usual residence in Kenya or unless the marriage was solemnized in Kenya <u>and</u> the petition seeks relief other than divorce of nullity of marriage." [Emphasis supplied]

The appellant says the petition is pegged on **section 4(a)** while the respondent says it is on **section 4(b)**. In his petition, the petitioner (respondent) sought not just the order for dissolution of their marriage but also for half share of matrimonial property in Kenya, which property was solely comprised of the house in Nyali.

24. In that case, his petition would fall squarely under **section 4(b)** of the Act, and it was properly before the Court. In his testimony in Court on 28th March, 2014 however, the petitioner dropped any claim over the house in Nyali, which was actually in the respondent's name and stated on cross examination:

"…. I have no interest in the house. We do not need to fight over it …"

It is on the basis of this statement that the appellant filed the Preliminary Objection which is the subject of this appeal. The reason for this is that having declared that he had no interest in division of the house which was the only matrimonial property, the petition changed from a **section 4(b)** motion to a **section 4(a)** motion.

25. The provisions of **section 4(a)** are explicit to the effect that if a party is not claiming any other relief in the divorce petition under the Act then the courts in Kenya would not have jurisdiction to entertain the petition unless the petitioner was domiciled in Kenya at the time he presented the petition. If therefore the petitioner was domiciled in Kenya as at 28th January, 2011 when he filed the petition, then the High Court had the requisite jurisdiction to hear the petition.

If on the other hand, the Court finds that he was not domiciled in Kenya as at that date, then it would not matter whether or not the marriage was celebrated in Kenya because other than the marriage being solemnized in Kenya, the petitioner would have to seek '*relief other than divorce or nullity of marriage*'. The two requirements are conjunctive, and both must be satisfied. If however a petition is based on **section 4(b),** then the issue of domicile would not matter as the same only requires 'usual residence'. The High Court would simply have no jurisdiction to entertain it. Among the issues at hand therefore is whether the learned Judge was wrong in finding that Kenya was the petitioner's domicile of choice. There is also the question as to whether the learned Judge misdirected herself when she made a finding that the petition was governed by the Marriage Act 2014 which came into force on 20th May, 2014, by virtue of **section 98(2)** of the Marriage Act, 2014.

26. On the issue of domicile, having considered the submissions of counsel both here and before the High Court and the cases cited, we are not persuaded that the appellant placed sufficient evidence before the High Court to prove that he had made Kenya his domicile of choice. It is worth mentioning at this point that the standard of proof as far as domicile is concerned is much higher than that of 'usual residence' anticipated under **section 4(b)** of the Act.

27. In his testimony on oath, the respondent told the High Court:

> ***"As at 28th January, 2011 I filed this petition of divorce. At that time I was in Kenya on a tourist visa for 3 months which was later extended to 6 months. The 3 month visa was due to expire on 30th March, 2011 …"***

Was a 3 month tourist visa sufficient to confer domicile to the petitioner? We need to define the term domicile or domicile at this stage. The term 'domicil' or domicile' is not defined in the Law of Domicil Act as alluded to by respondent's/applicant's counsel but the Act describes situations giving rise to its existence in various forms. An overview of the concept may, however, be gleaned from the following Law dictionary definitions:-

Baron's Dictionary of Legal Terms (2nd Edition) defines domicile to mean:

> ***'An individual's permanent home or principal establishment. Residence is not the same as domicile, since a person can have many transient residences but only one legal domicile, which is the home address to which he always intends to return for prolonged periods.'***

The **Oxford Dictionary of Law** defines domicile, *inter alia*, as under:

> ***'The country that a person treats as his permanent home and to which he has the closest legal attachment. A person cannot be without a domicile and cannot have two domiciles at once. He acquires at birth a domicile of origin…. He retains his domicile of origin until (if ever) he acquires a domicile of choice in its place. A domicile of choice is acquired by making a home in a country with the intention that it should be a permanent base ….'***

And **Mozley & Whiteley's Law Dictionary (12th Edition)** defines domicile, inter alia, as follows:

> ***'The place in which a person has his fixed and permanent home, and to which, when he is absent, he has the intention of returning. It is of three sorts: (1) by birth; (2) by choice; (3) by operation of law ….'***

We have no doubt that at some point, the respondent herein appeared desirous of acquiring domicile in Kenya. They stayed in Nyali but only during winters, and moved back to Spain. The burden of proving change or acquisition of domicile is a heavy one and whoever alleges must prove. See **Rayden on Divorce (8th Edition) at page 36** where the learned author stressed as follows:

> ***"The burden of proving that a domicil has been chosen in substitution for the domicil of origin is on him who asserts that the domicil of origin has been lost; the intention must be proved with perfect clearness. It is not necessary that a change of nationality should be intended, or any steps be taken to secure naturalization; …. If residence and intention of permanency are both present, a new domicil is acquired, even if a desire to retain the old one is expressed."***

28. The standard of proof required is quite high. We appreciate that the respondent did not need to have taken up residence to prove domicile, but there must be clear intention to acquire or change the said domicile. There must be an intention to make the new domicile permanent. This is what distinguishes domicile from 'usual residence'.

29. Other than visiting Kenya on a tourist visa once a year and staying a few months, there was nothing else to show that the respondent had any intention of making Kenya his domicile of choice or living here on a more permanent basis. In his own admission, he stated in cross examination:

> ***"I always came to Kenya as a visitor".***

The house in Kenya was in the name of the appellant herein. Other than the tourist visa, there was nothing else to show that the respondent had any interest in making Kenya his second domicile. Although a Swiss national, the respondent lived in Spain and bought properties there. That was a clear expression of his intention to live in Spain as a domicile of choice. There was nothing like this to show intention to have permanency in Kenya.

30. In **Halsbury's Laws (3rd Edn.) 2017, p. 15 para 28**, the learned Authors state:

> ***"Domicile of choice is acquired later by the actual removal of an individual to another country accompanied by his*** *"animus manendi"* ***…. Any person not under disability may at any time change his existing domicil and acquire for himself a domicil of choice by the fact of residing in a country other than that of his domicil of origin with the intention of continuing to reside there indefinitely".***

31. We think we have said enough to demonstrate that the respondent did not discharge his burden of proving that he had acquired domicile in Kenya as at the time he filed the petition in question. He may have established 'usual residence' in Kenya at some point as envisaged under **section 4(b)** the Act but definitely not domicil as stipulated in **section 4(a)**. He could however not peg his claim on **section 4(b)** in absence of the conjunctive requirement of seeking any other relief other than the dissolution of the marriage.

32. Finally, on the issue of application of the Marriage Act 2014, to these proceedings, in our view, as at the time the Marriage Act came into operation, the respondent's petition had converted from a **section 4(b)** petition to a **section 4(a)** petition. The coming into force of a new Act (law) does not take away an accrued right or cause of action from a party. **Section 98(2)** of the Matrimonial Act could not be applied to the prejudice or detriment of the appellant herein.

33. For the foregoing reasons, we are persuaded that the appellant's appeal has merit. We allow it with orders that the impugned Ruling dated 5th September, 2014 is hereby set aside. In its place we substitute therefor an order allowing the Preliminary Objection dated 15th September, 2011 with the result that the petition dated 21st January, 2011 is hereby struck out, with orders that each party bears its own costs here and in the High Court given the circumstances of the matter and the fact that the petition has not been determined on its merits.

Dated and delivered at Mombasa this 27th day of June, 2018

ALNASHIR VISRAM

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JUDGE OF APPEAL

W.KARANJA

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JUDGE OF APPEAL

M.K.KOOME

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR