

DIVORCE PROCESS UNDER KENYAN LAW

1. Introduction

Divorce is the dissolution of a marriage by the pronounced judgment of a court of Law. It is inferred from the provisions of Article 45 of the Constitution of Kenya, 2010 that envisages that every adult has the right to marry a person of the opposite sex, based on the free consent of the parties. This suggests that one may walk into a marriage voluntarily and may also leave voluntarily.

There are five forms of marriages in Kenya as per section 6 of the Marriage Act No. 4 of 2014 ("the Act/Marriage Act"), namely; Christian Marriages, Civil Marriages, Customary Marriages, Hindu Marriages and Islamic Marriages.

The law relating to dissolution of marriages is found in Part X of the Marriage Act.

2. What are the Common Grounds for Divorce?

2.1 The common grounds upon which marriages are dissolved are;

- a) one or more acts of adultery committed by the other party; or
- b) cruelty, whether mental or physical, inflicted by the other party on the party seeking a divorce or on the children, if any, of the marriage; or
- c) desertion by either party for at least three years immediately preceding the date of presentation of the petition; or
- d) exceptional depravity by either party; or
- e) the irretrievable breakdown of the marriage.

2.2 Additional Grounds of Divorce under Customary Marriages

In the case of customary marriages, section 69 of the Act includes an additional ground being any valid ground under the customary law of the party seeking a divorce.

In Hindu marriages, an additional ground can be; if the other party has converted to another religion or since the celebration of the marriage, the other party has committed rape, sodomy, bestiality or adultery.

In Islamic marriages, as governed by Islamic Sharia Law.

3. Divorce Procedure

3.1 Step 1-Filing of Petition

A divorce is instituted through a petition which is filed at the Magistrate's Court. The Petition outlines the grounds upon which one is seeking for the dissolution of the marriage. The Petition is accompanied by;

- a) Verifying Affidavit;
- b) Notice to Appear;
- c) List of witnesses;

- d) Witness Statements; and
- e) List of documents

The person presenting the petition is referred to as a petitioner while the person against whom the petition is being presented is referred to as a Respondent. In cases where the ground for divorce is adultery, the alleged adulterer can be enjoined as a co-respondent.

Once the Petition is filed, it is served upon the Respondent together with the Notice to Appear. The Respondent is then expected to enter appearance within fourteen days after service and thereafter file a response to the Petition. The Respondent can also file a cross-petition in the event that they also want the marriage to be dissolved. The Cross-petition must stipulate the grounds upon which the marriage should be dissolved.

3.2 Step 2-Application to certify matter as ready for Hearing

The Petitioner will then file an Application in Court under Chamber Summons requesting that the matter be certified as ready for hearing and/or issuance of any directions by the Deputy Registrar. In the event that the Respondent has duly responded, the matter will be certified ready for hearing as a defended suit. In the event that the Respondent fails to respond despite service being proper, the matter will be certified ready for hearing as undefended suit. The Court will then also proceed to issue a hearing date.

3.3 Step 3- Giving of evidence and cross-examination

Where the Petition is defended, both parties will give oral evidence in court and may be cross-examined by the other party or their advocate on record and will thereafter close their case. Where the Petition is undefended, the Petitioner will give oral evidence and thereafter close their case. Parties may also choose to adopt their written statements instead of giving oral evidence.

At the conclusion of the hearing, the Court normally gives parties the liberty to file their written submissions and thereafter issues a judgment date. In the alternative, the court may also issue a Mention date for highlighting of the written submissions and thereafter the court will proceed to issue a judgment date.

3.4 Step 4- Pronouncement of Decree

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 the 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 grounds necessitating to a divorce, it shall dismiss the petition. The decree of divorce at this stage is referred to as the decree nisi which is not to be made absolute until after the expiration of six months after the pronouncing thereof; unless the court by general or special order from time to time fixes a shorter time. A decree nisi is a temporary decree that allows any person to show cause why the decree should not be made absolute.

3.5 Step 5-Dissolution of Marriage

The decree nisi becomes decree absolute after lapse of the stipulated timelines by the Court. The Decree absolute is the final stage of the Divorce and it means that the marriage has been dissolved.

At this stage, the Court delivers a certified copy of the decree to the Registrar of marriages who then registers the decree in a register maintained for that purpose.

4. Emerging Jurisprudence with respect to Divorce

4.1 Petition for Divorce to be presented after the 3 years since celebration of marriage

Section 66 of the Marriage Act, 2014 provides that no petition for divorce shall be presented to the court unless at the date of the presentation of the petition, three years have elapsed since the celebration of the marriage. However, **Justice R. Nyakundi** in the Case of **Tukero Ole Kina -versus- Attorney General & Another [2019] eKLR** declared that section unconstitutional, null and void to the extent that it limits the presentation of a Petition for separation or divorce in a civil marriage until the expiry of three years.

4.2 Presumption of Divorce

Justice Nyakundi In re Estate of Jecinter Njoki Okoth (Deceased) [2020] eKLR has introduced the aspect of presumption of divorce notwithstanding that no formal petition is filed in a Court of Law to be decreed as such in accordance to the Law. This now means that spouses who conduct themselves in a manner that implies that they have abandoned the marriage will be deemed to have divorced.

5. Divorce Implications

5.1 Wills

In Kenya, former wife/wives are still dependants. Section 29 (a) of the Law of Succession Act Chapter 160 Laws of Kenya defines a dependant as *“the wife or wives, or former wife or wives, and the children of the deceased whether or not maintained by the deceased immediately prior to his death”*.

The Act is however silent on specific bequests to a former spouse in cases of divorce. It is therefore prudent to make a new will immediately after your divorce, especially if your spouse was a beneficiary or a trustee.

5.2 Spousal Support

During the course of any matrimonial proceedings or after granting a decree of divorce, a party can seek to be paid maintenance by their spouse. Please note that the Court can order a person to pay maintenance to a spouse or a former spouse. A divorcee falls under the former spouse category. The Court that issues the maintenance order has the power to revoke or vary the orders if there is a material change of circumstances.

If a party fails to comply with the maintenance order, the beneficiary of the order can recover the same by instituting a suit for recovery of a civil debt.

Except where an order for maintenance of a spouse is expressed to be for any shorter period or where any such order has been revoked, the order shall lapse;

- a) if the maintenance was unsecured, on the death of the spouse; or

- b) if the maintenance was secured, on the death of the spouse in whose favour it was made; or
- c) where the person being maintained is subsequently able to support himself of herself; or
- d) Upon the remarriage of the beneficiary of the order.

5.3 Division of Matrimonial Property

The property acquired during the subsistence of a marriage is dealt with under the Matrimonial Property Act. Matrimonial property means matrimonial home or homes, household goods and effects in the matrimonial home or homes, any other immovable and movable property jointly owned and acquired during the subsistence of the marriage.

The ownership of the matrimonial property vests in the spouses according to the contribution, which can either be monetary or non monetary, of either spouse towards its acquisition and shall be divided between the parties after the marriage is dissolved

The Court that hears and determines the divorce lacks the jurisdiction to determine issues on matrimonial property and the parties have to approach the High Court to resolve any disputes arising with respect to matrimonial property.

5.4 Tax Implications

Section 6 of the Eighth Schedule to the Income Tax Act, Cap 470 of the Laws of Kenya exempts the transfer of assets between former spouses as part of a divorce settlement or a bona fide separation agreement from tax. Similarly, any monetary spousal support, having originated from other taxed sources, does not attract additional tax.

5.5 Custody of Children

Noting that matters to do with Children are heard and determined by a Children's Court, once the decree nisi becomes absolute, a party will have to approach the Children's Court for an order on custody. The Court will hear the parties then make a determination taking into consideration the best interests of the child.

6. Conclusion

The Kenyan divorce system is mostly fault based meaning that the petitioner must prove an offence among the grounds set out above by the respondent. As the society becomes more liberal we expect that the system will evolve to also incorporate a no fault system where spouses do not need to show fault to be granted a divorce and can even divorce by consent.

Disclaimer

This article should be regarded as being for general information only and does not constitute legal or professional advice. For specific legal advice on the issues discussed in this article, please contact us on commercial@mga-legal.com or on the contact details listed below.



Head Office

ACK Garden House, Block AB, 1st Floor, 1st Ngong Avenue, Off Bishops Road
P.O. Box 50245-00100 Nairobi-Kenya
Tel: +254 20 4404192, +254 722/731 108111, 0765 408111
Email: info@mga-legal.com



Mombasa Office

Jubilee Arcade, 3rd Floor, Moi Avenue, Mombasa
P.O. Box 50245-00100 Nairobi-Kenya
Tel: +254 20 4404194, +254 718/752 108111
Email: mombasa@mga-legal.com



Nakuru Office

Assumption Centre, 3rd Floor, Off Moi Road, Nakuru
P.O. Box 50245-00100 Nairobi-Kenya
Tel: +254 20 4404193, +254 729 108111
Email: nakuru@mga-legal.com