



LAWS OF KENYA

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**MATRIMONIAL CAUSES ACT**

CHAPTER 152

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**CHAPTER 152**

**MATRIMONIAL CAUSES ACT**

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## CHAPTER 152

## MATRIMONIAL CAUSES ACT

[Date of commencement: 1st January, 1941.]

**An Act to consolidate and amend the law relating to matrimonial causes**

[Act No. 33 of 1939, Act No. 5 of 1952, L.N. 388/1959, L.N.304/1960, Act No. 15 of 1961, Act No. 21 of 1961, L.N. 142/1963, L.N. 2/1964, L.N. 168/1964, Act No. 9 of 1967, L.N. 121/1975.]

## PART I – INTRODUCTORY

**1. Short title**

This Act may be cited as the Matrimonial Causes Act.

**2. Interpretation**

In this Act, except where the context otherwise requires—

“**children**”, means in the case of Africans (including Somalis, Abyssmians (Amhara, Tigre and Shoa), Malagasies and Comoro Islanders), Arabs or Buluchis born in Africa, males who have not attained the age of sixteen years and females who have not attained the age of thirteen years, and in the case of all other persons, unmarried children who have not attained the age of majority;

“**marriage**” means the voluntary union of one man and one woman for life to the exclusion of all others;

“**President’s Proctor**” means the Attorney-General, who shall be the President’s Proctor for the purposes of this Act.

[Act No. 9 of 1967, Sch.]

**3. Jurisdiction of court**

Subject to the provisions, of the African Christian Marriage and Divorce Act (Cap. 151), jurisdiction under this Act shall only be exercised by the Supreme Court (hereinafter called “the court”) and such jurisdiction shall, subject to the provisions of this Act, be exercised in accordance with the law applied in matrimonial proceedings in the High Court of Justice in England.

**4. Limitation of Act**

Nothing in this Act contained shall authorize—

- (a) the making of any decree of dissolution of marriage or of 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 presented, his or her usual residence in Kenya or unless the marriage was solemnized in Kenya:

Provided that where a wife has been deserted by her husband, or where her husband has been deported from Kenya under any law for the time being in

force relating to the deportation of aliens, and the husband was immediately before the desertion or deportation domiciled in Kenya, the court shall have jurisdiction for the purpose of any proceedings under this Act, notwithstanding that the husband has changed his domicile since the desertion or deportation.

#### **5. Extension of jurisdiction of the court in certain matrimonial causes**

(1) Notwithstanding that the husband is not domiciled in Kenya, the court shall have jurisdiction in proceedings by a wife for divorce, if the wife is resident in Kenya and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings.

(2) Without prejudice to any jurisdiction exercisable by the court apart from this section, the foregoing provisions of this section shall apply to proceedings for nullity of marriage as they apply to proceedings for divorce.

(3) In proceedings under subsection (1) of section 21 of this Act, the court shall have jurisdiction in the following cases only, that is to say—

- (a) in any proceedings, if the petitioner is domiciled in Kenya;
- (b) in proceedings by the wife, if she is resident in Kenya and has been ordinarily resident there for a period of three years immediately preceding the commencement of the proceedings,

and in determining for the purposes of this subsection whether a woman is domiciled in Kenya, her husband shall be treated as having died immediately after the last occasion on which she knew or had reason to believe him to be living.

(4) In any proceedings in which the court has jurisdiction by virtue of this section or of the proviso to section 4 of this Act, the issues shall be determined in accordance with the law which would be applicable thereto if both parties were domiciled in Kenya at the time of the proceedings.

[Act No. 5 of 1952, s. 2.]

### **PART II – DIVORCE AND NULLITY OF MARRIAGE**

#### *Divorce*

#### **6. Restriction on petitions for divorce during first three years after marriage**

(1) No petition for divorce shall be presented to the court unless at the date of the presentation of the petition three years have passed since the date of marriage:

Provided that a judge of the court may, upon application being made to him in accordance with rules made under this Act, allow a petition to be presented before three years have passed on the ground that the case is one of exceptional hardship suffered by the petitioner or of exceptional depravity on the part of the respondent, but, if it appears to the court at the hearing of the petition that the petitioner obtained leave to present the petition by any misrepresentation or concealment of the nature of the case, the court may, if it pronounces a decree *nisi*, do so subject to the condition that no application to make the decree absolute shall be made until after the expiration of three years from the date of the marriage, or may dismiss the petition without prejudice to any petition which may be brought after the expiration of the said three years upon the same, or substantially the same, facts as those proved in support of the petition so dismissed.

(2) In determining any application under this section for leave to present a petition before the expiration of three years from the date of the marriage, the Judge shall have regard to the interests of any children of the marriage and to the question whether there is reasonable probability of a reconciliation between the parties before the expiration of the said three years.

(3) Nothing in this section shall be deemed to prohibit the presentation of a petition based upon matters which have occurred before the expiration of three years from the date of the marriage.

#### **7. Divorce proceedings after grant of judicial separation or other relief**

(1) A person shall not be prevented from presenting a petition for divorce, or the court from pronouncing a decree of divorce, by reason only that the petitioner has at any time been granted a decree of judicial separation under this Act or under any Act repealed by this Act, or an order under the Subordinate Courts (Separation and Maintenance) Act (Cap. 153) upon the same or substantially the same facts as those proved in support of the petition for divorce.

(2) On any such petition for divorce, the court may treat the decree of judicial separation or the said order as sufficient proof of the adultery, desertion or other ground on which it was granted, but the court shall not pronounce a decree of divorce without receiving evidence from the petitioner.

(3) For the purposes of any such petition for divorce, a period of desertion immediately preceding the institution of proceedings for a decree of judicial separation or an order under the said Act having the effect of such a decree shall, if the parties have not resumed cohabitation and the decree or order has been continuously in force since the granting thereof, be deemed immediately to precede the presentation of the petition for divorce.

#### **8. Grounds of petition for divorce**

(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent—

- (a) has since the celebration of the marriage committed adultery; or
- (b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or
- (c) has since the celebration of the marriage treated the petitioner with cruelty; or
- (d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition,

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

(2) For the purposes of subsection (1) of this section, a person of unsound mind shall be deemed to be under care and treatment while he is detained, whether in Kenya or elsewhere, in an institution duly recognized by the Government as an institution for the care and treatment of insane persons, lunatics or mental defectives, or is detained as a criminal lunatic under any law for the time being in force in Kenya; and a certificate under the hand of the

Minister that any place is a duly recognized institution for the purpose of this section shall be receivable in all courts as conclusive evidence of that fact.

[L.N. 168/1964.]

#### **9. Provision as to making adulterer co-respondent**

(1) On the petition for divorce presented by the husband or in the answer of a husband praying for divorce, the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.

(2) On a petition for divorce presented by the wife the court may, if it thinks fit, direct that the person with whom the husband is alleged to have committed adultery be made a respondent.

#### **10. Duty of court on presentation of a petition for divorce**

(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 made 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 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 matters it shall dismiss the petition:

Provided that the court shall not be bound to pronounce a decree of divorce, and may dismiss the petition if it finds that the petitioner has during the marriage been guilty of adultery or if, in the opinion of the court, the petitioner has been guilty—

- (i) of unreasonable delay in presenting or prosecuting the petition; or
- (ii) of cruelty towards the other party to the marriage; or
- (iii) where the ground of the petition is adultery or cruelty, of having without reasonable excuse deserted, or having without reasonable excuse wilfully separated himself or herself from, the other party before the adultery or cruelty complained of; or
- (iv) where the ground of the petition is adultery or unsoundness of mind or desertion, of such wilful neglect or misconduct as has conduced to the adultery or unsoundness of mind or desertion.

(3) For the purposes of this section, adultery shall not be deemed to have been condoned unless conjugal cohabitation has been continued or subsequently resumed.



**11. Dismal of respondent or co-respondent from proceedings**

In any case in which, on the petition of a husband for divorce, the alleged adulterer is made a co-respondent or in which, on the petition of a wife for divorce, the person with whom the husband is alleged to have committed adultery is made a respondent, the court may, after the close of the evidence on the part of the petitioner, direct the co-respondent or the respondent, as the case may be, to be dismissed from the proceedings if the court is of opinion that there is not sufficient evidence against him or her.

**12. Grant of relief to respondent on petition for divorce**

If in any proceedings for divorce the respondent opposes the relief sought, in the case of proceedings instituted by the husband, on the ground of his adultery, cruelty or desertion, or, in the case of proceedings instituted by the wife, on the ground of her adultery, cruelty or desertion, the court may give to the respondent the same relief to which he or she would have been entitled if he or she had presented a petition seeking such relief.

*Nullity***13. Petition for nullity of marriage**

A husband or wife may present a petition to the court praying that his or her marriage may be declared null and void.

**14. Grounds for decree of nullity**

(1) The following are the grounds on which a decree of nullity of marriage may be made—

- (a) that either party was permanently impotent, or incapable of consummating the marriage, at the time of the marriage; or
- (b) that the marriage had not been consummated owing to the wilful refusal of the respondent to consummate the marriage; or
- (c) that the parties are within the prohibited degrees of consanguinity (whether natural or legal) or affinity; or
- (d) that the former husband or wife of either party was living at the time of the marriage, and the marriage with such previous husband or wife was then in force; or
- (e) that the consent of either party to the marriage was obtained by force or fraud in any case in which the marriage might be annulled on this ground by the law of England; or
- (f) that either party was at the time of the marriage of unsound mind or subject to recurrent fits of insanity or epilepsy; or
- (g) that the respondent was at the time of the marriage suffering from venereal disease in a communicable form; or
- (h) that the respondent was at the time of the marriage pregnant by some person other than the petitioner:

Provided that, in the cases specified in paragraphs (f), (g) and (h) of this subsection, the court shall not grant a decree unless it is satisfied—

- (i) that the petitioner was at the time of the marriage ignorant of the facts alleged;

- (ii) that proceedings were instituted within a year from the date of the marriage; and
- (iii) that marital intercourse with the consent of the petitioner has not taken place since the discovery by the petitioner of the existence of the grounds of decree.

(2) Where a decree of nullity is granted in respect of a voidable marriage, any child who would have been the legitimate child of the parties to the marriage if it had been dissolved, instead of being annulled, on the date of the decree shall be deemed to be their legitimate child notwithstanding the annulment.

(3) Nothing in this section shall be construed as validating any marriage which is by law void but with respect to which a decree of nullity has not been granted.

[Act No. 5 of 1952, s. 3.]

### **15. Decree *nisi* for divorce or nullity of marriage**

(1) Every decree for a divorce or for nullity of marriage shall, in the first instance, be a decree *nisi* 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.

(2) After the pronouncing of the decree *nisi* and before the decree is made absolute, any person may, in the prescribed manner, show cause why the decree should not be made absolute by reason of the decree having been obtained by collusion or by reason of material facts not having been brought before the court, and in any such case the court may make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit.

(3) Where a decree *nisi* has been obtained, whether before or after the commencement of this Act, and no application for the decree to be made absolute has been made by the party who obtained the decree, then, at any time after the expiration of three months from the earliest date on which that party could have made such an application, the party against whom the decree *nisi* has been granted shall be a liberty to apply to the court and the court shall, on such application, have power to make the decree absolute, reverse the decree *nisi*, require further inquiry or otherwise deal with the case as the court thinks fit.

### **16. Remarriage of divorced person**

As soon as any decree for divorce is made absolute, either of the parties to the marriage may, if there is no right of appeal against the decree absolute, marry again as if the prior marriage had been dissolved by death or, if there is such a right of appeal, may so marry again, if no appeal is presented against the decree, as soon as the time for appealing has expired or, if an appeal is so presented, as soon as the appeal has been dismissed.

## **PART III – JUDICIAL SEPARATION**

### **17. Decree of judicial separation**

(1) A petition for judicial separation may be presented to the court by either the husband or the wife on any grounds on which a petition for divorce might

have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, and the provisions of this Act relating to the duty of the court on the presentation of a petition for divorce, and the circumstances in which such a petition shall or may be granted or dismissed, shall apply in like manner to a petition for judicial separation.

(2) Where the court in accordance with the said provisions grants a decree of judicial separation, it shall no longer be obligatory for the petitioner to cohabit with the respondent.

(3) The court may, on the application by petition of the husband or wife against whom a decree of judicial separation has been made, and on being satisfied that the allegations contained in the petition are true, reverse the decree at any time after the making thereof on the ground that it was obtained in the absence of the person making the application, or, if desertion was the ground of the decree, that there was reasonable cause for the alleged desertion.

(4) The reversal of a decree for judicial separation shall not affect the rights or remedies which any other person would have had if the decree had not been reversed in respect of any debts, contracts or acts of the wife incurred, entered into or done between the date of the decree and of the reversal thereof.

#### **18. Wife's property in case of judicial separation**

(1) In every case of judicial separation—

- (a) the wife shall, as from the date of the decree and so long as the separation continues, be considered as a feme-sole with respect to any property which she may acquire or which may devolve upon her, and any such property may be disposed of by her in all respects as a feme-sole and if she dies intestate shall devolve as if her husband had been dead; and
- (b) the wife shall, during the separation, be considered as a feme-sole for the purpose of contract and wrongs and injuries, and of suing and being sued, and the husband shall not be liable in respect of her contracts or for any wrongful act or omission by her or for any costs she incurs as plaintiff or defendant:

Provided that—

- (i) where on any judicial separation alimony has been ordered to be paid and has not been paid by the husband, he shall be liable for necessaries supplied for the use of the wife;
- (ii) if the wife returns to cohabitation with her husband, any property to which she is entitled at the date of her return shall, subject to any agreement in writing made between herself and her husband while separate, be her separate property;
- (iii) nothing in this section shall prevent the wife from joining at any time during the separation in the exercise of any joint power given to herself and her husband.

(2) In any case where the decree for judicial separation is obtained by the wife, any property to which she is entitled for an estate in remainder or reversion at the date of the decree, and any property to which she becomes entitled as executrix, administratrix or trustee after the date of the decree, shall be deemed

to be property to which this section applies, and for the purpose aforesaid the death of the testator or intestate shall be deemed to be the date when the wife became entitled as executrix or administratrix.

#### **19. Protection of third parties**

(1) Where a wife obtains a decree for judicial separation, the decree shall, so far as may be necessary for the protection of any person dealing with the wife, be valid and effectual until discharged and the discharge or variation of the decree shall not affect any rights or remedies which any person would have had if the decree had not been discharged or varied, in respect of any debts, contracts or acts of the wife incurred, entered into or done during the period between the date of the decree and the discharge or variation thereof.

(2) Any person who, in reliance on any such decree as aforesaid, makes any payment to or permits any transfer or act to be made or done by the wife shall, notwithstanding the subsequent discharge or variation of the decree, or the fact that the separation has ceased or has been discontinued, be protected and indemnified in the same way in all respects as if at the time of payment, transfer or other act the decree were valid and still subsisting without variation in full force and effect, or the separation had not ceased or been discontinued, as the case may be, unless at that time that person had notice of the discharge or variation of the decree or that the separation had ceased or been discontinued.

### PART IV – RESTITUTION OF CONJUGAL RIGHTS

#### **20. Decree for restitution of conjugal rights**

A petition for restitution of conjugal rights may be presented to the court by either the husband or the wife, and the court, on being satisfied that the allegations contained in the petition are true, and that there is no legal ground why a decree for restitution of conjugal rights should not be granted, may make the decree accordingly.

#### **21. Periodical payments in lieu of attachment**

(1) A decree for restitution of conjugal rights shall not be enforced by attachment, but where the application is by the wife the court, at the time of making the decree or at any time afterwards, may, in the event of the decree not being complied with within any time in that behalf limited by the court, order the respondent to make to the petitioner such periodical payments as may be just, and the order may be enforced in the same manner as an order for alimony made under this Act.

(2) The court may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments.

[Act No. 34 of 1941, s. 3.]

### PART V – PRESUMPTION OF DEATH AND DISSOLUTION OF MARRIAGE

#### **22. Proceedings for decree of presumption of death and dissolution of marriage**

(1) Any married person who alleges that reasonable grounds exist for supposing that the other party to the marriage is dead may present a petition to the court to have it presumed that the other party is dead and to have the

marriage dissolved, and the court, if satisfied that such reasonable grounds exist, may make a decree of presumption of death and of dissolution of the marriage.

(2) In any such proceedings the fact that for a period of seven years or upwards the other party to the marriage has been continually absent from the petitioner, and that the petitioner has no reason to believe that the other party has been living within that time, shall be evidence that he or she is dead until the contrary is proved.

(3) Sections 15, 16, 34 and 35 of this Act shall apply to a petition and a decree under this section as they apply to a petition for divorce and a decree of divorce respectively.

#### PART VI – ANCILLARY RELIEF

### 23. Damages

(1) A husband may, on a petition for divorce or for judicial separation or for damages only, claim damages from any person on the ground of adultery with the wife of the petitioner.

(2) The court may direct in what manner the damages recovered on any such petition are to be paid or applied, and may direct the whole or any part of the damages to be settled for the benefit of the children, if any, of the marriage, or as a provision for the maintenance of the wife.

### 24. Cost against a co-respondent

A co-respondent may be ordered to pay the whole or any part of the costs of the proceedings if adultery, with the wife of the petitioner has been established against him:

Provided that he shall not be ordered to pay the costs of the petitioner—

- (i) if at the time of the adultery he had no reason to believe the respondent to be a married woman; or
- (ii) if the respondent was, at the time of the adultery, living apart from her husband and leading the life of a prostitute.

### 25. Alimony *pendente lite*, alimony and maintenance

(1) In any suit under this Act, the wife may apply to the court for alimony pending the suit, and the court may thereupon make such order as it may deem just:

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue in the case of a decree *nisi* of dissolution of marriage or of nullity of marriage until the decree is made absolute.

(2) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable.

(3) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (2) of this section, direct the

husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable:

Provided that—

- (i) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part as the court thinks fit; and
- (ii) where the court has made any such order as is mentioned in this subsection and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.

(4) Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just.

(5) In all cases where the court makes an order for alimony, the court may direct the alimony to be paid either to the wife or to a trustee approved by the court on her behalf, and may impose such terms or restrictions as the court thinks expedient, and may from time to time appoint a new trustee if for any reason it appears to the court expedient so to do.

#### **26. Additional power of court to make order for maintenance**

(1) Where a husband has been guilty of wilful neglect to provide reasonable maintenance for his wife or the infant children of the marriage, the court, if it would have jurisdiction to entertain proceedings by the wife for judicial separation, may, on the application of the wife, order the husband to make to her such periodical payments as may be just; and the order may be enforced in the same manner as an order for alimony in proceedings for judicial separation.

(2) Where the court makes an order under this section for periodical payments it may, if it thinks fit, order that the husband shall, to the satisfaction of the court, secure to the wife the periodical payments, and for that purpose may direct that a proper deed or instrument to be executed by all necessary parties shall be settled and approved by the court.

[Act No. 5 of 1952, s. 4.]

#### **27. Power of court to order settlement of wife's property**

(1) If it appears to the court in any case in which the court pronounces a decree for divorce or for judicial separation by reason of the adultery, desertion or cruelty of the wife that the wife is entitled to any property either in possession or reversion, the court may, if it thinks fit, order such settlement as it thinks reasonable to be made of the property, or any part thereof, for the benefit of the innocent party, and of the children of the marriage or either or any of them.

(2) An instrument made under any order of the court made under this section shall be valid and effectual, notwithstanding the existence of coverture at the time of the execution thereof.

(3) Where the application for restitution of conjugal rights is by the husband, and it appears to the court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the court may, if it thinks fit, order a settlement to be made to the satisfaction of the court of the property or any part thereof for the benefit of the petitioner and of the children of the marriage or either or any of them or may order such part of the profits of trade or earnings, as the court thinks reasonable, to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them.

#### **28. Power of court to make orders as to application of settled property**

The court may, after pronouncing a decree for divorce or for nullity of marriage, inquire into the existence of ante-nuptial or post-nuptial settlements made on the parties whose marriage is the subject of the decree, and may make such orders with reference to the application of the whole or any part of the property settled either for the benefit of the children of the marriage or for that of the parties to the marriage, as the court thinks fit, and the court may exercise the powers conferred by this section notwithstanding that there are no children of the marriage.

#### **29. Protection orders**

(1) Any wife in whose property the husband has acquired an interest by virtue of the marriage may, if deserted by him, apply by petition to the court for an order to protect any property which she may have obtained or may obtain after the desertion, against him and his creditors and any person claiming under him.

(2) The court may, if satisfied that the desertion was without reasonable excuse, and that the wife is maintaining herself, make such order.

(3) The order shall state the time at which the desertion commenced, and shall, as regards all persons dealing with the wife in reliance thereon, be conclusive as to such time.

(4) While any such order is in force, the wife shall be, and be deemed to have been from the date of the desertion, in the like position in all respects with regard to property and contracts and suing and being sued as she would be if she had obtained a decree of judicial separation under this Act.

(5) The husband, or any creditor or person claiming under him, may apply to the court for the discharge or variation of the order, and the court may, if the desertion has ceased, or if for any other cause it thinks fit so to do, discharge or vary the order accordingly.

(6) If the husband or any creditor or person claiming under him seizes or continues to hold any property of the wife after notice of any such order, the wife may, by action, recover such property, and also a sum equal to double its value.

#### **30. Custody and maintenance of children**

(1) In any proceedings for divorce or nullity of marriage or judicial separation, the court may from time to time, either before, or by, or after the final decree, make such provision as appears just with respect to the custody, maintenance

and education of the children the marriage of whose parents is the subject of the proceedings, or, if it thinks fit, direct proper proceedings to be taken for placing the children under the protection of the court.

(2) On an application made in that behalf the court may, at any time before final decree, in any proceedings for restitution of conjugal rights, or, if the respondent fails to comply therewith, after final decree, make from time to time all such orders and provisions with respect to the custody, maintenance and education of the children of the petitioner and respondent as might have been made by interim orders if proceedings for judicial separation had been pending between the same parties.

(3) The court may, if it thinks fit, on any decree of divorce or nullity of marriage, order the husband, or (in the case of a petition for divorce by a wife on the ground of her husband's insanity) order the wife, to secure for the benefit of the children such gross sum of money or annual sum of money as the court may deem reasonable:

Provided that the term for which any sum of money is secured for the benefit of a child shall not extend beyond the date when the child—

- (i) if a male African (including a Somali, an Abyssinian (Amhara, Tigre and Shoa), a Malagasy and a Comoro Islander), Arab or Baluchi born in Africa attains the age of sixteen years, or if a female African (including a Somali, an Abyssinian (Amhara, Tigre and Shoa), a Malagasy and a Comoro Islander), Arab or Baluchi born in Africa attains the age of thirteen years;
- (ii) if a child, other than a child referred to in subparagraph (i) of this proviso, attains the age of majority or marries, whichever date is the earlier.

### **31. Amendments as to maintenance, settlement of property, etc.**

(1) When a petition for divorce or nullity of marriage has been presented, proceedings under section 25, section 27, section 28 or subsection (3) of section 30 of this Act may, subject to and in accordance with the rules made under this Act, be commenced at any time after the presentation of the petition:

Provided that no order under any of the said sections or under the said subsection (other than an interim order for the payment of alimony under section 25 of this Act) shall be made unless and until a decree *nisi* has been pronounced, and no such order, save in so far as it relates to the preparation, execution or approval of a deed or instrument, and no settlement made in pursuance of any such order, shall take effect unless and until the decree is made absolute.

(2) Section 25 of this Act shall apply in any case where a petition for divorce or judicial separation is presented by the wife on the ground of her husband's insanity, as if for the references to the husband there were substituted references to the wife, and for references to the wife there were substituted references to the husband, and in any such case, and in any case where a petition for divorce, nullity or judicial separation is presented by the husband on the ground of his wife's insanity or mental deficiency, the court may order the payments of alimony or maintenance under the said section to be made to such persons having charge of the respondent as the court may direct.



**32. Power to vary order**

The court may from time to time vary or modify any order for periodical payment of money made under this Act either by altering the times of payment or by increasing or diminishing the amount, or may temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part, as the court thinks just.

## PART VI – MISCELLANEOUS

**33. Power to allow intervention on terms**

In every case in which any person is charged with adultery with any party to a suit or in which the court may consider, in the interest of any person not already a party to the suit, that that person should be made a party to the suit, the court may, if it thinks fit, allow that person to intervene upon such terms, if any, as the court thinks just.

**34. Duties of President's Proctor**

In the case of any petition for divorce or for nullity of marriage—

- (a) the court may, if it thinks fit, direct all necessary papers in the matter to be sent to the President's Proctor, who shall instruct counsel to argue before the court any question in relation to the matter which the court deems to be necessary or expedient to have fully argued, and the President's Proctor shall be entitled to charge the costs of the proceedings as part of the expenses of his office;
- (b) any person may at any time during the progress of the proceedings or before the decree *nisi* is made absolute give information to the President's Proctor of any matter material to the due decision of the case, and the President's Proctor may thereupon take such steps as he considers necessary or expedient;
- (c) if in consequence of any such information or otherwise the President's Proctor suspects that any parties to the petition are or have been acting in collusion for the purpose of obtaining a decree contrary to the justice of the case, he may, after obtaining the leave of the court, intervene and retain an advocate and subpoena witnesses to prove the alleged collusion.

[Act No. 9 of 1967, Sch.]

**35. Provisions as to costs where President's Proctor intervenes or shows cause**

(1) Where the President's Proctor intervenes or shows cause against a decree *nisi* in any proceedings for divorce or nullity of marriage, the court may make such order as to the payment by other parties to the proceedings of the costs incurred by him in so doing or as to the payment by him of any costs incurred by any of the said parties by reason of his so doing as may seem just.

(2) Any costs or other expenses incurred by the President's Proctor in so intervening or showing cause which are not fully satisfied by any order made under this section for the payment of his costs shall be defrayed out of moneys provided by the Legislature.

[Act No. 21 of 1961, Sch., Act No. 9 of 1967, Sch.]

**36. Evidence**

The parties to any proceedings instituted in consequence of adultery and the husbands and wives of the parties shall for the purposes of this Act be competent to give evidence in the proceedings, but no witness in any such proceedings, whether a party thereto or not, shall be liable to be asked or be bound to answer any question tending to show that he or she has been guilty of adultery unless he or she has already given evidence in the same proceedings in disproof of the alleged adultery.

**37. Evidence of access**

(1) Notwithstanding any rule of law, the evidence of a husband or wife shall be admissible in any proceedings to prove that marital intercourse did or did not take place between them during any period.

(2) Notwithstanding anything in this section or any rule of law, a husband or wife shall not be compellable in any proceedings to give evidence of the matters aforesaid.

[Act No. 5 of 1952, s. 5.]

**38. Appeals**

Any decree *nisi* in a suit for dissolution or nullity of marriage may be appealed from within thirty days after the date of the making 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:

Provided that—

- (i) in suits for dissolution or nullity of marriage no respondent or co-respondent not appearing and defending the suit on the occasion of the decree *nisi* being made shall appeal against the decree being made absolute unless the court gives leave to appeal at the time of the decree being made absolute;
- (ii) no appeal, from an order absolute for dissolution or nullity of marriage shall lie in favour of any party who, having had time and opportunity to appeal from the decree *nisi*, has not appealed therefrom.

[Act No. 14 of 1948, s. 2, Act No. 15 of 1961, Sch.]

**39. Rules of court**

(1) The Rules Committee may make rules of court prescribing anything required to be prescribed under this Act and with respect to all matters of practice and procedure under this Act:

Provided that, until such rules have been made, the practice and procedure shall be in accordance with the rules set out in the Schedule to this Act.

(2) The power conferred upon the Rules Committee by this section to make rules shall include the power to rescind, revoke, amend or vary such rules and the rules set out in the Schedule to this Act.

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## SCHEDULE

[Section 39, L.N. 388/1959, L.N. 304/1960, L.N. 142/1963, L.N. 121/1975.]

## MATRIMONIAL CAUSES RULES

**1. Citation**

- (1) These Rules may be cited as the Matrimonial Causes Rules.
- (2) In these Rules—
  - “**a District Registry**” means a District Registry of the Supreme Court;
  - “**a district registrar**” means a district registrar of the Supreme Court;
  - “**Appendix**” means the Appendix to these Rules;
  - “**certified copy**” means a copy examined in the Divorce Registry against the original, marked as certified by the examining officer and sealed with the seal of the Divorce Registry;
  - “**defended cause**” means a matrimonial cause which is not an undefended cause;
  - “**filed**” means filed in the Divorce Registry;
  - “**person named**” includes a person described as “passing under the name of A.B.”;
  - “**the Act**” means the Matrimonial Causes Act (Cap. 152);
  - “**the Divorce Registry**” means the Registry of the Supreme Court at Nairobi and includes any District Registry;
  - “**the registrar**” means the Registrar of the Supreme Court and includes a district registrar and a deputy registrar;
  - “**undefended cause**” means a matrimonial cause in which no answer has been filed or in which all the answers filed have been struck out, but does not include a cause in which—
    - (a) the court is asked to exercise its discretion under section 10(2) of the Act; or
    - (b) relief is sought under section 8(1)(d) of the Act.

**2. Application for leave to present a petition**

- (1) An application for leave to present a petition for divorce before three years have passed since the date of the marriage shall be made by originating summons in form 1 in the Appendix.
- (2) There shall be filed in support of the summons an affidavit by the applicant stating—
  - (a) the grounds of the application;
  - (b) particulars of the hardship or depravity alleged;
  - (c) whether there has been any previous application under this rule;

- (d) whether there are living any children the marriage of whose parents is the subject of the application and, if so, the names and dates of birth or ages of such children and particulars of the place at which and person with whom they are residing;
- (e) whether any, and if so what, attempts at reconciliation have been made;
- (f) particulars of any circumstances which may assist the court in determining whether there is a reasonable probability of reconciliation between the parties,

and a copy of the intended petition shall be exhibited to the affidavit.

(3) When the summons is issued, it shall be made returnable for a fixed date before a judge in chambers and shall be accompanied by a form of acknowledgement of service in Form 8 in the Appendix.

(4) Unless otherwise directed, the summons shall be served on the respondent at least five clear days before the return date.

(5) No appearance need be entered to the summons and no affidavit need be filed in reply, and the intended respondent may be heard without entering an appearance.

[L.N. 304/1960.]

### **3. Commencement of proceedings**

(1) Every matrimonial cause shall be commenced by filing a petition addressed to the court.

(2) Every application in a matrimonial cause for ancillary relief, that is to say every application for—

- (a) alimony pending suit, except where a claim for such relief is made in the original petition;
- (b) maintenance of any children of the marriage (in these Rules referred to as maintenance of the children), except where a claim for such relief is made in the petition;
- (c) periodical payments by a husband to a wife in whose favour a decree for restitution of conjugal rights has been made, or for periodical payments by a wife against whom such a decree has been made of part of any profits of trade or earnings of which she is in receipt to her husband for his own benefit or to her husband or any other person for the benefit of the children of the marriage or either or any of them (in these Rules referred to as periodical payments) or for securing periodical payments to a wife;
- (d) the allotment of alimony to a wife in whose favour a decree of restitution of conjugal rights has been made or in whose favour or against whom a decree for judicial separation has been made or to a husband where the wife has presented a petition for judicial separation on the ground of his insanity (in these Rules referred to as permanent alimony);
- (e) the payment by a husband on a decree for divorce or nullity of marriage of monthly or weekly sums for the maintenance and

support of his wife, or by a wife, where she has presented a petition for divorce on the ground of her husband's insanity, of monthly or weekly sums for his maintenance and support (in these Rules referred to as maintenance), except where a claim for such relief is made in the petition;

- (f) the discharge, modification or temporary suspension of an order for periodical payments, securing periodical payments to a wife, alimony pending suit, permanent alimony, maintenance or maintenance of the children (in these Rules referred to as a modification order);
- (g) the securing by a husband on a decree for divorce or nullity of a gross or annual sum of money to his wife or for the benefit of the children of the marriage, or by a wife, where she has presented a petition for divorce on the ground of her husband's insanity, of a gross or annual sum of money to her husband or for the benefit of the children of the marriage (in these Rules referred to as a secured provision), except where a claim for such relief is made in the petition;
- (h) the application of the whole or any part of the property comprised in any ante-nuptial or post-nuptial settlement made on the spouses either for the benefit of the children of the marriage or of the spouses (in these Rules referred to as variation of marriage settlements);
- (i) the settlement, in the case of a decree for divorce or judicial separation, by reason of the adultery, desertion or cruelty of the wife, or for restitution of conjugal rights made against the wife, of the property to which she is entitled either in possession or in reversion or any part thereof for the benefit of her husband and of the children of the marriage or either or any of them (in these Rules referred to as settlement of a wife's property),

shall be by notice form 2 in the Appendix issued out of the Divorce Registry.

(3) Except where these Rules otherwise provide, every application shall be made to, and any leave or direction shall be obtained from, a judge by summons in chambers.

#### **4. Forms of petition**

- (1) The petition in a matrimonial cause shall state—
  - (a) the place and date of the marriage and the name and status of the wife before the marriage;
  - (b) the principal permanent addresses where the parties have cohabited within Kenya or, if it is the case, that there has been no address of cohabitation within Kenya;
  - (c) whether, there are living any children of the marriage and, if so, the names and dates of birth or ages of such children and, if it is the case, that the paternity of any child of the wife is disputed;
  - (d) the occupation of the husband and the residence and domicile of the parties to the marriage at the date of the institution of the cause;

- (e) if at the date of the institution of a cause by a wife the husband has deserted the wife, or has been deported from Kenya, and there is reason to believe that he has changed his domicile since the date of the desertion or deportation, the domicile of the husband immediately before the desertion or deportation, the date when and the circumstances in which the alleged desertion began or the date of the deportation order;
- (f) in the case of a wife's petition in which the court is alleged to have jurisdiction by virtue of section 5 of the Act (unless otherwise directed, and in lieu of the statement as to domicile required by subparagraph (d) of this paragraph), the addresses at which the petitioner has resided during the three years immediately preceding the presentation of the petition and the length of residence at each address;
- (g) whether there have been in the court or a subordinate court any, and if so what, previous proceedings with reference to the marriage by or on behalf of either of the parties to the marriage, the date and effect of any decree or order made in such proceedings, and whether there has been any resumption of cohabitation since the making thereof;
- (h) the matrimonial offences alleged or other grounds upon which relief is sought, set out specifically in separate paragraphs;
- (i) in the case of a petition for presumption of death and dissolution of the marriage, the last place of cohabitation of the parties, the circumstances in which the parties ceased to cohabit, and the date when and the place where the respondent was last seen or heard of; and
- (j) in the case of a petition for restitution of conjugal rights, the date when and the circumstances in which the respondent refused or ceased to render conjugal rights to the petitioner, the desire of the petitioner for a restitution of conjugal rights and the willingness on the part of the petitioner to render them to the respondent.

(2) A wife petitioner may include in her petition a claim for alimony pending suit, maintenance of her children, maintenance or a secured provision, in which case the petition shall contain a statement in general terms of her husband's income and property in so far as they are within her knowledge or belief.

(3) The petition shall conclude with a prayer setting out particulars of the relief claimed, including the amount of any claim for damages, any claim for costs and, in appropriate cases, a prayer that the court will exercise its discretion to grant a decree *nisi* notwithstanding the adultery of the petitioner during the marriage.

(4) The prayer of a petition may also include a claim for—

- (a) custody of the children of the marriage;
- (b) alimony pending suit;
- (c) maintenance of the children;
- (d) maintenance; or
- (e) a secured provision.

(5) Every petition shall, unless otherwise directed, be signed by the petitioner or, in the case of an infant or person of unsound mind, by his next friend.

#### **5. Co-respondent**

Unless otherwise directed, where a petition for divorce or a petition for judicial separation in which damages are claimed alleges adultery, every alleged adulterer, if male, and living at the date of the filing of the petition, shall be made a co-respondent in the cause, and where a petition contains a claim for costs against a woman named she shall be made a respondent in the cause.

#### **6. Affidavit in support of petition**

(1) There shall be filed with every petition an affidavit by the petitioner verifying the facts of which the deponent has personal cognizance and deposing as to belief in the truth of the other facts alleged in the petition and, except in the case of a petition for restitution of conjugal rights, stating whether the petition is presented or prosecuted in collusion with the respondent or any of the co-respondents.

(2) The affidavit shall also state—

- (a) in the case of every petition for divorce or judicial separation, where the ground of the petition is adultery, whether the petitioner has in any manner been accessory to or connived at or condoned the adultery, and, where the ground of the petition is cruelty, whether the petitioner has in any manner condoned the cruelty; and
- (b) in the case of a petition for nullity under section 14 of the Act, whether the petitioner was at the time of the marriage ignorant of the facts alleged and whether marital intercourse with the consent of the petitioner has taken place since the discovery by the petitioner of the existence of the grounds for a decree; and
- (c) in the case of a petition for presumption of death and dissolution of marriage, the steps which have been taken to trace the respondent.

(3) Where a petition for divorce or a petition for judicial separation in which damages are claimed alleges adultery against a male person who has died before the petition is filed, the affidavit shall prove the death of such person by reference to a death certificate exhibited thereto or by reference to such other evidence as is available.

#### **7. Notice to appear**

(1) A petition and every copy thereof for service upon a respondent or co-respondent shall be endorsed in conspicuous characters with a notice to appear in form 3 in the Appendix, and, if the petition includes a prayer for alimony pending suit, the petition and the copy to be served on the respondent husband shall also be endorsed with a notice to appear and file evidence in form 4 in the Appendix.

(2) A notice of an application for any ancillary relief and every copy thereof for service shall, if the respondent to the application has not already entered an appearance to the petition in the matrimonial cause in which the application is made, contain a notice to appear in form 5 in the Appendix.

(3) A notice of an application for alimony pending suit, permanent alimony, maintenance, maintenance of children, a secured provision, periodical payments or securing periodical payments to a wife and every copy thereof for service shall contain a notice to file evidence in form 6 in the Appendix.

#### **8. Service of petition, originating summons and notice of application for ancillary relief**

(1) Unless otherwise directed—

- (a) a certified copy of every petition shall be served personally or by post upon every respondent and co-respondent named therein;
- (b) a certified copy of every originating summons shall be served personally or by post upon the respondent thereto; and
- (c) a certified copy of every notice of an application for ancillary relief shall be served personally or by post upon the respondent thereto, unless the respondent has entered a general appearance to the petition in the cause in which the application is made in which case the notice may be served by leaving it at the address for service furnished by the respondent.

(2) Personal service shall in no case be effected by the petitioner or the intended petitioner.

(3) An application for leave to substitute for the modes of service prescribed by paragraph (1) of this rule some other mode of service or to substitute for service notice of the proceedings by advertisement or otherwise shall be made *ex parte* by lodging with the registrar an affidavit setting out the grounds on which the application is made.

(4) Where leave is given to substitute for service notice of the proceedings by advertisement, the form of the advertisement shall be settled by the registrar, and copies of the newspapers containing the advertisements shall be filed with a certified copy of the petition, originating summons or notice to which the advertisement relates.

#### **9. Service out of jurisdiction**

(1) A petition, originating summons, notice or other document in a matrimonial cause or matter may be served out of the jurisdiction without leave in manner provided by these Rules, or may be served in accordance with the procedure prescribed by Order V, rule 27, of the Civil Procedure (Revised) Rules, 1948, and in that case the official certificate required by paragraph (3) of that rule shall, in the case of a document served personally show the server's means of knowledge as to the identity of the person served.

(2) Where a petition, originating summons or notice of an application for ancillary relief is to be served out of the jurisdiction, the time limited for appearance to be endorsed on the petition or contained in the originating summons or notice shall be fixed having regard to the place or country where or within which the petition, originating summons or notice is to be served in accordance with the practice adopted under rule 24 of the said Order V.



**10. Proof of service**

Unless otherwise directed, a petition shall not proceed to trial unless the respondent and every co-respondent thereto and every person named therein—

- (a) has entered an appearance; or
- (b) is shown by affidavit in form 7 in the Appendix, which shall be filed, to have been served with the petition personally or in accordance with an order for substituted service; or
- (c) has returned to the advocate for the petitioner, or to the petitioner if he is acting in person, an acknowledgment of service in form 8 in the Appendix, which shall be filed.

**11. Service of other documents**

(1) Service of any document on a party who has not entered an appearance shall be personal service, unless otherwise directed, and, where any order or decree is personally served, the original or a certified copy thereof shall be produced to the person served at the time of service.

(2) Any notice or other document by these Rules required to be served, but of which personal service is not required, may be served by leaving the same at the address for service furnished by or on behalf of the party on whom the document is to be served or by sending it by post to the said address.

(3) A copy of every affidavit filed in support of or in answer to an application under rule 2 of these Rules or an application for ancillary relief, or in pursuance of an order for particulars, interrogatories or discovery, shall be delivered to the opposite party, if he has entered an appearance, at the address for service furnished by him within eight days after the affidavit has been filed and, if he has not entered an appearance and the time for appearance has not expired, a copy of such affidavit shall be personally served upon the opposite party with the originating summons or notice in support of which the affidavit is filed.

**12. Entry of appearance**

(1) All appearances shall be entered by delivering to the registrar a memorandum in writing in form 9 in the Appendix dated on the day of its delivery and containing the name of the advocate of the person entering an appearance or stating that that person appears in person and containing an address for service; the person entering the appearance shall at the same time deliver to the registrar a duplicate of the memorandum, which the officer shall issue as a certified copy and return to the person entering the appearance, and the duplicate memorandum so issued shall be a certificate that the appearance was entered as stated therein.

(2) Notice of such appearance in form 10 in the Appendix shall be given to the opposite party.

(3) Upon receipt of the memorandum of appearance, the registrar shall forthwith enter the appearance in the book provided for the purpose.

**13. Form of appearance**

(1) An appearance to a petition or originating summons may be under protest, and an appearance to a petition may be either general or limited to any

claim made in the petition for alimony pending suit or to any claim made after the filing of the petition for ancillary relief.

(2) The appearance may be entered at any time before a step has been taken in default and thereafter by leave, except that in the case of an application for ancillary relief the respondent may enter an appearance to the petition without leave in accordance with the notice to appear contained in the application and limited to the particular claim for ancillary relief, notwithstanding that a step in default may have been taken against him in the proceedings on the petition.

(3) Any appearance under protest shall state concisely the grounds of protest, and the party so appearing under protest shall before the expiration of the time allowed for filing an answer apply for directions as to the determination of any question arising by reason of such appearance under protest and, in default of making such application, shall be deemed to have entered an unconditional appearance.

(4) Any such directions may provide for the trial of a preliminary issue with or without a stay of proceedings or for determination of the matters in question at the hearing of the cause and for any interlocutory matters incidental thereto.

#### **14. Amended and supplemental petitions**

(1) A petition may be amended before service—

- (a) without leave, upon the filing of an affidavit by the petitioner; or
- (b) with leave, upon the filing of an affidavit of the advocate of the petitioner,

verifying the new facts alleged.

After service a petition may be amended only with leave.

(2) A supplemental petition may be filed only after service of the original proceedings and only with leave.

(3) An application for leave to amend a petition after service or for leave to file a supplemental petition shall, unless otherwise directed, be supported by an affidavit by the petitioner verifying the new facts alleged, and shall, unless otherwise directed, be served on every opposite party who has entered an appearance, or may, if no appearance has been entered, be made *ex parte* by filing the affidavit.

(4) Any affidavit filed under this rule shall verify the new facts of which the deponent has personal knowledge and depose as to his belief in the truth of the other new facts alleged, and as to the existence or otherwise of collusion, connivance and condonation in the manner required by rule 6 of these Rules in the case of the original petition.

(5) An order made under this rule shall—

- (a) in cases where an appearance has been entered in the original proceedings, fix the time within which the answer must be filed or amended;
- (b) if made after the registrar has given his certificate under rule 29 of these Rules, provide for a stay of the hearing until that certificate has been renewed.

(6) Unless otherwise directed, a copy of the order made under this rule together with a certified copy of the supplemental petition or of the amended petition shall be served upon the respondent, co-respondent or person named therein, and, in the case of a respondent, co-respondent or person not named in the original petition, the supplemental petition or amended petition shall be endorsed with a notice to appear in form 3 or, as the case may be, with a notice in form 11 in the Appendix, and the provisions of rules 8, 9 and 10 of these Rules shall apply to supplemental and amended petitions as they apply to original petitions.

#### **15. Interveners**

(1) Unless otherwise directed, where a husband is charged with adultery with a named person who is not made a respondent under rule 5 of these Rules, and where, in a husband's petition for judicial separation, the wife is charged with adultery and no damages are claimed, a certified copy of the petition or answer containing such charge shall be personally served on the person with whom adultery is alleged to have been committed, endorsed in lieu of a notice to appear with a notice in accordance with form 11 in the Appendix that such person is entitled within the time limited thereby to apply for leave to intervene in the cause.

(2) Application for leave to intervene in any cause shall be supported by affidavit, which shall be filed, and leave may be given with such directions as to appearance and procedure as the Judge shall think fit.

(3) Unless otherwise directed, a party intervening shall join in the proceedings at the stage which those proceedings have reached at the time leave to intervene is given, and the name of that party shall appear in the title to the cause from the day on which he enters an appearance.

#### **16. Answer**

A respondent, co-respondent or person named who has entered in appearance to a petition may within fourteen days after the expiration of the time allowed for the entry of such appearance file an answer to the petition.

#### **17. Evidence in support of and service of answer**

(1) There shall be filed with every answer which contains matter other than a simple denial of the fact stated in the petition an affidavit by the person filing the answer verifying such other matter so far as he has personal cognizance thereof and deposing to his belief in the truth of the rest of such other matter and, where that person is husband or wife of the petitioner, deposing in so far as such other matter is concerned to the existence or otherwise of collusion, connivance and condonation in the manner required by rule 6 of these Rules in the case of a petition.

(2) Where the answer of a husband alleges adultery and prays for relief, the alleged adulterer shall be added to the title of the cause as "A.B. cited", and shall be served personally with a certified copy of the answer endorsed with a notice to appear as if it were a petition.

(3) Where the answer of a husband alleges adultery but does not pray for relief, a certified copy of the answer shall be served personally on the alleged

adulterer endorsed with a notice in accordance with form 11 in the Appendix that he is entitled within the time thereby limited to apply for leave to intervene in the cause.

**18. Reply**

(1) No reply shall be filed without leave except where relief is claimed in the answer, in which case a reply may be filed within fourteen days from the delivery of the answer.

(2) No subsequent pleading shall be filed except by leave.

**19. Amendment of originating summons, etc.**

Any originating summons, notice of an application for ancillary relief, summons, pleading or other document may be amended by leave, subject to any directions as to re-service and as to consequential amendment of pleadings already filed.

**20. Pleadings out of time**

No pleading shall be filed out of time without leave after a step in default has been taken.

**21. Particulars**

(1) Any party may by letter require any other party to furnish particulars of any allegation or other matter pleaded, and, if such other party fails to furnish such particulars within a reasonable time, the party requiring the particulars may apply for an order that particulars be given.

(2) All particulars, whether given in pursuance of an order or otherwise, shall be filed together with an affidavit in support within eight days of being furnished to the party requiring them.

**22. Delivery of subsequent pleadings**

A copy of every answer (other than an answer of which personal service is required), reply and subsequent pleading shall within eight days after it is filed be delivered to the opposite parties or their advocates.

**23. Discovery**

(1) A party to a matrimonial cause may by leave deliver interrogatories in writing for the examination of an opposite party.

(2) A copy of the interrogatories proposed to be delivered shall be lodged in the Divorce Registry when the summons is issued and a further copy shall be served with the summons.

(3) Interrogatories shall, unless otherwise ordered, be answered by affidavit to be filed within ten days.

(4) A party to a matrimonial cause may apply for an order for discovery of documents by an opposite party, and such opposite party may be ordered to make such general or limited discovery on oath as the judge shall think fit.

**24. Medical inspection**

(1) In proceedings for nullity on the ground of the impotence or incapacity of the respondent, the petitioner shall, after an answer as been filed or if no answer has been filed or appearance entered to the cause after the expiration of the time allowed for filing an answer or entering an appearance, as the case may be, apply for the appointment of medical practitioners to examine the parties, and the judge shall upon such application appoint two medical practitioners to examine the parties and to report to the court the result of the examination, and shall order the parties to attend the medical practitioners so appointed for the purposes of the examination.

(2) The order endorsed with notice of the time and place of the examination shall be served personally upon the respondent unless he has appeared in which case the order may be served on his advocate.

(3) The examination shall be held at the consulting room of one of the medical practitioners or at some other convenient place selected by them.

(4) At such medical examination, the petitioner's advocate shall produce to the medical practitioners a minute of identification, and thereupon the medical practitioners shall call upon the advocates for the parties to identify the parties to be examined by them, and, after identification, the parties and their advocates shall sign their names, and the paper bearing such signatures shall be signed by the medical practitioners and annexed to the report.

(5) On a petition for nullity on the ground that the marriage has not been consummated owing to the wilful refusal of the respondent to consummate the marriage, either party may apply for the appointment of medical practitioners to examine the parties; and upon such application the judge shall appoint two medical practitioners, and either of the parties shall be at liberty to submit himself for examination to the medical practitioners so appointed.

(6) The provisions of paragraphs (3) and (4) of this rule shall apply to any such examination, and the medical practitioners shall report to the court the result of any examination made by them.

(7) Every report made in pursuance of this rule shall be filed, and either party shall be entitled to be supplied with a copy upon payment of the prescribed fee.

**25. Evidence**

(1) Subject to the provisions, of the Act and of this rule, the witnesses at the trial or hearing of any matrimonial cause shall be examined by *viva voce* and in open court:

Provided that a judge may on application made to him—

- (i) subject to the provisions of paragraph (2) of this rule, order that any particular facts to be specified in the order may be proved by affidavit;
- (ii) order that the affidavit of any witness may be read at the trial or hearing on such conditions as the Judge may think reasonable;
- (iii) order that evidence of any particular facts to be specified in the order shall be given at the trial or hearing by statement on oath of

information and belief or by production of documents or entries in books or by copies of documents or entries or otherwise as the judge may direct; and

- (iv) order that not more than a specified number of expert witnesses may be called.

(2) Where it appears to the judge that any party reasonably desires the production of a witness for cross-examination and that such witness can be produced, an order shall not be made authorizing the evidence of such witness to be given by affidavit, but the expenses of such witness at the trial shall be specially reserved.

(3) Any party may apply for the appointment of an examiner or for a commission or for letters of request to examine a party or witness in any cause and for leave to give the depositions taken on the examination in evidence at the trial or hearing, and the provisions of Order XXVII of the Civil Procedure (Revised) Rules, 1948, shall apply to the examination.

(4) Nothing in any order made under this rule shall affect the power of the judge at the trial or hearing to refuse to admit evidence tendered in accordance with any such order if in the interests of justice he should think fit to do so.

[L.N. 142/1963.]

## **26. Staying proceedings for restitution**

At any time after the commencement of proceedings for restitution of conjugal rights, the respondent may apply for an order to stay the proceedings by reason that he is willing to resume or to return to cohabitation with the petitioner.

## **27. Trial of issues**

A judge may direct and a petitioner and any party to a cause who has entered an appearance may apply to a judge for directions for the separate trial of any issue of fact or any question as to the jurisdiction of the court.

## **28. Discretion statement**

(1) Every party to a matrimonial cause praying that the court shall exercise its discretion to grant a decree *nisi* notwithstanding that party's adultery shall lodge in the Divorce Registry a statement (in these Rules called a discretion statement) signed by him or his advocate stating that the court will be asked to exercise its discretion on his behalf notwithstanding his adultery and setting forth particulars of the acts of adultery committed and of the facts which it is material for the court to know for the purpose of the exercise of its discretion.

(2) Where the application for the registrar's certificate under rule 29 of these Rules is made by the party praying for the discretion of the court, the discretion statement shall be lodged with the application for the registrar's certificate, or, where the application for that certificate is made by any other party to the cause, the discretion statement shall be lodged within ten days after the receipt of notice that the cause has been set down for hearing.

(3) A discretion statement shall be open to the inspection of the President's Proctor, but, except by the direction of the Judge, shall not be open to inspection by any other person.

(4) Where a discretion statement contains an allegation of adultery or other matrimonial offence on the part of the other spouse which is not referable to any specific allegation in the pleadings, notice of such allegation shall be given forthwith to the said spouse:

Provided that if the court at the hearing is satisfied that failure to give such notice is justified it may be dispensed with.

(5) Neither the fact that a discretion statement has been lodged nor the fact that the said notice has been given nor the contents of the discretion statement or notice shall be given as evidence against the party lodging or giving the same in any matrimonial cause or matter, except when that party has put in evidence in open court the discretion statement or the said notice or the contents thereof.

[Act No. 9 of 1967, Sch.]

### **29. Registrar's certificate and directions for trial**

(1) The petitioner or any party who is defending a matrimonial cause shall, before setting down the cause for hearing, refer the pleadings and proceedings in the cause to the Registrar for his certificate that the pleadings and proceedings are in order and for directions as to the place of hearing, and, if the cause is one in which the discretion of the court is prayed under subsection (2) of section 10 of the Act, a statement informing the registrar of that fact shall be lodged with the pleadings.

(2) In undefended causes the application for the registrar's certificate shall include a statement in writing of the places where the witnesses whom it is proposed to call at the trial reside and any other facts relevant to a decision as to the place of trial, and the registrar shall give directions as to the place of trial with his certificate.

(3) The registrar may, upon the application of any party, vary any direction given as to the place of hearing of any cause.

### **30. Setting down for hearing**

(1) The petitioner, after the Registrar's certificate has been obtained, shall set the cause down for hearing in the Divorce Registry, and, within eight days of having done so, shall file and give to each party in the cause who has entered an appearance notice of his having done so, and, if the petitioner fails so to set the cause down within fourteen days after the granting of the registrar's certificate, any party defending the cause may set the cause down for hearing, and within eight days of having done so shall file and give to the petitioner and all other parties in the cause who have entered an appearance notice of his having done so.

(2) If an undefended cause is not set down within a month after the granting of the Registrar's certificate, the cause shall not be set down unless the registrar's certificate has been renewed.

(3) No cause shall be entered for hearing at a District Registry less than fourteen days before the session fixed for that Registry except by order of the judge to be obtained *ex parte* by motion and with the consent of the judge going the circuit on which that District Registry is.

(4) Save with the consent of all parties or by leave of the Judge, no cause shall be placed in the list for hearing until after the expiration of ten days from the date of setting down.

### **31. Right of respondent or co-respondent be heard without filing answer**

After entering an appearance, a respondent or co-respondent may, without filing an answer, be heard in respect of any question as to costs or damages, and a respondent spouse may, without filing an answer, be heard as to any question of custody of or access to any children the marriage of whose parents is the subject of the proceedings:

Provided that—

- (i) without leave, a co-respondent or party cited in an answer shall not be heard in respect of any question as to damages unless he has entered an appearance before the registrar has given his certificate under rule 29 of these Rules;
- (ii) no allegation shall be made against a party claiming costs or damages unless the party making the allegation has filed an answer.

### **32. Form of decree**

(1) The registrar shall draw and sign every decree of the court.

(2) Where in any case there has been a finding of adultery against one of the parties to the cause, but the judge has refused to exercise his discretion under subsection (2) of section 10 of the Act, that finding and the refusal shall be set out in the decree, and where in such a case the judge exercises his discretion the decree shall state that it is made in the exercise of the discretion conferred on the court by the said section.

(3) A sealed or other copy of any decree of the court may be issued to any person requiring it on payment of the prescribed fee.

## **PART VI – MISCELLANEOUS**

### **33. Interventions by President' Proctor**

(1) (a) When the President's Proctor desires to show cause against making absolute a decree *nisi*, he shall enter an appearance in the cause in which such decree has been pronounced, and shall within fourteen days thereafter file his plea setting forth the grounds upon which he desires to show cause, and within eight days of filing his plea shall deliver a copy thereof to the person in whose favour such decree has been pronounced or to his advocate.

(b) Where such plea alleges a petitioner's adultery with any named person, the President's Proctor shall, unless otherwise directed, serve each such person with a copy of his plea omitting such part thereof as contains any allegation in which the person so served is not named.

(c) Such copy shall be endorsed with a notice in accordance with form 11 in the Appendix so far as the same is applicable.

(d) Service shall be effected and proof of service shall be given in the manner provided for by rules 8, 9 and 10 of these Rules in the case of a copy of a petition served on a co-respondent.



(e) Except as hereinafter provided, these Rules shall apply to all subsequent pleadings and proceedings in respect of such plea as if the plea were an original petition.

(2) If no answer to the plea of the President's Proctor is filed within the time limited, or if an answer is filed and has been struck out or not proceeded with, the President's Proctor may apply forthwith by motion to rescind the decree *nisi* and dismiss the petition.

(3) If the charges contained in the plea of the President's Proctor are not denied in the answer thereto, the party in whose favour the decree *nisi* has been pronounced shall apply for the registrar's certificate that the pleadings are in order and, within fourteen days after obtaining it, set down the intervention for hearing, and, within eight days after setting down the intervention, shall file and give to the President's Proctor notice of his having done so; and, if default is made in setting down and giving notice to the President's Proctor as aforesaid, the President's Proctor may apply forthwith by motion to rescind the decree and dismiss the petition.

(4) If the charges contained in the plea of the President's Proctor are denied in the answer thereto, the President's Proctor shall apply for the Registrar's certificate and, within fourteen days after obtaining it, set down the intervention for hearing, and, within eight days after setting down the intervention, shall file and give to the other parties to the intervention notice of his having done so.

[Act No. 9 of 1967, Sch.]

#### **34. Intervention by person other than President's Proctor**

(1) When any person other than the President's Proctor desires to show cause against making absolute a decree *nisi*, he shall enter an appearance in the cause in which the decree *nisi* has been pronounced, and shall within four days thereafter file an affidavit setting forth the facts upon which he relies and within eight days of filing such affidavit deliver copies thereof to the party or the advocate of the party in whose favour the decree has been pronounced.

(2) The party in the cause in whose favour the decree *nisi* has been pronounced may within fourteen days after delivery of the affidavits as aforesaid file an affidavit in answer and within eight days after filing deliver copies thereof to the person showing cause or to his advocate, and if any such affidavits are so filed and delivered the person showing cause may within a further fourteen days file and deliver copies of affidavits in reply.

(3) No affidavits shall be filed in rejoinder to the affidavits in reply without leave.

[Act No. 9 of 1967, Sch.]

#### **35. Intervention to be heard in Nairobi**

The hearing of any intervention under rule 33 or rule 34 of interventions these Rules shall take place in Nairobi unless the Chief Justice to be heard otherwise directs.

#### **36. Decree absolute**

(1) An application by a spouse to make absolute a decree *nisi* pronounced in his favour shall be made by lodging with the registrar a notice of application in

form 12 in the Appendix on any day after the expiration of the period prescribed for making the decree absolute; and if the registrar, after searching the proper books of the Divorce Registry, is satisfied—

- (a) that no appeal against the decree is pending; and
- (b) that no appearance has been entered, or, if appearance has been entered, that no affidavits have been filed within the time allowed for filing, by or on behalf of any person wishing to show cause against the decree being made absolute,

the notice shall be filed:

Provided that, if the application is made after the expiration of one year from the date of the decree *nisi*, there shall be lodged with the notice an affidavit by the applicant accounting for the delay, and the notice shall not be filed without leave.

(2) Upon filing of the said notice the decree *nisi* shall become absolute.

(3) An application by a spouse to make absolute a decree *nisi* pronounced against him shall be made to the registrar on not less than four days' notice, and shall be accompanied by an application on form 14 in the Appendix; and on any such application the Registrar may make such order as he thinks fit, or may refer the application to a judge.

(4) A certificate in form 13 or form 14 in the Appendix, whichever is appropriate, that the decree has been made absolute shall be prepared and filed by the registrar; the certificate shall be authenticated by affixing thereto the seal of the registry.

### **37. Reversal of decree judicial of separation**

(1) A petition to the court for the reversal of a decree of judicial separation shall set out particulars of the decree the reversal of which is being prayed and the grounds on which the petitioner relies.

(2) No such petition shall be filed unless an appearance has been entered in the cause in which the decree has been pronounced by the party praying for a reversal of the decree; if no such appearance has been entered before the pronouncement of the decree leave to enter an appearance shall be obtained.

(3) A certified copy of the petition shall be personally served upon the party in the cause in whose favour the decree has been made, who may within fourteen days after service file an answer thereto.

(4) A copy of the answer shall be delivered to the other party in the cause or to his advocate within eight days after the answer is filed.

(5) All subsequent pleadings and proceedings arising out of such petition and answer shall be filed and carried on in the same manner as is by these Rules directed in respect of the original petition and answer thereto, so far as such directions are applicable.

### **38. Alimony pending suit**

A wife petitioner who has not included in her petition a prayer for alimony pending suit may make an application for alimony pending suit at any time after filing the petition, and a respondent wife or a respondent husband against whom

a petition for divorce or judicial separation is presented on the ground of his insanity may make an application for alimony pending suit at any time after entering appearance to a petition.

### **39. Maintenance of children**

A petitioner at any time after service of a petition in which custody of any children of the marriage is claimed and the respondent to any such petition, after entering an appearance to the petition, or any person who has obtained leave to intervene in the suit for the purpose of applying for custody, or who has the custody or control of such children under an order of the court after entering an appearance to the petition for this purpose may make an application for maintenance of the children.

### **40. Maintenance, secured provision, variation of marriage settlements, settlement of wife's property**

(1) An application for maintenance, a secured provision variation of marriage settlements, or settlement of a wife's property, in the case of proceedings for divorce, may be made by the petitioner at any time after the time for entering an appearance to the petition has expired, and by a respondent spouse at any time after entering an appearance to the petition, but no application shall be made later than one month after final decree except by leave of a judge.

(2) An application for settlement of a wife's property, in the case of proceedings for judicial separation or for restitution of conjugal rights, may be made at any time after the pronouncement of the decree.

(3) Upon an application for variation of marriage settlements, settlement of a wife's property or a secured provision, the judge shall, unless he is satisfied that the proposed variation does not adversely affect the rights or interests of any children of the marriage or that the settlement or secured provision makes adequate provision for any children of the marriage, direct that the children be separately represented on the application by an advocate, and may assign a guardian *ad litem* by whom any infant children may appear upon the application; and an affidavit of fitness of the proposed guardian, in form 15 in the Appendix, shall be filed.

### **41. Permanent alimony**

An application for the allotment of permanent alimony may be made at any time after the pronouncement of a decree for restitution of conjugal rights or for judicial separation, as the case may be.

### **42. Periodical payments**

An application for periodical payments or securing periodical payments to a wife may be made at any time after non-compliance with a decree for restitution of conjugal rights, but, where the application is one for the benefit of children of the marriage and is made by a person who has obtained leave to intervene in the suit for the purpose of applying for custody or has the custody or control of such children under an order of the court, such person shall first enter an appearance to the petition.

**43. Modification order**

A petitioner, or a respondent if he has entered an appearance to the petition, may at any time apply for a modification order.

**44. Evidence on applications for alimony, etc.**

(1) Where a husband is served with a petition in which alimony pending suit is claimed, he shall within fourteen days after entering an appearance file an affidavit setting out full particulars of his property and income.

(2) Where a husband is served with a notice of an application for alimony pending suit, permanent alimony, maintenance, maintenance of the children, a secured provision, periodical payments or securing periodical payments to a wife, he shall, within fourteen days after service of the notice upon him or, if he has not at the time of such service entered an appearance, within fourteen days after entering an appearance, file an affidavit setting out full particulars of his property and income, unless in the case of any such application other than an application for alimony pending suit the wife at the time of service of the application therefor gives notice to him or to his advocate of her intention to proceed with the application upon the evidence already filed on her application for alimony pending suit.

(3) Where a wife is served with a notice of an application for alimony pending suit, a permanent alimony, maintenance, a secured provision or periodical payments, the provisions of paragraph (2) of this rule shall apply to the filing of an affidavit by the wife setting out full particulars of her property and income as they apply to the filing of an affidavit by the husband as to his property and income.

**45. Evidence in support of application for variation of settlement, etc.**

(1) An application for variation of marriage settlements, or settlement of a wife's property, shall state the nature of the variation or settlement proposed, and shall, unless otherwise directed, be supported by an affidavit of the petitioner stating the facts relied on, and, in the case of an application for variation of marriage settlements, such affidavit shall set forth full particulars of the marriage, any children of the marriage, all settlements whether ante-nuptial or post-nuptial and the funds brought into the settlements by the husband and wife, and, in the case of an application for settlement of the wife's property, full particulars of the property to which she is entitled either in possession or reversion.

(2) The application shall, in addition to being served on the respondent, be served on the trustees of any settlements and upon such other persons as the judge may direct, and any party so served may, within fourteen days after such service and after entering an appearance, file an affidavit in answer.

**46. Further evidence on applications for alimony, etc.**

If in an affidavit filed under rule 44 or rule 45 of these Rules the husband alleges that the wife has property or income, she may, within fourteen days after delivery of the husband's affidavit to her or her advocate, file an affidavit in reply to that allegation, but no further evidence shall be filed by any party without leave.

**47. Evidence on application for modification order**

(1) An application for a modification order shall be supported by an affidavit of the applicant giving full particulars of his property and income and the grounds on which the application is made.

(2) The respondent to the application may, within fourteen days after delivery of the affidavit to him or to his advocate, and, unless he is the petitioner in the cause after entering an appearance, file an affidavit in reply, but no further evidence shall be filed by any party without leave.

**48. Preliminary investigation by judge**

On an application for ancillary relief, the registrar shall fix an appointment for the hearing of the application, and notice thereof shall be given by the applicant to every other party to the application who has entered an appearance, and at the appointment so fixed the judge shall in the presence of the parties or their advocates investigate the allegations made in support of and in answer to the application, and may order the attendance of the spouses and any other person for the purpose of being examined or cross-examined, or may take the oral evidence of witnesses, and at any stage of the proceedings may order the discovery and production of any document or call for further affidavits.

**49. Applications heard by judge**

In the case of a claim for alimony pending suit contained in a petition or of an application for ancillary relief including an application for settlement of the wife's property or variation of marriage settlements where there are children of the marriage, the judge shall, after conducting his investigation under rule 48 of these Rules, make such order as he thinks fit.

**50. Custody of and access to children**

(1) When custody of any children of the marriage is claimed in any petition, the petitioner or the respondent spouse or guardian or any person who has obtained leave to intervene in the suit for the purpose of applying for custody or who has the custody or control of such children under an order of the court, after entering an appearance to the petition for this purpose, may apply at any time either before or after final decree to a judge for an order relating to the custody, or education of such children or for directions that proper proceedings be taken for placing such children under the protection of the court.

(2) A petitioner may at any time after filing a petition in a matrimonial cause, and a respondent may at any time after entering an appearance, apply for access to any children of the marriage, but an application for access by the spouse against whom a decree, whether *nisi*, final or absolute, has been pronounced shall be made to the judge, unless the other party consents to give access to the children and the only question for determination on the application is the extent to which access shall be given.

**51. Injunction restraining removal of children**

At any time after filing a petition in a matrimonial cause, and notwithstanding that the petition has not been served, the petitioner may apply *ex parte* to a judge for an injunction restraining the respondent or any other person from removing

any child the marriage of whose parents is the subject of the proceedings out of the jurisdiction of the court or out of the custody, care or control of any person named in the application.

#### **52. Separate representation of children**

If, in any proceedings to which these Rules apply, it appears to the court that any child ought to be separately represented, the court may, on the application of the Attorney-General or some other proper person, make an order assigning a guardian *ad litem* of the child and authorizing him to enter an appearance and intervene on the child's behalf; and any proposed guardian, other than a public officer, shall file an affidavit of fitness in accordance with form 13 in the Appendix.

#### **53. Information as to other proceedings relating to children**

On any application under these Rules relating to any children of the marriage, the applicant shall file a statement as to whether any, and if so what, proceedings relating to any of those children are in progress in the court.

#### **54. Proceedings in chambers**

The name of the cause or matter and of the person taking out a summons shall be endorsed thereon, and a copy of the summons shall be served on the party to whom the summons is addressed or on his advocate one clear day at least before the summons is returnable.

#### **55. Hearing of summons**

(1) On the day and at the hour named in the summons, the party taking out the same shall attend with the original summons at the place appointed for hearing.

(2) If any party to the summons does not appear after the lapse of a reasonable time after the time appointed in the summons, the judge may proceed in his absence upon being satisfied by affidavit or otherwise that any party not in attendance had due notice of the time appointed.

#### **56. Subpoenas**

Subpoenas in any cause or matter to which these Rules relate may issue out of the Divorce Registry at which cause or matter is to be heard.

#### **57. Appeals**

Any party may appeal from an order or decision of the registrar to a judge in chambers by summons issued within seven days of the order or decision complained of, but the appeal shall not, unless otherwise ordered, act as a stay of such order or decision.

#### **58. Attachment and committal**

An application for attachment or committal shall be made to a judge, and any person attached or committed may apply to a judge for his discharge.

#### **59. Enforcement of orders**

(1) In default of payment to any person of any sum of money at the time appointed for the payment thereof, an application may be made to a judge in

chambers supported by affidavit (of service of the order and of non-payment), and the judge may make such order as to attachment of the person or of the property of the person so failing to pay as in the circumstances may seem expedient.

(2) A decree requiring a person to do an act thereby ordered, shall state the time within which the act is to be done, and the copy to be served upon the person required to obey the same, shall be endorsed with a notice in form 16 in the Appendix.

(3) Where a party who has been ordered to lodge damages in court fails to do so in accordance with the order, the party in whose favour the order was made may apply to the judge at any time to vary the order by directing the payment of such damages to an individual to be specified in the application, and the judge, if satisfied that in the circumstances it is just and equitable to do so, may vary the order for lodgement of damages accordingly upon an undertaking by that individual to lodge the same in court or otherwise deal with the same as and when received as the Judge may direct:

Provided that if the application is made after decree absolute the judge may, if satisfied as aforesaid, dispense with the undertaking.

(4) Where a party who has been ordered to pay costs into court fails to do so in accordance with the order, the party in whose favour the order was made may apply to a judge to vary the said order by directing payment to an individual to be specified in the application, and the judge, if satisfied that in the circumstances it is just and equitable to do so, may vary the order accordingly:

Provided that, if the application is made before decree absolute, the order shall only be made upon the individual undertaking to pay the costs into court as and when received.

## **60. Motions**

(1) Unless a judge otherwise directs, four clear days' notice of any motion, other than an *ex parte* motion, to be made to the court shall be served on all parties who may be affected by the proposed order.

(2) A copy of the notice so served shall be filed in the Divorce Registry, and the affidavits to be used in support of the motion and original documents referred to therein or intended to be used at the hearing of the motion shall at the same time be lodged in the Divorce Registry; and copies of all such affidavits or documents shall be delivered upon request to the parties who are entitled to be heard upon the motion.

## **61. Infants and persons of sound mind**

(1) An infant or a person of unsound mind may commence and prosecute any cause to which these Rules relate by his next friend, and may defend or intervene in any such cause by his guardian appointed for that purpose.

(2) When in any such cause any document is required to be personally served and the person on whom service is to be effected is an infant, that document shall, unless otherwise directed, be served on the father or guardian of the infant or, if none, upon the person with whom the infant resides or under whose care he is, and service so effected shall be deemed good service on the infant:

Provided that the judge may order that service made or to be made on the infant shall be deemed good service.

(3) When in any such cause any document is required to be personally served and the person on whom service is to be effected is of unsound mind, that document shall, unless otherwise directed, be served upon the person with whom the person of unsound mind resides or under whose care he is, and service so effected shall be deemed good service upon the person of unsound mind.

(4) Any document served in accordance with paragraph (3) of this rule shall be endorsed with a notice that the contents or purport of the document shall be communicated to the person of unsound mind to whom it relates, unless the person on whom the document was served is satisfied, after consultation with the medical attendant of the person of unsound mind or the medical officer of the institution in which the person of unsound mind is, that the communication would be detrimental to the mental condition of the person of unsound mind, and, in a case where any order has been made under the Mental Treatment Act (Cap. 248) in respect of the person of unsound mind appointing a manager, with a further notice that the contents and purport of the document shall be communicated to the manager so appointed.

(5) After service of any document has been effected upon a person of unsound mind in accordance with paragraphs (3) and (4) of this rule, the party at whose instance the document was served shall, unless otherwise directed, file an affidavit made by the person with whom the person of unsound mind resides or under whose care he is, stating whether or not the contents or purport of the document were communicated to the person of unsound mind and, if not, giving the reasons why the contents or purport of the document were not so communicated.

(6) Before the name of any person is used in any proceedings as next friend, such person shall sign a written authority to the advocate for that purpose; and the authority shall be attested by an advocate, who shall certify that the proposed next friend has no interest in the proceedings adverse to that of the infant or of the person of unsound mind.

(7) No order for the appointment of a guardian under this rule shall be necessary, but the advocate seeking to enter appearance shall make and file an affidavit of fitness in accordance with form 13 in the Appendix.

(8) Where a petition, originating summons or answer has been served on a person who is an infant or a person of unsound mind, and no appearance has been entered in the cause or no application for leave to intervene has been made by or on behalf of the infant or person of unsound mind, the party at whose instance the petition, originating summons or answer was served shall, before proceeding further with the cause, apply for an order that some proper person be assigned guardian of the infant or person of unsound mind by whom he may appear and defend or intervene in the proceedings.

## **62. Paupers**

(1) Any person may be admitted to take or defend or be a party to any matrimonial proceedings under these rules *in forma pauperis*, subject to his or her satisfying the court that he or she is not in possession of sufficient means to



enable him or her to pay the fees hereinafter prescribed for such proceedings, and that he or she has reasonable grounds for taking or defending or being a party to such proceedings.

(2) The procedure on application for leave to take or defend or be a party to any matrimonial proceedings *in forma pauperis* and the steps subsequent thereto shall be governed by Order XXXII of the Civil Procedure (Revised) Rules, 1948, *mutatis mutandis*.

### **63. Entry of decree or order**

Every decree and order in a cause or matter to which these Rules relate proceeding in a District Registry shall be entered in the District Registry in a book provided for the purpose, and a certified copy of every decree so entered shall be transmitted by the district registrar to the registrar, and shall be filed by him.

### **64. Taxation**

(1) All bills of costs shall be referred to a registrar for taxation and may be taxed by him or such other taxing officer as the Chief Justice may appoint for the taxation of bills.

(2) Such bills shall be filed, and notice of the time appointed for taxation shall be given to the party filing the bill at the address furnished by him, and he shall give the other parties to be heard on the taxation at least three clear days' notice of the appointment, and shall at the same time or previously deliver to them a copy of the bill to be taxed.

### **65. Taxation in absence of party**

When any party to be heard on the taxation does not attend at the time appointed, the registrar or taxing officer may nevertheless proceed to tax the bill after the expiration of a quarter of an hour, upon being satisfied by affidavit or otherwise that any party not in attendance had due notice of the time appointed.

### **66. Taxation as between advocate and client**

The bill of costs of an advocate shall be taxed on his request as against his client after sufficient notice given to the person or persons liable for the payment thereof, or on the request of such person after sufficient notice given to the advocate.

### **67. Basis of advocates' costs**

In matrimonial causes and matters to which these Rules relate the remuneration of advocates, the taxation thereof and the taxation of costs as between party and party shall, subject to the provisions of these Rules, be in accordance with the provisions of the Remuneration of Advocates Order (Cap. 16, Sub. Leg.), so far as the same may be applicable thereto.

### **68. Taxing fees**

The fees payable on the taxation of any bill of costs shall be paid by the party on whose application the bill is taxed, and shall be allowed as part of such bill.

**69. Certificate of taxation**

(1) Upon the registrar's certificate as to costs being signed, an order of the court for payment of the amount within seven days, or such other time as the registrar shall direct, may issue.

(2) An order for payment of costs contained in a decree *nisi*, if drawn up before the decree *nisi* is made absolute, shall direct payment into court, and such costs shall not be paid out of court to the party entitled to receive them under the decree *nisi* until that decree has been made absolute; but a wife who is unsuccessful in a cause, and who at the hearing of the cause has obtained an order of the judge for costs, may nevertheless proceed at once to obtain payment of such costs after allowance thereof on taxation.

**70. Security for wife's costs**

(1) A wife who is petitioner or who has entered an appearance to a petition may at the hearing of an application for a commission or for letters of request or for the appointment of a special examiner to examine a party or witness who is outside the jurisdiction of the court ask for security for her costs of and incidental to such examination or may apply for such security at any time after such an examination is granted, and the registrar, after ascertaining what is a sufficient sum of money to cover the costs of the wife of and incidental to the examination, may, unless the husband proves that the wife has sufficient separate estate or shows other good cause, order the husband to pay into court or to secure the costs of and incidental to the examination within such time as he may fix.

(2) A wife who is petitioner or who has filed an answer may, after the registrar's certificate that the pleadings are in order has been given or at an earlier stage of a cause with leave, file her bill of costs for taxation as against her husband and ask for security for her costs of and incidental to the hearing of the cause:

Provided that a wife who is a poor person may not file her bill of costs for taxation without leave.

(3) The registrar or taxing officer to whom such bill of costs is referred for taxation shall ascertain what is a sufficient sum of money to cover the costs of the wife of and incidental to the hearing of the cause, and may, unless the husband proves that the wife has sufficient separate estate or shows other good cause, order the husband to pay to the wife or into court her costs up to the setting down of the cause and to pay into court or secure the costs of and incidental to the hearing within such time as he may fix. and may direct a stay of the proceedings until the order is complied with.

(4) The bond taken to secure the costs of a wife of and incidental to such an examination or to the hearing of a cause shall be given to the registrar, and shall be filed, and shall not be delivered out or sued upon without leave.

**71. Payment of money out of court**

Persons entitled to payment of money out of court on applying for the same shall lodge in the Divorce Registry duplicate forms in writing setting forth the date

on which the money applied for was paid into court, the amount applied for and the name and address of the person to receive the same.

72. *Revoked by L.N. 121/1975*

APPENDIX

FORM 1

(r. 2(1))

[L.N. 304/1960.]

ORIGINATING SUMMONS

IN THE HIGH COURT OF KENYA

*In the Matter of a Proposed Petition by A.B. for the Dissolution of His (or Her) Marriage with C.D.*

LET ..... of ..... in the Province of ..... within eight days<sup>(1)</sup> after service of this summons inclusive of the day of such service upon him (or her) cause an appearance to be entered for him (or her) to this summons, which is issued upon the application of ..... for an order that the said ..... may be at liberty to file a petition in the Divorce Registry at ..... for dissolution of his (or her) marriage with the said ..... solemnized on the ..... day of ....., 20 ....., notwithstanding that three years have not passed since the date of the said marriage.

Dated this ..... day of ....., 20 ..... THIS SUMMONS was taken out by ..... advocate for the above-named.

The said C.D. may appear herein by entering an appearance either in person or by an advocate at the Divorce Registry at .....

*Note.*—If the said C.D. does not enter an appearance within the time and at the place above-mentioned, such order will be made and proceedings may be taken as the judge may think just and expedient.

- 1. Or as the case may be.

FORM 2

(r. 3(2))

[L.N. 304/1960.]

NOTICE OF AN APPLICATION FOR ANCILLARY RELIEF

In the Supreme Court of Kenya at ..... IN THE MATTER OF A PETITION BY .....for (*here set out particulars of the matrimonial cause in which the application is made*).

APPENDIX, FORM 2—continued

To ..... of .....

TAKE NOTICE that the petitioner (respondent) intends to apply to the Court for an order that (*here set out the ancillary relief claimed*).<sup>(1)</sup>

THIS NOTICE is issued by<sup>(2)</sup> ..... of .....

Dated the ..... day of ....., 20 .....

<sup>(1)</sup>. Insert here in appropriate cases the contents of form 6 and/or 7.

<sup>(2)</sup>. State name and address of applicant or advocate.

FORM 3

(r. 7(1) and r. 14(6))

NOTICE TO APPEAR TO BE ENDORSED ON A PETITION

In the High Court of Kenya at .....

To ..... of .....

TAKE NOTICE that you are required, within eight days <sup>(1)</sup> after service hereof upon you, inclusive of the day of such service, to enter an appearance either in person or by your advocate at the Divorce Registry at ....., should you think fit so to do, and thereafter to make answer to this petition<sup>(2)</sup>, and that, in default of your so doing, the Court will proceed to hear the petition<sup>(2)</sup> and pronounce judgment, your absence notwithstanding.

(If the petition includes a claim for alimony pending suit here insert the contents of form 4.)

The petition<sup>(3)</sup> is filed and this notice is issued by<sup>(4)</sup>.

Dated at the ..... day of ....., 20 .....

.....

Registrar

Note.—Any person entering an appearance must at the same time furnish an address for service.

- 1. Or as the case may be.
- 2. Or answer.
- 3. Or answer.
- 4. State name and address of petitioner or advocate.

FORM 4

(r. 7(1))

ADDITIONAL NOTICES TO BE INCLUDED IN A NOTICE TO APPEAR (FORM 3) WHERE THE PETITION CONTAINS A CLAIM FOR ALIMONY PENDING SUIT

AND FURTHER TAKE NOTICE that, should you not desire to be heard on this petition in regard to any relief claimed other than the claim for alimony pending suit, you are at liberty within eight days<sup>(1)</sup> after service hereof upon you, inclusive of the date of such service, to enter an appearance in manner aforesaid to the

APPENDIX, FORM 4—continued

said petition limited to that claim, and that in default of your so doing the Court will proceed to hear and determine such claim, and may order payment of alimony pending suit, your absence notwithstanding;

AND FURTHER TAKE NOTICE that in the event of your entering an appearance to the said petition either generally or limited to the claim for alimony pending suit, you are required within fourteen days thereafter to file in the Divorce Registry an affidavit in pursuance of rule 44 of the Matrimonial Causes Rules, giving full particulars of your property and income.

- 1. Or as the case may be.

**FORM 5**

**(r. 7(2))**

NOTICE TO APPEAR TO BE CONTAINED IN A NOTICE OF AN APPLICATION FOR ANCILLARY RELIEF WHERE NO APPEARANCE HAS BEEN ENTERED TO THE PETITION

AND FURTHER TAKE NOTICE that should you the said ..... desire to be heard on the said application you are at liberty within eight days<sup>(1)</sup> after service hereof upon you inclusive of the day of such service to enter an appearance to the said petition limited to the subject matter of the said application either in person or by your advocate at the Divorce Registry at ..... , and that in default of your so doing the Court may proceed to hear the said application and make such order thereon as it may think fit, your absence notwithstanding.

Note.—If you enter an appearance you must at the same time furnish an address for service.

- 1. Or as the case may be.

**FORM 6**

**(r. 7(3))**

NOTICE TO FILE EVIDENCE TO BE CONTAINED IN A NOTICE OF AN APPLICATION FOR ALIMONY PENDING SUIT, PERMANENT ALIMONY, MAINTENANCE, MAINTENANCE OF CHILDREN, A SECURED PROVISION, PERIODICAL PAYMENTS OR SECURING PERIODICAL PAYMENTS TO A WIFE

AND FURTHER TAKE NOTICE that unless at the time of the service hereof upon you the applicant or her advocate gives notice to you dispensing with this requirement you are required within fourteen days after ((<sup>1</sup>) such service) ((<sup>2</sup>) entering an appearance) to file in the Divorce Registry ((<sup>3</sup>) of the Supreme Court of Kenya) an affidavit in pursuance of rule 44 of the Matrimonial Causes Rules, giving full particulars of your property and income.

- 1. If contents of Form are omitted.
- 2. If contents of Form 6 are included.
- 3. Omit if contents of Form 6 are included.

APPENDIX—continued

FORM 7

(r. 10)

AFFIDAVIT OF SERVICE

In the High Court of Kenya at .....

Between ..... *Petitioner*

and

..... *Respondent*

and

..... *Co-respondent*

I ..... of ..... make oath and say—

1. That a certified copy of the (1) bearing ..... date the ..... day of ....., 20 ....., filed in this Court(issued out of the Divorce Registry)was duly served by me on the said ..... at on the day of ..... 20 ....., by delivering to the said personally a certified copy thereof.

(Means of knowledge of identity of the person served must be inserted here.)

SWORN, etc.

1. Petition, originating summons or notice.

FORM 8

(r. 2(3) and r. 10)

ACKNOWLEDGEMENT OF SERVICE

In the High Court of Kenya at .....

Between ..... *Petitioner*

and

..... *Respondent*

and

..... *Co-respondent*

I am the person named as ..... in the Petition (1).

I received on the ..... day of ....., 20 ..... at ..... (place of receipt).

- 1. A copy of the petition (1) filed in this case.
- 2. Notice of petition/proceedings (2).
- 3. Memorandum of appearance in duplicate (3).

.....  
(Signed)

Date: .....

APPENDIX, FORM 8—continued

To: (the Petitioner or the Respondent or his Advocate)

- 1. Or as the case may be.
- 2. Delete whichever is not applicable.
- 3. Delete if not applicable.

FORM 9

(r. 12(1))

MEMORANDUM OF APPEARANCE

In the High Court of Kenya at .....

Between ..... *Petitioner*

and

..... *Respondent*

and

..... *Co-respondent*<sup>(1)</sup>

Enter an appearance (in person) <sup>(2)</sup> for .....  
the respondent <sup>(3)</sup> in this cause (generally)] (limited to the claim made in the  
petition for alimony pending suit) (limited to the claim for ..... made  
by notice dated the ..... day of ....., 20 .....

.....  
(Signed)

of .....  
whose address for service is .....  
agent for ..... of .....

- 1. In appropriate cases.
- 2. If such is the case.
- 3. Or as the case may be.

FORM 10

(r. 12(2))

NOTICE OF APPEARANCE

In the High Court of Kenya at .....

Between ..... *Petitioner*

and

..... *Respondent*

and

..... *Co-respondent* <sup>(1)</sup>

To: *the petitioner* <sup>(2)</sup> or his or her Advocate

APPENDIX, FORM 10—continued

TAKE NOTICE that appearance has been entered in this cause for the respondent <sup>(3)</sup> (name of person appearing) <sup>(4)</sup>

Dated the ..... day of ....., 20 .....

(Signed)

of .....

whose address for service is .....

agent for ..... of .....

- 1. Or as the case may be.
- 2. Or as the case may be.
- 3. Or as the case may be.
- 4. State whether the appearance is general or limited to any particular relief.

FORM 11

(r. 14(6))

NOTICE TO A PERSON ENTITLED TO INTERVENE

In the High Court of Kenya at .....

To ..... of .....

TAKE NOTICE that you are entitled within eight days <sup>(1)</sup> after service hereof upon you, inclusive of the day of such service, to apply upon summons for leave to enter an appearance either in person or by your advocate at the Divorce Registry at ....., and to intervene in this cause, should you think fit so to do, and thereafter to make answer to the charges in this petition, <sup>(2)</sup> and that, in default of your so doing, the Court will proceed to hear the said charges proved and pronounce judgment, your absence notwithstanding.

The petition <sup>(3)</sup> is filed and this notice is issued by <sup>(4)</sup> ..... of .....

Dated at the ..... day of ....., 20 .....

Registrar

Note.—Any person entering an appearance must at the same time furnish an address for service.

- 1. Or as the case may be.
- 2. Or answer.
- 3. Or answer.
- 4. State name and address of petitioner or advocate.



APPENDIX—continued

FORM 12

(r. 36)

NOTICE OF APPLICATION FOR DECREE *NISI* TO BE MADE ABSOLUTE

In the High Court of Kenya at .....

Between ..... *Petitioner*

and

..... *Respondent*

and

..... *Co-respondent*

I ..... of .....  
the advocate for [a member of the firm of X.Y. and Co., advocates for] the  
petitioner (<sup>1</sup>), give notice that application is hereby made on behalf of the  
petitioner (<sup>1</sup>) that the decree *nisi* pronounced in this cause on the .....  
day of ....., 20 ....., be made absolute.

Dated the ..... day of ....., 20 .....

.....  
*Advocate for the Applicant.*

1. Or respondent.

FORM 13

(r. 36(4))

CERTIFICATE OF MAKING DECREE *NISI* ABSOLUTE (NULLITY)

In the High Court of Kenya at .....

Between ..... *Petitioner*

and

..... *Respondent*

Referring to the decree made in this cause on the .....  
day of ....., 20 ....., whereby it was ordered that the marriage in fact  
had and solemnised on the ..... day of .....,  
20 ....., at ..... between ..... the petitioner and  
..... the respondent be pronounced and declared to have been and  
to be absolutely null and void to all intents and purposes in the law whatsoever  
by reason ..... and the said petitioner be pronounced to have  
been and to be free of all bond of marriage with the said respondent .....  
..... unless sufficient cause be shown to the court  
within ..... from the making thereof why the said  
decree should not be made absolute and no such cause having been shown. It  
is hereby certified that the said decree was on this .....  
day of ....., 20 ....., made final and absolute and that the  
said marriage was absolutely null and void and that the said petitioner was and  
is free from all bond of marriage with the said respondent.

APPENDIX—continued

FORM 14

(r. 36(4))

CERTIFICATE OF MAKING DECREE N/ISI ABSOLUTE (DIVORCE)

In the High Court of Kenya at .....
Between ..... Petitioner
and
..... Respondent
and
..... Co-respondent

Referring to the decree made in this cause on the ..... day
of ....., 20 ....., whereby it was decreed that the marriage had and
solemnized on the ..... day of ....., 20 .....,
at ..... between ..... the petitioner and
..... the respondent be dissolved by reason that unless sufficient
cause be shown to the court within ..... from the making thereof why
the said decree should not be made absolute and no such cause having been
shown. It is hereby certified that the said decree was on this day of .....,
..... 20 ....., made final and absolute and that the said
marriage was thereby dissolved.

FORM 15

(r. 40)

AFFIDAVIT OF FITNESS OF GUARDIAN AD LITEM

In the High Court of Kenya at .....
Between ..... Petitioner
and
..... Respondent
and
..... Co-respondent

I ..... of .....
the advocate for (a member of the firm of X.Y. and Co., advocates for) the
above-named (respondent) (co-respondent) C.D., a .....,
make oath and say as follows—

- (1) [I am informed and verily believe that] A.B. of .....
is a fit and proper person to act as guardian ad litem of the above-named
(respondent) (co-respondent), and the consent of the said A.B. to act as
such guardian is hereto annexed.
(2) The said A.B. has no interest in the matters in question in this cause
adverse to that of the said
SWORN, etc.

APPENDIX—continued

**FORM 16**

**(r. 59(2))**

NOTICE TO BE ENDORSED ON A DECREE OR ORDER

TAKE NOTICE that if you the within-named A.B. neglect to obey this decree (order) within the time therein limited you will be liable to process of execution for the purpose of compelling you to obey the same.

Advocate for the .....

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**CHAPTER 152**

**MATRIMONIAL CAUSES ACT**

SUBSIDIARY LEGISLATION

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*List of Subsidiary Legislation*

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1. Matrimonial Causes (Decree Absolute) Order, 1967 .....	55



Order under section 15(1)

**MATRIMONIAL CAUSES (DECREE ABSOLUTE) ORDER, 1967**

[L.N. 409/1957.]

1. This Order may be cited as the Matrimonial Causes (Decree Absolute) Order, 1967.
  2. Unless the court by special order fixes a shorter or longer time (not exceeding six months in any case), a decree *nisi* may be made absolute after the expiration of three months after the pronouncing of the decree.
  3. The Divorce (Decree Absolute) General Order is revoked.
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