

SPECIAL ISSUE

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THE MARRIAGE (AMENDMENT) BILL, 2023

A Bill for

AN ACT of Parliament to amend the Marriage Act, 2014 to provide for the dissolution of marriage by mutual consent and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

1. This Act may be cited as the Marriage (Amendment) Act, 2023.

Short title.

2. Section 2 of Marriage Act, 2014 (in this Act referred to as “the principal Act”) is amended by inserting the following new definition in the proper alphabetical sequence—

Amendment of section 2 of No. 4 of 2014.

“mutual separation” means the agreement by the spouses to live separately as husband and wife whether they live under the same roof or not.

3. The principal Act is amended by inserting the following new section immediately after section 75—

Insertion of a new section 75A in No. 4 of 2014.

Divorce by mutual consent.

75A (1) The parties to a marriage celebrated under Part III, IV, V and VI may jointly petition the court for a decree of divorce by mutual consent on the ground that—

- (a) the marriage has irretrievably broken down;
- (b) the parties have mutually separated for at least one year immediately preceding the date of presentation of the petition; and
- (c) the parties have mutually agreed to dissolve the marriage.

(2) The court may grant a decree of divorce by mutual consent under subsection (1) if—

- (a) the petition is made after at least one year of the celebration of the marriage;
- (b) the parties jointly present the petition;

(c) both parties freely give consent to the divorce in writing; and

(d) both parties are present in person at the hearing of the petition.

(3) Upon satisfaction of the court that the averments made in the petition are true, the court shall grant a decree of divorce.

(4) Any party to the petition may, by filing a notice of motion, withdraw the petition any time before a decree of divorce is granted.

(5) The court may, on application of a party, nullify a decree of divorce granted under subsection (1) on the grounds that the consent was obtained by—

(a) coercion;

(b) fraud; or

(c) undue influence.

(6) The innocent party is entitled to damages where the court nullifies a decree of divorce under subsection (5).

(7) Parties to a marriage dissolved under this section shall be deemed to have been divorced with effect from the date of the decree absolute granted by the court.

(8) The Rules Committee established under the provisions of the Civil Procedure Act may make rules regulating any matter of practice or procedure under this section.

MEMORANDUM OF OBJECTS AND REASONS

Statement of the Objects and Reasons for the Bill

The principal objective of this Bill is to amend the provisions of the Marriage Act, 2014 to provide for divorce by mutual consent.

Divorce in Kenya has always been and is still fault-based meaning that a person will only get a divorce when they prove a matrimonial fault on the part of their spouse. This means that divorce proceedings have been acrimonious, lengthy, tedious and expensive due to the time taken to prove such faults in court. Owing to the significant amount of time taken to finalize divorce proceedings, spouses whose marriages have broken down are forced to continue staying in unhappy marriages even though it may not be in their best interest. This Bill seeks to remedy such situations by allowing spouses to mutually agree to divorce. This will enable spouses to part ways in an amicable, simple and cost effective manner in terms of time and resources.

The Bill also ensures that consent to divorce by mutual consent is rightly obtained without coercion, fraud or undue influence and provides recourse where this does not happen.

Statement on the delegation of legislative powers and limitation of fundamental rights and freedoms

The Bill delegates legislative powers to the Rules Committee established under the provisions of the Civil Procedure Act (Cap. 21) but it does not limit fundamental rights and freedoms.

Statement on whether the Bill concerns County Governments

The Bill does not concern county governments in terms of Article 110(1)(a) of the Constitution.

Statement that the Bill is not a money Bill within the meaning of Article 114 of the Constitution

This Bill is not a money Bill within the meaning of Article 114 of the Constitution.

Dated the 14th June, 2023.

PETER FRANCIS MASARA,
Member of Parliament.

Section 2 of No. 4 of 2014 which it is proposed to amend —

2. Interpretation

In this Act, unless the context otherwise requires—

"child" means an individual who has not attained the age of eighteen years;

"cohabit" means to live in an arrangement in which an unmarried couple lives together in a long-term relationship that resembles a marriage;

"conciliatory body" means—

- (a) a body established under this Act for the purpose of reconciling parties to a marriage;
- (b) a mechanism of conciliation recognised under customary or Islamic law;
- (c) any other body designated as such by the Cabinet Secretary by notice in the *Gazette*; or
- (d) any other body established by any written law;

"court" means a resident magistrate's court established under section 3 of the Magistrates' Courts Act (Cap. 10);

"dowry" means any token of stock, goods, moneys or other property given or promised in consideration of an intended marriage;

"faith" means an association of a religious nature and, in the case of any system of religious beliefs which is divided into denominations, sects or schools, any such denomination, sect or school;

"Hindu" means a person who is—

- (a) a Hindu by religion in any form (including a *Virashaiva*, a *Lingayat* and a follower of the *Brahmo*, *Prarthana* or *Arya Samaj*);
- (b) a Buddhist of Indian origin; or
- (c) a Jain or a Sikh by religion;

"matrimonial proceedings" means proceedings instituted under Part IX and include proceedings for the payment of maintenance or for custody of children instituted independently of a petition for a declaratory decree or for annulment, separation or divorce;

"monogamous marriage" means a marriage whose character has been converted to a monogamous marriage by a declaration made under section

8, including an originally polygamous or potentially polygamous marriage;

"party", in relation to a marriage, an intended marriage or a purported marriage, means a spouse in a marriage, or the intended spouse to a marriage or purported spouse in a marriage;

"polygamy" means the state or practice of a man having more than one wife simultaneously;

"prohibited marriage relationship" has the meaning assigned to it in section 10;

"Registrar" means a person appointed under section 50 of this Act;

"spouse" means a husband or a wife; and

"witness" means to be present at, to observe, and to attest to the celebration of a marriage by signing ones name to or putting ones mark on a marriage certificate.

Section 75 of No. 4 of 2014 which it is proposed to amend —

75. Effect of a decree of annulment

The parties to a marriage which has been annulled by decree absolute of the court shall be deemed never to have been married but a decree of annulment shall not—

- (a) render lawful anything which was done unlawfully during the marriage or render unlawful anything which was done lawfully during the marriage; or
- (b) affect the competence of either of the parties as a witness in respect of anything done or omitted to be done, or any privilege in respect of communications between them, during the—
 - (i) marriage; or
 - (ii) relieve either party of any debt properly incurred on behalf of the other during the marriage.

