

A. F. GROSS

ADVOCATE

Barrister-at-Law | Chartered Arbitrator | Accredited Mediator | Notary Public | Commissioner for Oaths | Certified Secretary 'CS'

Associates:

Samuel Njuguna
Carla Mwalabu
Irene Otieno

Solicitor:

Casimir Gross

Dear Ms. [REDACTED]

RE: Kenyan Family Law – Legal Opinion

We write further to your emails of instruction in relation to a Kenyan Law opinion for Mrs. [REDACTED]

Your questions were in relation to the 21st century justice modernization law introduced in France to allow for divorce through mutual consent, without legal process. Pursuant to this new law, and as we understand it, in France spouses assisted by lawyers are able record an agreement dealing with all aspects of a divorce. Once the Agreement is registered by a French Notary, the divorce may in turn be registered on the marriage license.

You asked once this divorce is made final in France, is it possible to have it:

- (a) Domesticated in Kenya; or
- (b) If not, would it be possible to rely on the French Divorce to stop the Wife from asking for Divorce in Kenya.

RECOGNITION OF FOREIGN DIVORCE IN KENYA

While recognition of foreign divorce in Kenya is well-established, the recognition of the modernized law in France is a novel concept, which to our best knowledge and belief has not been attempted or considered by the Kenyan Courts at the time of writing.

Section 67 of our Marriage Act makes provision for recognition of foreign **decrees** issued by foreign courts in matrimonial proceedings whether or not the marriage was celebrated in Kenya. For these decrees to be recognized, the following conditions must be fulfilled:

- i. either party should be domiciled in the country where that foreign court has jurisdiction or either party should have been ordinarily resident in Kenya for at least two years immediately preceding the date of institution of proceedings; or
- ii. the decree of annulment, divorce or separation, should be effective in the country of domicile of the parties or either of them.

In order to understand the meaning of a **decree** and whether the divorce agreement in France would fall under this definition, we turn to our Civil Procedure Act ("CPA"). Section 2 of the CPA defines a decree to mean the formal expression of an adjudication which, so far as regards the court

When replying please quote our file number

Office: +254 733 539 008 / 722 597 470
Direct: +254 722 514 783
Fixed: +254 20 232 4620 / 240 3876
Email: info@afgross.com
Web: www.afgross.com

Nairobi: Elgeyo Marakwet Close, off Ngong Rd.
P.O. Box 57792 00200 City Square, Nairobi, Kenya
Dropping Zone: Membership #13, Embassy House,
Basement Floor, Rm 8, Harambee Avenue, Nairobi

Nanyuki: First Floor, Cedar Mall,
Nanyuki-Rumuruti Rd
Office: +254 718 901 052
VAT: 11053 **PIN:** A000126923G

expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final.

Kenya's Judicial pronouncements have in the past upheld foreign decrees dissolving marriages even where the grounds presented in that foreign jurisdiction are not found in Kenyan Law.

In **M N M v P N M [2016] eKLR**, one of the parties challenged the dissolution of the marriage by the Florida court which they argued was founded on a consent of the parties which was contrary to Kenyan law. The Kenyan courts upheld the Florida Court's dissolution of a marriage contracted in Kenya noting that:

"It was urged that the marriage had been dissolved by the Florida court on the basis of a consent, yet under Kenyan law marriage by consent is not recognized. With respect, I do not find force in that argument. The law of Kenya that the appellant cited, with respect to a consent to divorce, relates to statutory marriages. None has been cited to me which states that customary law marriage cannot be dissolved by consent. In any event a court in the USA, exercising jurisdiction under the US law, is not bound by the Kenyan law on the same matter. Needless to say that the appellant has not demonstrated that the US law similarly provides that divorce cannot be by consent.... I have not been persuaded that the Florida court had no jurisdiction to entertain the matter. Consequently, the order in question is an order of a court of competent jurisdiction. It is valid and binding, unless it is set aside, reversed or varied by the court which made it or by a higher court on appeal."

While this case implies that the Kenyan Court would consider registering the dissolution of a marriage even when the law or procedure is not recognized in Kenya, it does not go as far as confirming that the Kenyan Court would do so when the dissolution of the marriage is not by way of a **Court Decree**.

CONCLUSION

While one might be able to present the modernized French Law and notarized Divorce Agreement to the Kenyan Court, we are not able to say with certainty that the Kenyan Court would register or recognize the divorce.

The above provisions would suggest, and our opinion would agree, when one of the parties wishes to have the agreement of the parties dissolving the marriage recognized in Kenya, and in absence of anything to confirm the Kenyan Court would recognize the modernized law in France, the Agreement should be presented to a French Court for adoption as an order/decreed for purposes of satisfying section 67 of the Kenyan Marriage Act.

In the event that the Kenyan Court does not recognize the Divorce Agreement, and no foreign divorce is registered in Kenya, the Wife, provided she can prove domicile in Kenya and that the Kenyan Court has jurisdiction to hear a divorce, would entertain a filed Divorce petition.

Should anything be unclear, or should you have any further questions please do let us know.

Yours faithfully

A.F.Gross Advocates

Date: 28 July 2020

When replying please quote our file number

Office: +254 733 539 008 / 722 597 470
Direct: +254 722 514 783
Fixed: +254 20 232 4620 / 240 3876
Email: info@afgross.com
Web: www.afgross.com

Nairobi: Elgeyo Marakwet Close, off Ngong Rd.
P.O. Box 57792 00200 City Square, Nairobi, Kenya
Dropping Zone: Membership #13, Embassy House,
Basement Floor, Rm 8, Harambee Avenue, Nairobi

Nanyuki: First Floor, Cedar Mall,
Nanyuki-Rumuruti Rd
Office: +254 718 901 052
VAT: 11053 **PIN:** A000126923G