

THE MARRIAGE BILL, 2011

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THE MARRIAGE BILL, 2010

A Bill for

An Act of Parliament to amend and consolidate the various laws relating to marriage and divorce and for connected purpose.

ENACTED by the Parliament of Kenya as follows—

PART I—PRELIMINARY

Short title and commencement.

1. This Act may be cited as the Marriage Act, 2011 and shall come into operation on such date as the Minister may appoint and different dates may be appointed for different parts or provisions.

Interpretation.

2. (1) In this Act, unless the context otherwise requires—

“conciliatory body” means

- (a) a body, if any, set up by the appropriate authority of any specified faith for the purpose of the reconciliation of the parties to a marriage;
- (b) a council of local elders recognized as arbitrators under customary or Islamic law; or
- (c) any other body designated as such by the Minister by notice in the Gazette;

“child” means a person below the age of eighteen years;

“court” means a court having jurisdiction under section 57;

“dowry” means any payment of stock, goods, moneys or other property made 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

denominational body or other association of a religious nature;

“matrimonial home” means the building or part of a building in which the husband and wife ordinarily reside or formerly resided together, as the case may be;

“matrimonial proceedings” means proceedings instituted under Part VI and includes 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;

“minimum age for marriage” has the meaning assigned to it in section 8;

“minister of religion” means a minister, priest or other person who is empowered to celebrate marriages of a faith according to the rites of which marriages may be celebrated under the provisions of this Act;

“party”, in relation to a marriage, intended or purported marriage, means the husband or the wife of the intended or purported marriage;

“prohibited relationship” has the meaning assigned to it in section 9;

“registrar” means a person appointed as a registrar under this Act and includes an assistant registrar;

“specified faith” means a faith specified in a notice under section 21.

(2) A reference in this Act to a monogamous marriage includes a marriage, originally polygamous or potentially polygamous, the character of which has been converted to a monogamous marriage by declaration made under section 5, and a reference to a polygamous or potentially polygamous marriage shall be construed accordingly.

PART II—MARRIAGE

The Nature of Marriage

Meaning of marriage. **3.** (1) Marriage means the voluntary union of a man and a woman intended to last for their life time.

(2) Parties to a marriage are entitled to equal rights at the time of marriage, during the marriage and at the dissolution of the marriage.

- Kinds of marriages.
- 4.** (1) There may be contracted or celebrated in Kenya, two kinds of marriages, namely—
- (a) marriages that are monogamous;
 - (b) marriages that are polygamous or are intended by each party, at the time of marriage, to be potentially polygamous.
- (2) A marriage contracted in Kenya which is subsisting at the commencement of this Act shall—
- (a) if contracted in Islamic form (unless the parties were *Shia Imami Ismailis*) or in accordance with customary law in Kenya, be presumed to be polygamous or potentially polygamous; and
 - (b) in any other case, be presumed to be monogamous unless the contrary is proved.
- (3) Subject to section 5, a marriage contracted after the commencement of this Act in Kenya, or abroad by virtue of section 27, shall be of the kind of which it has been declared or recorded to be pursuant to section 16 (2) (f) or section 24.
- (4) For the avoidance of doubt, all marriages recognized under this Act shall have the same legal status.

- Conversion of marriage.
- 5.** (1) A marriage contracted in Kenya or abroad may be converted from being a potentially polygamous marriage to a monogamous marriage if the spouses declare that they both agree, of their own free will to such conversion.
- (2) No marriage may be converted in terms of subsection (1) unless at the time of the conversion the husband has only one wife.
- (3) A declaration under subsection (1) shall be made in the presence of a registrar and shall be recorded in writing and signed by each spouse.
- (4) A registrar before whom a declaration is made under subsection (2) shall forthwith transmit a copy thereof to the Chief Registrar.

Duration of marriage. **6.** A marriage, whether contracted in Kenya or elsewhere, shall for all purposes of the law of Kenya subsist until determined by—

- (a) the death of either party thereto; or
- (b) a decree declaring that the death of either party thereto is presumed; or
- (c) a decree of annulment; or
- (d) a decree of divorce; or
- (e) a divorce or annulment obtained in a foreign country and recognized in Kenya under the provisions of section 62 or 63

Presumption of marriage. **7.** Where it is proved that a man and woman having capacity to marry have lived together openly for at least two years in such circumstances as to have acquired the reputation of being husband and wife, there shall be a rebuttable presumption that they were duly married.

Restrictions on Marriage

Minimum age. **8.** No person shall marry while under the age of eighteen years.

Prohibited relationships. **9.** (1) No person shall marry—

- (a) his or her grandparent, parent, child, grandchild, sister, brother, great aunt, great uncle, aunt, uncle, niece, nephew, great niece or great nephew; or
- (b) the grandparent, parent, child or grandchild of his or her spouse or former spouse; or
- (c) the former spouse of his or her grandparent, parent, child or grandchild; or
- (d) a person whom he or she has adopted or by whom he or she has been adopted.

(2) For the purposes of this section, relationship of the half blood is as much impediment to marriage as relationship of the full blood.

(3) A person who, by this section is forbidden to marry shall be said to be within a

prohibited relationship.

- Subsisting marriages. **10** (1) Subject to section 5 this Act, no married man shall while married—
- (a) by a monogamous marriage contract another marriage; or
 - (b) by a polygamous or potentially polygamous marriage contract a marriage in any monogamous form.
- (2) No married woman shall, while her marriage subsists, contract another marriage.
- (3) Subject to this Act, a marriage shall not, after a decree of divorce or annulment relating thereto has been granted be an impediment to the subsequent marriage of either marriage of the parties thereto.

No marriage except of free will. **11.** No marriage shall be contracted except of the free will of each of the parties.

Void and Voidable Marriages

- Void marriages. **12.** (1) A purported contract of marriage is a nullity if at the time of the ceremony
- (a) either party thereto is below the minimum age for marriage; or
 - (b) the parties thereto are within the prohibited relationship' or
 - (c) either party is incompetent to marry by reason of a subsisting marriage; or
 - (d) by order made under section 19, the court has directed that the intended marriage is not to be contracted; or
 - (e) the consent thereto of either party has not been freely given; or
 - (f) either party is absent from the ceremony; or
 - (g) both parties knowingly and willfully permit a person who is not lawfully entitled to do so to officiate thereat;
 - (h) the marriage is expressed by the parties or either of them to be intended to last for any period other than their joint lives.
- (2) Without prejudice to the generality of paragraph (e) of subsection (1), consent shall be held not to have been freely given if the party who purported to give it—
- (a) was influenced by coercion of fraud; or

- (b) was mistaken as to the nature or purport of the ceremony; or
- (c) was suffering from any mental disorder or mental abnormality, whether permanent or temporary, or was intoxicated, or was under the influence of drugs, so as not to fully appreciate the nature or purport of the ceremony.

(3) A purported contract of marriage which is a nullity by reason of the provisions of this section shall be void for all purposes.

Voidable marriages.

13. (1) Subject to section 66 and 67, a marriage is voidable if—

- (a) at the date of the marriage—
 - (i) either party was and has ever since remained incapable of consummating it;
 - (ii) either party was and has ever since remained subject to recurrent attacks of insanity; or
- (b) there was a failure to give notice of intention to marry as required by section 17; or
- (c) notice of objection to the intended marriage having been given was not withdrawn or dismissed; or
- (d) a person officiating thereat was not lawfully entitled to do so.

Children born of void marriages

14. (1) Where a child is born to persons who are parties to a purported ceremony of marriage which is a nullity by reason of section 12, such child shall not be affected by such nullity for any legal purpose.

(2) Where prior to the commencement of this Act any persons were parties to a ceremony purporting to be a marriage which under the law then applicable thereto was a nullity, any child of those persons shall not be affected by such nullity for any legal purpose from the date of commencement of this Act.

Matters not affecting validity of marriage.

15. A marriage which in all respects complies with the express requirements of this Act shall not be invalid by reason only of—

- (a) non compliance with any custom relating to dowry or the giving or exchanging of gifts before or after the marriage; or
- (b) any failure to give notice of intention to marry as required by section 16 ;or
- (c) notice of objection to the intended marriage having been given and not withdrawn or dismissed; or
- (d) the fact that a person officiating the marriage was not lawfully entitled to officiate; or
- (e) a procedural irregularity; or
- (f) failure to register the marriage.

Preliminaries to Marriage

Notice of intention to marry.

16. (1) Where a man and a woman intend to marry, they shall give to a registrar or registration assistant not less than twenty-one days and not more than three months notice in writing of their intention.

(2) A notice given under this section shall include or be accompanied by a statement containing the following particulars—

- (a) the names and ages of the parties and the places where they are residing verified by the production of their birth certificates, identity cards or other documents, to the satisfaction of the registrar for reasons to recorded;
- (b) the names of the parents of the parties, if known, and if alive, the place where they are residing;
- (c) a statement that the parties are not within a prohibited relationship;
- (d) the marital status of each party, and where either party is divorced, particulars of the divorce together with court verified copies of the relevant decrees;
- (e) a declaration that the marriage is intended to be monogamous or polygamous or potentially polygamous, as the case may be;
- (f) where the intended husband is married, the name or names of the existing wife or wives;

(g) the date when and the place where the parties intend to marry.

(3) The notice under subsection 2 shall be signed by both parties, and where the consent of the court to the intended marriage has been obtained, shall be accompanied by a certified copy of the court order.

Publication of notice of intention to marry.

17. A registrar or registration assistant shall, after receiving a notice under section 16, shall publish the notice in such form and by such means as may be prescribed.

Notice of objection.

18. (1) A person who is aware of any grounds for alleging the existence of any impediment to the intended marriage may, subject to this section, give written notice of objection to a registrar or registration assistant, and a notice of objection shall, where practicable, be given in the same registration area where notice has been given under section 17.

(2) A person who has given notice of objection may at any time withdraw the objection in writing.

(3) A person who has reason to believe that a marriage is intended and that there exists a valid objection under this Act to the marriage may give notice of objection to the Chief Registrar.

(4) The Chief Registrar shall not, unless the notice has been withdrawn, exercise the powers conferred by section 20 to dispense with giving of a notice in accordance with section 17.

Determination of objection.

19. (1) On receipt of a notice of objection and notice of intention the registrar, shall request the attendance of the parties to the intended marriage and the objector and shall hear them and their witnesses, if any, and any other persons the court may consider necessary to hear, and shall make findings on the facts alleged in the notice of objection and shall, by order, either direct that the intended marriage is not to be

contracted or dismiss the objection.

(2) The court may conduct proceedings under this subsection notwithstanding the failure of any party or other person to appear before it; and shall send a certified copy of its decision to the registrar or registration assistant to whom the notice intention was given

(3) A registrar or registration assistant who receives a notice of objection shall not celebrate or participate in the intended marriage and shall take all lawful action within his or her power to prevent it from being contracted until he or she has received a written notification that the objection has been withdrawn or dismissed.

Power of Chief Registrar to dispense with notice of objection.

20. Subject to section 19, the Chief Registrar may, by licence in the prescribed form, dispense with the giving of the notice required by section 17 on proof by statutory declaration and upon such other evidence (if any) as he or she may require that—

- (a) neither party is within a prohibited relationship;
- (b) there is no subsisting marriage which, but for the provisions of this Act, would constitute an impediment;
- (c) neither party is below the minimum age for marriage; or
- (d) there is some good and sufficient reason for so doing.

Contracting of Marriage

Manner of contracting marriage.

21.(1) A marriage may be contracted in Kenya—

- (a) in a civil form; or
- (b) according to rites recognized in Kenya by customary law; or
- (c) if the intended husband is a Muslim, in Islamic form; or
- (d) between parties both of whom are Hindus in accordance with the customary rites and ceremonies of those parties or either of the parties; or
- (e) according to the rites of any Christian denomination or any faith

specified in an order made under subsection (2).

(2) The Minister may, by notice in the Gazette, authorize the celebration of marriages according to the rites of any faith which he or she may specify.

(3) For the purpose of this Act, a marriage in Islamic form means a marriage contracted in the manner recognized by Islam or by any school or sect of that faith.

(4) Subject to Article 24 (4) of the Constitution, the provisions of this Act shall be qualified to the extent strictly necessary for the application of Muslim law before the Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage, divorce and inheritance.

(5) For the purposes of this Act 'Hindu' means a person who is a Hindu by religion in any form (including a *Virashaiva*, a *Lingauat* and a follower of the *Brahm*, *Prarthana* or *Arya Samaj*) or person who is a Buddhist of Indian origin , a Jain or a Sikh by religion.

Time for contracting marriage.

22. Except as otherwise provided under this Act, an intended marriage may be contracted upon the lapse of twenty-one days and within three months of notice of intention to marry but the Chief Registrar may in dispensing under section 20, with the giving of notice required by section 17, authorize a marriage to be contracted before twenty-one days or after three months have elapsed.

Witnesses to a marriage.

23 (1). A marriage shall be contracted in the presence of at least two witnesses.

(2) No person shall be competent to act as a witness to a marriage who is below the age of eighteen years, or who is unable to understand the nature or purport of the ceremony by reason of mental illness or intoxication, or who is unable to understand, whether through an interpreter or otherwise, the language in which the ceremony is held.

(3) Neither a registrar in whose presence a marriage in civil form is contracted nor a minister of religion who celebrates a marriage shall be treated as a witness to the marriage.

Procedure for marriage in civil form.

24. A marriage may be contracted in civil form, either in the presence of the district registrar in his or her office or in the presence of a registrar in any other place in the manner provided for in the First Schedule.

Marriage according to religious rites.

25. (1) A marriage may be celebrated according to the rites of a specified faith in any place by any minister of that faith who has been licensed in that behalf by the Chief Registrar and who is willing to officiate thereat.

(2) The Chief Registrar may, on the application of the proper authority of any specified faith, by notice published in the Gazette, license any minister of that faith to celebrate marriages according to the rites of that faith and may at any time in such manner cancel the license.

(3) A licence granted in respect of a marriage according to religious rites under any law in operation before the commencement of this Act and now repealed by this Act, shall, if the licence has not cancelled at the commencement of this Act, be deemed to be a licence granted under this section.

Issue of marriage certificate.

26. (1) When a marriage has been contracted or celebrated in the presence of a registrar or a Kadhi or a priest or minister of religion or other person in accordance with Hindu rites and ceremonies, the registrar, Kadhi, priest, minister of religion or other person, as the case may be, shall forthwith complete and sign a marriage certificate in triplicate in the prescribed form and cause it to be signed by the parties and by two witnesses to the marriage, and shall thereupon hand two copies of the marriage certificate to the parties.

(2) When a marriage has been contracted in the presence of a registration assistant, he or she shall forthwith complete and sign a statement of particulars in the

prescribed form and cause it to be signed by the parties and by two witnesses of the marriage and shall send it to the district registrar or to the Kadhi, as the case may be.

(3) On receipt of a statement of particulars from a registration assistant under subsection (2) the district registrar or Kadhi, after registering the marriage in accordance with section 39, shall issue a marriage certificate in triplicate, retain one copy and send the other two copies to the registration assistant for transmission to the parties.

Marriage in Kenya embassies etc, abroad.

27. (1) A marriage may be contracted in the presence of the registrar in a Kenya embassy, High Commission or consulate in a foreign country designated in accordance with section 36 (3) if the registrar is satisfied that—

- (a) at least one of the parties is a citizen of Kenya; and
- (b) each party has capacity to marry according to the laws of Kenya; and
- (c) notice of the marriage has been given in accordance with the requirements of section 17, or has been dispensed with under section 22, and no notice of objection has been received by the registrar; and
- (d) where either party is a citizen of a country whose law provides for the issue of a certificate of no impediment before marriage, that party has obtained such a certificate..

(2) The provisions of this Act and Rules made thereunder relating to the procedure of contracting of marriage, the registration of marriage and the issue of marriage certificates shall so far as it is practicable be applied in respect of marriages contracted pursuant to this section.

(3) The registrar appointed for a foreign country shall have the same powers and duties as a district registrar appointed under section 34.

Issue of certificate of no impediment.

28. (1) If a citizen of Kenya desires to contract a marriage in a foreign country, in accordance with the law of that country, and the law of that country requires a

certificate of no impediment, the Chief Registrar may, if satisfied that there is no legal impediment to the intended marriage, issue a certificate accordingly.

(2) If a registrar has been appointed under this Act for the country in which the marriage is intended to be contracted, the application for a certificate mentioned in subsection (1) shall be sent to that registrar for transmission to the Chief Registrar.

(3) On receipt of an application under this section the Chief Registrar shall cause such inquiries to be made as are practicable and, if no impediment is shown, he or she shall issue the required certificate.

Recognition of marriage contracted abroad.

29. A marriage between a man and a woman contracted in a foreign country otherwise than in accordance with section 28, shall be recognized as valid for all purposes of the law of Kenya if—

- (a) it was contracted in accordance with the law of that country; and
- (b) both parties had, at the time of the marriage capacity to marry under the law of their country of domicile; and
- (c) where either of the parties is at the time of the marriage domiciled in Kenya, both parties had capacity to marry according to this Act.

Recognition of marriage contracted in foreign embassies in Kenya

30. A marriage between a man and a woman contracted in Kenya in the embassy, High Commission or consulate of a foreign country shall be recognized as valid under the law of Kenya if—

- (a) it was contracted in accordance with the law of that foreign country; or
- (b) both parties had, at the time of the marriage capacity to marry under the law of their country of domicile; and
- (c) where either of the parties is at the time of the marriage domiciled in Kenya, both parties had capacity to marry under this.

PART III—APPOINTMENTS, REGISTRATION OF MARRIAGES, ANNULMENT, DIVORCE

AND EVIDENCE OF MARRIAGE

Appointments

- Declaration of registration Areas. **31** The Minister may, by notice in the Gazette declare any area of Kenya to be a registration area for the purposes of this Act.
- Appointment of Chief Registrar **32.** (1) There shall be a Chief Registrar of Marriages who shall be appointed by the Minister.
(2) There shall be a Deputy Chief Registrar and as many Assistant Chief Registrars of Marriages as the Minister may consider necessary.
(3) The Deputy Chief Registrar and Assistant Chief Registrars shall, subject to any general or special directions of the Chief Registrar be competent to exercise the powers of the Chief Registrar under this Act.
- Appointment of district registrars. **33.** (1) There shall be a district registrar and as many assistant district registrars of marriages as the Minister shall consider necessary.
- Appointment of registrars. **34.** The Chief Registrar, the Deputy Chief Registrar, every Assistant Chief Registrar, district registrar, assistant district registrar, minister of religion who is licensed under section 25 and every Kadhi shall be a registrar for the purposes of this Act.
- Appointment of registration assistants. **35.** Registration assistants shall be appointed for such areas as the Minister may decide and shall perform such duties as may be prescribed including assisting registrars in the performance of their functions under this Act.
- Appointment of registrars in foreign countries. **36.** (1) The Minister may, by notice in the Gazette, appoint a member of the diplomatic staff of Kenya in a foreign country to which this section applies to be a registrar for the purposes of this Act in respect of that country.
(2) The Chief Registrar shall maintain a register of foreign marriages.

Registration of Marriages, Annulments and Divorces

Maintenance of marriage registers.

37. (1) Every registrar shall maintain a register of marriages in the prescribed form.

(2) Within thirty days after the last day of every month, every registrar or registration assistant shall send to the Chief Registrar certified copies of all entries made during that month in the register of marriages in his or her custody.

Maintenance of central records.

38 (1) The Chief Registrar shall maintain such central records of marriages or conversions thereof, divorces, and annulments as may be prescribed under this Act or any other written law.

(2) When any register of marriages maintained under this Act has been completed, a registrar shall forthwith send it to the Chief Registrar.

Cap 150

Cap 151

Cap 156

(3) Every person who immediately before the date of commencement of this Act was a registrar of Marriages under the Marriage Act (now repealed) or the African Christian Marriage and Divorce Act (now repealed), or an assistant registrar under the Mohammedan Marriage and Divorce Registration Act (now repealed), shall, as soon as practicable thereafter send all registers of marriages and divorces kept under those Acts in his or her possession to the Chief Registrar.

(4) Any person, on payment of such fee, if any, as may be prescribed, may inspect any entry in a marriage register in the custody of the Chief Registrar and any certified copy of an entry in a marriage register, and may obtain a certified copy thereof.

Duty to register marriages.

39. (1) When a marriage is contracted or celebrated—

(a) in a civil form; or

(b) by a minister of a religion according to the rites of a specified faith as provided for under section 29; or

(c) in Islamic form in the presence of a Kadhi; or

(d) in the presence of a priest or other person in accordance with

Hindu rites and ceremonies, or

(e) in accordance with customary rites in the presence of a registrar the registrar, minister of religion, Kadhi, priest or other person before whom the marriage is contracted or celebrated, as the case may be, shall forthwith register it.

(2) When a marriage is contracted in Islamic form or according to customary rites and there is no Kadhi or registrar or registration assistant present, the parties thereto shall, within ten days after the marriage, apply for registration to the registrar or registration assistant to whom notice was given pursuant to section 17.

(3) A registrar or registration assistant to whom application is made under subsection (2) shall satisfy himself or herself that the marriage was validly contracted and thereupon comply with section 26 (2).

(4) A Kadhi or district registrar who receives a statement or particulars sent to him or her by virtue of section 26 (2) shall register the marriage where he or she is satisfied that the marriage was validly contracted and that the facts contained in the statement of particulars are correct.

(5) A registrar to whom an application for registration is made under subsection (3) shall satisfy himself or herself that the marriage was validly contracted, and for that purpose may require the attendance of two witnesses to the marriage before he or she registers the marriage.

(6) A marriages shall be registered under subsection (4) or (5) notwithstanding that the application for registration was not made within the prescribed time.

Registration of
subsisting
unregistered
marriages.
Cap 158
Cap 157

40. (1). Both parties to a subsisting marriage contracted under customary law or the Hindu Marriage and Divorce Act (now repealed) or the Mohammedan Marriage and Divorce Registration Act (now repealed) before the commencement of this Act, which has not been registered under the provision of any other law, may apply to the Chief Registrar or District registrar or to a registration assistant for the registration of that marriage under this Act.

(2) On receipt of an application under this section, the Chief Registrar,

District registrar, or registration assistant shall make such inquiries as he or she may think necessary to satisfy himself or herself that the marriage was validly contracted in accordance with the customary, Islamic or Hindu law applicable.

(3) Where an application under this section has been made to a registration assistant, he or she shall send a statement of particulars relating to the marriage to the district registrar, and shall, if he or she is satisfied that the marriage was validly contracted under customary or Islamic or Hindu law, so certify.

(4) Where an application under this section has been made to the satisfaction of the Chief Registrar or district registrar or where a district registrar has received a statement of particulars and certificate from a registration assistant he or she shall, subject to subsection (2), register the marriage.

Registration of marriages contracted abroad.

41. (1) When a citizen of Kenya has contracted a marriage outside Kenya, otherwise than under section 24, either spouse may apply to the Chief Registrar for the registration of that marriage under this Act and the Chief Registrar, if satisfied that the marriage should be recognized as valid under section 29, shall register the marriage.

(2) The Chief Registrar may, for the purpose of registration under subsection (1), accept as evidence of a marriage contracted in a foreign country a marriage certificate issued in that country or such other evidence as he or she may consider sufficient; and where a certificate is not in English it shall be accompanied by a translation into English certified to be correct by a consular officer or notary public or other approved official.

Copies of decrees of annulment and divorce to be sent to Chief Registrar.

42. A court which grants a decree of annulment or divorce shall forthwith send one certified copy of the decree to the Chief Registrar for registration.

Registration of foreign annulments

43. (1) Where a marriage contracted in Kenya is annulled or dissolved by the decree

and divorces.

of a foreign court, or there is a declaration to that effect, either of the parties may apply for the registration of that decree or declaration to the Chief Registrar who, if satisfied that the decree or declaration is one which should be recognized as effective under section 62 or 63, shall thereupon register the decree or declaration.

(2) An application under this section shall be accompanied by—

- (a) a copy of the decree or declaration is not in English, a translation thereof into English certified to be a correct translation of the original by a consular officer or notary public or such other person as the Chief Registrar may, in writing approve; and
- (b) a statutory declaration by a legal practitioner with knowledge of the law applicable in the country concerned stating that the decree or declaration would be effective in that country and, if necessary setting out the grounds upon which the foreign court was alleged to have jurisdiction.

Endorsement of marriage registers.

44. (1) Where a marriage has been converted under section 5, the Chief Registrar shall, on receipt of a copy of the declaration made under that section, cause the fact to be recorded on the entry in the register of marriages relating to that marriage together with a reference which would enable the declaration to be traced.

(2) Where a decree of annulment or of divorce wherever granted, has determined a marriage or purported marriage contracted in Kenya and has been registered in accordance with the provisions of this Act or any written law in force before the commencement of this Act, the Chief Registrar shall, on registering the decree, cause the entry in the register of marriages relating to that marriage to be marked with the word “Determined” and a reference to the proceedings in which the decree was granted.

Correction of errors.

45. The Chief Registrar, or a registrar authorized by him or her, may correct any error or omission in a register or in a marriage certificate, but no correction shall render

what was written illegible, and the signature of the Chief Registrar or of the registrar and the date of the correction shall be written thereunder.

Power of Minister to restrict registration.

46. The Minister may, if he or she considers that adequate facilities for registration of marriages contracted under customary law do not exist in any particular registration area, by notice in the Gazette, suspend the provisions of this Act relating to the registration of such marriages, in relation to that registration area.

Evidence of marriage.

47. The following documents shall be admissible in evidence without proof in any court or before any person having by law or consent of parties authority to receive evidence and shall be prima facie evidence of the facts recorded—

- (a) a marriage certificate issued under this Act or any other written law;
- (b) a copy of a marriage certificate referred to under paragraph (1) certified as a true copy by the registrar having custody of the original;
- (c) an entry in any register of marriages kept under this Act or any other written law;
- (d) a copy of an entry in any register referred to under paragraph (c) purporting to be certified under the seal of the Chief Registrar, or the signature of the district registrar having custody of the register, to be a true copy;
- (e) an entry made in any register of marriages before the date of commencement of this Act by the proper authority of the *Khoja Shia Ith`nasheri*, the *Shia Imam/ Ismailis*, or the *Bohra* community, or a copy of any such entry certified by the proper officer of that authority to be a true copy; and
- (f) in relation to a marriage celebrated in a place of worship at a time when the official registration of that marriage was not required, an entry in any register of marriages kept by the proper authority of the faith concerned or a copy of any such entry sealed with the seal, if any, of that authority and certified under the hand of the registrar or other proper officer of that authority to be a true copy.

PART IV—MATRIMONIAL RIGHTS, LIABILITIES AND STATUS

Duty to maintain spouse.

48. Except where the parties are separated or by decree of the court and subject to any subsisting order of the court either spouse shall maintain the other spouse and provide him or her with accommodation, clothing, food and other necessities as may be reasonable having regard to his or her means and way of life.

Presumption of spouse's authority to pledge the other spouse's credit, etc.

49. (1) Subject to subsections (2) , (3), and (4) either spouse is presumed to have authority to pledge the other spouse's credit, or to borrow money in his or her name, or to use any of his or her money which is in his or her possession or under his or her control, or to convert his or her movable property into money, and use it, so far as that credit or money is required or used for the purchase of necessities for himself or herself and any children of the marriage, and so far as is reasonable having regard to the other spouse's means and way of life.

(2) Authority under subsection (1) shall not be presumed unless—

- (a) the spouses are living together; or
- (b) the spouses are separated under an agreement which provides that either spouse shall pay maintenance to the other and the spouse required to pay maintenance has failed to comply with that agreement, or
- (c) either spouse has deserted the other.

(3) Notwithstanding subsection (1) and (2) authority shall not be presumed if it is proved that a spouse is living openly in an adulterous association.

(4) A presumption under this section may be rebutted by evidence—

- (a) that a spouse at the material time was receiving a sufficient allowance or sufficient maintenance or had sufficient means of her own; or
- (b) that a spouse at the material had a sufficient quantity of those necessities; or
- (c) that a spouse has acted extravagantly having regard to the other spouse's means

and it is immaterial that the person giving credit or lending money was unaware of

the existence of that evidence.

Husband and wife
and the law of tort.

50. Notwithstanding the provisions of any other written law—

- (a) no spouse shall be liable for the torts of the other spouse by reason only of his or her being her or his spouse; and
- (b) spouses shall have the same liability in tort towards each other as if they were unmarried; and
- (c) neither spouse shall be entitled to claim, in any action resulting from a negligent act, omission or breach of duty, which causes loss of the companionship of the other, or damages in respect of that loss.

Agreement to live
apart.

51. The parties to a marriage may agree to live apart and any such agreement shall be valid and enforceable; but the court may, notwithstanding any provisions to the contrary in the agreement, vary or set aside the agreement or any of the provisions thereof if it is satisfied that since it was made, there has been a material change of circumstances.

Rights of widows.

52. No law or custom shall operate so as to restrict the freedom of a widow to reside wherever she pleases or to marry a man of her choice.

PART V—MISCELLANEOUS RIGHTS OF ACTION

Agreements to marry
not enforceable in
law.

53. (1). Except as otherwise expressly provided in this section—

- (a) an agreement between two persons to marry one another shall not have effect as a contract giving rise to legal rights; and
- (b) no action shall lie for breach of an agreement between two persons to marry each other.

(2) Notwithstanding subsection (1), damages are recoverable by either party if—

- (a) the loss was incurred prior to a breach of agreement by the other party; and
- (b) either party was of, or over the age of eighteen years.

(3) A party to an agreement referred to in subsection (1) who makes any gift of property to the other party to the agreement on the express or implied condition that it shall be returned if the agreement is terminated shall not be prevented from recovering that property by reason only of his or her having terminated the agreement.

(4) No action shall lie under this section unless commenced within one year after the termination of the agreement.

Contracts to pay dowry not enforceable.

54. An agreement to give dowry, whether made before or after the commencement of this Act, shall not be enforceable as a contract and the breach of any such agreement shall not give rise to any remedies for breach of contract.

No action for return of dowry.

55. No action may be brought for the return of dowry whether in whole or in part.

PART VI—MARITAL DISPUTES AND MATRIMONIAL PROCEEDINGS

General Principles

General principles

56. A court or conciliatory body, in exercising functions under this Act, shall have regard to the following general principles—

- (a) that the institutions of marriage and the family are to be supported;
- (b) that the parties to a marriage which may have broken down are to be encouraged to take all practicable steps, whether by marriage counselling or otherwise, to save the marriage;
- (c) that a marriage which has irretrievably broken down and is being brought to an end should be brought to an end with minimum distress to the parties and to the children affected and without costs being unreasonably incurred in connection with the procedures to be followed in bringing the marriage to an end;

(d) that any risk to one of the parties to a marriage, and to any children, of violence from the other party should, so far as reasonably practicable, be removed or diminished.

Jurisdiction and Procedure in Matrimonial Causes.

Jurisdiction of courts. **57.** Original jurisdiction in matrimonial proceedings under this Act shall be vested—

- (a) in the case of a marriage contracted in Islamic form, jurisdiction shall be in the Kadhi's courts, or if both parties agree, in the Resident Magistrates Court of the First Class; and
- (b) in all other cases in the Resident Magistrate's Court of the First Class..

Right to invoke jurisdiction. **58.** (1) Subject to subsection (2), a person domiciled or ordinarily resident in Kenya may petition the court for a declaratory decree under any of the provisions of this Act.

(2) A person who was married or purportedly married in Kenya and is resident in Kenya may petition the court for a declaratory decree as to the validity of the marriage.

(3) Subject to sections 70, 71 and 72, a person who is domiciled in Kenya or has been ordinarily resident in Kenya for at least two years immediately preceding the date of filing the petition may petition to the court for a decree of annulment, divorce or separation.

(4) Subject to this section, a person who is domiciled in Kenya or who, at the time of the application is ordinarily resident in Kenya may apply to the court for maintenance or other matrimonial relief.

Forms of proceedings. **59.** (1) Proceedings for a declaratory decree or for a decree of annulment, separation or divorce shall be instituted by petition.

(2) An application for maintenance or other matrimonial relief shall, unless included in a petition for a declaratory decree or for annulment, separation or divorce, be made by summons.

Petitions and answers.

60. (1). The respondent to a petition may include in answer to the petition a cross prayer for matrimonial relief and, subject to section 76, the court may grant relief on the cross prayer as it might have granted had a petition for that relief been filed.

(2) A petition shall ordinarily be heard in open court but the court may order that the public be excluded from the whole or any part of the hearing if it is satisfied that it is in the interests of justice so to do.

(3) Where a petition for divorce or of judicial separation or an answer to a petition alleges adultery, every alleged adulterer shall, unless otherwise directed by the court, be made a party to the proceedings.

(4) A person made a party to proceedings in pursuance of subsection (3) may enter an appearance and file an answer or such other pleading as may be appropriate and be entitled to be heard in respect of all questions relating to the adultery alleged against him or her.

(5) Where there is cross prayer for matrimonial relief, the court may grant decrees in favour of both of the petitioner and of the respondent.

Dismissal of petition for deception or non disclosure.

61. The court may dismiss matrimonial proceedings or make any other order it deems fit, including an order as to costs, if it is satisfied that either party has attempted to deceive the court in any material respect or has willfully failed to make a full disclosure of all relevant facts.

Recognition of decrees of foreign courts.

62. Where a court of competent jurisdiction in a foreign country has granted a decree in matrimonial proceedings whether arising out of a marriage contract in Kenya or elsewhere, that decree shall be recognized as effective for all purposes of the law of Kenya—

(a) if either party was domiciled in that country or had been ordinarily resident there for at least two years immediately preceding the date of institution of those proceedings;

(b) if, being a decree of annulment, divorce or separation, it has been declared to

be effective by a country of domicile of the parties or either of them.

Recognition of
foreign divorces.

63. A divorce, otherwise than by decree of a court, in a foreign country, shall be recognized as effective for all purposes of the law of Kenya if—

- (a) it was effective according to the law of the country of domicile of each of the parties at the time of the divorce; or
- (b) it has been declared to be effective by a court of competent jurisdiction in the country of domicile of the parties of either of them.

Declaratory decrees.

64. (1) In proceedings under this Part the court may, on the petition of any interested person, grant a declaratory decree, with or without consequential relief and those proceedings shall not be open to objection on the ground merely that a declaratory decree is sought or that no consequential relief is claimed.

(2) Without prejudice to the generality of subsection (1), the court may—

- (a) on the petition of any person who was party to a ceremony purporting to be a marriage, whether the ceremony took place in Kenya or in a foreign country grant a decree declaring the ceremony to have been a valid marriage for the purposes of the law of Kenya; or
- (b) on the petition of any person who desires to establish that he or she or either of his or her parents or, as the case may be, the grandparents of that person were lawfully married grant a decree declaring that the person or either of his or her parents, or as the case may be the grandparents of that person were lawfully married; or
- (c) on the petition of any person who claims that his or her marriage was determined under Islamic or customary law prior to the commencement of this Act, grant a decree declaring that the marriage was or was not so determined; or
- (d) on the petition of any person who claims that his or her marriage has been annulled or dissolved under the law of any foreign country, grant a decree

declaring that, for the purpose of the law of Kenya, the marriage was or was not so determined; or

(e) on the petition of any person who can show reasonable grounds for supposing that his or her spouse is dead, grant a decree declaring that such spouse is presumed to be dead, or dismiss the petition.

(3) In proceedings pursuant to paragraph (e) of subsection (2) there shall be a rebuttable presumption that a spouse is dead if that spouse has been continuously absent for a period of not less than seven years and either he or she has not been seen or heard of during that period by persons who might be expected to have seen or heard of him or her had he or she been alive or there is good reason to believe that he or she is dead.

Appeals and enforcement.

65. All decrees orders made by the court in proceedings under this Act shall be enforced and may be appealed from, as if they were decrees orders made by the court in exercise of its civil jurisdiction.

Annulment, Separation and Divorce

Annulment of voidable marriages.

66. (1) The court may grant a decree of annulment in respect of a marriage which is voidable under the provisions of section 13.

(2) Where the petition alleges that at the date of the marriage the respondent was subject to recurrent attacks of insanity or was pregnant by some person other than the petitioner or a former husband of hers, the court shall not grant a decree unless it is satisfied that—

- (a) the petition was filed within one year of the date of the marriage; and;
- (b) at the date of the marriage the petitioner was ignorant of the facts alleged; and
- (c) marital intercourse has not taken place with the consent of the petitioner since discovery by the petitioner of those facts.

Parties to a petition for annulment. **67.** (1) Subject to subsection (2), a petition for annulment may be presented only by one of the parties, but where the petition alleges facts of which only one party was ignorant at the date of that marriage, it may be presented only by that party, and where the petitioner alleges the willful refusal of one party to consummate the marriage it may not be presented by the party against whom the allegation is made.

(2) A petition for annulment which alleges that one of the parties was below the minimum age for marriage may be presented by the parent or guardian of that party.

Effect of decree of annulment. **68.** Subject to this Act, 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;
- (b) affect the competence or compellability 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 marriage; or
- (c) relieve either party of any debt properly incurred on behalf of the other during the marriage.

Right to petition for separation or divorce. **69.** Subject to section 58, 70 and 71, a married person may petition the court for a decree of separation or divorce on the ground that the marriage has irretrievably broken down.

Restrictions on petitions for divorce. **70.** (1) No person shall, without the leave of the court, petition for divorce before the expiry of a period of two years from the date of the marriage which it is sought to dissolve.

(2) Leave shall not be granted to file a petition for divorce within two years of marriage unless on petition sought to be filed is on grounds of exceptional hardship being suffered by the petitioner or of exceptional depravity on the part of the

respondent; and the court shall, before determining whether or not to grant leave, have regard to the interests of any children of the marriage and to the question whether a reasonable probability of reconciliation between the parties during that period exists.

(3) An application for leave under this section may be made notwithstanding the fact that a reference to a conciliatory body under section 71 has not been made.

Requirement of prior reference to a conciliatory body.

71. (1) A court before which a petition for divorce is presented may require the party presenting the petition to establish that efforts have been made to reconcile the parties before religious leaders, counselors, or other person or conciliatory body and that such efforts have failed to reconcile the parties.

(2) Subsection (1) shall not apply—

- (a) where the petitioner does not know the whereabouts of a spouse against whom desertion is alleged; or
- (b) where the respondent resides outside Kenya and is unlikely to enter the jurisdiction within six months after the date of the petition; or
- (c) where the respondent has been requested to appear before a conciliatory body and has willfully failed to attend; or
- (d) where the respondent is serving a sentence of imprisonment expressed to be for a term of five years or more; or
- (e) where the petitioner alleges that the respondent is suffering from incurable mental illness; or
- (f) where the court is satisfied that reference to a conciliatory body is impracticable; or
- (g) where the court has given leave under section 70.

(3) A matrimonial dispute may be referred to a conciliatory process agreed between the parties.

(4) The hearing of proceedings for divorce may be adjourned for any period not exceeding six months which the court may think fit for further inquiries or further attempts at reconciliation to be made.

Contents of petition
for separation or
divorce.

72. (1) A petition for a decree of separation or for divorce shall contain—

- (a) particulars of the marriage between the parties and the names, age and sex of any child of either party under the age of eighteen years;
- (b) a statement of the full names of the parties the present address and occupation (if known) of the parties and of the last address at which the parties resided together;
- (c) particulars of the facts giving the court jurisdiction;
- (d) particulars of any previous matrimonial proceedings between the parties including any similar proceedings in a foreign court;
- (e) particulars of the principal allegations which it will be sought to prove as evidence of the breakdown of the marriage;
- (f) particulars of the terms of any agreement or arrangement made regarding maintenance or the division of any assets acquired through the joint efforts of the parties or, where no agreement or arrangement has been reached, the petitioner's proposals in that regard;
- (g) a statement of the reliefs sought; and
- (h) such other particulars as may be prescribed.

(2) There shall be filed with every petition for a decree of separation or for divorce an affidavit verifying the facts of which the deponent has personal knowledge and deposing as to his or her belief in the truth of the other facts alleged in the petition.

(3) Where a petition alleges adultery against a person who has died before the date of presentation of the petition, the affidavit shall include proof of the death of the person by reference to a death certificate exhibited thereto or by reference to any other

evidence which is available.

Contents of petition for annulment.

73. (1) A petition for a decree of annulment shall contain the particulars and statements set out in paragraphs section 72 (1) together with particulars of the principal allegations which it will be sought to prove as evidence that, and particulars of the provision or provisions of section 13 upon which, a decree of annulment should be granted.

(2) There shall be filed with every petition for a decree of annulment an affidavit verifying the facts of which the deponent has personal knowledge and deponing as to his or her belief in the truth of other facts alleged in the petition.

Evidence of irretrievable breakdown of marriage.

74. (1) Before deciding whether or not a marriage has irretrievably broken down, the court shall have regard to all relevant evidence regarding the conduct and circumstances of the parties, and may refuse to grant a decree where a petition is founded exclusively on the petitioner's own doing or wrong doing.

(2) Any one or more of the following matters may be evidence that a marriage has irretrievably broken down—

- (a) one or more acts of adultery committed by either spouse; or
- (b) cruelty, whether mental or physical, inflicted by either spouse on the other or in the children, if any, of the marriage or
- (c) willful neglect by either spouse for at least two years immediately preceding the date of presentation of the petition; or
- (d) separation, whether voluntary or by decree of the court, where it has continued for at least two years immediately preceding the date of filing of the petition; or
- (e) desertion by either spouse for at least two years immediately preceding the date of presentation of the petition; or
- (f) a sentence of imprisonment of the respondent expressed to be for life or for a term of seven years or more, regard being had both to the length of the

- sentence and to the nature of the offence for which it was imposed; or
- (g) insanity of the respondent, where two doctors, at least one of whom is qualified or experienced in psychiatry, have certified that the insanity is incurable or that recovery is improbable during the life time of the respondent in the light of existing medical knowledge; or
- (h) change of faith by the respondent, where both spouses followed the same faith at the time of the marriage and where, according to that faith, the change dissolves or is a ground for the dissolution of marriage.

Evidence in support of petition for divorce may be the same for the previous separation.

75. When hearing a petition for divorce the court may admit and found its decision, wholly or partly, on evidence received from the petitioner which is substantially the same as that on which a decree of separation has previously been granted.

Power of court to grant decree of separation or divorce.

76. (1) At the conclusion of the hearing of a petition or cross petition for a decree of separation or for divorce, the court may, if satisfied that the marriage has irretrievably broken down, grant a decree of separation or divorce accordingly.

(2) If the court is not satisfied as required by subsection (1) it may dismiss the petition or cross petition, as the case may be, or both.

(3) Whenever a decree of separation or for divorce is granted or refused the court shall, by order, make provision for the maintenance and custody of any children of the parties, but the order, whether in respect of maintenance or custody or both, may be expressed to be of only temporary effect pending a final order to be made after the conclusion of specified further inquiries as to the most satisfactory arrangements that can be made in that regard.

Effect of decree of separation.

77. A decree of separation shall relieve the parties of any obligation to cohabit or right to consortium and, except so far as the decree or other order of the court otherwise provides, of the duty to maintain each other, but shall not dissolve their

marriage.

Power of court to rescind or vary decrees of separation.

78. (1) The court shall rescind a decree of separation on the application of either or both of the parties if both parties have consented thereto.

(2) The court may rescind a decree of separation on the application of either party where it is satisfied that the decree was obtained as the result of misrepresentation or mistake of fact.

(3) Subject to rules of court, the terms of a decree of separation may be varied on the application of both or either of the parties where there has been any material change of circumstances.

Effect of decree of divorce etc.

79. (1) A decree of divorce shall dissolve the marriage to which it relates.

(2) A decree declaring that a party is presumed to be dead shall, even if that party is not in fact dead, dissolve the marriage to which it relates.

(3) Subject to subsection (2) of this section and paragraph (c) of section 101, a declaratory decree in proceedings under this Act shall be conclusive and binding upon all persons who were parties to or were served with notice of those proceedings and all persons claiming under them.

Division of Assets as Between Husband and Wife, Maintenance and Other Reliefs

Power of court to order division of matrimonial assets.

80. Subject to any law on matrimonial property, a court, when or after granting a decree of annulment, divorce or separation, may order a division between the parties of any assets acquired by them during the marriage by their joint efforts, or may order the sale of any of those assets and a division between the parties of the proceeds of the sale.

Maintenance.

81. (1) The court may order a person to pay maintenance to his or her spouse or former spouse—

- (a) if the person has refused or neglected to provide for the spouse as required by this Act;
- (b) if the person has deserted his or her spouse, for as long as the desertion continues;
- (c) during the course of any matrimonial proceedings;
- (d) when granting or subsequent to the grant of a decree of separation or divorce; or
- (e) if, after a decree of presumption of death, the spouse is found to be alive.

(2) The power to order maintenance in the cases referred to in paragraphs (d) and (e) subsection (1) may be exercised where the decree was granted by a foreign court if it is recognized as effective under this Act, and for this purpose a declaratory decree recognizing as effective a divorce obtaining otherwise than by a decree of a court shall be deemed to be a decree of divorce.

Assessment of maintenance.

82. The amount of any maintenance ordered by the court to be paid by one spouse to the other shall ordinarily be assessed according to the needs of the parties, but for this purpose regard shall be paid also to—

- (a) the degree of responsibility which the court may apportion to either party for the breakdown of the marriage;
- (b) the customs of the community to which the parties or either of them belong; and
- (c) the capacity and ability of either party to earn a living.

Security for maintenance of a spouse.

83. The court may when awarding maintenance for the benefit of a spouse, order the person liable to pay maintenance to provide security for the payment of the maintenance.

Compounding of maintenance.

84. An agreement for the payment, in money or other property, or a capital sum in settlement of all future claims to maintenance of a spouse shall not be effective until

it has been approved, with or without conditions, by the court, but when so approved it shall be a good defence to any further claim for maintenance.

Duration of orders for maintenance. **85.** Except where an order for maintenance of a spouse is expressed to be for any shorter period or where any such order has revoked and subject to section 95, the order shall expire—

(a) if the maintenance was unsecured, on the death of the husband or wife, or

(b) if the maintenance was secured, on the death of the spouse in whose favour it was made.

Right to maintenance to cease on remarriage. **86.** (1) An order of the court providing for maintenance of a spouse shall cease to have effect upon the marriage of that spouse.

(2) The right of a divorced spouse to receive maintenance from a former spouse under an agreement shall cease on remarriage of the divorced spouse, unless the agreement otherwise provides.

Revocation or variation of order for maintenance. **87.**(1) The court may revoke or vary a subsisting order for maintenance of any kind, whether secured or unsecured, if it is satisfied that the order was based or obtained as the result of any misrepresentation or mistake of fact or that there has been a material change of circumstances since the order was made.

(2) Subject to section 93, the court may vary the terms of an agreement as to maintenance between spouses wherever made if satisfied that there has been a material change of circumstances since the agreement was made notwithstanding any provision to the contrary contained therein.

Maintenance payable under order of court to be inalienable. **88.** Maintenance payable to A person under an order of the court shall not be assigned or transferred or liable to be attached, sequestrated or levied upon for, or in respect of, any debt or claim.

Recovery of arrears of maintenance. **89.** (1) Notwithstanding any other period of limitation prescribed by the Limitation of

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Actions Act, no installment of maintenance shall be recoverable in proceedings instituted after a period of three years from the date upon which the installment accrued due.

(2) Subject to subsection (1), arrears of unsecured maintenance, whether payable by agreement or under an order of the court, shall be a civil debt recoverable summarily or, where they accrued due before the making of a receiving order against the party in default, shall be provable in subsequent bankruptcy proceedings and where they accrued due before death, shall be a debt from the estate of the deceased.

(3) Subject to subsection (1) arrears of unsecured maintenance which accrued due before the death of the person entitled shall be a civil debt recoverable summarily by the legal personal representative of that person.

Fraudulent
dispositions.

90. (1) Where—

- (a) matrimonial proceedings are pending; or
- (b) an order under section 80 has been made but not complied with; or
- (c) an order under this Act for maintenance has been made and has not been rescinded; or
- (d) maintenance is payable under an agreement for the benefit of a spouse or former spouse or child,

the court may, if it is satisfied that a disposition of property has been made by the spouse or former spouse of the person by or on whose behalf the application is made, within the preceding three years, with the object on the part of the person making the disposition of reducing the means to pay maintenance or of depriving a spouse of any rights in relation to that property, or is intended to be made with any such object, on application, set aside the disposition or grant an injunction prohibiting that disposition, as the case may be

(2) In this section, “disposition” includes a sale gift, lease, mortgage or other transaction whereby ownership or possession of the property is transferred or

encumbered but does not include a disposition made from money or moneys worth to or in favour of a person acting in good faith and in ignorance of the object for which the disposition is made

Other relief. **91.** (1) The court may order a party to refrain from molesting a spouse or former spouse.

2) No proceedings may be brought to compel one spouse to cohabit with the other, but a spouse who alleges that he or she has been deserted may refer the matter to a conciliatory body.

Custody and Maintenance of Children

Orders concerning children. **92.** (1) Subject to the Children Act, the court may make such orders concerning or affecting a child as it thinks fit and may by subsequent order discharge or vary or suspend the whole or any provision thereof

(2) An order under subsection (1) may be made at any time during the course of, or after the conclusion of matrimonial proceedings on the application of either of the parents of a child.

Declaration of unfitness. **93.** On or after the pronouncement of a decree of divorce or separation the court may on application of either the father or mother, by order, declare either parent to be a person unfit to have the custody of any one or more children of the marriage, and the parent so declared to be unfit shall not, unless the order has been rescinded, be entitled to the custody of any such child, whether on the death of the other parent or otherwise unless the court so directs

Duration of orders. **94.** (1) No order in respect of the peripheral payment of money towards the maintenance of the child or of the custody of a child shall except in relation to any arrears due under it continue in force after the date when the child to whom it relates

attains the age of eighteen years unless the court, for reasons to be recorded in writing so directs.

(2) No order for the custody or the periodical payment of money towards the maintenance of a child shall unless the court otherwise orders be enforceable and no liability thereunder shall arise so long as the parents of the child are residing together and the order shall cease to have effect if for any period of not less than three months after it is made the parents continuously reside together: but the court may notwithstanding that the parents are residing together at the date of the order, order that the father of the child shall pay to the mother such periodical sum towards the maintenance of the child as it considers reasonable

(3) No order made under this Act during the course of matrimonial proceedings, and concerning or affecting a child the marriage of whose parents is the subject of these proceedings, shall continue in force after the date of pronouncement of a decree or the dismissal of the proceedings unless the court when or before, pronouncing the decree of dismissing the proceeding declares the order to be final or adjourns consideration of arrangement with regard to the welfare of the child to chambers.

Injunction on
removal of a child
from Kenya.

95. (1) The court may grant an injunction to restrain a person from removing from Kenya a child who is ordinarily resident in Kenya

(2) An application to the court under this section may be made at any time by a parent of a child or by any person who satisfies the court that he or she may reasonably be registered as being entitled to exercise parental rights in relation to a child to the exclusion of either parent.

(3) Instead of granting an injunction the court may give leave for removal of the child from Kenya either unconditionally or subject to such conditions or undertaking as may appear to be reasonably required.

(4) The court shall ,before granting an injunction except where it appears that the object of granting it would be defeated by delay, direct that notice of the application be given to the person alleged to be seeking so to remove the child from Kenya

PART VII—OFFENCES AND PENALTIES

False statement in notice.

96. Any person who, in a notice intention to marry under section 17, or notice of objection to an intended marriage under section 18, makes a false statement shall be guilty of an offence and liable to imprisonment for a term not exceeding three years; but it shall be a defence to a charge under this section that the person charged had reasonable grounds for believing the statement to be true.

Failure to attend before conciliatory body.

97. A person who without reasonable excuse refuses or neglects to attend before the conciliatory body after having lawfully been requested so to do shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings.

Marriage of persons within prohibited relationship.

98. (1) A party to a ceremony purporting to be a marriage ceremony where the parties are within a prohibited relationship shall be guilty of an offence and liable to imprisonment for a term not exceeding five years; but it shall be a defence to a charge under this section that the person charged did not know and could not reasonably be expected to have discovered the relationship.

(2) A person who participates in a ceremony referred to under subsection (1) and who, at the time, knows or has reasonable cause to believe that the prohibited relationship exists shall be guilty of an offence and liable to imprisonment for a term not exceeding three years.

Prohibited ceremony.

99. (1) A party to a ceremony purporting to be a ceremony of marriage who, at the time knows that the intended marriage has been forbidden or prohibited by this Act or by order of the court shall, upon proof that the marriage was in fact so forbidden or prohibited be guilty of an offence an be liable to imprisonment fro a term not exceeding five years.

(2) A person who participates in a ceremony referred to under subsection (1) and who at the time knows that the intended marriage has been forbidden or prohibited shall be guilty of an offence and liable to imprisonment for a term not exceeding five years.

Coercion, fraud etc

100. A party to a ceremony purporting to be a marriage who at the time, knows or has reason to believe that the consent of the other party was induced by coercion or fraud or by a mistake as to the nature of the ceremony or that the other party was suffering from any mental disorders or mental abnormality whether permanent or temporary or was intoxicated or under the influence of drugs, so as not fully to appreciate the nature or purport of the ceremony, shall be guilty of an offence and liable to imprisonment for a term not exceeding five years

Ceremony performed by unauthorized official.

101. A person who is a party to or participates in a ceremony purporting to be a marriage who at the time of the ceremony knows or has reason to believe that a person officiating at such ceremony is not lawfully entitled to do so shall upon proof that the person was not so entitled, be guilty of an offence and liable to a fine not exceeding twenty thousand shillings

Absence of witnesses.

102. A person who is a party to or participates in a ceremony purporting to be a marriage at which he or she is or ought reasonably to be aware that there are not at least two witnesses present shall be guilty of an offence and liable to a fine not exceeding ten thousand shillings

Irregular marriage.

103. (1) A person who is party to a ceremony of marriage where—

- (a) either party is below the age of twenty-one years and consent to the marriage, if required, has not been given in accordance with this Act; or
- (b) notice of intention to marry if required, has not been given in accordance with this Act; or

(c) notice of objection to the intended marriage has been given in accordance with this Act and the objection has not been withdrawn or dismissed shall be guilty of an offence and liable to imprisonment for a term not exceeding six months, but it shall be a defence to a charge under paragraph (a) or paragraph (c) that the person charged did not at the time of the ceremony know or have any reason to believe that the party was below the age of twenty one years or that notice or objection had been given as the case may be.

(2) A person who participates in a ceremony under subsection (1) and at the time knows of the existence of any of the irregularities mentioned in subsection (1) shall upon proof of this knowledge and after the conviction of a party thereunder also be guilty of an offence and liable to the same penalty

Meaning of participation.

104. For the purpose of sections 99 to 103 (inclusive) “ to participate in” a ceremony means to officiate thereat or to act as witness thereto.

Failure to apply for registration.

105. A person who being under a duty to apply for the registration of a marriage, fails to do so within the time prescribed, shall be guilty of an offence and liable to a fine not exceeding twenty thousand shillings; but no person shall be charged with an offence under this section if the marriage has been registered pursuant to section 39 (7).

PART VIII—MISCELLANEOUS PROVISIONS

Costs.

106. (1) costs in matrimonial proceedings shall be in the discretion of the court.

(2) At any stage of matrimonial proceedings the court may order a party to furnish security for the payment of the costs in those proceedings of any other party.

(3) Notwithstanding subsection (1) and (2) the court shall not order a person to

pay costs or furnish security for the payment thereof unless such an order appears to be reasonable having regard to the amount of property owned by the person at the time the order is made

Rules
Cap 21.

107. (1) The Rules Committee established under section 81 of the Civil Procedure Code may make rules of court regulating any matter of practice or procedure under this Act.

(2) Rules under subsection (1) shall provide for the better carrying into effect of the provisions and purposes of this Act and without prejudice to the generality of the foregoing those Rules may—

- (a) prescribe forms to be used and fees to be paid in respect of any application or licence made or issued under Part II;
- (b) prescribe the manner in which notices of intention to marry are to be made known;
- (c) prescribe the form to be used for the giving of any notice required by this Act to be given;
- (d) prescribe a form of explanation to be given by a district registrar or registration assistant to the parties to an intended marriage in civil form or according to rites recognized by customary law as the case may be before asking them whether the marriage is to be monogamous or polygamous or potentially polygamous;
- (e) prescribe the forms of licences and marriage certificate to be issued by the Chief Registrar;
- (f) prescribe the form of statement for particulars relating to marriage to be used by registration officers;
- (g) prescribe the procedure for registration and the form of returns to be made and the register to be kept under this Act;
- (h) prescribe the payment of fees to a person (other than a public officer) in respect of the performance of any duty or function under this Act; and
- (i) prescribe anything required to be prescribed under this Act

Savings.

108. (1) A subsisting union between a man and a woman which under any written or customary law hitherto in force constituted a valid marriage immediately before the date of commencement of Part II shall be deemed to be a valid subsisting marriage for the purposes of this Act so long as it would but for the provision for Part II remain a valid marriage under that written or customary law

(2) Proceedings commenced under any written law repealed by this Act shall, so far as practicable, be continued in accordance with the provisions of this Act.

(3) Notwithstanding subsection (2) an order for judicial separation or decree of divorce granted under any law repealed by this Act shall in relation to the powers of the court regarding maintenance be deemed to be a decree of separation or divorce as the case may be granted under this Act.

Repeals.

109. The Acts of Parliament listed in the Second Schedule are repealed.

FIRST SCHEDULE

Procedure for Contracting a Marriage in Civil Form S. 24

1. If the registrar is satisfied that the requirements of section 22 and of either sections 16 and 17 or section 20 have been complied with and that there is no impediment to the marriage he or she shall ask each of the parties, in the presence of the other and of the witnesses, to express a willingness to marry the other; and
2. If the registrar is satisfied that the reply of each party has been given in the exercise of free will, and if each party has expressed willingness to marry the other, the registrar shall thereupon enquire of each party whether the marriage is intended to be monogamous or polygamous or potentially polygamous, and he or she shall for that purpose satisfy that they understand the meaning and consequences of the different kinds of marriage, before their replies are recorded; and
3. If the parties are in agreement as to the kind of marriage they desire, and not otherwise, the registrar shall record the agreement, and the intended husband shall say to the intended wife “I (giving his name) take you (giving her name) to be my wife” and the intended wife shall say to the intended husband “I (giving her name) take you (giving his name) to be my husband”.
4. The marriage shall thereupon be contracted, but the parties may add any additional rite.

SECOND SCHEDULE

Repealed Acts S. 109

Cap 150	The Marriage Act.
Cap 151	The African Christian Marriage And Divorce Act.
Cap 152	The Matrimonial Causes Act.
Cap 153	The Subordinate Court (Separation and Maintenance) Act.
Cap 155	The Mohammedan Marriage And Divorce Registration Act.
Cap 156	The Mohammedan Marriage Divorce and Succession Act.
Cap 157	The Hindu Marriage and Divorce Act.

MEMORANDUM OF OBJECTS AND REASONS

The principal purpose of this Bill is to provide for