

Federal Court



Cour fédérale

**Date: 20180928**

**Docket: IMM-1360-18**

**Citation: 2018 FC 965**

**Toronto, Ontario, September 28, 2018**

**PRESENT: The Honourable Mr. Justice Harrington**

**BETWEEN:**

**PERPETUA WAMBUI KARANJA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] It would be somewhat harsh to label Mr. Waicigo a bigamist. After all he thought he was divorced when he married Ms. Karanja in Kenya in 2015.

[2] Ms. Karanja, a Canadian permanent resident, then applied to sponsor him as her spouse, a member of the family class.

[3] The visa officer refused to issue a permanent resident visa on the grounds that the marriage was not valid. Section 117(1) of the *Immigration and Refugee Protection Regulations* specifically provides that a foreign national (Mr. Waicigo is Kenyan) cannot be considered a member of the family class if at the time of the marriage to the sponsoring spouse he was married to another person. The basis for that decision is that his certificate of divorce from his first wife was fake, a fact admitted to be true. The conclusion to be drawn was that he was still married to his first wife.

[4] Ms. Karanja appealed to the Immigration Appeal Division of the Immigration and Refugee Board of Canada. The IAD requested written submissions as to the validity of the marriage. The member seems to accept her response that her husband did not knowingly misrepresent his divorce but was the victim of an unscrupulous lawyer. “Had he known that the divorce certificate was not genuine, he would not have presented it...” The matter was considered in chambers under rule 25 of the *Immigration Appeal Division Rules* which indicates that credibility was not in issue. In a short set of reasons the member dismissed the appeal.

[5] Ms. Karanja’s appeal was dismissed because she had not shown that the visa officer’s refusal was wrong in law. On the basis of the record Mr. Waicigo could not be considered a member of the family class.

[6] However, the story is far more complicated, and parts of the record strongly suggest that Mr. Waicigo did not need a divorce issued by a Kenyan court after all.

I. Background

[7] Mr. Waicigo married his first wife in 1988 under Kikuyu customary laws and rites. She deserted him in the year 2000, leaving him with custody of their two children.

[8] There is confirmation from the chief that in 2006 Mr. Waicigo sought a customary divorce. The elders met and his marriage was dissolved under Kikuyu custom. He was given the elders' blessings and according to the chief was free to marry from then on.

[9] The fraudulent divorce certificate from a Kenyan court definitely muddies the waters. Prior to his marriage to Ms. Karanja, Mr. Waicigo was in another relationship which was supposed to lead to a church wedding. He was informed that in order to have such a wedding he needed a court issued divorce certificate. He began proceedings but left them in abeyance as that relationship ended.

[10] Still thinking he needed a court issued divorce certificate he reactivated the proceedings in order to marry Ms. Karanja. The fact that he was victimized by his new lawyer who provided him with a fake certificate was not contested.

[11] Ms. Karanja says that she was told by the registrar of marriages in Kenya that Mr. Waicigo did not need a divorce certificate.

[12] The record contains a generic blog from a Kenyan law firm as to customary law and judicial divorces in Kenya. It says that a divorce under customary law can be either judicial or extra-judicial. The elders may dissolve a marriage extra-judicially if satisfied, among other things, of willful desertion, which is the situation here.

[13] A judicial divorce is only necessary if a party refuses to comply with an extra-judicial divorce, which is not the case here.

[14] Unless proved as a fact to differ, foreign law is presumed to be the same as Canadian law. (*J.P. Morgan Chase Bank v Mystras Maritime Corporation* 2006 FC 409; *Lakeland Bank v Never E Nuff (Ship)* 2016 FC 1096) I accept that the IAD, unlike a court, is not bound to follow the strict rules of evidence, however;

[15] In Canada, the solemnization of a marriage by someone not licensed by the state is not valid. Many marriages are both valid in a religious context and civilly because the minister is licensed.

[16] If the ceremony was conducted by an unlicensed person, though there may well be property and family considerations, as there was no marriage in the eyes of the state, there is no need for a divorce.

[17] By the same token, if the marriage is valid in law, a religious annulment, unaccompanied by a divorce, would not permit a second legal marriage.

[18] All this leads me to conclude that there was a great deal in the record which leads away from the decision which was rendered. At the very least some explanation is required as to why that information was rejected (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998) 157 FTR 35).

[19] Consequently the application for judicial review is granted. At the redetermination, Ms. Karanja would be wise to proffer an opinion from Kenyan counsel on the points raised herein. Although apparently there is nothing to prevent Mr. Waicigo from now obtaining a divorce from a Kenyan court, the sponsorship backlog is such that it might take years for a new application to be processed.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** for the reasons given the judicial review of the decision of the Immigration Appeal Division of the Immigration and Refugee Board of Canada is granted. The matter is referred back to that division for redetermination before a different officer.

There is no serious question to certify.

"Sean Harrington"

---

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-1360-18

**STYLE OF CAUSE:** PERPETUA WAMBUI KARANJA v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** SEPTEMBER 26, 2018

**JUDGMENT AND REASONS:** HARRINGTON J.

**DATED:** SEPTEMBER 28, 2018

**APPEARANCES:**

Jeremiah Eastman

FOR THE APPLICANT

Daniel Engel

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Jeremiah Eastman  
Barrister and Solicitor  
Brampton, Ontario

FOR THE APPLICANT

Attorney General of Canada

FOR THE RESPONDENT