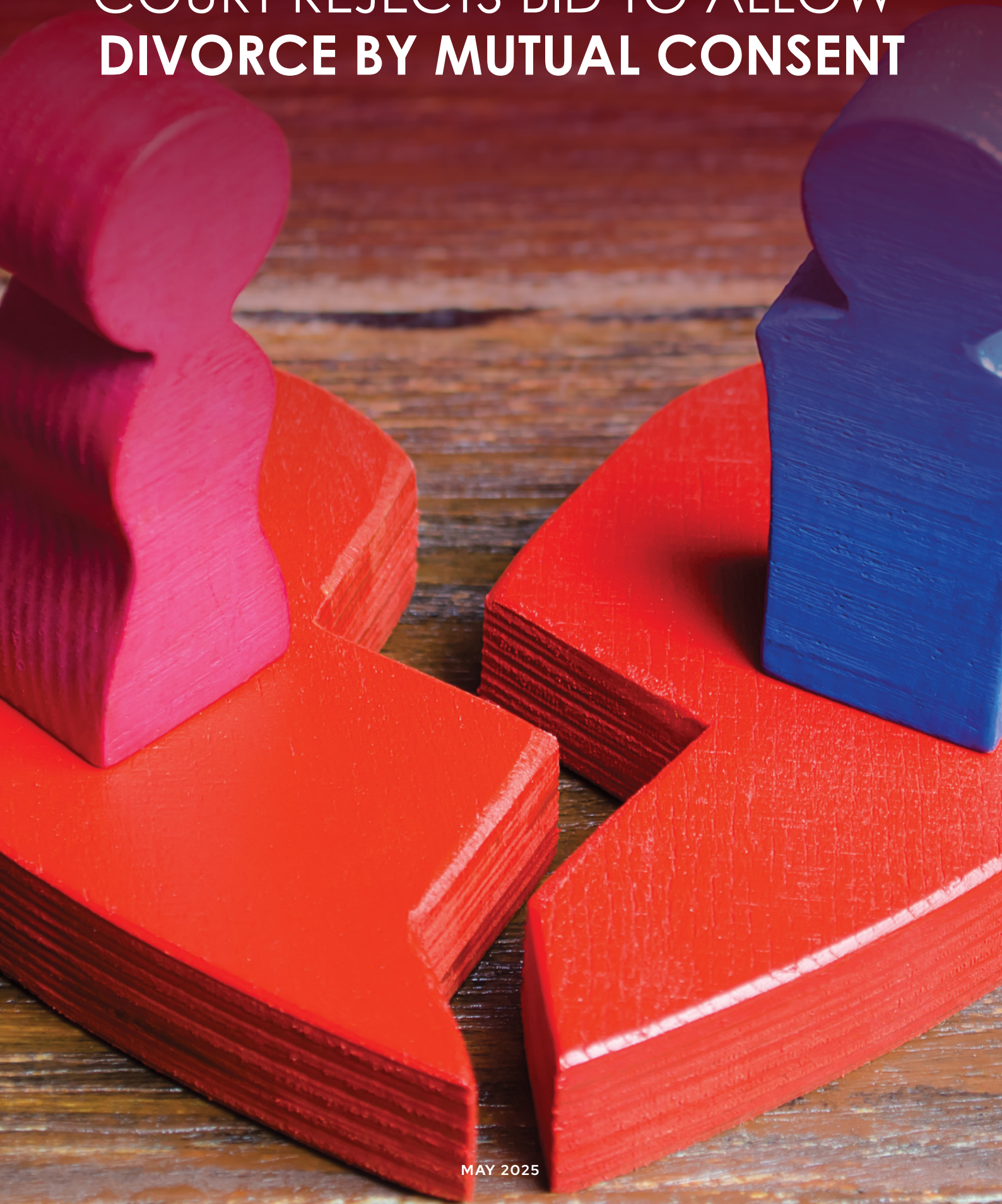


# COURT REJECTS BID TO ALLOW **DIVORCE BY MUTUAL CONSENT**



MAY 2025

On 24th April 2025, the High Court at Nairobi (Constitutional and Human Rights Division) delivered its judgment in **Constitutional Petition No. E075 of 2022, Coppler Attorneys & Consultancy v Attorney General & another** (the **Petition**) dismissing a petition that sought to introduce mutual consent as an independent ground for divorce. The Petition challenged the constitutionality of Part X of the Marriage Act, Cap 150, (the **Act**) which outlines grounds for dissolution of a marriage. The petitioners sought recognition of mutual consent as a standalone ground for divorce, arguing that the fault-based system entrenched in the Act violated several constitutional rights.

## BACKGROUND

On 18 th February 2022, the petitioners filed the Petition seeking the court to declare that Part X of the Act was unconstitutional for failing to recognize dissolution of marriage by mutual consent. They contended that the current fault-based divorce regime contradicted Articles 2 (Supremacy of the Constitution), 10 (National values and principles of governance), 36 (Freedom of association), 45 (Family), and 259 (Construing this Constitution) of the Constitution. In sum, they specifically argued that:

- Section 3(1) of the Act recognizes marriage as a voluntary union of a man and woman in a monogamous or polygamous set up hence a similar voluntary right to exit should exist;
- The fault-based litigation process leads to reputational damage, psychological trauma, public humiliation and adversely affects children; and

- A mutual consent mechanism would foster civility, reduce litigation costs and align with the constitutional rights to dignity and freedom of association.

One of the interested parties supported the petitioners and further argued that the law violates human dignity as it requires the party filing for divorce to prove the grounds of divorce which in turn, subjects the party to psychological torture owing to the adversarial nature of such proceedings. In opposition to the petition, the respondents underscored the presumption of constitutionality, the public interest considerations in the need to protect marriage as a fundamental societal unit while citing the legislative intent behind the Act. They further argued that compelling Parliament to amend the law would violate the doctrine of separation of powers.

## COURT'S ANALYSIS AND REASONING

The Court reiterated the principles applicable to constitutional interpretation, notably:

- Promoting constitutional values (Article 259);
- Presuming the constitutionality of legislation unless clearly shown otherwise;
- Considering the purpose and effect of a statute; and
- Interpreting the Constitutional harmoniously, ensuring no provision undermines another.

Relying on authorities such as **Council of County Governors v Attorney General & another [2017] KEHC 6395 (KLR)** and **Ndyanabo v Attorney General of Tanzania [2001]**,

the Court highlighted the significance of safeguarding marriage as a societal institution. Further it was observed that in order to examine the constitutionality of a statute or any of its provisions, one of the most relevant considerations is the object and reasons as well as legislative history of the statute. This would help the court in arriving at a more objective and justifiable approach. The court reasoned that:

- Marriage, as the foundation of family and social order (Article 45), is not merely a private contract but a societal institution deserving of legal protection;
- Part X of the Act seeks to discourage impulsive dissolution by mandating specific grounds, such as adultery, cruelty, desertion, or irretrievable breakdown, and allowing for reconciliation efforts through counselling, mediation and any other form of intervention;
- Permitting divorce by mutual consent without structured safeguards would erode societal interest embedded in marriage, potential leading to casual and impulsive termination; and
- The legislature's deliberate decision to structure marriage dissolution through a regulated framework align with constitutional imperatives and does not infringe on fundamental rights.

Further, the Court emphasized that it could not compel Parliament to legislate in a specific manner, as doing so would contravene the doctrine of separation of powers (Article 94(5)).

The Court concluded that Part X of the Act is constitutional and that the absence of mutual consent as a standalone ground for

divorce does not invalidate the statutory framework. The petition was dismissed in its entirety.

## CONCLUSION

The High Court's decision reinforces the principles that marriage, while a voluntary union, is also a societal institution that merits structured regulation to protect its sanctity and stability. By rejecting the inclusion of mutual consent as an independent ground for divorce, the Court prioritized societal interests and emphasized the role of marriage as a foundation of social order under the Constitution. The judgment also underscores the limits of judicial intervention in legislative processes, reiterating the need to respect the doctrine of separation of powers. This decision may reignite discussions on potential reforms, but for now, the traditional fault-based divorce system remains firmly in place in Kenya.

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