



REPUBLIC OF KENYA



KENYA LAW
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**HWMJ v MWM (Civil Appeal 79 of 2023)
[2024] KEHC 11351 (KLR) (Civ) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEHC 11351 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYANDARUA**

**CIVIL
CIVIL APPEAL 79 OF 2023**

**CM KARIUKI, J
SEPTEMBER 26, 2024**

BETWEEN

HWMJ APPELLANT

AND

MWM RESPONDENT

*(Being an Appeal against the Judgment of Honourable Vincent Kiplagat,
Senior Resident Magistrate, delivered on 16th December 2022 in the
Chief Magistrate Court at Nyahururu Divorce Cause No. 7 of 2020)*

JUDGMENT

1. This is a dispute from a petition of Divorce and a cross-petition for an injunction from the alienation of the matrimonial home.
2. The matter was heard by the trial court, which dismissed the Petition but granted an injunction to restrain alienation of the matrimonial home.
3. This attracted an appeal lodged by the Appellant in which he mounted two (2) principle grounds.
4. The Court directed the parties to canvass appeals via submissions in which both sides filed.

5. Appellant Submissions

6. The Appellant has filed this appeal following the dismissal of his Petition for Divorce. He has set out six grounds he proposes to submit on two grounds mainly;
 - a. That the trial Magistrate erred and misdirected himself in holding that the marriage had not broken down irretrievably.



- b. That the trial Magistrate equally erred in issuing an injunction against the Appellant while at the same time declining to dissolve the marriage.
7. There are a number of grounds upon which a marriage can be dissolved. A party is not obligated to prove all the grounds, but it can suffice to dissolve a marriage if one of the grounds set out under section 65 of the Marriage Act No. 4 of 2014.
 8. Both the Appellant and the Respondent agree that they have not lived together as a couple since 2015. That is for five years prior to the presentation of the Petition for Divorce in the lower Court.
 9. The Appellant, in his evidence and also the pleadings filed in the lower Court, testified that there were profound differences between himself and the Respondent and that the atmosphere became toxic and was not conducive for them to continue cohabiting together. The differences were so significant that he was even assaulted by the Respondent, together with their children and hired goons.
 10. The Marriage Act under Section 65 (c) provides for the dissolution of a marriage and the basis of desertion by either party for at least three years immediately preceding the date of presentation of the Petition. It is clear from the proceedings in the lower Court that the Appellant moved out of the matrimonial home in 2015 and has never gone back therein. He stated that he moved out after serious disagreements with the Respondent. He further testified that attempts to reconcile with the Respondent using the Area Chief and elders were too successful.
 11. To that extent, he has proved that one of the grounds for Divorce is desertion.
 12. She stated that "the appellant is a very dangerous man. He can kill. He is a hot-tempered man. There is external force driving him".

As much as the Respondent is blowing hot and could at the same time say that the marriage can work, it is evident that it has broken down irretrievably.
 13. There is no way that the marriage between the parties herein can work, even going by the testimony of the Respondent, who testified that the Appellant is a person who can kill. It is submitted that to avoid such an eventuality, the prudent thing under the circumstances would be to grant the Appellant the Divorce that he sought in the lower Court.
 14. As much as they are an aged couple who have been married for the years cited therein from both the evidence of the Appellant and that of the Respondent, they cannot enjoy their sunset years together.
 15. The trial Magistrate erred in issuing an injunction against the Appellant relating to the matrimonial properties in purely divorce proceedings.
 16. As rightly pointed out by the Respondent in her submissions, matrimonial property cause No. 3 of 2019 is being appended through which the Respondent can canvass.
 17. The trial magistrate went out of his way to grant matrimonial property in purely divorce proceedings and, therefore, did not have any jurisdiction to make such orders.

By making the said order, the trial court erred and misdirected itself in conferring jurisdiction relating to matrimonial property, which is the exclusive jurisdiction of the High Court.
 18. From that holding, the Court determined that the Appellant cannot only enter the matrimonial property but also be barred from laying any claims to the same. The trial court thus erred in constituting itself into a matrimonial property court and thus making an absolute declaration that the Appellant could not lay any claims to that property.



19. Having failed to dissolve the marriage and, at the same time, barring the Appellant from ever setting foot in the matrimonial home, this was a contradiction in terms of the judgment. How is the Appellant expected then to be married to the Respondent, yet he has been enjoined from setting foot to the matrimonial home? Is that in itself amounting to allowing the Divorce as the parties cannot cohabit together in the matrimonial home?

20. Respondent submissions

21. Issues for determination are as follows;
- a. Whether the learned trial Magistrate erred in law and fact in finding that the marriage between the Appellant and the Respondent had not broken down irretrievably.
 - b. Whether the learned trial Magistrate erred in law and fact in issuing an injunction against the Appellant over a parcel of land for which he is the sole and registered proprietor.
 - c. Who should bear the cost of this appeal?

22. The Law

23. (a) whether the learned trial Magistrate erred in law and fact in finding that the marriage between the Appellant and the Respondent had not broken down irretrievably (submission on grounds 1, 2, 3, 4, and 6)

24. In light of the contentions enumerated by the parties herein, a perusal of their pleadings discloses that the Petition for dissolution of the marriage was instituted by the appellant/husband on the allegations that the marriage to the respondent/wife had broken down irretrievably.
25. Central to the contention was claiming that the behaviour of the respondent/wife had broken down irretrievably. Central to the contention were claims of the behaviour of the respondent/wife towards the Appellant.
26. However, it was clear from the onset of the Appellant's Petition for Divorce that the Petition had been instituted in bad faith and was only meant as a means for him to achieve his ill motive and corrupt intentions to dispose of the couple's matrimonial properties.
27. Indeed, the Appellant could not prove the grounds for dissolution of marriage and why he was so much interested in tearing apart his marriage to the Respondent, which had weathered the storms from 1977 as contracted in church.
28. The grounds for the dissolution of a Christian Marriage are well itemized under section 65 of the Marriage Act No. 4 of 2014, which provides:

Grounds for Dissolution of a Christian Marriage

“A Party to a marriage celebrated under part 3 may petition the Court of a decree of dissolution of marriage on the grounds of:

- i. One of more acts of Adultery committed by the other party.
- ii. Cruelty, whether mental or physical, inflicted by the other party on the Petitioner or the children, if any, of the marriage.
- iii. Desertion by either party for at least three (3) years immediately preceding the date of presentation of the Petition.



- iv. Exceptional depravity by either party.
- v. The irretrievable breakdown of the marriage."

29. At all times, the Appellant had the legal burden to prove any allegations of cruelty by the Respondent. The sentiment is well founded on the provisions of sections 107, 108, and 109 of the Evidence Act, which provides as follows:

Section 107. Burden of proof

- "(1) whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Section 108. Incidence of burden

"The burden of proof in a suit or proceeding lies on that person who would fail if no evidence at all were given on either side."

Section 109. Proof of the particular fact

"The burden of proof as to any particular fact lies on the person who wishes the Court to believe in its existence unless any Law provides it that the proof of that fact shall lie on any particular person. "

30. It is submitted that the Appellant failed to disclose any evidence whatsoever of cruelty by the Respondent. Further, there was no indication that the Respondent had ever behaved in any manner that had any semblance of unreasonableness so as to cause the breakdown of the parties' marriage. In other words, there was no matrimonial fault on the part of the Respondent herein.

31. It is submitted that, given the novelty of the case herein, Respondent cites the case of *Owens v Owens* [2018] UKSC 41, where the United Kingdom's Supreme Court was called upon to determine whether the Respondent's behavior was unreasonable. Before dismissing the appeal by the Appellant, the Supreme Court observed as follows:

"25. Fourth, *Stevens v Stevens* 119791 1 WLR 885. The facts were unusual and, for present purposes, of interest. In March 1976, a judge had dismissed the wife's Petition under the subsection; he had held that the marriage had irretrievably broken down, that the wife had not established her case of behaviour against the husband, and that the cause of the breakdown had been her behaviour.

26. Fifth, *Balraj v Balraj* (1981) 11 Fam Law 110. T... In giving the leading judgment Cumming-Bruce LJ at p 112 offered an analogy:

"In behavior cases, the Court has to decide the single question whether the husband (for example) has so behaved that it is unreasonable to expect the wife to live with him. In order to decide that, it is necessary to make findings of fact of what the husband actually did and then findings of fact upon the impact of his



conduct on that particular lady. As has been said again and again between a particular husband and a particular lady whose conduct and suffering are under scrutiny, there is, of course, a subjective element in the totality of the facts that are relevant to the solution. However, when that subjective element has been evaluated, the question falls to be determined on an objective test at the end of the day. "

27. And sixth, *Buffery v Buffery* [1988] 2 FLR 365. A recorder had dismissed a wife's Petition under the subsection on the basis that she had failed to establish either that the husband's behavior had been grave and weighty or that it had caused the breakdown of the marriage. "
32. Further to this, from the evidence of both the Appellant and the Respondent, it was clear that the parties had been together despite the violent and uncouth behavior of the Appellant. The uncouth and chauvinistic behavior by the Appellant was equally highlighted by the learned trial Magistrate when the Appellant alluded that the Respondent was his property and he even became violent towards their adult children in open Court.
33. It is, therefore, not correct for the Appellant to now allege that the honorable trial magistrate erred and misdirected himself in "making sarcastic and condescending remarks that the appellant was a classic male chauvinist, which was not supported by any evidence."
34. Indeed, the more than seventy (70) year old couple had lived together for more than forty-five (45) years. It is, hence, reasonable for the duo to spend their sunset age together. Reliance is made on the case of the U.K. Supreme Court, where the Court held that:
 - “41. ... Moreover, at the end of his judgment, the judge explained his crucial conclusion in the following few words:

"I find no behavior such that the wife cannot reasonably be expected to live with the husband. The fact that she does not live with the husband has other causes. The petition will be dismissed. " (italics supplied). "
35. Similar to the troubling case in *Owens v Owens* (Supra), this case presents a case of whether the unreasonable conduct by the Appellant warrants the grant of Divorce to the parties.
36. In summary of the facts, one of the spouses, being the Appellant herein, in his desperate attempt to sell their marital properties, which includes L.R. No: Nyandarua/L xxxx and L.R. No: Nyandarua/Olkalou S/xxxx began frustrating the Respondent in an attempt to force her into petitioning for a divorce
37. Such attempts included years of indefinitely with the parties' former house help, SNM, and using violence and obscene language directed towards the Respondent. The violent behavior of the Appellant has included assaulting her and, on occasion, causing her physical injuries, refusing to perform his duties as a husband, including giving the Respondent her conjugal rights.
38. Indeed, the Appellant had, prior to instituting the Petition subject to this appeal, made several attempts to sell matrimonial properties. While those attempts became impossible, the Appellant even proceeded to file Nyahuruu Matrimonial Property Cause No. 3 of 2019 before the High Court, where he sought to have the matrimonial properties distributed during their marriage.



39. Interestingly, these were properties purchased through much of the Respondent's efforts, who even enrolled the Appellant in [Particulars Withheld] Training College in 1979 and even paid his school fees while still maintaining their matrimonial home and their young children.
40. On the other hand, the Respondent has never exhibited any form of cruelty or violence. Furthermore, she has never shirked from her responsibilities as a wife to the Appellant, despite his behavior towards her. It is submitted that the marriage between the Appellant and the Respondent has not broken down irretrievably.
41. Instead, it is the Appellant who is running away from the marriage at no fault of the Respondent but with the sole hidden agenda of selling their properties. The theatrics by the Appellant are, in any case, in the nature of the normal wear and tear of marital life.
42. In these circumstances, there is no doubt that the allegations by the Appellant were unsubstantiated. Consequently, the Appellant, who bears the burden of proving his case on a balance of probability, failed to discharge the same.
43. In consequence, we humbly submit that the honorable trial magistrate did not err in law or facts in dismissing the Appellant's Petition for Divorce.

Whether the learned trial magistrate erred in law and fact in issuing an injunction against the Appellant over a parcel of land for which he is the sole and registered proprietor (submission on ground 5)

44. Another substantive issue for determination, as raised by the Appellant's grounds of appeal, revolves around the injunction issued against him over a parcel of land on which he claims to be the sole registered proprietor. Your Lordship, in respect of marriage, Article 45 (3) of the Constitution of Kenya enumerates that:

“Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage, and at the dissolution of the marriage.”

45. The Court of Appeal in PNN v ZNN [2017] eKLR illuminated the interpretation of the Constitution provision, observing that:

One of the earliest opportunities to interpret the provisions of Article 45 (3) came one year after the promulgation in the case of Agnes Nanjala William -vs.- Jacob Petrus Nicolas Vander Goes (Civil Appeal No. 127 of 2011), where this Court states as follows:

“Article 45 (3) of the Constitution. Provides that parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage, and at the dissolution of the marriage. This article clearly gives both parties to a marriage equal rights before, during, and after a marriage ends. It arguably extends to matrimonial property and is a constitutional statement of the principle that marital property is shared 50-50 in the event that a marriage ends. However, pursuant to Article 68, Parliament is obligated to pass laws to recognize and protect matrimonial property, particularly the matrimonial home. Although this is yet to happen, we hope that in the fullness of time, Parliament will rise to the occasion and enact such a law. Such law will no doubt direct a court, when or after granting a decree of annulment, Divorce, or separation, to order a division between the parties of any assets acquired by them during the coverture. Pending such enactment, we are nonetheless of the



considered view that the Bill of Rights in our Constitution can be invoked to meet the exigencies of the day."

46. True to the sentiment of the Court of Appeal, Parliament enacted The Matrimonial Property Act, 2013. Section 7 of the legislation provides that:

"Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved."

Section 14 of the Matrimonial Property Act states as follows:

Presumptions as to property acquired during marriage where matrimonial property is acquired during marriage -

- a. in the name of one spouse, there shall be a rebuttable presumption that the property is held in trust for the other spouse and
 - b. in the names of the spouses jointly, there shall be a rebuttable presumption that their beneficial interests in the matrimonial property are equal.
47. While indeed the properties in question are registered in the name of the Appellant, the same constitutes matrimonial property irrespective of whose name they are registered to. It is submitted that the Respondent contributed massively towards the acquisition of all parcels of land known as L.R. NO: Nyandarua/L/xxxx and L.R. No: Nyandarua/O SaLient/xxxx.
48. Furthermore, a casual look at the evidence highlights a union where the Respondent and everything belonging to her were properties of her husband, the Appellant herein. In consequence, it was only proper for the subject parcels of land to be registered in his name.
49. To further buttress our sentiment, reliance is made on the case of F.S v E.Z [2016] eKLR, where while illuminating the provision of section 14 of the Matrimonial Property Act 2013, he stated that:

"The above provision indicates that there is a rebuttable presumption that the property acquired in the name of one spouse is being held in trust for the other spouse. In the case of Njoroge -v- Ngari [1985] KLR, 480, the Court held that if a matrimonial property is being held in the name of one person, even if that property is registered in the name of that one person but the other spouse made a contribution towards its acquisition, then each spouse has property interests in that property. That decision was made way before our Matrimonial Property Act Was enacted. The decision is in line with Section 14 of the Matrimonial Property Act, 2013.

It should not be lost that when properties are acquired during the subsistence of the marriage, both parties are happy and have trust in each other. There is no suspicion at that time. It is unfortunate that when the marriage hits rock bottom, the registered party strives to have the property registered in his/her name be declared as exclusively his/hers. In this case, the applicant concedes that it is the Respondent who made the financial payments towards the purchase of the properties. The Respondent is a foreigner and was not in Kenya when the properties were bought. The matrimonial property was bought in 2004, soon after the marriage. The Respondent provided all the monies. The presumption is that the applicant held the properties in trust for the Respondent. The applicant's contention that she has held the properties for ten (10) years and the Respondent has not asked the properties



to be transferred to his name cannot be held. The Respondent trusted her, and there was no warning at that time that the marriage would not last. I do find and hold that the properties were being held in trust for the benefit of both parties. "

50. It is submitted that the Appellant, in his desperate move to dispose of L.R. No: Nyandarua/Olkalou S/xxxx, tried all hook and crook to achieve his goal devoid of the knowledge, consent, and/ or authority of the Respondent. At the time, the Respondent would get tip-offs from their neighbors any time the Appellant brought potential purchasers on the parcel of land. As a result, the Respondent registered cautions and restrictions to preserve her interest in the matrimonial properties.
51. However, registering the cautions and restrictions never deterred the Appellant's unquenchable thirst to sell the properties. Instead, it fueled his intention, and he subsequently moved to Court in Nyahururu Chief Magistrate, Miscellaneous Application No., 9 of 2018, where he sought orders to lift the cautions.
52. Notably, all proceedings were done without the knowledge of the Respondent, who only got wind of the developments by chance. It was then, that the Respondent rushed to the Land Registry for Nyandarua District, where, to her utter shock, she found that the caution on the property had been lifted vide a court order issued on 22nd August 2018. As a result, the Respondent then rushed to the honorable Court, where a subsequent order was issued setting aside the orders of 1st August 2018.
53. Not to be deterred by the events, the Appellant rushed back to Court at Nyahururu High Court, where vide Matrimonial Cause No. 3 of 2019, he sought orders of distribution of the matrimonial properties. When it became impossible for him to distribute the same during the subsistence of the parties' marriage, the Appellant approached the Court in an attempt to dissolve their holy matrimony.
54. It is submitted that the antics and drama caused by the Appellant were all informed by his possessed spirit to sell the couple's matrimonial properties, causing irreparable damage to the Respondent's interest in the properties. To this end, it was, hence, and fair for the honorable Court to issue an order if the injunction against the Appellant as prayed for under Prayer (b) of the Respondent's Cross Petition dated 30th July 2020. The Court is thus urged that the judgment dated 16th December 2022 by the Honourable Vincent Kiplagat (SRM) be upheld.

Cost And Interest

55. On the issue of costs and interest, the Court is urged that the same be granted in favor of the Respondent. Reliance is made on the pertinent provisions of Sections 26 and 27 of the Civil Procedure Act Cap 21 Laws of Kenya, which states:

Section 26 states:

"(1)Where and in so far as a decree is for the payment of money, the Court may, in the decree, order interest at such rate as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of the decree in addition to any interest adjudged on principle sum of any period before the institution of the suit, with further interest at such rate as the Court deems reasonable on the aggregate sum so adjudged from the date of the decree to the date of payment or to such earlier date as the Court thinks fit."

56. Issues, Analysis And Determination

57. After going through the evidence on record, especially the parties' statements admitted as evidence and the pleadings that are Petition and the cross-petition, I find the issue is whether any of the grounds



- for Divorce were established under the law. Whether the trial magistrate had jurisdiction to injunct matrimonial properties in divorce cases. What is the order as to costs?
58. Under Section 65 of the Act, persons who contracted a Christian marriage can petition for Divorce on the following grounds;
- a) One or more acts of Adultery committed by the other party;
 - b) Cruelty, whether mental or physical, inflicted by the other party on the Petitioner, or the children, if any of the marriage;
 - (c) Desertion by either party for at least three years before the presentation of the divorce petition;
 - (d) Exceptional depravity by either party
 - (e) The irretrievable breakdown of the marriage.
59. It is worth noting that all these must be offenses done by a person other than the person seeking a divorce. Thus, one cannot commit Adultery and then rush to Court for Divorce on the basis of his/her matrimonial fault. It must be a fault on the part of the other party.
60. Grounds for Divorce in Kenya for Christian marriages In Kenya, the grounds for Divorce in Christian marriages are specified under the Marriage Act of 2014. Here are the critical grounds:
- i. Adultery: If one spouse commits Adultery, the other spouse can file for divorce¹².
 - ii. Cruelty: This includes both mental and physical cruelty inflicted by one spouse on the other or their children²³.
 - iii. Desertion: If one spouse deserts the other for at least three years immediately preceding the date of the divorce petition¹².
 - iv. Exceptional Depravity: This refers to extremely immoral or wicked behavior by one spouse².
 - v. Irretrievable Breakdown of the Marriage: This is a general ground indicating that the marriage has broken down beyond repair¹².
61. The Appellant's evidence, as per his statement adopted as evidence, is that they stopped cohabiting in 2015 and have been cohabiting to date 2024. During the subsistence of the marriage, he was subjected to a very abusive and hostile attitude, being denied conjugal rights, setting children against him, ganging up together with hired goons to beat him, and driving him away from the matrimonial home. He used to be denied food and abused on several occasions in the presence of relatives and other members of the public, calling him maraya. Arbitration via relatives and area chief failed. Aforesaid convinced him that the marriage irretrievably broke down and continues to be so.
62. On the Respondent's part, via her statement adopted as evidence, the Appellant deserted her home in 2013, 11 years now. During the subsistence of the marriage, the Appellant is said to have exhibited an ungovernable temper, treated the Respondent with contempt, hostility, and cruelty, and physically assaulted her, which used to drive her to the fortress of police to escape the Appellant's wrath.
63. These accusations spawned the instant contest in which Petition and cross-petition were lodged by parties, respectively. In the realm of such an environment in which parties are still 11 years plus or seeing eye to eye, is there marriage or semblance of what can be called a marriage?



64. Irretrievably Breakdown of the Marriage" is a legal ground for Divorce that indicates the marriage has broken down beyond repair. This means that the relationship between the spouses has deteriorated to such an extent that there is no reasonable prospect of reconciliation.
65. In many jurisdictions, including Kenya, this ground allows one or both spouses to file for Divorce without having to prove fault, such as Adultery or cruelty¹. It simplifies the process by focusing on the fact that the marriage cannot be saved rather than assigning blame.
66. Definition: It includes situations where a spouse commits Adultery, is cruel to their spouse or children, wilfully neglects their spouse, or where spouses have been separated for at least two years. Other Grounds: It also covers cases where a spouse has deserted the family, been sentenced to imprisonment for seven years or more, or suffers from incurable insanity.
67. Court's Role: The Court assesses various factors such as animosity, mistrust, disrespect, and communication breakdown to determine if the marriage has irretrievably broken down. Aside from the other grounds for Divorce under the Marriage Act, the irretrievable breakdown of marriage is also listed as a ground for dissolution of marriage.
68. The last scenario thus leads to a broad, inexhaustive list of situations that may lead the Court to find that a marriage has broken down. Thus, the irretrievable breakdown of marriage as a ground is very impactful as it is up to the Court to determine the threshold for whether a marriage should be dissolved.
69. Threshold to prove Irretrievable Breakdown of Marriage: Courts have also made pronouncements on the threshold for what constitutes an irretrievable breakdown of marriage as a spouse must show that it is no longer tenable or possible for spouses to remain married together due to the destruction of the marital relationship. The issues within the marriage taken together must show that the marriage has reached a point where it cannot be saved by the spouses in question.
70. Thus, the Court will look at the degree of: Animosity Resentment Mistrust Disrespect Disharmony Communication breakdown Lack of willingness to try and resolve issues Duration of physical separation Desertion from the marital home Emotional needs of spouses Failure to carry out matrimonial/marital duties The likelihood of the marital offense being resolved Etc.

Examples of scenarios leading to irretrievable breakdown

Cheating on one's spouse Bullying one's spouse Neglect or failure to cater to one's family duties despite an ability to do so Specified Illnesses that are incurable that lead to burdensome family life Incessant arguing Abandoning one's family home for a prolonged duration Alcoholism Emotional abuse Contemptuous treatment.

71. How do we prove the irretrievable breakdown of marriage? Whether or not a divorce is contested, the grounds for Divorce to be relied upon must be proved to the Court on a balance of probabilities such that the Court is convinced after hearing testimony that, more likely than not, the events leading to the Divorce indeed happened and have destroyed the marital relationship such that the marriage has irreparably broken down.
72. A party presenting this ground of 'irretrievable breakdown of marriage' cannot assume that where the Divorce is uncontested or undefended, the Court will, as a matter of course, grant the divorce decree on this ground without proof of all events leading to the divorce petition.
73. Both the Appellant and the Respondent agree that they have not lived together as a couple since 2015. That is for five years prior to the presentation of the Petition for Divorce in the lower Court.



74. The Appellant, in his evidence and also the pleadings filed in the lower Court, testified that there were severe differences between himself and the Respondent and that the atmosphere became toxic and was not conducive for them to continue cohabiting together. The differences were so much that he was even assaulted by the Respondent, together with their children and hired goons.
75. The Marriage Act under Section 65 (c) provides for the dissolution of a marriage and the basis of desertion by either party for at least three years immediately preceding the date of presentation of the Petition. It is clear from the proceedings in the lower Court that the Appellant moved out of the matrimonial home in 2015 and has never gone back therein. He stated that he moved out after severe disagreements with the Respondent. He further testified that attempts to reconcile with the Respondent using the Area Chief and elders were too successful.
76. To that extent, he has proved that one of the grounds for Divorce is desertion.
77. She stated that "the appellant is a very dangerous man. He can kill. He is a hot-tempered man. There is external force driving him". As much as the Respondent is blowing hot and could at the same time say that the marriage can work, it is evident that it has broken down irretrievably.
78. There is no way that the marriage between the parties herein can work, even going by the testimony of the Respondent, who testified that the Appellant is a person who can kill. It is submitted that to avoid such an eventuality, the prudent thing under the circumstances would be to grant the Appellant the Divorce that he sought in the lower Court.
79. As much as they are an aged couple who have been married for the years cited therein from both the evidence of the Appellant and that of the Respondent, they cannot enjoy their sunset years together.
80. The purpose of marriage in people's lives and social setup is complex and multifaceted. Marriage provides emotional companionship, social support, procreation and family formation, and legal and financial benefits that contribute to the stability and security of individuals and families. It creates a sense of belonging and community, providing a stable environment for raising children.
81. Furthermore, marriage acts as a social institution that helps to create a sense of belonging and social support. It provides individuals with a network of family and friends, creating a community of support and connection.
82. The instant so-called relationship, for all intent and purpose, lapsed in purpose, and the parties have not exhibited any scintilla or whiff of the likelihood of ever patching up at the sunset of their lives and resuscitating the relationship. The Court's rejection of formalizing the demise of the marriage serves no purpose. Thus, the Court sets aside and grants Divorce accordingly.
83. On cross-Petition granting an injunction against alienation of matrimonial property, on the onset, it was a misjoinder of causes of action. Legal frameworks separated the causes for Divorce and matrimonial property rights. Under the Matrimonial Property Act, protection of property can still be sought even before it is decreed by filing a declaratory right over the matrimonial property and seeking interim orders to preserve the subject matter.
84. It is not too late to initiate proceedings over property outside the divorce cause. Thus, the Court finds that the injunction issued by the trial court can not be sustained thus set aside.
85. On costs, the parties are still family, though living in disarray; thus, it is not desirable to punish either party with a burden of costs. Thus, the court orders parties to bear their costs.
86. In sum, the Petition is allowed, and thus, the Court makes the orders;



- i. The Divorce is granted, and orders of the trial court dismissing the Petition are set aside.
- ii. The injunction granted in cross-petition is set aside, and cross-petition is dismissed with no orders regarding costs.
- iii. Parties to bear their costs of the High Court and the trial court.

JUDGMENT DATED, SIGNED, AND DELIVERED AT Nyandarua THIS 26TH DAY OF SEPTEMBER 2024.

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CHARLES KARIUKI

JUDGE

