



**KPO v DMK (Divorce Cause 3 of 2020)
[2023] KEHC 201 (KLR) (Family) (20 January 2023) (Judgment)**

Neutral citation: [2023] KEHC 201 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
DIVORCE CAUSE 3 OF 2020
MA ODERO, J
JANUARY 20, 2023**

BETWEEN

KPO APPLICANT

AND

DMK RESPONDENT

JUDGMENT

1. Before this court is the Petition dated April 28, 2020 by which the Petitioner KPO seeks the following orders:-
 - ' a. That the marriage celebrated between the Petitioner and the Respondent on February 13, 2010 be dissolved.
 - b. That the legal custody care and control of the children of the marriage namely ATK and ETE be granted jointly to the Petitioner and the Respondent.
 - c. That the parental responsibility agreement agreed by the parties be deemed as the Agreement between the parties for the care and control for the said children ATK and ETE.
 - d. That the Respondent be restrained from making any form of contact with the Petitioner unless when visiting the children and/or providing maintenance
 - e. That each party to bear its own costs of this cause.
 - f. Any further or other relief that this Honorable court may deem just and fit to grant to the Petitioner in the circumstances.'



2. In reply to the Petition the Respondent DMK filed a Replying Affidavit dated May 22, 2020 as well as an Answer to Petition and counterclaim dated July 2, 2020 seeking the following orders:-
 - a. Declaration that the Petitioner is liable for adultery, cruelty and desertion.
 - b. Dissolution of the marriage on the grounds of adultery, cruelty and desertion.
 - c. The Respondent be granted legal and actual custody of the minors.
 - d. Any other relief that the court may deem fit to grant.'
3. The matter was canvassed by way of viva voce evidence on the virtual platform.

Background

4. The Petitioner and the Respondent got married to each other in Uganda. The couple initially lived in the Democratic Republic of Congo from February 2010 to December 2010. Thereafter they moved to Nairobi where they both continue to reside to date.
5. The couples union was blessed with two (2) daughters namely:-
 - (i) ATK – born on January 22, 2011.
 - (ii) ETE – born on June 6, 2014.
6. The Petitioner stated that the couple separated in April 2019 when the Respondent packed her belongings and moved out of the family home with the two (2) children of the marriage. Since that time, the couple have not resumed cohabitation. The petitioner then filed this Petitioner seeking the dissolution of their marriage.

Analysis and Determination

7. I have carefully considered this Petition for divorce the Answer and counterclaim filed by the Respondent as well as the evidence adduced by the parties.
8. The parties were not quite in agreement regarding where their marriage took place. The petitioner told the court that whilst the cultural rites were conducted in Rwanda (the Respondents country of birth) the actual church marriage ceremony took place in Uganda which was his country.
10. The Respondent on the other hand insists that their marriage took place in Rwanda though she concedes that the couple did undergo a church wedding in Uganda.
11. Annexed to the Petition (Annexure 'KPO-1') is a copy of a marriage Certificate Serial No xxxx indicating that the couple solemnized their union in Uganda on February 13, 2020 at Our Lady of Africa Mbuya church. For purposes of this Petition, I find that the couple got married in Uganda.
12. It is common ground that the couples union was blessed with two (2) daughters and that whilst they began their cohabitation as man and wife in the DRC, they later moved to Nairobi, Kenya in the year 2010 and both still reside in Kenya to date.
13. The parties both agree that they separated in April 2019. The Petitioner states that the Respondent for unknown reasons abandoned the matrimonial home and went to pursue an extra marital relationship with one AM a Dutch citizen, who was also the Respondent's manager.
14. On her part, the Respondent whilst conceding that she moved out of the matrimonial home states that she did so because the Petitioner was a habitual drunkard who had abandoned his responsibilities



to the family. The Respondent further alleges that the Petitioner was having extra marital affairs with two of his work colleagues.

15. The Petitioner herein is a Ugandan citizen whilst the Respondent is Rwandese. Their marriage was conducted in Uganda. Foreign marriages are recognized in Kenya by virtue of section 40 of the Marriage Act which provides that

' 40 A civil marriage contracted in a foreign country shall be recognized as a valid marriage if –

- (a) It is contractual in accordance with the law of that country.
- (b) It is consistent with the provisions of this part, and
- (c) The parties have the capacity to marry under this Act.

16. Undoubtedly the couple who were both adults had capacity to marry. The annexed certificate of marriage indicates their marriage was conducted in conformity with the Ugandan Marriage Act, Cap 25, Laws of Uganda. I therefore find that the said marriage is recognizable in Kenya. A marriage which is recognizable in Kenya can also be dissolved under the Laws of the Country.

17. The parties herein entered into a Civil Marriage. Section 66 of the Marriage Act 2014 provides as follows:-

' 66. (1) A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

- (2) A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds—
 - (a) Adultery by the other spouse;
 - (b) Cruelty by the other spouse;
 - (c) Exceptional depravity by the other spouse;
 - (d) Desertion by the other spouse for at least three years; or (e) the irretrievable breakdown of the marriage.'

18. The Petitioner and Respondent celebrated their marriage in February 2010. This Petitioner was filed on April 28, 2020. I find that more than three (3) years have elapsed since the couple got married. Thus this Petition conforms with section 66 (1) of the Marriage Act.

19. The Petitioner has cited desertion, cruelty and adultery as grounds for his petition seeking a dissolution of the marriage. On her part in her counterclaim, the Respondent cites drunkenness, neglect, cruelty and adultery as grounds for her prayer for dissolution of the marriage.

20. Thus each party has a litany of complaints against the other. Section 66 (b) of the Marriage Act provides as follows: -

' (6) A marriage has irretrievably broken down if—

- (a) A spouse commits adultery;
- (b) A spouse is cruel to the other spouse or to any child of the marriage;



- (c) A spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;
- (d) The spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;
- (e) A spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;
- (f) A spouse has been sentenced to a term of imprisonment of the for life or for a term of seven years or more;
- (g) A spouse suffers from incurable insanity, 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) Any other ground as the court may deem appropriate.'

- 21. From the evidence it is clear that the parties herein ceased cohabitation as man and wife in April 2019. To date despite attempts from family and friends as well as a session with a Counsellor, the couple have been unable to resolve their differences and have not resumed cohabitation. The couple have lived a part for more than two (2) years, which is proof that their marriage has irretrievably broken down'. There would be no benefit in compelling the warring couple to remain in a matrimonial bond when it is clear that they both want out.
- 22. Accordingly, I find that the marriage between the Petitioner and the Respondent has irretrievably broken down. The marriage is therefore dissolved. Decree Nisi to issue to be made absolute within thirty (30) days of the date of this judgment.
- 23. Regarding the issue of custody, maintenance and access to the two (2) children of the marriage both parties stated that these issues had been canvassed and determined in the Children's Court. Indeed such matters fall under exclusive mandate of the Childrens Court.
- 24. I have seen the consent orders dated November 13, 2020 adopted by the Children Court regarding custody, maintenance and access to the two (2) minors (Annexure 'KPO-2'). The same remain binding on the parties unless reviewed or appealed against by either party. In the circumstances, this court will make no orders in respect of the Children of the marriage.
- 25. Finally, I do allow this Petitioner for Divorce and direct that each party shall bear its own costs.

DATED IN NAIROBI THIS 20TH DAY OF JANUARY, 2023.

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MAUREEN A. ODERO
JUDGE

