



**COM v ZS (Divorce Cause 25 of 2015) [2023] KEHC 2334 (KLR) (24 March 2023) (Judgment)**

Neutral citation: [2023] KEHC 2334 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
DIVORCE CAUSE 25 OF 2015  
G MUTAI, J  
MARCH 24, 2023**

**BETWEEN**

**COM ..... PETITIONER**

**AND**

**ZS ..... RESPONDENT**

**JUDGMENT**

1. COM, then a bachelor, got married to ZS, then a spinster, on August 23, 2003 at ACK Barnaba's Church, Mkwachunyi in Voi. It is pleaded that after the marriage was solemnized COM and ZS lived together as husband and wife at Shimba Hills. Their marriage was blessed with one issue, MM, who was aged 10 at the time this petition was filed.
2. Vide a petition dated April 16, 2015 COM sought to have his marriage with ZS dissolved on the ground that ZS was guilty of adultery, cruelty and desertion which he particularised. I reproduce the same in verbatim below:-
  - a. The respondent committed adultery with Pastor RK, resulting into the birth of a baby boy;
  - b. The respondent has been cruel to the petitioner in that she could welcome the aforementioned pastor to the matrimonial house of the petitioner and the respondent at Shimba Hills to sleep in the house only for the petitioner to learn that at night the respondent and the said Pastor RK would go out to the bush and spend some time there, after having locked the main door of the matrimonial house from outside;
  - c. The respondent deserted from the matrimonial house or home in Shimba Hills in 2010 and up to date she has never come back.
3. It was pleaded that it hadn't been possible to reconcile the parties. The marriage had therefore broken down irretrievably and could not be salvaged. COM thus prayed for the dissolution of the marriage



and custody of MM as well as for costs “and or any other relief this honourable court may deem fit to grant”.

4. I must state at the outset that this court, as the divorce court, is unable to issued prayer (b) of the petition. I am of the firm opinion that issues of custody of children is a cause best handled by the Children Court, even when such matter arises in the course of the matrimonial proceedings. I shall therefore not delve into custody issue.
5. After filing the petition COM did not prosecute the matter with diligence. It was only on May 27, 2021 that a Notice of Motion application dated May 26, 2021 was filed vide which this honourable court was requested to issue a certificate that pleadings were in order and also directions on how the hearing was to proceed.
6. The petitioner provided evidence of service of the petition on the Respondent by filing an affidavit of service dated July 19, 2017. The deponed therein, a court process server, averred that he served the Respondent on April 3, 2017 outside KCB Bank Kenya Ltd, Kiserian Branch, in Kajiado County.
7. This case came up for mention before me on February 15, 2023. On the said date I fixed this matter for hearing on March 7, 2023.

#### **Evidence adduced**

8. On March 7, 2021 the petition was heard. The respondent did not attend court. COM relied on his witness statement and list of documents dated May 26, 2021. He testified that the marriage between him and the Respondent had produced 1 issue, MM, whose birth certificate he produced. he testified that he was unable to produce the marriage certificate as the Respondent was in possession thereof and had refused to release it.
9. He stated that the Respondent deserted the matrimonial home, had been cruel and also committed adultery with Pastor RK. He further stated that attempts on his part to procure reconciliation had failed. It was his testimony therefore that the marriage between him and the Respondent had irreversible broken down and was a sham devoid of love and affection. He therefore prayed that the same be dissolved.

#### **The applicable law.**

10. Counsel for the petitioner opted not to file submissions. The court was referred to the statements which the petitioner’s counsel deemed to be sufficiently cogent and believable.
11. The marriage between COM and ZZS was solemnized under the African Christian Marriage and Divorce Act (Cap 154) (now repealed) Section 14 of the said Act (on jurisdiction) provided that:-
  - a. “Subordinate courts of the first class shall have the same jurisdiction, in the case of marriages solemnized or contracted under this Act or the Native Christian Marriage Act (now repealed) as is vested in the High Court by virtue of the Matrimonial Causes Act”.
12. At the time this matrimonial cause was filed the Marriage Act, 2014 was in force, having commenced on May 20, 2014. “Court” is defined in section 2 of the said Act as “a Resident Magistrate’s court established under section 3 of the Magistrate’s Courts Act (Cap 10)”.
13. Section 65 of the Marriage Act, 2014 provides that a marriage may be dissolved upon prove of any of the following grounds:-
  - a. Adultery;



- b. Cruelty;
  - c. Desertion (for a period in excess of 3 years immediately preceding the date of presentation of the petition);
  - d. Exceptional depravity by either party and;
  - e. The irretrievable break down of the marriage.
14. From the foregoing it is clear to me that this matter should have been filed in the Chief Magistrate’s Court. I am however of the opinion that referring this matter to the said court 8 years after it was filed in this court would not amount or lead to the best use of the judicial time nor would it facilitate the just, expeditious and affordable resolution of the matrimonial dispute before me. I note that the High Court has jurisdiction under Article 165 (3) (a) of *the Constitution* of Kenya “unlimited original jurisdiction in criminal and civil matters.” I am therefore of the opinion that I should not down my tools, but rather take them up, so that justice in this cause isn’t delayed. In any case I should not pay undue regard to procedure technicalities.
15. The Court of Appeal in *AWK v WK [ 2002] eKLR* stated that the standard of proof necessary to prove a matrimonial outcome was that of being satisfied on “preponderance of probability” by which they meant that the court “ought to be satisfied as to feel sure that cruelty or desertion or even adultery (all being matrimony offences) has been (as the case may be) established”.

**Analysis of the law and the facts**

16. The Respondent despite being served did not appear for the hearing. The evidence of the applicant was therefore unchallenged.
17. In his testimony the petitioner testified that the respondent left the matrimonial home in 2010. I take notice of the fact that the petitioner was in fact served in Kiserian, Kajiado County. The petitioner and the respondent haven’t lived together for a period exceeding 12 years. In my view desertion was proved.
18. It would appear to me that the marriage between the petitioner and the respondent has irreversibly broken down and cannot be salvaged. petitioner and respondent have lived apart for a long time and do not communicate anymore. The marriage is clearly a sham. There is no love between the two. I therefor find and hold that the said marriage has irreversibly broken due to desertion on the part of the respondent.
19. No sufficient evidence of cruelty and adultery was placed before me. Those grounds of divorce were therefore not proved.

**Disposition**

20. In the premises therefore judgment shall be entered in this cause on the following terms:-
- a. The marriage solemnized between the petitioner and respondent on August 23, 2003 is hereby dissolved. Decreed nisi dissolving the marriage is hereby issued. The said decree shall be made absolute thirty (30) days from the date of this judgment;
  - b. Each party shall bear own costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 24<sup>TH</sup> DAY OF MARCH, 2023**

.....



**Gregory**

**JUDGE**

**In the presence of:**

**Winnie Migot – Court Assistant**

**Ms Chengo for the Petitioner**

**The Respondent (Absent)**

