



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

(FAMILY DIVISION)

DIVORCE CAUSE NUMBER 1 OF 2020

NHB.....PETITIONER

VERSUS

RRF.....RESPONDENT

JUDGMENT

1. The petitioner herein by Amended Petition dated 30th June, 2020 filed on 2nd July 2020 seeks the following prayers:

- a) *That the marriage between her the respondent be dissolved.*
- b) *An order restraining the respondent from molesting, assaulting or otherwise harassing her.*
- c) *That custody of the issue of the marriage named herein be granted to the petitioner and the respondent be granted visitation and access rights whenever he so requires.*
- d) *That the Respondent be compelled to provide for the maintenance of the minor.*
- e) *The affirmation and upholding of her proprietary interest and rights in the matrimonial home.*
- f) *Costs of this cause.*
- g) *Any further or other relief that this Honourable court may deem just and fit to grant to the petitioner circumstances*
- h) *Interest on (a) and (b) (sic) above at court's rates from the time of filing this suit to the final payment thereof. Such other and further relief that this Honourable court may deem fit and just to grant.*

2. According to the petitioner her marriage to the respondent has irretrievably broken down and as a result the petitioner has been compelled to move out of the matrimonial home and she is currently living at her parents' house. The grounds for this state of affairs are;

- i. *The petitioner is a practicing Hindu while the respondent is a Christian.*
- ii. *That parties have been constantly quarreling.*
- iii. *That the parties have as result became wholly incompatible.*
- iv. *That the parties are no longer committed to the marriage.*
- v. *That all attempts at reconciling the parties or mediating between them have failed.*

3. It is the Petitioner's case that the respondent had intimated that he was planning to relocate to India with the minor. That both he and the minor had VISAs for USA, Canada among other countries and she was fearful that he would leave with the child an action that would not be in her best interest. That this would not only deny her access but would make access very expensive. She averred further that the respondent had been threatening the minor whenever she wanted to visit the petitioner. She now sought maintenance in the sum of Kshs. 200,000/= per month towards the minor's upkeep.

4. The respondent filed a response to the petition and cross petition dated 27th August 2020 on 1st October 2020; He conceded that the marriage has irretrievably broken down and lays the blame at the Petitioner's feet, accusing her of sustaining 'unwife' like conduct towards him and by;

i. Engaging in extramarital affairs and eloping with one NS whom she is currently living with.

ii. Deserting the Respondent and leaving their matrimonial home.

iii. Denying the respondent his conjugal rights.

iv. Being generally adulterous.

5. He seeks the following orders;

a) An order for dissolution of marriage.

b) An order for custody of VRR

c) An order of restricted visitations with prior notice to the petitioner/respondent.

d) The matrimonial property be held in trust for the minor herein until she attains the majority age.

6. Regarding the custody of the child he contended that it was the petitioner who unceremoniously left the child in his custody when she moved out of the matrimonial home. That the petitioner could have limited access to the child to prevent a situation where she would be disturbing his life.

7. Regarding the matrimonial property it was his averment that his share of the house be held in trust for their child until she attained the age of majority.

8. He conceded to the dissolution of the marriage save that each party bears its own costs.

9. The parties, the petitioner, a Kenyan citizen and a [particulars withheld], the respondent is an Indian citizen and an accountant formalized their marriage at registrar' office under the repealed **Marriage Act** and subsequently on 28th January 2012 solemnized their marriage under the **Hindu Marriage and Divorce Act (now repealed)** at the CGHU Temple in Nakuru. They lived as husband and wife in Nakuru. Their union was blessed with one issue namely VRR.

10. They also jointly acquired a house situate on plot No. Nakuru/Municipality Block [...].

11. At the hearing of the Petition it was evident that the marriage had broken down, and the Petitioner had moved on. She testified that that during the marriage there was physical assault, mental anguish and unending disagreements and misunderstanding between her and the respondent.

12. That for over three (3) years the respondent had denied her conjugal rights. She admitted committing adultery because the respondent denied her conjugal rights. She also confirmed that she had moved on.

13. That their religious differences brought disagreement because she refused to convert from Hindu to Christianity.

14. She testified that she wanted the respondent to have custody of the child because she was not financially stable to provide for the child. She however asked for unlimited access. That currently she was visiting the child daily at her mother's place which is next to her matrimonial home. It was her desire that this arrangement be maintained.

15. During her testimony she was also in agreement with the respondent that the property they had acquired be registered in their joint names in trust for their child same should be held in trust for their child.

16. In his testimony the Respondent accused the petitioner of adultery. That he too had been denied his conjugal rights in that since the birth of their child in 2011 the petitioner hardly slept in his bed but always slept with their child.

17. He had a problem with the petitioner having unlimited access. He wanted that defined. He said he did not want her shadow in his house. He complained that the petitioner was manipulating the child while he was away at work and if she had wanted to bond with the child she would not have left the child behind. He conceded that he had threatened to leave Kenya with the child and not come back. He stated that if he got better prospects elsewhere outside Kenya he would leave, and would not have any reason to come back. He wondered why he would need the leave of court to leave the country with his own child. He conceded that the child held a Kenyan passport and that he was permanent resident in Kenya. He confirmed that the Petitioner could have limited access to the child and that their property could be registered in a trust for the child.

ANALYSIS & DETERMINATION.

18. The issues that arise for determination are:

- a. whether the marriage between the Petitioner and the respondent should be dissolved**
- b. who should have custody of the child? What about access?**
- c. who should bear costs.**

19. **Section 70 of the Marriage Act** provides grounds for divorce in Hindu marriages: A party to a marriage celebrated under Part VI may petition the court for the dissolution of the marriage on the ground that—

- (a) the marriage has irretrievably broken down;*
- (b) the other party has deserted the petitioner for at least three years before the making of the petition;*
- (c) the other party has converted to another religion;*
- (d) since the celebration of the marriage, the other party has committed rape, sodomy, bestiality or adultery;*
- (e) the other party has committed cruelty on the other; and*
- (f) the other party has committed exceptional depravity on the other.*

Section 66(6) states situations in which a marriage is considered to have irretrievably broken down; where –

- (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.*

20. It is the evidence of both parties that the petitioner committed adultery. She does not deny it and blames the respondent for his cruelty and denial of her conjugal rights. He also accuses her of denying him the same rights since the birth of their child. Evidently the marriage has broken beyond repair as the petitioner has moved out of the matrimonial home and is living with another man.

21. With regard to the custody of the child, I requested for a children officer's report which was availed by the County Children's Coordinator Mrs. Alice Wanyonyi.

22. There was a fear expressed by the petitioner that the respondent having resigned from his job intended to travel to India with the child who holds a Kenya Passport with the intention of denying her access. As a result she filed an the application dated 26th April 2021. Upon consideration of the application I made the following orders;

- a. The application involves the custody and possible removal of the child in issue in this matter out of the jurisdiction of this court while this matter is still pending determination. The application is therefore certified urgent and service dispensed with in the first instance*
- b. The respondent RRF, and /or his parents be and are hereby restrained from removing the minor VRR, aged 10 years, and whose passport no is [...], from the jurisdiction of this court, without leave of this court, pending the hearing and determination of this application.*

23. On the 17th of May 2021 the counsel for the respondent confirmed that the respondent had no reason to leave the country, or leave with the child. Parties agreed that instead of pursuing this issue separately to have the court to determine issue of custody together with the issue of the dissolution of the marriage. They also consented to the consideration of the Children Officer's Report as part of the evidence. They chose not to file any submissions.

24. I have carefully considered the Children Officer's Report.

25. **Section 83 of the Children Act** provides the principles to be applied in making custody order. That in determining whether or not a custody order should be made in favour of the applicant, the court shall have regard to—

(a) the conduct and wishes of the parent or guardian of the child;

(b) the ascertainable wishes of the relatives of the child;

(c) the ascertainable wishes of any foster parent, or any person who has had actual custody of the child and under whom the child has made his home in the last three years preceding the application;

(d) the ascertainable wishes of the child;

(e) whether the child has suffered any harm or is likely to suffer any harm if the order is not made;

(f) the customs of the community to which the child belongs;

(g) the religious persuasion of the child;

(h) whether a care order, or a supervision order, or a personal protection order, or an exclusion order has been made in relation to the child concerned and whether those orders remain in force;

(i) the circumstances of any sibling of the child concerned, and of any other children of the home, if any;

(j) the best interest of the child.”

26. **Section 81** defines *custody, care and control* saying that unless the context otherwise requires—

(a) “custody” with respect to a child, means so much of the parental rights and duties as relate to the possession of the child;

(b) “care and control” means actual possession of a child, whether or not that possession is shared with one or more persons;

(c) “legal custody” means so much of the parental rights and duties in relation to possession of a child as are conferred upon a person by a custody order;

(d) “actual custody” means the actual possession of a child, whether or not that possession is shared with one or more persons.”

27. **Article 53(1) (e)** provides that it is the right of every **child to have parental care and protection, which includes equal responsibility of the mother and father to provide for the child, whether they are married to each other or not;** At 53(2) it provides that *a child's best interests are of paramount importance in every matter concerning the child.*

28. According to **Section 6 of the Children Act No. 8 of 2001**, the right of a child to parental care is the right to live with and to be cared for by the parents.

29. **Section 23** of the same **Act** defines parental responsibility to mean :

...all the duties, rights, powers, responsibilities and authority which by law a parent of a child has in relation to the child and the child's property in a manner consistent with the evolving capacities of the child.

30. The duties referred to above include in particular—

(a) the duty to maintain the child and in particular to provide him with—

(i) adequate diet;

(ii) shelter;

(iii) clothing;

(iv) medical care including immunisation; and

(v) education and guidance;

(b) the duty to protect the child from neglect, discrimination and abuse;

31. The parent's rights are set out at 23 (2) in the following terms. The parent has the right with respect to the child to:-

(i) give parental guidance in religious, moral, social, cultural and other values;

(ii) determine the name of the child;

(iii) appoint a guardian in respect of the child;

(iv) receive, recover, administer and otherwise deal with the property of the child for the benefit and in the best interests of the child;

(v) arrange or restrict the emigration of the child from Kenya;

(vi) upon the death of the child, to arrange for the burial or cremation of the child.”

32. The children officer's visits and investigations indicated that the two parents have the capacity to provide for their child. The officer recommends joint custody of the child, with the child spending school term with the father and weekends and holidays with the mother.

33. Custody of the child comes with parental responsibility. The parents have an equal responsibility, equal rights to the child and none has a higher authority over the child than the other. And it is the right of the child to be cared for by both parents, to have equal access to both parents, and for the parents to exercise parental responsibility only in the best interests of the child.

34. It is therefore important for the respondent to understand that it is not upon him to determine the 'amount' of access the petitioner will have. He did not produce any evidence of the alleged manipulation of the child by the petitioner. It is the interests of the child that will determine that. It is not about the petitioner bonding with the child, it is about the child having her time and bonding with her mother. He cannot and is not allowed to project his bitterness or anger about the petitioner's actions against the relationship between the child and the petitioner. The rights, duties, responsibilities and authority set out in the Constitution and the Children Act are for both parents.

35. The parties herein ought to be aware that anything they do to hurt each other through the child may amount to making the child to become in need of care and protection by exposing her to their differences. That has not only legal consequences but more importantly it may add further trauma to the child who is already traumatized by their separation and divorce. They have problems between them. There is no evidence that the child has any problem with either of them. Neither parent should make it their business to destroy the child's relationship with the other.

36. It is established through the evidence of the parties and the Children Officer's Report that the respondent has taken over the provision of maintenance, education and shelter for the child. He has not asked for any financial contribution from the Petitioner. Equal responsibility does not necessarily mean 50% money contribution. Parents have the capacity of knowing the needs of their child and sharing their responsibilities equitably. In this case the respondent has no problem providing for the child.

37. This child is a girl of tender years. She is close to her mother and has no problem interacting with her mother. Her mother does not have any problem with the child living with the father in what the child knows as her home, and for her father to continue making provision for her. The mother says that her own parent's home is next to the home where the child lives with the father. Hence the interactions will not in any way interfere with the respondent's life as the petitioner does not need to go to the respondent's house. The petitioner also has her own house where the child can visit.

38. Clearly therefore the recommendation of joint legal custody fits well into this case. That means the parents have equal custody rights. The recommendation that the father stays with the child during the school term and the mother the weekends and holidays would work well. However even when the mother is her own mother's house which is next to the respondent's house, the child should not be restrained from visiting the mother. Considering her age it would not be in her best interest for her to know that her mother is next door and to be denied the opportunity to spend time with her. Such restrictions will not be in her best interests.

39. Regarding the house, the parents are in agreement that the same be registered into trust for the child.

40. In the end the following orders issue:

a. The petition and cross petition both succeed, the marriage between the two parties be and is hereby dissolved.

b. The petitioner and the respondent be and are hereby awarded joint legal custody of the child VRR.

c. Subject to review by the court, or consent of parties, the joint custody will be shared in the following terms: the child VRR to remain in the actual custody of the respondent during the school term, and actual custody of the petitioner during weekends and the school holidays. The child be at liberty to visit the petitioner when she visits her parents' house next to the respondent's house.

d. The petitioner and the respondent to share their parental responsibilities equitably.

e. The respondent, his parents and or relatives or agents be and are hereby prohibited from leaving this country with the child without the consent of the petitioner. This order be served on the Department of Immigration for compliance.

f. The property owned jointly by the parties herein be registered in their joint names to hold in trust for the minor VRR until she attains the age of 18 years.

g. Each party to bear its own costs

DATED, SIGNED AND DELIVERED VIA ZOOM THIS 24TH DAY OF JUNE, 2021.

MUMBUA T. MATHEKA,

JUDGE.

In the presence of:

Edna Court Assistant

Petitioner

For Petitioner Mr. Matiri

Respondent

For Respondent Mr. Situma