



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO. 23 OF 1996

TKM.....PETITIONER

VERSUS

YAO.....RESPONDENT

JUDGEMENT

1. On 17.5.91, TKM the Petitioner then a bachelor married YAO the Respondent, then a spinster at the Registrar's Office in Mombasa. Following the marriage, the parties cohabited in Mombasa County. The parties were blessed with two children, NK born in June 1987 and KK born on 20.2.93, who are now adults.

2. The Petitioner filed this Petition dated 26.8.96 against the Respondent, seeking orders that:

- a. the marriage between the Petitioner and Respondent be dissolved.**
- b. the Petitioner be granted custody of the 2 children.**
- c. the Respondent be condemned to pay costs of this cause.**
- d. this Honourable Court be pleased to make further or any other order as may be just.**

3. The grounds upon which the Petitioner seeks the dissolution of marriage are cruelty and desertion. The particulars of cruelty are that since 1994, the Respondent denied the Petitioner warmth, respect, affection and companionship and was rude and quarrelsome. Since 16.4.96, the Respondent has been guilty of constructive desertion and has rendered it impossible for cohabitation to resume. The marriage has therefore irretrievably broken down.

4. In her Answer to Petition dated 14.10.96, the Respondent denied the allegations of cruelty contained in the Petition. She averred that the Petitioner left the matrimonial home in April 1994 and began to cohabit with another woman, thus committing adultery. She accused the Petitioner of wilful neglect of the Respondent and their 2 children. That following her report to the children's department, the Petitioner was ordered to pay maintenance which he did not pay regularly. The Respondent prayed for custody, care and control of the 2 children. She also prayed for alimony pending suit and permanent maintenance for her and the children and cost.

5. By an order of 28.7 97, this Court awarded custody of the 2 children to the Respondent and granted the Petitioner access over the weekends. The Court also ordered the Petitioner to pay to the Respondent the monthly sum of Kshs. 4,300/= being alimony pending suit with effect from 31.7.97. Following default over many months, this Court did on 15.9.05, pursuant to an application dated 8.8.05, order attachment of the Petitioner's property for failure to pay Kshs. 309,600/=. Execution was however not possible following the filing of an objection dated 7.10.05 by one Abubakar Mohd Abubaka Shegu, claiming that the goods attached *vide* a warrant of attachment dated 29.9.05, belonged to him.

6. At the hearing, the Petitioner in his brief testimony told the Court that he and the Respondent had disagreements. He accused the Respondent of disrespect and that she used to abuse him in the presence of the children. He filed the Petition after they separated in 1994. Since separation 25 years ago, they have not resumed cohabitation.

7. On her part, the Respondent denied abusing the Petitioner. She accused the Petitioner of having another woman in his life. He abandoned her in 1994 when the children were 7 years and 11 months old respectively. The Petitioner never assisted the children, leaving the Respondent to struggle with them on her own. The Petitioner paid the maintenance ordered by the Court for a short period and then defaulted. When his goods were attached, he denied ownership of the same. The Respondent thereafter raised the children who are now

adults, without any assistance from the Petitioner. She prayed that the Court grants her the costs she incurred on the children since 1994 to date. She had no objection to the dissolution of the marriage.

8. Parties filed submissions which I have considered.

9. For the Petitioner, it was submitted that due to the long period of separation since 1994, the parties no longer wish be husband and wife. The marriage subsists on paper only and should be dissolved.

10. For the Respondent, it was submitted that the allegations of cruelty were denied and contended that it was the Petitioner who deserted the Respondent and went to live with another woman. The Respondent contended that the Petitioner married another woman while still married to her contrary to Section 37 of the repealed Marriage Act. Further, that a marriage could be presumed between the Petitioner and Dolly by virtue of their cohabitation. The case of Hortensiah Wanjiku Yawe v Public Trustee Civil Appeal No. 13 of 1976 was cited to buttress this submission. In the end however, the Respondent submitted that she does not contest the dissolution of the marriage.

11. The Petition herein was filed under the provisions of the repealed Matrimonial Causes Act. The grounds upon which a marriage contracted under the repealed Marriage Act, Cap 150 could be dissolved are stipulated in the Matrimonial Causes Act at Section 8 which provides:

(1) A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent

(a) has since the celebration of the marriage committed adultery; or

(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or

(c) has since the celebration of the marriage treated the petitioner with cruelty; or

(d) is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition, and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.

12. The Petitioner alleges cruelty on the part of the Respondent which she denied. The Respondent on her part alleges adultery on the part of the Petitioner with a woman named D. Other than stating that the Respondent disrespected him and abused him in the presence of the children, the Petitioner did not in his brief testimony give incidents of the alleged abuse by the Respondent. N did he give any details of the disrespect by the Respondent. I am therefore not persuaded that the ground of cruelty has been established.

13. On her part, the Respondent alleged adultery on the part of the Petitioner. The Petitioner did not in his testimony deny the allegations of adultery. It is trite law that what is not denied is deemed to be admitted. It is stated in Odger's Principles of Pleadings and Practice in the High Court of Justice 25th Edition, page 124:

“1. Any allegation of fact unless traversed is admitted.

The pleader must either admit or deny every material allegation of fact in the pleading of his opponent and he must make it absolutely clear which facts he admits and which he denies. To ensure this, Rule 13 provides that any allegation of fact is deemed to be admitted unless traversed and that a traverse may be either by a denial or by a statement of non-admission and either expressly or by necessary implication.”

14. Having failed to deny the allegations of adultery in both his pleadings and testimony, the Petitioner is deemed to have admitted the same. I therefore find that the ground of adultery has been established.

15. Further, the evidence on record shows that the parties have, since they separated in 1994, not resumed cohabitation. From their testimony, it was clear that they have no intention to resume cohabitation. Neither party is opposed to the divorce. The long period of separation speaks of a marriage that is irretrievably broken down. In N v. N [2008] 1 KLR [G & F] 16, Madan, J. (as he then was) observed:

“...if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union, the guilty spouse bearing the consequences.”

16. It is manifest that 26 years ago in 1994, the parties herein reached that point of not being able to live together reasonably happily, or at all and they went their separate ways. Since then, they have not resumed cohabitation and neither is interested in the marriage. This marriage is therefore beyond salvage and exists only on paper. Accordingly, the parties are entitled to be released from their matrimonial union.

17. As regards the prayer for alimony, it was submitted that the Respondent failed to demonstrate that she was entitled to the same. She acquiesced to the status and cannot be heard to complain now. The Petitioner contended that it would be unjust and punitive for the Court to grant the prayer at this stage. On the maintenance amount of Kshs. 4,300/= the Petitioner was ordered to pay in 1997, it was submitted that the same was intended for the upkeep of the children who were then minors. The Respondent did not make serious effort to enforce the order

if at all there was default. According to the Petitioner, the order was in force for over 22 years and was overtaken by events by the passing of the Children Act. It was also argued that the order is time barred and not enforceable. The Petitioner urged the Court to find that the prayer for enforcement of the said order cannot be granted.

18. For the Respondent, it was submitted that the Petitioner complied with the maintenance order of 5.11.98 for a while but defaulted thereafter. An objector frustrated her efforts to execute the attachment order of 20.9.05 for the recovery of Kshs. 309,600/= being maintenance arrears. She further contended that she singlehandedly educated their 2 children and took care of them up to maturity. She claimed that during the pendency of their marriage, the Petitioner acquired Plot No. Kwale/S. N./Kundutsi 'x'/xxx and she is entitled to a share thereof. The Petitioner also owns with others, a flat on Title No. Mombasa/Block XLVII/xxx in Ganjoni. She further claimed that the Petitioner has since "been able to amass quite an amount of wealth and should thus be condemned to ameliorate the suffering already gone through by the Respondent."

19. The Respondent prayed that the Court grants her alimony in accordance with the Court order of 5.11.98 from the date of default until payment in full together with interest. She also prayed for damages for the struggles the Respondent went through.

20. The Court notes that there was indeed an order by this Court of 28.11.97 and dated 5.11.98 directing the Petitioner to alimony pending suit in the sum of Kshs. 4,300/= per month with effect from July 1997. The record further shows that following default and pursuant to an application dated 8.8.05, this Court on 15.9.05 granted to the Respondent an attachment order of the Petitioner's household property, for failure to pay Kshs. 309,600/=. The Respondent's efforts at attachment were however frustrated by the Objection filed by one Abubakar Mohd Abubaka Shegu, claiming that the goods attached vide a warrant of attachment dated 29.9.05, belonged to him.

21. Since the attachment aborted in 2005, the Respondent has not demonstrated what further action she took, if any, towards recovery of the arrears. She had the option of applying for attachment of the Petitioner's immoveable property and it is not clear why she did not do so. For this inordinate delay of 15 years in pursuing her claim, the Court finds the Respondent guilty of laches and acquiescence.

22. In Njuguna Githiru v Attorney General [2016] eKLR, Lenaola, J. (as he then was), made reference to the doctrine of laches as follows:

On the doctrine of laches in Common law, in Smith vs Clay [1767] EngR 55, (1767) 3 Bro CC 646, (1767) 29 ER 743, Lord Camden LC stated that:

'A Court of Equity has always refused its aid to stale demands, where a party has slept upon his right and acquiesced for a great length of time. Nothing can call forth this Court into activity, but conscience, good faith, and reasonable diligence; where these are wanting, the Court is passive, and does nothing.'

23. It is a well settled maxim that equity aids the diligent and not the indolent. A party who slumbers on their rights is deemed to have abandoned the same. The Respondent has clearly slept on her rights for about 15 years and cannot at this stage seek the Court's indulgence. It must also be noted that the sum granted way back in 1997, was alimony *pendent lite*. In my view, the purpose for which the sum was granted to the Respondent has now been overtaken by events. In any event, the present proceedings are not execution proceedings and not ought to be used as such. The prayer by the Respondent in this regard must therefore fail.

24. I now turn to the claim for damages and a share in the Petitioner's property. The Respondent in her submissions prayed for damages for the struggles she went through. She also claimed that she is entitled to a share of Plot No. Kwale/S. N./Kundutsi 'x'/xxx, a flat on Title No. Mombasa/Block XLVII/xxx in Ganjoni and the wealth the Petitioner has since amassed. This is a new issue now raised by the Respondent. It is well established that new issues cannot be raised in submissions and any issues so raised, are best ignored. This was well articulated by Korir, J. in Republic v Chairman Public Procurement Administrative Review Board & another Ex-Parte Zapkass Consulting And Training Limited & another [2014] eKLR where he stated:

The Applicant, the respondents and the Interested Party all introduced new issues in their submissions. Submissions are not pleadings. There is no evidence by way of affidavits to support the submissions. New issues raised by way of submissions are best ignored.

25. For the foregoing reasons, the claim for damages and share of the Petitioner's property must fail.

26. In the end, I do pronounce a decree of divorce and order that the marriage between the Petitioner, TKM and the Respondent, YAO solemnized on 17.5.91, at the Registrar's Office in Mombasa, be and is hereby dissolved. Decree nisi to issue and the same to be made absolute within 1 month. This being a matter between parties who were once married, I direct that each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 6th March 2020

M. THANDE

JUDGE

In the presence of: -

.....**for the Petitioner**

.....for the Respondent

.....Court Assistant