



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

DIVORCE CAUSE NO. 1 OF 2011

UNC.....PETITIONER

BP.....CO-PETITIONER

VERSUS

RC.....RESPONDENT

AD.....CO-RESPONDENT

JUDGEMENT

1. By a Petition dated 6.1.11 and amended on 28.10.11, UNC, the Petitioner sought the dissolution of his marriage to the Respondent RC which was solemnised under Hindu rites and religion on 19.2.94 in Nairobi. The Petitioner also sought injunctive orders and custody of their 3 children.

2. The grounds upon which the Petitioner seeks the dissolution of marriage are cruelty and adultery. The particulars of cruelty are failure to show the Petitioner affection; ranting and raving at the Petitioner at the Mvita Tennis Club and at the Petitioner's clinic in the presence of club members, clinic staff and patients, thereby causing him embarrassment, humiliation and injury to his respect and reputation; nagging the Petitioner and attempting to commit suicide in 1995 and 1997, thereby adding to the stress and pressure factor. The Respondent's constant abuses, emotional attacks and humiliation of the Petitioner resulted in great mental anguish and distress which affected his concentration at work and general well-being.

3. On adultery, the Petitioner accused the Respondent of having a sexual relationship with **BP, the Co-Respondent an Indian expatriate, who she met at the Mombasa Sports Club gym. The 2 would meet whenever the Petitioner was away in Nairobi for business, at the Co-Respondent's flat in Biashara Bank Building. When the Petitioner confronted the Respondent on the matter, she confessed to the same but her father pleaded with the Petitioner to give her another chance. The Respondent however did not abandon her adulterous ways.**

4. In her Reply to Petition and Cross Petition dated 13.8.11 and amended on 8.11.11, the Respondent denied all the allegations of cruelty made against her by the Petitioner. She however conceded to committing adultery with the Co-Respondent and accused the Petitioner of refusing to share the matrimonial bed with her, thereby denying her conjugal rights for the last 7 years. She however ended the liaison when it became known by their respective families.

5. The Respondent accused the Petitioner of cruelty. In particular, the Respondent accused the Petitioner of bribing the police to put her in custody whenever they disagreed; verbally abusing and assaulting her and causing her physical harm that required treatment; depriving the Respondent of the car with which she took her children to school, thereby occasioning them suffering; failing to provide for the family, causing the Respondent resort to borrowing from her relatives; travelling to Nairobi often to take care of his dental practice which deprived him of time with the family; taking away her jewellery and other personal items; refusing to eat the Respondent's food; severally confiscated her phone and destroying vital information.

6. The Respondent accused the Petitioner of committing adultery with his late cousin PC and the Co-Petitioner with whom he was caught at Hillcrest Hotel, Nairobi by CID officers hired by the Respondent; picking women and young girls from the streets of Mombasa, some of whom are known to the Respondent, who include a girl named S; being a pornographic addict and inviting the Co-Petitioner and his mistresses to his matrimonial home not caring that he was hurting the Respondent and the children.

7. The Respondent prayed that the marriage be dissolved and that she be granted custody of the children. She also prayed for maintenance and upkeep for herself and the children and a return of her jewellery and personal items and vehicle.

8. At the hearing, the Petitioner in his brief testimony told the Court that he and the Respondent married in Nairobi in 1994 and initially lived in Nairobi, before moving to Mombasa. Their 3 children who were born in Nairobi are now adults. The Petitioner relied on the grounds of divorce set out in his amended Petition. All efforts at reconciliation have failed and the parties have lived apart for over 5 years. To him, there is no marriage and he prayed that the same be dissolved.

9. On her part, the Respondent relied on the averments in her amended Reply to Petition and Cross Petition. She said that in the initial years, her marriage to the Petitioner was good. From 2004 however, there was conflict between the parties. They were always fighting. To her, the marriage has irretrievably broken down and she wished that the same be dissolved.

10. The parties' marriage was conducted in accordance with Hindu rites and religion in 1994. At the time of the marriage, Hindu marriage and divorce in Kenya were governed by the Hindu Marriage and Divorce Act, now repealed. Section 9 of that Act provided:

Except where and to the extent that other provision is made in this Act, the provisions of the Matrimonial Causes Acts shall apply to matrimonial causes relating to marriages, and the Matrimonial Causes Act shall, in relation to marriages, be subject to the provisions of this Part.

11. Pursuant to the foregoing provision, the Petition herein was filed under the provisions of the repealed Matrimonial Causes Act. Cruelty and adultery are some of the grounds upon which a marriage contracted under the repealed Hindu Marriage and Divorce Act could be dissolved. Section 10 of the Act provides in part:

(1) A petition for divorce may be presented to the court by either party to a marriage whether solemnised before or after the commencement of this Act on the ground that-

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

(b) ...

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

12. The Petitioner alleged cruelty on the part of the Respondent. He also accused her of committing adultery with the Co-Respondent. The offence of adultery was conceded by the Respondent. On her part, the Respondent accused the Petitioner of cruelty. She also alleged that he committed adultery with multiple women and girls including the Co-Petitioner, his late cousin PC and one S. Notably, the Petitioner did not rebut the allegations of cruelty and 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."

13. 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 on the part of the Petitioner and the Respondent has been established.

14. It is quite evident to the Court that the marriage herein has irretrievably broken down. The marriage became troubled way back in 2004 and there was conflict and fighting between the parties. They have lived separately for over 5 years. The marriage clearly exists only on paper and the parties are no longer interested in the same. Accordingly, the parties are entitled to be released from their matrimonial union.

15. The parties did not urge the other prayers in the amended Petition and amended Cross Petition. In any event the children of the marriage are now adults. Accordingly, the prayer for custody of the children by both parties has been overtaken by events.

16. In the end, I do pronounce a decree of divorce and order that the marriage between the Petitioner, UNC and the Respondent RC solemnised on 19.2.94 in Nairobi, 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 hitherto married, I direct that each party shall bear own costs.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 24TH DAY OF JULY 2020

.....

M. THANDE

JUDGE

In the presence of: -

.....for the Petitioner

.....for the Respondent

.....Court Assistant