



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

DIVORCE CAUSE NO. 15 OF 2014

FOJ.....PETITIONER

VERSUS

NMK.....RESPONDENT

JUDGMENT

1. The Petitioner filed a petition dated 27th May 2014 seeking dissolution of the union marriage solemnized between the petitioner and the respondent on 20th July 2010 plus cost of this suit and any other relief the Court may deem fit to grant.
2. The petitioner stated that the marriage was solemnised on 20th July 2010 at the District Commissioner's office at Nakuru as they resided at [Particulars Withheld] Estate in Nakuru. She attached marriage certificate to the affidavit to confirm that. He averred that prior to their marriage, the petitioner was a widower with 3 children and living in the United States of America while the respondent had 1 child from her previous marriage and residing in Kenya.
3. The petitioner's ground for dissolution of the union is inability to consummate their marriage due to the HIV/AIDS status of the respondent; that the status brought emotional break down of the relationship as the two could not get a child guaranteed to be negative. Petitioner aver that for that reason, the marriage has irretrievably broken down.
4. In response the respondent filed reply to the petition and a cross petition seeking for dissolution of the union between her and the petitioner plus costs of the suit and any other relief the Court may deem fit.
5. The respondent avers that the marriage has irretrievably broken down due to the desertion by the petitioner and emotional breakdown of the respondent and not due to her HIV/AIDS status as the petitioner was aware of her status before they solemnized the marriage. She avers that they have not consummated their marriage due to the desertion by the petitioner who declined to move to Kenya on the ground of high rate of unemployment in Kenya. She further averred that the petitioner was not committed to the union from the inception as he delegated all his duties including dowry negotiations and never tried to consummate the marriage.

ANALYSIS AND DETERMINATION

6. It is not in dispute the petitioner and the respondent were husband and wife and that they solemnized their marriage on 20th July 2010. It is not also disputed that the said marriage was not consummated and that each of them want the marriage to be dissolved on ground that it has irretrievably broken down. The petitioner argues that the marriage was not consummated due to respondent's HIV status while the respondent on the other hand asserts that the petitioner was aware of her HIV status prior to the marriage and that petitioner never made any attempts to consummate the marriage but instead chose to continue residing out of the country (in USA) despite respondent's for him to come to Kenya.
7. Grounds for dissolution of marriage in Kenya are provided by **Section 66 (2) of the Marriage Act, 2014** set out as follows: -

“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.”

8. And **section 66 (2), section 66 (6)** states that a marriage has irretrievably broken down if any one of the following happens: -

i. A spouse commits adultery;

ii. A spouse is cruel to the other spouse or to any child of the marriage;

iii. A spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;

iv. The spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;

v. A spouse has deserted the other spouse or at least three years immediately preceding the date of presentation of the petition;

vi. A spouse has been sentenced to a term of imprisonment for life or for a term of seven years or more;

vii. Any other ground as the court may deem appropriate.

6. Petitioner stated that he is a resident of USA and the last time he travelled to Kenya to be with the respondent was from 26th June to 23rd July 2011; he confirmed that he left his matrimonial home in July 2011 making the total period he has been away from the respondent over nine (9) years and they have not demonstrated that there is a possibility of living together. Two years' separation or neglect is sufficient ground for divorce. There is no doubt that the marriage has irretrievably broken down. This is sufficient ground under **section 66 (6) of the Marriage Act, 2014** to have the marriage dissolved.

7. From the foregoing, I find that sufficient ground has been demonstrated to warrant dissolution of marriage between the petitioner and the respondent.

8. FINAL ORDERS

1. Marriage solemnized between the petitioner and the respondent on 20th July 2010 is hereby dissolved.
2. Decree Nisi do issue forthwith; to be made absolute after one (1) month.
3. Each party to bear own costs.

Judgment dated, signed and delivered via zoom at Nakuru

This 19th day of November, 2020

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RACHEL NGETICH

JUDGE

In the presence of:

Jeniffer - Court Assistant

Mr. Mbeche holding brief for Mrs. Mbeche for petitioner

No appearance for Respondent