



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KABARNET**

**DIVORCE CASE NO. 1 OF 2017**

**(FORMERLY NAKURU NO. 4 OF 2012)**

**PJK.....PETITIONER**

**=VERSUS=**

**OKK.....RESPONDENT**

**JUDGMENT**

1. By a Petition dated 11<sup>th</sup> June 2012, the Petitioner who celebrated a civil marriage with the Respondent under the Marriage Act at the District Commissioner's Office Baringo on 6/6/2006 prayed for dissolution of marriage on the grounds of cruelty and irretrievable breakdown of the marriage.

2. The Petitioner gave as one of the particulars of cruelty that the Respondent had attempted to force the Petitioner into a polygamous marriage against her and insisted on remaining with a woman stranger in the matrimonial home when *“between June 2011 and June 2011, the Petitioner went on a peace keeping mission outside Kenya, representing the Kenya Air-force and when she came back the Respondent had cohabited with another woman in the matrimonial home and became extremely cruel and hostile to the Petitioner.”*

3. Despite service and appearance by entry of Memorandum of Appearance dated 26<sup>th</sup> September 2012, the Respondent did not file an Answer to the petition but at the hearing with leave of Court made representation that:

*“I do not oppose the proceedings. I only seek that there be no order as to costs.”*

4. The Petitioner confirmed at the hearing that she did not wish to pursue costs. The cause then proceeded as undefended cause in accordance with the Registrar's Certificate of 4<sup>th</sup> July 2013.

5. The Petitioner testified as PW1 and, on a balance of probabilities in the absence of any answer and evidence from the Respondent, proved that upon return from a foreign peace keeping mission in 2011 she had come back to find the Respondent had already married another wife and the two were living together at Marigat at the Petitioner's matrimonial home, and that she did not agree to stay in a polygamous marriage in their rental home with another woman who at the time was already pregnant. The Respondent had said that –

*“If I did not agree to stay with the other wife then I must leave. I was being forced to enter into a polygamous marriage when I intended to engage into only a single marriage. I was emotionally tortured. We have not lived together since 2012. We have lived separately.”*

6. The issue for determination in this petition is whether cruelty and irretrievable breakdown of the marriage has been proved to warrant dissolution of the marriage.

**Determination**

7. Without hesitation, the Court finds that the conduct of the Respondent in secretly marrying a second wife while the Petitioner was abroad on work assignment and attempting to force the Petitioner into a polygamous marriage when she had contracted a monogamous civil marriage under the marriage Act cap 150 laws of Kenya was cruel. In addition, although not pleaded the Respondent's action amount to adultery which is also a ground of divorce. The parties have not lived together since 2012 – over 6 years, and this is an indication that the marriage has irretrievably broken down.

8. Although the petition was filed under the substantive and procedural regime of the Matrimonial Causes Act, which was repealed by the Marriage Act of 2014, the matter is to be continued in accordance with the latter Act by virtue of section 98 thereof which provides as follows:

98. *Saving*

1) *A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming into force of this Act is valid for the purposes of this Act.*

2) ***Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act.***

3) *Despite subsection (2), an order for judicial separation or decree of divorce granted under any written law shall in relation to the powers of the Court regarding maintenance be deemed to be a decree of separation or divorce as the case may be granted under this Act.*

9. In accordance with section 66 (6) of the Marriage Act 2014, a marriage is irretrievably broken down where-

(6) *A marriage has irretrievably broken down if-*

a) ***A spouse commits adultery;***

b) *A spouse is cruel to the other spouse or to any child of the marriage;*

c) *A spouse wilfully 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 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.*

10. I, therefore, find that the Petitioner has proved cruelty on the part of the Respondent and the marriage has irretrievably broken down, not to mention that the Respondent is guilty of the matrimonial offence of adultery, which not being pleaded shall not be used as a ground to dissolve this marriage.

### **Orders**

11. For the reasons stated above, the Court finds that the Respondent guilty of cruelty against the petitioner and that the marriage between the Petitioner and the Respondent has on account of long separation of over 6 years irretrievably broken down

12. Accordingly, there shall be a ***decree nisi*** for dissolution of the marriage between the Petitioner and the Respondent with no order as to costs.

*Order accordingly.*

**DATED AND DELIVERED THIS 26<sup>TH</sup> DAY OF FEBRUARY 2019**

**EDWARD M. MURIITHI**

**JUDGE**

### **Appearances:**

M/S Kipkeni & Co. Advocates for the Petitioner.

Respondent in person.