



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

DIVORCE CAUSE NO. 40 OF 2014

WKC.....PETITIONER

VERSUS

FNN.....RESPONDENT

JUDGEMENT

1. The Petitioner WKC filed this Petition dated 20.3.14 seeking the dissolution of his marriage to FNN, the Respondent. The marriage between the parties was solemnised on 22.10.04 at the Registrar's office in Mombasa. There are no children in the marriage. The Respondent however had had a child from another relationship. The grounds upon which the Petitioner seeks divorce are desertion, cruelty and adultery. The particulars are that the Respondent was arrogant and hot tempered. She often went home late without explanation forcing the Petitioner to take care of her child and the home. She refused to cook for the Petitioner and further denied him conjugal rights. The Respondent left the matrimonial home in April 2011 and went back to her mother's home. She returned in August after talks were held. In December they travelled to Eldoret for the Petitioner's mother's funeral. The Respondent declined to stay on and insisted on returning to Mombasa the same day against their custom. Upon the Petitioner's return to Mombasa in January 2012, he found the Respondent had left the matrimonial home. After negotiations, the Respondent wrote 2 apology letters and returned home. However in April 2012, the Respondent deserted the matrimonial home never to return. As a result of the actions of the Respondent, the Petitioner suffered emotional and mental anguish. He prayed for the dissolution of the marriage which has irretrievably broken down.

2. In her Reply to Petition dated 2.3.15, the Respondent denied all the allegations contained in the Petition and in her Cross-Petition accuses the Petitioner of cruelty. The Respondent averred that the Petitioner has continuously committed adultery and even brought another woman to the Respondent's home and started living there. He has married another woman during the subsistence of their marriage. He has mistreated and abused her, complaining endlessly that she has refused to give him children. The Respondent further accused the Petitioner of purchasing property without informing her and misusing money borrowed by the Respondent. She further claimed that she took a loan from her Sacco of Kshs. 235,000/= with which she contributed to the purchase of the plot in Eldoret and construction of the matrimonial home thereon. In November 2011, she took a loan from Cooperative Bank to construct a house for her mother but the Petitioner used the money to purchase a *tuk tuk* which he later sold and used the money. When the Petitioner chased the Respondent away, she left behind the household goods listed in her Cross-Petition in the Eldoret and Nyali homes worth Kshs. 279,000/=. The Respondent seeks the dissolution of the marriage and an order that the Petitioner be compelled to pay to her the following:

- i) Kshs. 235,000/= being her contribution towards purchase of the Eldoret matrimonial home.
- ii) Kshs. 600,000/= being her contribution towards construction of the home.
- iii) The household goods she left in the matrimonial homes.
- iv) Kshs. 150,000/= being the loan from Cooperative Bank used by the Petitioner to buy the *tuk tuk*.

3. In his response, the Petitioner denied all the allegations by the Respondent and stated that it was in fact the Respondent who owed him money. He prayed that the Cross-Petition be dismissed.

4. The parties did at the hearing give vent to their averments in their respective pleadings. The Petitioner denied that he was cruel to the Respondent demanding a child. He stated that his salary was Kshs. 22,000/= while that of the Respondent was Kshs. 8,000/=. He further stated that he borrowed money from Sacco and National Bank and bought land in Eldoret. The Respondent made no contribution of Kshs. 235,000/= or Kshs. 600,000/= towards purchase and construction of the house as alleged. He however conceded that the agreement for the purchase of the plot was in both their names and the purchase price was Kshs. 150,000/=. The Respondent used the loan she took to construct a house for her mother. The household goods she claims were bought by him and not by the Respondent. He also denies ever buying a *tuk tuk*. He denied remarrying but conceded that he had a fiancé with whom he has been living since 2014.

5. The Respondent stated in her testimony that she did not desert the matrimonial home but was chased away by the Petitioner. She took a

loan from Mukuyu Sacco Bamburi of Kshs. 235,000/=. They bought a piece of land in Eldoret for Kshs. 150,000/= and built a house. The loan she took from National Bank of Kshs. 165,000/= on 9.7.08 is what was used for building the house. She took another loan of Kshs. 150,000/= with which they bought a *tuk tuk*. The Petitioner later sold the *tuk tuk* while they were still together but did not give her any of the money. She prayed that the Court enables her get the money she borrowed to buy and develop the plot in Eldoret and the items in the matrimonial home retained by the Petitioner. Although the agreement for the purchase of plot was in both their names, she is the one who contributed the funds to buy the same. They however built the house together at the cost of Kshs. 700,000/=. Her salary is Kshs. 14,000/= with a house allowance of Kshs. 7,000/=. During the marriage her salary was lower. The Petitioner's salary was Kshs. 28,000/=. She prayed that the marriage be dissolved and that they share cost of construction of the house on 50/50 basis.

6. The Marriage Act, 2014 at Section 66(2) stipulates the grounds upon which a civil marriage may be dissolved as follows:

- (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"**

7. The parties herein accuse each other of cruelty. Both deny the accusations. The Petitioner accuses the Respondent of deserting the matrimonial home while the Respondent claims it was the Petitioner who chased her out. Both accuse each other of adultery and both deny the same. However, the Petitioner conceded in his testimony that he has been living with his fiancé since 2014. I do therefore find that the ground of adultery on the part of the Petitioner is established. It is difficult to ascertain the veracity of the other accusations and counter accusations. The fact remains however that the parties both seek dissolution of the marriage. The irretrievable breakdown of the marriage is one of the statutory grounds for divorce. The parties have lived apart since April 2012 and have not resumed cohabitation. There appears to be no hope for this marriage. In the circumstances I am satisfied that the marriage herein has irretrievably broken down.

8. I now turn to the issue of property. Section 6 of the Matrimonial Property Act defines matrimonial property as follows:

- (1) For the purposes of this Act, matrimonial property means—**
 - (a) the matrimonial home or homes;**
 - (b) household goods and effects in the matrimonial home or homes; or**
 - (c) any other immovable and movable property jointly owned and acquired during the subsistence of the marriage**

9. The Respondent claims that she substantially contributed to the purchase and development of the plot in Eldoret where the matrimonial home stands. She prays that the Petitioner be ordered to pay her Kshs. 235,000/= for purchase of plot, Kshs. 600,000/= for construction of the same and Kshs. 150,000/= for purchase of *tuk tuk*. She also seeks the listed household goods she left in the house in the matrimonial homes.

10. On the purchase of the plot in Eldoret, the Respondent exhibited a letter of offer dated 9.7.08 from National Bank to the Respondent for an unsecured personal loan of Kshs. 165,000/=. The purpose of the loan is indicated as purchase of a plot. Also exhibited is the agreement dated 14.7.08 for a 1.2 acre plot in Turbo Settlement Scheme between JT as vendor and the Petitioner and the Respondent as purchasers. The purchase price is Kshs. 160,000/=. The Petitioner stated that his salary was Kshs. 22,000/= while that of the Respondent was Kshs. 8,000/=. He further stated that he borrowed money from Sacco and National Bank and bought land in Eldoret. He produced a loan application form from Mombasa Parents Club Sacco for Kshs. 120,000/=. The Court notes however that this loan was taken on 1.9.08, after the purchase of the plot. No evidence of the alleged loan from National Bank was produced. The cash payment voucher from MPC Sacco for Kshs. 100,000/= is dated 16.9.11. It is not clear for what purpose the loan was taken. In any event it was taken over 3 years after the plot was purchased. Given that the loan was advanced to the Respondent just a few days before agreement for sale, and without any evidence to the contrary, I am satisfied that this is the money that was used to purchase the plot.

11. On construction of the house on the plot, the Respondent claims she contributed Kshs. 600,000/= towards construction of the house. She claims she took a loan of Kshs. 235,000/= from Mukuyu Sacco. No evidence was however availed to support this claim. As for the Petitioner, beyond denying the contribution of the Respondent, he provided nothing by way of evidence of his own contribution.

12. The Respondent prays for an order that she be paid Kshs. 150,000/= she borrowed but was used by the Petitioner to purchase a *tuk tuk*. The Respondent says the purpose of the loan was to construct a house for her mother. The Petitioner on the other hand denies any knowledge of the alleged *tuk tuk*. The Respondent did not produce any evidence of the loan she allegedly took. She does not even say when the loan was taken. No registration number, log book or any other details of the *tuk tuk* were produced. She did not say when the *tuk tuk* was purchased nor when and for how much it was sold. There is therefore nothing on record by way of evidence to persuade this Court to grant this prayer.

13. The Respondent further claims household goods worth Kshs. 279,000/=. She alleges that when the Petitioner chased her out of the matrimonial home she left all her household goods. The Petitioner on the other hand claims that when the Respondent left the matrimonial home she took his items from their home and carted them off to her mother's home. The Petitioner does not however state what those items are. In his list of documents he has a receipt from Pwani Cushion Makers for what appears to be a sofa set dated 2.6.14. There is also a

delivery note from Mbitini Cushion Makers for a cupboard and tea table dated 12.4.11. Clearly these items were purchased after the parties separated. The only item purchased during their cohabitation is a television purchased on 7.10.06 according to a receipt exhibited by the Petitioner. The Respondent's list of items and their respective values is in my view not sufficient to sustain her claim for payment or return of the same by the Petitioner.

14. Section 7 of the Matrimonial Property Act stipulates how ownership of matrimonial property is vested:

Subject to section 6(3), ownership of matrimonial property vests in the spouses according to the contribution of either spouse towards its acquisition, and shall be divided between the spouses if they divorce or their marriage is otherwise dissolved.

15. As indicated earlier, I have found that the plot in Eldoret on which the matrimonial property stands though purchased in the joint names of the parties, the funds were from the loan taken by the Respondent. As regards construction of the matrimonial home on the said plot, the actual contribution of each party is not clear from the evidence. Section 14(b) of the Matrimonial Property Act provides that where spouses hold matrimonial property jointly, there shall be a rebuttable presumption that their interest therein is equal:

“Where matrimonial property is acquired during marriage –

1. ...

2. in the names of the spouses jointly, there shall be rebuttable presumption that their beneficial interests in the matrimonial property are equal.”

16. The matrimonial home was constructed during the subsistence of the marriage. In the absence of proof to the contrary, the Court finds the parties' beneficial interests in this matrimonial home are equal. The Petitioner has failed to produce any evidence to rebut this presumption.

17. The Constitution of Kenya, 2010 stipulates the principle of fairness and non-discrimination to be applied by the Court in considering the entitlement of the parties in the matrimonial home. Article 45(3) provides:

Parties to a marriage are entitled to equal rights at the time of the marriage, during the marriage and at the dissolution of the marriage

18. In view of the foregoing, and guided by the law and the Constitution, I make the following orders:

- i) The marriage between the Petitioner and the Respondent solemnized on 22.10.04 at the Registrar's office, Mombasa be and is hereby dissolved.
- ii) Decree nisi to issue and the same to be made absolute within 1 month.
- iii) The matrimonial home in Eldoret shall be sold and the proceeds thereof be divided between the Petitioner and the Respondent. The Respondent shall have the amount equal to the value of the land while the development thereon shall be divided equally between the parties.
- iv) In the alternative, the matrimonial home shall be valued and the Petitioner shall pay to the Respondent her share in accordance with the proportion set out in iii) above.
- v) Each party shall bear own costs.

DATED, SIGNED and DELIVERED in MOMBASA this 26th day of April 2019

M. THANDE

JUDGE

In the presence of: -

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

.....**for the Respondent**

.....**Court Assistant**