



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

DIVORCE CAUSE NO.12 OF 2017

CH.....PETITIONER

VERSUS

KRGH.....RESPONDENT

JUDGMENT

1. Through her petition dated 22<sup>nd</sup> May 2015 but filed before Milimani Commercial Chief Magistrate's Court on 5<sup>th</sup> June 2015, the petitioner sought dissolution of her marriage to KRGH citing grounds among them family neglect, financial embarrassment and cruelty meted against her.

2. After celebrating their marriage in accordance with the Hindu rituals on 14<sup>th</sup> October 1989 at [Particulars withheld], Brent, England, they settled and cohabited at various places interalia, Sherbourne Gardens, Kingsbury, U.K, between 14<sup>th</sup> October 1989 to 1993 when they relocated to Nairobi, Kenya and continued to cohabit as such at various estates ranging from Westlands, Loresho, Kileleshwa and Ruaka up to 19<sup>th</sup> August 2014 when they separated due to irreconcilable differences.

3. The couple is blessed with three living issues namely KKH (Adult son), JKH (Adult Son) and J KH (Adult son). The petitioner who is an interior designer by profession and respondent a businessman and a director of [particulars withheld], are both domiciled in Kenya despite having celebrated their marriage in the United Kingdom.

4. Among the grounds cited for dissolution of their marriage vide paragraphs 10 of the petition is cruelty which is particularized as hereunder

**(a) Failure by the respondent to pay his own debts resulting in police officers going to the matrimonial home causing the petitioner extreme stress and anxiety.**

**(b) Constantly having outstanding debts and owing third parties money resulting in the respondent being arrested and held in police custody or released on bail on several occasions causing the petitioners stress and anxiety.**

**(c) Making the petitioner feel insecure and unsafe as a result of the many people who visited the matrimonial home demanding payment of outstanding monies owed by the respondent from the petitioner.**

**(d) Failing to honour his financial obligations to the family, resulting in the petitioner looking for finances to cater for the upkeep of the children, school fees and rent thus causing the petitioner extreme stress and anxiety.**

5. She therefore pleaded for dissolution of the marriage on the premise that it has irretrievably broken down and that there was no collusion nor connivance in filing this petition.

6. Despite service of the petition herein, the respondent did not bother to file any response hence registrar's certificate was issued on 18<sup>th</sup> February 2016 and the matter certified as properly filed and the same to proceed as undefended cause. After hearing the matter, the trial magistrate made a finding that she did not have jurisdiction to hear and determine a claim over dissolution of foreign marriage thus culminating to the transfer of the same to the high court on 7<sup>th</sup> July 2017 for hearing and determination.

7. During hearing, the petitioner adopted the averments contained in her affidavit in support of the petition alleging that the respondent had neglected the family and that he was too abusive to her.

8. I have considered the petition herein, affidavit in support and petitioner's testimony. Issues for determination are:

- (a) Were the petitioner and respondent married in accordance to Hindu rituals?**
- (b) Was their marriage celebrated outside Kenya? If so, does this court have jurisdiction to dissolve their marriage?**
- (c) Has the petitioner proved the ground of cruelty and irretrievable breakdown of their marriage?**

9. Grounds for dissolution of a marriage contracted in accordance with Hindu rituals are stipulated under Section 70 of the Marriage Act which provides that:

**“A party to a marriage celebrated under Part VI may petition the court for dissolution of the marriage on the grounds that:**

- (a) The marriage has irretrievably broken down.**
- (b) The other party has deserted the petitioner for at least three years before the making of the petition.**
- (c) The other party has converted to another religion.**
- (d) Since the celebration of the marriage, the other party has committed rape, sodomy, bestiality or adultery.**
- (e) The other party has committed cruelty on the other and**
- (f) The other party has committed exceptional depravity on the other”.**

10. There is no dispute that the couple herein did solemnize their marriage in U.K. in accordance with Hindu rituals. It is also not disputed that the couple have been domiciled in Kenya since 1993 up to 2014 when the two parted ways (separated).

11. The key question that begs for an answer is whether this court has jurisdiction to entertain the suit herein the marriage in question having been celebrated in a foreign country. Although there is no express provision under the Marriage Act providing for dissolution of marriages contracted in a foreign country, jurisdiction can be assumed from Section 38 and 40 of the Marriage Act 2011. Section 38 provides thus:

**“A marriage celebrated in a foreign country otherwise than in accordance with Section 37 is valid if:**

- (a) It was contracted in accordance with the law of that country and is consistent with the Laws of Kenya.**
- (b) At the time of the marriage the parties had the capacity to marry under the law of that country and is consistent with the laws of Kenya.**
- (c) Either of the parties is at the time of the marriage domiciled in Kenya, both parties had capacity to marry under this Act; and**
- (d) .....**

Section 40 goes further to recognize foreign marriages as civil marriages in Kenya by providing as follows:

**“a civil marriage contracted in a foreign country shall be recognized as a valid marriage if:**

- (a) It is contracted in accordance with the law of that country.**
- (b) It is consistent with the provisions of this part; and**
- (c) The parties have the capacity to marry under this Act.**

12. From the wording of the two provisions quoted above, there is no mandatory requirement that foreign marriage be it civil or Hindu must be registered in Kenya. What is required for a foreign marriage to be recognized in Kenya is that, the same must have been contracted in accordance with the law of that particular county (foreign country), that the parties must have had the capacity to marry which law must also be consistent with Kenyan laws. From the marriage certificate attached, both parties at the time of their marriage were adults of sound mind and of the opposite sex. There is nothing on record to suggest that the marriage herein celebrated in accordance with the Hindu rituals in America was not valid.

13. The cardinal element for consideration is the place of domicile of the parties for a period allowed and relevant to the applicable law prior to the institution of the divorce proceedings. In the case of **M.N.M v P.N.M (2016) eKLR** Judge Musyoka had this to say:

**“in personal matters, such as marriage, domicile is critical about residency. The law of domicile plays an important role in the determination of whether or not the court to which a dispute has been presented has jurisdiction. Crucially, the court will only have jurisdiction over a suit for dissolution of a marriage where parties have been domiciled within the jurisdiction of that court for the period allowed by the relevant law..... the jurisdiction of a family court to entertain a divorce cause is therefore guided by the law of domicile”.**

Similar position was held by J. Ougo in ER v EP (2016)eKLR.

14. In this particular case, both parties were residents and or domiciled in Kenya since the year 2001 till the suit herein was filed the year 2017. Based on that criteria, this court is seized of the requisite jurisdiction as their place of domicile was Kenya and they had separated at least 2 years before the divorce petition. Confronted by similar scenario where the couple both American citizens celebrated their marriage in Colorado, Justice G.B.M. Kariuki in the case of Jeffrey Stiles Worden vs Jessica rainy Worden Divorce Cause No. 124/2011 (unreported) held that:

**“In this case, the marriage between the parties was solemnized in the United States of America where both parties are domiciled. However, the petitioner has been ordinarily resident in Kenya since 2001. The petition is not by the wife who although a foreign national domiciled elsewhere, would under Section 5(1) of the Matrimonial Causes Act be entitled to seek divorce if she were ordinarily resident in Kenya for 3 years before the filing of the divorce petition”.**

The Honourable Judge went further to state that:

**“Although the petitioner is a husband who is neither domiciled in Kenya nor a Kenyan citizen but is otherwise ordinarily resident in Kenya and notwithstanding Section 4 and 5 of the Matrimonial Causes Act, I hold the view that he is entitled to petition for divorce in Kenya”.**

15. It is my finding therefore, that this court has jurisdiction to entertain the suit herein and make a determination. Having made a finding with regard to the issue of jurisdiction, I would proceed to determine the element of cruelty a ground cited by the petitioner for divorce. Although there is no internationally accepted standard definition on what constitutes cruelty in divorce proceedings, various courts have advanced and adopted some common ground by holding that:

**“.....cruelty is willful and unjustifiable conduct of such character as to cause danger to life, limb, or health, bodily or mental so as to give reasonable apprehension of such a danger”.**

(See A.M.A. v G.S.B. HCDC No. 134/2010 Nairobi and Russellvs Russel (1895) P 315, 322)

16. From the petitioner’s averments and testimony before court, there is no evidence or proof of cruelty meted out against her. Mere financial embarrassment or inability leading to accumulation of huge debts by a husband or a spouse cannot be equated to cruelty. For those reasons, the ground of cruelty cannot stand.

17. As to whether the marriage has irretrievably broken down, the petitioner alleged that the respondent was in consistent quarrel and abusive. The couple has been living separately since 19<sup>th</sup> August 2014 to date. Every effort to reconcile them have not been successful. Although the exact abusive words were not specified, it is quite clear that their marriage cannot be salvaged. Marriage is a voluntary social contract between two consenting adults. Separation for over two years preceding the institution of this suit is a clear manifestation of a totally broken marriage with no affection or room for resuscitation.

18. Each party should be let free to move on with his or her life. There comes a time when even twins have to part ways in life and each goes his or her way. For all purposes and intents, the marriage between the two has irretrievably broken down pursuant to Section 66 (6) (d) of the Marriage Act as the parties have been living separately for at least two years immediately preceding the date of presentation of the petition. There is no proof of connivance or collusion in filing this petition.

19. Accordingly, I am satisfied that the petitioner has proved her case on a balance of probability hence the same is allowed as prayed with orders that:

- (a) The marriage between the petitioner and respondent celebrated on 14<sup>th</sup> October 1989 be and is hereby dissolved.
- (b) That a decree nisi to issue and the same be declared absolute after three months.
- (c) That this being a family matter, each party shall bear his or her own costs.

**SIGNED, DATED AND DELIVERED AT NAIROBI THIS 21<sup>ST</sup> DAY OF MARCH, 2018.**

**J.N. ONYIEGO**

**(JUDGE)**

In the presence of:

Ms Gatuhi holding brief for Ms Quadros.....Counsel for the Petitioner

N/A..... for the respondent

Edwin.....Court Assistant