



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO. 15 OF 2015

GK.....PETITIONER

VERSUS

DKM.....RESPONDENT

WW.....CO-RESPONDENT

JUDGEMENT

1. The petitioner pleads in her petition that she and the respondent contracted a marriage under Kikuyu and Kisii customary laws sometime in August 2007. The parties cohabited thereafter as husband and wife within Nairobi, Kenya. They were blessed with issue, two children, namely – JMK (born on 28th May 2008) and KNK (born on 4th July 2014). It is pleaded that since the celebration of the marriage the respondent has treated the petitioner with cruelty, committed adultery and deserted the petitioner. The petitioner prays for dissolution of the marriage, maintenance, alimony *pendente lite*, general damages for mental pain and anguish, division of matrimonial property, a mandatory injunction to restrain the respondent from interfering with her, and costs of the suit.

2. Regarding cruelty it is averred that the petitioner has severally assaulted the petitioner and threatened her with physical violence, has been going out and not coming back home and often stays out of the home over public holidays, has forced the petitioner and the children out of the matrimonial home, and has allowed his women friends to interfere with the peace of the matrimonial home. He is described as a person of violent temper and intemperate disposition. The respondent is characterised as a serial adulterer. He is accused of having committed adultery with several women, some of whom are named in the petition. The said women include the co-respondent herein with whom the respondent is alleged to have been cohabiting at Runda, Nairobi. She accuses the said co-respondent of having an affair with the respondent while knowing that he was married to the petitioner, and of making intrusive phone calls to her. On desertion, she pleads that although the respondent had been providing for the needs of the family he has remained out of touch and stays out of the matrimonial home for long periods of time while visiting other women over weekends and public holidays. He is said to have no time for the family, and whenever he is around he is rude and violent towards them. He is said to have bought a house for the co-respondent where he has been residing with her since 2014.

3. On 18th August 2016, the Deputy Registrar cleared the petition to proceed as undefended, upon being satisfied that both the respondent and the co-respondent had been served with the pleadings herein.

4. The Petitioner testified on 8th March 2018. Her testimony gave vent to the allegations made in her petition. She added that she was living at their former matrimonial home and that she had finally gotten employment. She testified that the marriage started as mere cohabitation, then they formalised the relationship through customary law rites. Her evidence was not very clear on the rites that were undertaken. They separated after he began to be unfaithful to her through the co-respondent. She stated that he moved in with the co-respondent and the two now have three children together. She stated that their matrimonial property was auctioned for non-payment of a mortgage, but she still lived in it on the understanding that she should relocate after sometime. They however had other assets, and she named two cars, both in her name – a Kxx 4xxP and another, and two landed assets, Kajiado/Mailua/[particulars withheld] and Kajiado/Kaputiei North/[particulars withheld], both of which are in their joint names. She added that she had custody of one of the cars. She stated that the property was acquired together during the currency of the marriage. She further stated that there was a pending case at the Children's Court on matters relating to children.

5. I am being invited to dissolve an alleged marriage between the parties hereto. The alleged marriage is not statutory, and therefore no certificate of marriage was ever issued. The petitioner alleges that they started off their marriage life through cohabitation, and later formalised their relationship into a customary law marriage. The evidence given on the alleged customary law marriage by the petitioner was scanty. The petitioner talked of a *ruracio* ceremony having been conducted in keeping with Kikuyu customary law. In my view, the petitioner displayed a marked ignorance of the customary law relating to a marriage between persons from different ethnic groups. The practice is that the law that is complied with is that of the woman and not that of the man. The man can only have the woman as a wife under customary law after he has complied with the customs of the community or ethnic group from which she comes. It is only after that that the man can take her away as a wife. From the names of the parties, it is clear to me that the petitioner, the woman, is Kisii by ethnicity, while

the respondent, the man, is Kikuyu by ethnicity. In that scenario, it was the respondent who was bound to comply with Kisii customary law on marriage before he could take the petitioner as a wife at customary law. It could not be that the respondent was expected to perform the Kikuyu *ruracio* ceremony for a Kisii woman. I can only conclude from the testimony by the petitioner that no customary law rites of marriage were conducted, and the parties before me did not therefore contract a marriage under customary law.

6. That then leaves me to determine the question as to whether there was a marriage of any sort between the two parties. I note that the pleadings herein were served on the respondent, and he did not file a response thereto. The petitioner alleges existence of a marriage. That allegation has not been controverted. I have eliminated the possibility of statutory and customary law marriages, which then leaves me with the possibility that the parties had been in a marriage relationship that could be deemed from prolonged cohabitation and other factors. The principles on presumption of such marriages have been stated over time by the courts in such cases as *Hortensiah Wanjiku Yawe vs. Public Trustee* civil appeal number 13 of 1976, *Njoki vs. Muthuru* (1985) KLR 871 and *Christopher Nderi Githambo vs. Samuel Muthui Munene* High Court civil case number 1372 of 2001, among others. The factors taken into consideration in making the presumption include a long period of cohabitation, repute that the parties are married, children born during the cohabitation, valuable property acquired jointly and performance of some customary law rite of marriage.

7. During the hearing the petitioner did not produce any documents to advance her case. She had, however, lodged documents herein earlier to support a Motion dated 19th January 2015. There is an affidavit of marriage sworn jointly by the petitioner and the respondent on 4th April 2013, where it is averred that the parties were married. It is also averred that the couple had a child named JMK, born in 2008. There are two birth certificates of the alleged children of the marriage, born in 2008 and 2014, both indicating the parents of the two children to be the petitioner and the respondent herein. There are documents relating to purchase of a motor vehicle Kxx 4xxP BMW X6 SE. The buyers are indicated in the sales document dated 19th September 2013 as the petitioner and the respondent herein, but the vehicle, according to Registration Certificate dated 3rd June 2011, was registered in the name of the petitioner. There are also documents relating to landed assets. The title deed for KJD/Mailua/[particulars withheld] states the registered proprietor as the petitioner and the respondent herein. There are also copies of sales agreements in respect of Kajiado/Kaputiei North/[particulars withheld] (a portion thereof being Plot No. [particulars withheld]) and Kajiado/Mailua/[particulars withheld], where the purchasers who executed the agreements were the petitioner and the respondents herein. All these documents evidence that the principal parties hereto were together, bringing forth children and acquiring property. I have no hesitation in making the presumption, therefore, that the two were husband and wife.

8. On whether I should proceed to dissolve the marriage that arises from that presumption, I note that the petitioner has raised three grounds, cruelty, adultery and desertion. In her oral testimony she made reference to violence as well as infidelity. Her case is that the respondent moved out of their matrimonial home to live with another woman with whom he has had children. These allegations are not controverted by counter pleadings or counter testimonies. I shall therefore find that the petitioner was subjected to cruelty, adultery and desertion by the respondent. I am also satisfied that the marriage herein has totally broken down.

9. I have been invited to make orders on distribution of matrimonial property. There are two cars, Kxx 1xxQ and Kxx 4xxP. There are registration certificates on record, which show that Kxx 1xxQ is registered in the name of the respondent while Kxx 4xxP is registered in the name of the petitioner. The respondent is said to have had taken Kxx 4xxP with him and left Kxx 1xxQ with the petitioner. Details of who actually acquired or procured the two vehicles were not given at the trial. I shall therefore presume that Kxx 1xxQ belongs to the respondent and Kxx 4xxP belongs to the petitioner. Each of them should surrender the vehicles in their possession to the other party. Regarding the landed assets, Kajiado/Mailua/[particulars withheld] and Kajiado/Kaputiei North/[particulars withheld], I have seen the two sale agreements. The petitioner and the respondent were the joint purchasers of the two. However, only the title deed for Kajiado/Mailua/[particulars withheld] shows joint ownership, the copy of title deed for Kajiado/Kaputiei North/[particulars withheld] exhibited is not in the names of the parties hereto. Joint ownership presupposes equal ownership thereof unless the contrary is established. Nothing contrary to that principle has been presented to me.

10. The other prayer is for maintenance. At the oral hearing, the petitioner did not lead any evidence on the prayer. She did not place before me her needs and her means; neither did she present any evidence on the means of the respondent. I therefore do not have basis at all for making any orders relating to maintenance. The same would apply to the prayer for alimony pending suit. That can only be granted as an interim measure pending hearing and determination of the suit. The suit was heard, I am in the process of determining it. No doubt the prayer has been overtaken by events.

11. On whether I should make an order for mandatory injunction to restrain the respondent interfering with the petitioner, I also note that no evidence was led at the hearing on this. The petitioner merely said that the respondent's dishonesty bred violence and infidelity. No substantive evidence was led on this. Although there is a prayer for general damages for pain and anguish, no evidence was tendered thereon at the trial.

12. On the whole, after taking everything into account, I am moved in the circumstances to make the following final orders:-

- (a) That I hereby make a presumption that the petitioner herein and the respondent herein were married to each other;**
- (b) That the said marriage between the petitioner and the respondent is hereby dissolved;**
- (c) That I declare that motor vehicle registration mark and number Kxx 4xxP belongs to the petitioner and possession thereof shall be restored to her by the respondent within thirty (30) days of this order, and, in turn, the petitioner shall surrender motor vehicle registration mark and number Kxx 1xxQ to the respondent;**
- (d) That I declare that Kajiado/Mailua/[particulars withheld] is owned by the petitioner and the respondent in equal shares, and the Kajiado Land Registrar is hereby directed to rectify the relevant register accordingly, with notice to the respondent; and**

(e) That there shall be no order as to costs.

DATED, SIGNED and DELIVERED at NAIROBI this 14TH DAY OF JUNE, 2018.

W. MUSYOKA

JUDGE