



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI FAMILY DIVISION

DIVORCE CAUSE NO. 6 OF 2015

S M K.....PETITIONER

VERSUS

N W M.....RESPONDENT

JUDGMENT

1. The Petitioner herein got married to the Respondent under Kikuyu Customary law in Machakos County on 27th December 1977. Subsequently, the couple settled and cohabited as husband and wife in various places interalia; Machakos, Embu and Nairobi. The marriage was blessed with 4 issues, one of whom is deceased and the remaining three are all Adults.

2. The petitioner filed a petition on 12th January 2015 in which he sought dissolution of his marriage to the respondent and eviction of the respondent from their matrimonial home in Nairobi. It is the petitioner's case that during the subsistence of their marriage, the respondent committed adultery the particulars of which are contained in paragraph 9 of the Petition as follows:

For the last 15 years or so, and without knowledge of the petitioner, the respondent has openly been involved in an adulterous relationship with one Musyimi, usually referred to by the respondent as chairman, e.g

(a) On various occasions, when the petitioner and the respondent lived in Nairobi, and while the petitioner was away at work, the respondent entertained the said Musyimi in the matrimonial home at [Particulars Withheld], and had sumptuous meals prepared for him by the house girl.

(b) On different dates during the period when the petitioner and the respondent lived within the gated community known as [Particulars Withheld], Karen, the respondent has been picked and dropped at the main gate of [Particulars Withheld] by the said Musyimi.

(c) On different occasions during the period when one Rodric Lundu was employed by the petitioner to work for him on the petitioner's farm in [Particulars Withheld], in Ngong, the respondent would go to the Farm with the said Musyimi, and would ask the said Rodric Lundu to slaughter a chicken and prepare ugali for them, after which the two would drive away.

3. He further accused the respondent of neglecting her parental duties to the issues of the marriage and his sick mom who was by then staying with them suffering from terminal illness.

4. The respondent was served with the petition for divorce on 21st January 2015. She filed her cross petition and answer to the petition on 13th February 2015. She denied all the allegations contained in the petition and specifically all the allegations of adultery. Through her cross-petition, she accused the petitioner of adultery particulars of which are as follows:

a) That on various occasions including but not limited to 16th August 2012, the petitioner spent 3 nights with Mary Wanjiru Mburu at Severin Sea Lodge in Mombasa where they slept in one room and that she has on several occasions seen text messages from the named lady to the petitioner that explicitly reveal that the two engage in an adulterous affair.

b) That the petitioner has been involved in an adulterous affair with Eunice Wairimu and they have a daughter together named June.

c) That the petitioner was involved in an adulterous affair with Juliet Ingati from mid-2013 during which period she had

travelled to Germany to visit one of their daughters, and that the said Juliet Ingati is still living in their matrimonial house and has constantly abused and assaulted her hence causing her untold humiliation.

d) That the petitioner was involved in an adulterous affair with Veronica Wambui Mbugua which affair was witnessed by a distant relative. That the petitioner and the said lady have a child together.

e) That the petitioner was involved in an adulterous affair with Diana Muchache which affair she found out through a message on the petitioner's phone.

f) That the petitioner was involved in an adulterous affair with Irene Mwiga which affair she found out through several message on the petitioner's phone.

g) That the petitioner was involved in an adulterous affair with A. Kimani which affair she found out through a message on the petitioner's phone.

5. Besides adultery, the respondent accused the petitioner of cruelty particulars of which include:

a. That in April 2014 and without warning her, the petitioner changed the locks to their matrimonial bedroom ensuring that he was the only one, together with Juliet Ingati, who had access to the room forcing her to move into a small library which has got no bathroom or toilet;

b. That the petitioner instructed the said Juliet Ingati to lock the pantry where the food was stored denying her access to the food.

c. That on 11th February 2015 and 13th February 2015, the petitioner changed the locks to the main door denying the respondent access to their matrimonial home.

d. That the petitioner forcefully took away her motor vehicle keys for vehicle registration No. KAL 924B forcing her to use public transport despite the availability of the vehicle.

6. It is her case that the marriage has irretrievably broken down due to the petitioner's conduct. She sought dissolution of the marriage and division of the matrimonial property. In reply to the Cross- Petition, the petitioner filed an answer in response denying every allegation therein and urged the Court to dismiss the same with costs.

7. When the matter came up for hearing on 12th July, 2018, the parties withdrew their quest for distribution of matrimonial property and agreed to have the court decide on the divorce matter after which the distribution of matrimonial property would be done separately in afresh suit. Consequently, prayer two of the petition was abandoned and the matter proceeded with divorce proceedings only. In his testimony, the petitioner adopted his petition and affidavit in support of the petition. Equally, the respondent adopted her cross-petition and answer to the petition and her witness statement filed on 11th March 2016.

8. After careful examination and analysis of the pleadings and oral evidence of the parties in this case, the following issues arise for determination:

a) **Whether the Petitioner has adduced sufficient evidence to warrant the grant by this Court of a divorce on the ground of adultery**

b) **Whether the respondent has adduced sufficient evidence to warrant the grant by this Court of a divorce on the ground of adultery and cruelty**

c) **Whether the marriage has irretrievably broken down**

9. I have carefully perused the petition, supporting affidavit, answer to petition and cross petition plus the supporting affidavit. I have further considered the particulars of the grounds cited by each party and the evidence presented in this matter touching on the divorce petition. From the onset, I must confess that these divorce proceedings have been controversial and emotive given that the couple is staying in the same house with each occupying his or her bedroom with separate eating arrangements. It is also curious that nobody wants to leave the matrimonial home even as each is yearning for divorce while accusing each other of adultery, cruelty and responsibility for irretrievable break down of their marriage. I will therefore wish to address each ground independently.

Adultery

10. It is the petitioner's case that the respondent had a man friend by the name of Musyimi with whom she used to visit their farm at Upper Matasia and had their chicken slaughtered by the shamba boy who would cook for them and thereafter proceed with their love affairs elsewhere. He further accused her of taking and openly making love with Musyimi in their matrimonial home with the full knowledge of their house girl. On the other hand, the respondent accused the petitioner of engaging in love affairs with several women and literally every house help they hired thus impregnating most of them. She specifically made reference to a house help by the name of Eunice and Juliet whom she referred to as her 'rival wife' in the house thus necessitating this court at some point to issue eviction orders of the said house help from the house.

11. For the ground of adultery to succeed, It is incumbent upon the alleging party to prove the same. what is the standard of proof required in proving Adultery? In the case of **DM -vs- JM (2008) IKLR** the late Justice Chesoni had this to say regarding Adultery.

“... that the evidence required to establish adultery must be more than the mere suspicion and opportunity: evidence of a guilty inclination or passion was undisclosed, nevertheless the evidence of a single witness might suffice to establish Adultery.”

12. The Onus of proving Adultery purely lies on the party alleging it. It is trite law that he who alleges must prove the facts alleged (see section 107 and 108 of the Evidence Act). In the case of **Alfred Ndogi Mata –vs-Hellen Siemeko Adede, (2005) eKLR** the court held that:

“Legal disputes are determined on the basis of facts proved by evidence and law applied to the facts.”

13. In the present case, the petitioner accused the respondent of adultery. He however did not call any witness or produce any evidence to prove the allegations of adultery. Neither the shamba boy nor house girl who told him that musyimi was the respondent’s boyfriend ever testified. His allegation of infidelity against the respondent was therefore not substantiated as the information given by the shamba boy and house girl who never testified is mere hearsay evidence which is inadmissible.

14. Regarding the respondent’s cross-petition, the respondent accused the petitioner of adultery. She went on to join the various ladies she accused the petitioner of committing adultery with as co-respondents to the petition but later withdrew the claim against them. She too did not call any witness or file any evidence linking the petitioner to the listed ladies in an adulterous manner. To this extent, I find that the respondent did not prove the alleged adultery against the petitioner and her evidence is purely hearsay hence inadmissible.

Cruelty

15. The respondent further accused the petitioner of cruelty alleging that he locked her out of their matrimonial bedroom after changing locks. That he withdrew her family car from her use thus forcing her to use public transport. She claimed that the petitioner neglected her when she was expectant of their last born thereby forcing her to deliver in a poorly equipped private hospital where she suffered due to poor services leading to mishandling of their newborn who suffered cerebral palsy leading to mental instability. What is cruelty? There is no standard definition of what constitutes cruelty. The term cruelty was considered in the case of **N vs N (2008) I KLR (G & F)** wherein the court held, *inter alia* that:

“Whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standard”.

16. Cruelty was further considered by Justice Kariuki in the case of **AMA vs GSB HCDC No. 134 of 2010 Nairobi** wherein he held:

“.....cruelty is willful and unjustifiable conduct of such character as to cause danger to life, limb, or health, bodily or mental or so as to give reasonable apprehension of such a danger.....”. (see also Russell vs Russell (1895) P. 315, 322).

17. The petitioner did not deny changing the locks to the doors, but instead accused the respondent of walking in and out of the home as she pleased. Does change of locks amount to cruelty? There is no straight answer to this question as it all depends on the circumstances. In this case the couple was accusing each other of adultery and even threatening each other’s life. In the circumstances, it was inevitable to temporarily reflect on each other’s conduct while in separate rooms. In that context I do not find that ground sustainable. Regarding delivery in a poorly equipped private hospital, it was out of choice as the respondent had an alternative of delivering at Kenyatta National Hospital where she was working as a nurse. Concerning non user of family car, it is not an act of cruelty. In any event there was no proof. In the circumstances, that ground has not been proved.

Irretrievable break down of marriage

18. On whether the marriage has irretrievably broken down, this court is guided by Section 66(6) of the Marriage Act which provides thus:

A marriage has broken down irretrievably 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 willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition.

(d)

(e) A spouse has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition.

(f)

(g)

(h) Any other ground as the court may deem appropriate.

19. Though the petitioner and respondent live in the same home, they occupy different rooms in the same house and have not had any conjugal relationship since the year 2012. Each party acknowledged during the hearing that the marriage has broken down beyond repair hence yearning for divorce. There is no taste of love anymore without sex for about six years now. Besides companionship, sex is the key driver in a marriage institution. Where it is willfully withdrawn, the marriage automatically fails.

20. The two former lovers have not been in talking terms since 2012 when they fell out. Nobody cares for the other. In fact, when Juliet their house girl allegedly assaulted the respondent, the petitioner who is an Advocate by profession took the brief of defense counsel against the wife (complainant). It sounds strange but that is the reality on the ground hence there is no marriage capable of salvaging despite occupying the same house. Apparently, there is total neglect of each other's interest for over two years in compliance with section 66(6)(c) of the Marriage Act.

21. If the outright animosity portrayed in court between the two is anything to go by, it is manifestly clear that the two are sworn enemies who can harm each other any time at the slightest opportunity available. Marriage is not a theoretical concept but actual companionship based on mutual love and trust. In the instant case, it over. It has hit a rock and there is nothing to salvage. It is immaterial whether the couple is still occupying the same house or not. Physical separation is not necessary where the ground of irretrievable breakdown of a marriage has been established.

22. I am satisfied that every effort involving elders and parents in reconciling the two has not borne any fruit. I am further convinced that there was neither connivance nor collusion in filing this suit.

23. Having held that the marriage herein has irretrievably broken down, this court has no choice but to call it a day and set free each party to move on with life elsewhere in a manner that is pleasing to reap happiness in the world without any interruption from each other. Accordingly, the marriage herein between the petitioner and the respondent is hereby dissolved. Subsequently, a decree nisi shall issue and the same be declared absolute after 30 days from the date of this judgment. This being a family matter each side shall bear own costs.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER, 2018.

J.N. ONYIEGO

JUDGE