



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 22 OF 2018

BETWEEN

P A Z.....PETITIONER

AND

T G Z.....RESPONDENT

JUDGMENT

1. This is an Appeal arising from the Judgment of the Honourable Resident Magistrate Margaret W. Murage which was delivered on the 5th of February 2018, in Divorce Cause NO. 139 of 2017.

In the said divorce cause the Appellant (then Petitioner) had Petitioned for a divorce against the Respondent citing irreconcilable differences. He set out particulars in support.

The said cause proceeded as an undefended cause. And upon hearing the suit the trial court dismissed the cause.

2. The Appellant being dissatisfied with the said judgment appealed to this court on the following grounds; -

- i. The trial Magistrate erred in Law and fact in failing to have regard to Section 66 (6) (e) of the Marriage Act 2014 more particularly; that a marriage has irretrievably broken down if spouses have been separately for at least Two (2) years.**
- ii. The Learned Magistrate erred in Law and fact in misinterpreting Section 66 (2) (e) of The Marriage Act 2014.**
- iii. The Learned Magistrate erred in Law and fact in holding that the Appellant had not proved his case to the required standards.**
- iv. The Learned Magistrate erred in Law and fact in holding that the Appellant had not proved his case to the required standard.**
- v. The Learned Magistrate erred in Law and Fact that the Appellant failed to pursued her that the marriage had irretrievably broken town.**

3. In the Appellant's amended written submissions counsel proposed two issues for consideration in this appeal; -

- i. Whether the trial Magistrate was right to strike out the Appellant's Petition for divorce?**
- ii. Whether the court mis interpreted Section 66(2) (e) of the Marriage Act?**

4. It was submitted that the Respondent and the Petitioner had irreconcilable differences and had lived apart for two years before filing of the petition and further that counselling had not helped. The differences cited were; the Respondent leaving the country to join her parents in America and the appellant not desiring to relocate; the two having emotional disconnect; having no love and trust between the two; resulting in the Appellant suffering severe stress and frustration. In support of this ground counsel cited the following cases, **Blunt -vs- Blunt (1943) A.C. 517, HI & K.A.S. -VS- M. M. K (Div.Cause No. 16 of 2016).**

5. Further counsel submitted that there was adequate proof that the marriage broken down irretrievably yet the court decided against the weight of evidence, Reference was made to the case of **P.K.K. -vs- J.O.O. (Civil Appeal No. 7 of (2016)e KLR**

6. As the first Appellate Court I have considered the pleadings and evidence afresh in order to arrive at an independent decision taking into account the fact that the trial court received the evidence first hand and had the occasion to observe the Appellant.

7. The record indicates that the parties solemnised their Marriage under Chapter 151 of the laws of Kenya on 11th of July 1986 and cohabited in Nairobi and Naivasha up to 2015. The two were blessed with twins born on 15th March 1990; E S Z & T J Z.

8. In the Petition the Appellant cited irreconcilable differences between the two; including dissatisfaction for two-year prior to the filing of the Petition, inability to live together and emotional disconnect and mistrust. He sought for dissolution the marriage and for each of them to bear their own costs.

9. The Respondent entered appearance on the 22nd of March 2017 but failed to file a response to the Petition or be in court on the date the matter was set for hearing.

10. At the hearing the Appellant informed the court that they had irreconcilable differences, the Respondent had moved to America and that they are unable to live together. Further he testified that they were emotionally disconnected, there was mistrust between the two and as a result of all the above they both suffered stress and frustration and efforts to undergo marriage counselling did not help.

11. The Marriage Act provides as follows; -

Section 66

“(2) A party to a marriage celebrated under Part iv may only petition the court for the separation of the parties or the dissolution of the Marriage on the grounds-

(e) the irretrievable breakdown of marriage.”

(6) A marriage has irretrievably broken down if-

(c) a spouse wilfully neglects the other spouse for at least two years immediately preceding the date of the petition;

(d) the spouses have been separated for at least two years, whether voluntarily or by decree of the court

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

(f) any other ground as the court may deem appropriate.

12. From the evidence on record the Respondent deserted the Appellant by moving to the United States of America yet her matrimonial home is in Kenya. Further I find that the Respondent wilfully neglected her spouse by her action and deeds. It appears that three years down the line both parties have physically and emotionally moved separate ways. It is clearly evident that the marriage between the parties has irretrievably broken down and it will serve no purpose to hold the two together any longer.

13. Based on the evidence on record I fault the trial court’s finding that the Appellant had failed to prove the marriage between him and the Respondent had irretrievably broken down.

14. Consequently, I set the said Judgment aside and in its place, I order the union between the **P A Z** and **T G Z** be dissolved.

15. The decree be made absolute after lapse of three months.

16. Each party to meet his own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 20th DAY OF DECEMBER, 2018.

ALI-ARONI

JUDGE

In the presence of:

Petitioner.....

Respondent.....