



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MALINDI

DIVORCE CAUSE NO. 16 OF 2016

M D.....PETITIONER

VERSUS

S L.....RESPONDENT

JUDGEMENT

The petitioner is seeking dissolution of his marriage to the respondent on grounds of desertion and adultery particularized in the petition filed on 10th October, 2016. It is pleaded that at the time of marriage on 3rd September, 2005, the petitioner and respondents were both single having each been previously divorced. It is alleged that both parties are Italian citizens who acquired residency in Kenya since January, 1993 and both currently reside in Malindi. The marriage was celebrated at the District Commissioner's Office in Malindi

The petitioner states that before the marriage he resided at a house in Casuarina in Malindi and continued to reside there after the marriage for a period of 18 years. He pleads that there are other immovable and movable properties purchased by him in his own name or in the joint names.

It is alleged that the respondent vacated the matrimonial home in 2011 and moved to live in another property purchased by the petitioner in seclusion of him. She left on her own volition on 7th July, 2011 and informed the petitioner that she was no longer desirous of living with him. It is alleged that the psychological effect of the desertion have been weighty to bear. At the time of filing suit the petitioner is stated to have been 73 years old and the respondent 55 years old and that they had sired no issues out of their marriage.

It is further alleged that the respondent has since the celebration of the marriage committed adultery and had confessed on 23rd August, 2016 to her friends and his relatives about her relations with a man other than her husband. The petitioner pleads that he has neither colluded nor connived with the respondent to petition for a divorce.

The respondent was served with a notice to appear and entered appearance on 24th October, 2016 but did not file any response to the petition. The matter was set down for hearing on 24th, January, 2017 where the sole witness was the petitioner. He relied wholly on his written statement which was filed on 18th January, 2016. He produced the marriage certificate as P. Exhibit 1.

Section 66 (1) of the Marriage Act, provides that: -

“A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or for the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.”

Part IV is in reference to civil marriages. The marriage certificate produced indicates that the marriage was solemnized on 3rd September, 2005 which is a good number of years above the three-year preliminary requirement to filing for divorce whenever a civil marriage is concerned.

Section 66 (2) of the Act provides that adultery and desertion are some of the grounds for dissolution of a marriage. Whilst there is no proof of adultery since all the petitioner has is hearsay evidence, there is allegation of desertion of the matrimonial home since 2011 to the time of hearing of the suit.

Section 66 (6) (e) of the act provides that: -

“a marriage has irretrievably broken down if –

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

This petition was presented four years after the respondent allegedly deserted and the petitioner qualifies to be considered under section 66 (6) (e) of the Act. The respondent has offered no contrary view via an answer to the petition. This is a civil matter whose standard of proof is on a balance of probabilities. The petitioner has given his testimony which appears to hold some water hence his claim stands proved. This marriage is therefore regrettably found to be irretrievably broken down as per section 66 (6) (e) of the Act.

In the end, I do find that the marriage between the parties has irretrievably broken down beyond reconciliation. The marriage is hereby dissolved. A decree nisi to issue and absolute after the expiry of thirty (3) days. Parties shall bear their own respective costs.

Dated, signed and delivered in Malindi this 27th day of February, 2017.

S.J. CHITEMBWE

JUDGE