



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 67 OF 2013

D M M PETITIONER

VERSUS

V N N RESPONDENT

JUDGMENT

1. The petitioner filed a petition dated 3rd April, 2013 which was subsequently amended and an Amended Petition filed on 28th March, 2017 in which he sought for dissolution of his marriage to the respondent. The couple celebrated their marriage ceremony on 29th September, 2009 at the Office of the Registrar of Marriages in Nairobi. They then settled and cohabited as husband and wife at Muthaiga within Nairobi. They were however not blessed with any issues of marriage.

2. It is the petitioner's case that during the subsistence of their marriage, the respondent has treated him with adverse cruelty the particulars of which are contained in paragraph 9 of the Amended Petition as follows:

- (a) Using abusive, offensive and insulting language at the petitioner to demean him before neighbours, friends, workmates and family.**
- (b) Using abusive, offensive and insulting language to the petitioner's relatives/next of kin and being overly discourteous to demean the petitioner.**
- (c) Use of violent behavior to communicate with petitioner.**
- (d) Sending abusive, insults on phone to the petitioner and causing breach of peace.**
- (e) Treating the petitioner with a good for nothing attitude.**
- (f) Making it impossible to negotiate constructively with the respondent on matters affecting the marriage and it has irretrievably broken down.**
- (g) Respondent has conducted herself in a manner that endangers life and safety of the petitioner and it has become impossible for the petitioner to communicate with the respondent even on matters that are crucial for running of the family affairs.**
- (h) The respondent has conducted herself in a manner to exhibit that she is having an extra marital affair, with many nights deserting the family and spending elsewhere and has been excessively violent when confronted on the issue by the petitioner.**

Besides cruelty, the petitioner also has accused the respondent of deserting their matrimonial home months after celebration of their marriage.

3. The respondent was served with the petition for divorce on 7th April, 2017. She did not enter any appearance or file a response to the petitioner's petition. The Deputy Registrar being satisfied that the pleadings had been duly served upon the Respondent, issued a certificate certifying the cause as one suitable to be heard as an undefended divorce cause.

4. During the hearing of the petition on 27th July, 2017, the petitioner in giving his oral evidence reiterated the contents of his petition. He told the court that the respondent left their matrimonial home 5 months after the date of marriage and they have not lived together since 2010. He further stated that there was no hope of reconciliation between them and it was his prayer for the marriage between them be dissolved on the ground of cruelty.

5. The court has carefully considered the grounds cited for divorce. The issue for determination is whether the petitioner has established a sufficient case to warrant this court to grant him the order for divorce based on grounds of cruelty and desertion.

6. Cruelty was considered in the case of N vs N (2008) I KLR (G & F) wherein the learned judge 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”.

7. The petitioner in his petition particularized the instances in which the respondent has supposedly been cruel to him inter alia, using abusive language towards him and making it hard for them to communicate constructively on their marital issues just to mention but a few. I have considered the petitioner's testimony which has not been challenged and I am satisfied that the respondent has during their marriage been cruel to the petitioner on the basis of the evidence provided by the petitioner regarding the respondent's conduct in paragraph 9 of the petition.

8. Although there is no universally acceptable definition of what constitutes cruelty Justice Kariuki in AMA vs GSB HCDC No. 134 of 2010 Nairobi had this to say:

“.....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).

9. The respondent's conduct in this case is one capable of causing mental anguish which in turn hinders chances of having a peaceful, successful and lovely marriage.

10. With regard to desertion, the respondent deserted their matrimonial home five months after getting married without any plausible reason. It is now seven years down the line since the respondent deserted the matrimonial home. Every effort to reconcile did not bear any fruit. Under Section 66(1) (b) of the Marriage Act, cruelty is a ground for divorce so as to desertion for at least three years preceding presentation of a petition for divorce (see Section 66 (1) (d)).

11. Based on the evidence adduced in respect of the two grounds advanced for divorce which are not controverted by the respondent, this court is convinced that the marriage herein has irretrievably broken down in compliance with 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)

(d)

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

12. The respondent having failed to file response in spite of service of the divorce petition the evidence of the petitioner is unchallenged.

13. According to the petitioner, there was no collusion nor connivance in the filing of this proceedings. This court is therefore convinced that this is a marriage that never took shape five months after exchange of vows. Parties to a marriage cannot be forced to stay together when circumstances and or environment for a conducive, happy, peaceful and loving union is impossible.

14. Marriage is no longer an act or mission of procreation but rather a voluntary union whose key component is companionship, happiness and love. In the instant case, the marriage in question has irretrievably broken down and nothing can salvage it.

15. Having arrived at the above finding that the marriage between the petitioner and respondent celebrated on 29th September, 2009 has irretrievably broken down, it is ordered that the same be and is hereby dissolved. Subsequently, a decree nisi shall issue and the same be declared absolute after three months from the date of this judgment.

SIGNED, DATED AND DELIVERED AT NAIROBI THIS 29TH DAY OF SEPTEMBER, 2017.

J. N. ONYIEGO (JUDGE)

In the presence of:

.....Counsel for the petitioner