



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
DIVORCE CAUSE No. 243 OF 2014

C C S.....PETITIONER

VERSUS

J K.....RESPONDENT

JUDGMENT

By way of a Petition accompanied by a Verifying Affidavit dated 11th December 2014, the Petitioner sought to the marriage to the Respondent dissolved on grounds of cruelty and dissipation as elucidated in the Petition.

The Petitioner and Respondent were married on 11th December 2007 under Marriage Act (repealed) as evidenced by the marriage certificate of serial no. [particulars withheld] . They resided in Kilimani Estate, Nairobi and were blessed with two issues who were born in 21st September 2009 and 2nd February 2008 respectively. The Petitioner is currently employed as a Customer service agent while the Respondent is an accountant.

PETITIONER'S CASE

The particulars of cruelty and desertion were outlined in Paragraph 7 and 9 respectively of the Petition as follows; it was submitted that during the subsistence of the marriage, the Petitioner and the Respondent lacked intimacy and the Respondent abandoned all financial responsibilities to the Petitioner. The Petitioner succumbed to depression and sought Counseling services. the Respondent visited physical violence on her on false accusations of extra-marital affair(s) She also stated that the Respondent treated her with indifference and his conduct in many occasions as elucidated by paragraph 8 of the Petition evidenced that he had neither love nor affection for her.

The Petitioner further stated that during the subsistence of the marriage, the Respondent deserted her by moving out of the main house of their matrimonial home. She submitted that their marriage had irretrievably broken down solely due to the Respondent's conduct and thus prayed that the marriage be dissolved, that the Court directs the Respondent to cater for the minors' welfare and that the Court be pleased to grant other orders as may be just with regard to the custody and maintenance of the Issues of the marriage.

By way of her Answer to Cross Petition filed on 13th March 2015, the Petitioner. She denied the particulars of cruelty as stated in the Cross Petition and put the Respondent to strict proof. She reiterated the contents of her Petition and prayed that the divorce be granted and that the Court directs that there be

a joint maintenance plan between herself and the Respondent with regards to the upkeep and maintenance of the Issues of the marriage.

RESPONDENT'S CASE

The Respondent defended this course by entering an appearance of 4th February 2015 and putting in an Answer to Petition and Cross Petition on the same date. In his Answer to Petition, he admitted being married to the Petitioner and that they had 2 Issues from the marriage. He denied being cruel to the Petitioner and stated that his indifference to the Petitioner was due to the fact that there was no intimacy from either of them. He denied every particular of the cruelty stated by the Petitioner and in the alternative stated that they had marital problems since 2012 but they stayed together until their separation in 2013. He stated that the separation was amicably agreed on by both parties in a bid to give each other some space to think over and determine the way forward on the matters that affected both of them emotionally.

Further, in denying to the allegation that he caused the Petitioner trauma due to placing a overwhelming financial obligation on her, he submitted he took care of household bills up to 2010 and that they mutually agreed that the Petitioner would take up also the education policy payments for the Issues of the marriage approximately Ksh. 24,000/- per month and that they both contribute towards the payment of the household bills. He stated that they had attempted marital counseling but they were not able to resolve their disputes.

The Respondent also denied to the allegation of desertion as highlighted in the Petition. He stated that the marriage had irreconcilable differences between both of them and prayed that the Petition be dismissed with costs.

By way of Cross Petition, the Respondent accused the Petitioner of cruelty. Particulars of the said cruelty were stated in paragraph 5 of the Cross Petition. He alleged that the Petitioner spent time out with friends in total disregard of the Respondent's feelings and the children's care. The Respondent alleged that the Petitioner's disconnected and cold attitude towards him led to breakdown of their marriage. The Respondent stated that the differences cannot be cured but he is desirous to move on with his life separate and independent from the Petitioner. He prayed that the marriage be dissolved and that the Petitioner be ordered to pay costs of this suit.

DETERMINATION

The hearing was on 23rd February 2017 when both parties testified and relied on the pleadings. From the pleadings and oral evidence by the parties, the issue before this Court is whether the parties' marriage can be dissolved on the grounds adduced in their pleadings.

Section 65 of the Marriage Act, 2014 provides:

“A party to a marriage celebrated under Part III may petition the court for a decree for the dissolution of the marriage on the ground of—

(a) One or more acts of adultery committed by the other party;

(b) Cruelty, whether mental or physical, inflicted by the other party on the petitioner or on the children, if any, of the marriage; or

(c) Desertion by either party for at least three years immediately preceding the date of presentation of the petition;

(d) Exceptional depravity by either party;

(e) The irretrievable breakdown of the marriage...”

In the instant case, both parties have accused each other of cruelty and other matrimonial offences by casting the blame on the other party. This notwithstanding, none has provided sufficient evidence to support the allegations of cruelty, neglect, emotional abuse and the other offences as pleaded. However, although both have denied the allegations pleaded by the other, their common ground is that both seek to have their marriage dissolved. In the same breath, this Court also acknowledges the fact that both Parties admit that their union has irretrievably broken down and none of them want to salvage the marriage. They have been living separately from 2013 and this very fact reveals that they wish to be separated from each other legally so that they can move on with their individual lives.

In *N vs N 2008 1 KLR 16*, Madan J (as he then was) held:

“if two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union.....”

Relying on the **Section 65(e) of the Act** as afore-highlighted, this Court finds that the marriage between the Petitioner and the Respondent has irretrievably broken down. The parties have reached the point of not salvaging the marriage and the efforts at reconciliation are futile as both parties sought dissolution of marriage. Due to the reasons adduced and the law provides where they are not able to live together they are entitled to be released from the union. They are thus entitled to live their individual lives away from each other.

On the issue of custody and maintenance of their Children; both of who are still Minors, it appears from the pleadings that the parties have not filed a suit in the Children’s Court to determine the question of custody, maintenance and other related matters. While the Petitioner prayed that the Court orders that there be a joint maintenance plan between herself and the Respondent, the Respondent did not pray for any specific order with regard to maintenance and custody but only prayed that the Court be pleased to make such other orders as may be fair and just.

The Children’s Act, 2001 provides that the Children court has jurisdiction on matters regarding children as the Court of 1st instance pursuant to **Section 91** which reads:

“Any parent, guardian or custodian, of the child, may apply to the court to determine any matter relating to the maintenance of the child and to make an order that a specified person make such periodical or lump sum payment for the maintenance of a child, in this Act referred to as a “maintenance order,” as the court may see fit:

Provided that—

(a) On the making, varying, or discharging of a residence, guardianship or custody order, the court may make a maintenance order for a child even though no application has been made by any person...

Further, **Section 92 of the same Act** provides:

“The Court shall have power to make a maintenance order, whether or not proceedings for nullity, judicial separation, divorce or any other matrimonial proceedings have been filed by the parent of a child, or during proceedings or after a final decree is made in such proceedings:

This Court finds that there is no dispute as to the issues of the marriage by parties as parents of the children. Since the minor’s rights cannot await the matter to be filed in Children Court for these rights to be safeguarded, their lives must go on. By virtue of **Article 53 1 (e) Constitution of Kenya**; each of the parent to share in upkeep and maintenance of the children of the marriage; pending filing the appropriate application in the Children Court. Accordingly, both parties shall have the legal custody of the Issues of the marriage. They shall both contribute to the financial maintenance and wellbeing of the Issues of the

marriage.

DISPOSITION

This Court holds:

1. The Marriage between the Petitioner and the Respondent solemnized on 11th December 2007 under the Marriage Act, Cap 150 is hereby dissolved. A decree *nisi* to be issued forthwith and shall be absolute within 30 days.

2. Physical custody of the Issues of the Marriage shall remain with the Petitioner with agreed visitation rights by the Respondent and both parties shall equally contribute to the financial maintenance of the Issues of the marriage until the matter is heard and determined if need be by the Children Court

3. This being a family matter, each party shall bear their own costs.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 22ND DAY OF SEPTEMBER, 2017.

M. W. MUIGAI

JUDGE

In the presence of:

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