



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MOMBASA**  
**DIVORCE CAUSE NO. 34 OF 2009**

**H A B.....PETITIONER**

**VERSUS**

**L A O..... RESPONDENT**

**RULING**

1. By the Motion dated 23.6.16 (“the Application”) L A O, the Respondent seeks the following:

- a. THAT this Honourable Court be pleased to grant the Respondent in these proceedings leave to reinstate her Cross-Petition filed on 20<sup>th</sup> July 2009.*
- b. THAT the Notice of Withdrawal of the Cross-Petition dated 11<sup>th</sup> September, 2009 be nullified and be expunged from the Court record.*
- c. IN THE ALTERNATIVE this Honourable Court be pleased to grant the Respondent Leave to file a fresh Cross-Petition in terms of the Cross-Petition filed on 20<sup>th</sup> July 2009.*
- d. Costs be in the cause.*

2. The Respondent has set out her grounds in her affidavit sworn on 23.6.16. She avers that the Petitioner filed the divorce petition herein against her. In response, she filed an answer and a Cross Petition. The Respondent claims that thereafter the Petitioner demanded that she withdraws the Cross Petition. He put pressure on her by withdrawing her children from school and withdrawing all financial support to her. The Petitioner also threatened her with physical violence. As a result the Respondent filed the Notice of Withdrawal of the Cross Petition dated 11.9.09. Since the withdrawal of the Cross-Petition, the Petitioner has not taken any steps to have the Petition heard and determined. That both parties want the divorce and no party stands to suffer any prejudice if the Cross-Petition is reinstated.

3. The Petitioner in his Replying Affidavit sworn on 26.1.17 opposes the Application. He denies having threatened the Respondent otherwise she would have reported the same to a law enforcement authority. The Petitioner has always supported his children and denies withdrawing financial support. The Petitioner’s position is that the Cross-Petition was voluntarily withdrawn by the Respondent who expressed remorse and regret in respect of the false allegations she made therein. Failure to prosecute the Petition was informed by counsel from family and friends to pursue other means to resolve the differences between the parties which the Respondent is aware of. According to the Petitioner, the Respondent cannot invoke non-prosecution as a ground for resurrecting the extinguished Cross-Petition. The Respondent was free to have the Petition prosecuted or dismissed if the alternative dispute resolution avenues were not working. The Application is an abuse of the court process and brought mala fide to

embarrass and scandalise and embarrass the Petitioner. He prayed that the same be dismissed.

4. Parties' counsel made their oral submissions before me which I have given due consideration. For the Respondent, it was submitted that the marriage between the parties herein has irretrievably broken down. They have lived apart since 2004. The Petition has been in Court for 9 years without prosecution by the Petitioner. The Respondent cannot apply for dismissal for the same as she wants the divorce. If the Cross-Petition is reinstated then she can prosecute the same and bring the matter to an end. No prejudice will be suffered by the Petitioner who himself filed the Petition but is not willing to prosecute the same.

5. For the Petitioner, it was argued that the withdrawal of the Cross-Petition was done 8 years ago on 11.9.09. Although the Cross-petition was withdrawn, the Answer to Petition remains. A Cross Petition withdrawn 8 years ago cannot be reinstated. It was further submitted that subsequent to withdrawal, certain consents were entered into by the parties and that their positions have changed. It would therefore be highly prejudicial to the Petitioner to have to deal with issues that have been extinguished by the withdrawal. It would also be in disregard to judicial discretion to re-open a matter abandoned and finally settled 7-8 years ago. It is the view of the Petitioner that the delay is inexcusable. No reason has been given for expunging the Notice of Withdrawal from the record. The Petitioner prayed that the Application be dismissed with costs.

6. In a rejoinder for the Respondent, it was submitted that the divorce is still pending and no consent settling the matter herein has been brought before the Court. On delay, justice cuts both sides. The Petitioner having filed the Petition has not prosecuted it for 9 years. Both parties are desirous of having the divorce. Litigation must come to an end.

7. The issue for determination is whether the Cross-Petition dated 15.7.09 having been withdrawn on 14.9.09 can now be reinstated. The given reason for withdrawal of the Cross-Petition is that the Respondent was threatened by the Petitioner with physical violence and withdrawal of financial support for both her and her children. This is denied by the Petitioner. The Petitioner filed the divorce on 22.5.09. To date, he has not prosecuted the same. Although it was submitted for the Petitioner that certain consents were entered into by the parties and that their positions have changed, no evidence of the same was laid before me. It is a fact that the Petitioner has not withdrawn the Petition. It is also not disputed that the parties have not lived together since 2004. It would therefore appear that efforts at alternative resolution of the dispute herein have failed.

8. In *N v. N* [2008] 1 KLR [G & F] 16, Madan, J (as he then was) observed:

***“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, the guilty spouse bearing the consequences.”***

9. As the Respondent wishes to be released from the unhappy matrimonial union, she can only do so by the hearing and determination of the divorce herein. Given that the Petitioner has not set the Petition down for hearing since he filed the same in 2009, it would only be fair and just for the Cross-Petition to be reinstated to enable the Respondent prosecute the same and bring this matter to a close.

10. In the premises in exercise of my inherent powers and discretion I allow the Application dated 23.6.16 and hereby reinstate that Cross-Petition withdrawn on 14.9.09. The Applicant is directed to fix a hearing date at the Registry within 14 days of the date hereof. In default this order being discretionary, shall lapse.

**DATED, SIGNED and DELIVERED in MOMBASA this 8<sup>th</sup> day of December 2017**

---

**M. THANDE**

**JUDGE**

**In the presence of: -**

..... **for the Applicants**

..... **for the Respondents**

..... **Court Assistant**