



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA

DIVORCE CAUSE NO. 3 OF 2015

K.O.O..... PETITIONER

V E R S U S

C.U.A..... RESPONDENT

J U D G M E N T

The petitioner K.O.O filed a petition dated 1st July 2015 against the respondent C.U.A. It was alleged in the petition that the petitioner and the respondent were married under the Marriage Act and that they had cohabited between 2010 and 2014. That during the subsistence of their marriage, they were blessed with a son D.J.O aged 4 years. Prior to marriage, the respondent had a daughter by the name H.B.A aged 15 years, whom the petitioner accepted to be his daughter.

It was alleged by the petitioner that the respondent had been guilty of adultery. Particulars of the alleged adultery of the respondent were noted in the petition and in particular, that the respondent had a relationship with A.J.S who lived and resided in Kisumu County, and that the respondent had cohabited with that man as husband and wife. This conduct of the respondent according to the petitioner, caused him embarrassment and mental anguish.

The petitioner also alleged that the respondent was guilty of cruelty. Particulars of cruelty were also listed in the petition, in that the respondent had formed the habit of consuming a lot of alcohol and coming home late.

It was stated in the petition that there was no collusion in bringing this petition. The petitioner sought orders that the marriage between him and the respondent be dissolved. Secondly that custody of the children of the marriage be granted to the respondent but that the petitioner be granted visitation rights. Further, that the respondent should bear the costs of the divorce proceedings. Lastly that the court grants any other relief that it may deem fit and just in the circumstances.

When the petition was served the respondent, in addition to entering an appearance, the respondent filed a notice of preliminary objection stating that this court had no jurisdiction to hear and determine the matter as the marriage was solemnized in Kisumu and therefore the Kisumu High Court was the proper court to hear the matter. She stated that she intended to apply for the case to be transferred to Kisumu for hearing and determination.

The respondent also filed an answer to the petition. She denied the allegations of adultery and cruelty. She stated that all was well in the

marriage until the petitioner came up with false allegations against her, beat her up and threatened to kill her, and then neglected and subjected the respondent and the children to cruelty.

She listed particulars of cruelty of the petitioner, indicating that he failed to provide for the family, treated the respondent with cruelty and was harassing and threatening the respondent because of trivial issues. She also complained that the respondent forced her out of the matrimonial home and that the petitioner committed adultery with an assortment of women. She stated that the marriage had irretrievably broken down.

At the hearing of the case, only the petitioner tendered evidence on the petitioner's side. He stated that they were married with the respondent in October 2010 and got one baby boy. That respondent already had a daughter and he accepted her as his own. They later experienced differences with the respondent who moved out of the matrimonial home and refused to come back. He stated that he wanted the marriage to be dissolved and for him to be allowed to visit the children during holidays. He asked the court to deliver its decision on the hearing date.

On the side of the respondent, she was also the only witness. She stated that during their life together with the petitioner, they had problems which led her to leave the matrimonial in December 2014 and

had since been living with the children. She stated that she wanted the marriage to be dissolved and asked the court to help in making the petitioner contribute to the upkeep of the children.

This is a petition for divorce. Under section 8 (1) of the Matrimonial Causes Act (Cap 152), either adultery or cruelty or both can be a grounds for dissolution of a marriage.

The petitioner claims that the respondent committed adultery and named a person who had cohabited with the respondent. The respondent has also complained about adultery of the petitioner but has not given particulars of any of the women with whom the petitioner has committed adultery.

A party who comes to the court is required to prove the allegations made. Neither of the petitioner nor respondent has challenged any of the contents of the petition and the answer to petition through their evidence. The evidence of both the petitioner and the respondent in support of the allegations is however very sketchy.

In addition to adultery, of them also alleged cruelty in the petition and answer to petition respectively. In their evidence in court they did not give further particulars of the allegations of cruelty. They however agreed through their evidence that they were living separately and that they had done so for some time now. The respondent is in Kisumu, while the petitioner is in Garissa. They both claim that their marriage has broken irretrievably and cannot be salvaged.

The respondent initially filed a preliminary objection that the High Court at Garissa has no jurisdiction to deal with this matter. She did not however pursue her preliminary objection. In my view, though the marriage was celebrated in Kisumu, any High court in Kenya has jurisdiction to entertain this petition. It all depends on where the petitioner and the respondent are living at the time of filing the petition. Since that preliminary objection has not been pursued by the respondent, I find that it was abandoned. In any case it is not a valid objection this court has powers to determine this matter.

Under section 10 of the matrimonial causes Act, this court is required to enquire and be satisfied that there is no collusion or convenience in divorce proceedings. From the pleadings and the evidence tendered before me, I find that there is no collusion or convenience in bringing this petition between the petitioner and the respondent.

From the evidence on record, I find that the petitioner has proved his ground of adultery. The cruelty alleged by both sides in my view was just an attempt to expand the ground of adultery by making its effects a ground for divorce. I also find that the marriage has broken down irretrievably. I will thus grant divorce.

With respect to the children, it has been admitted that there are two children of the marriage. They are currently living with the respondent. The petitioner has asked this court to allow him access to the

children, but to grant custody to the respondent. As a parent, in my view, he cannot be denied access. I will thus grant the petitioner access to the children.

The respondent has asked the court to require the petitioner to provide maintenance or support for the children. None of the parties has however given the court any information about their respective means. The responsibility of bringing up children is a responsibility to be borne by both parents. However, in my view an appropriate application or proceedings have to be filed in which the court will decide the issue of maintenance or upkeep of the children, after receiving evidence on the means of each of the parents herein.

The issue that remains is that one of costs. This being a family matter, between a husband and a wife, in my view it is most appropriate to order that each party bears their respective costs of this proceedings.

To conclude, I allow the petition and order as follows:-

1. The marriage between the petitioner and the respondent be and is hereby dissolved. A decree nisi for divorce will issue to be made absolute after the lapse of six months.
2. The custody of the two children be and is hereby granted to the respondent, but the petitioner is granted a right to visit the children.
3. Either party may apply appropriately to a court with jurisdiction on the issue of maintenance or support of the children.
4. Each party will bear their respective costs of these proceedings.

Dated and delivered at Garissa this 28th January 2016.

GEORGE DULU

JUDGE