



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
FAMILY DIVISION
DIVORCE CAUSE NO. 6 OF 2015

R A PPETITIONER

VERSUS

K R PRESPONDENT

JUDGMENT

1. The Petitioner **R A P** has filed this petition dated 26.1.15 seeking the dissolution of his marriage to the Respondent **K R P**. The Respondent filed both an appearance and an Answer to Petition.
2. The grounds for divorce as set out in the Petition are cruelty and desertion. The Petitioner avers that the Respondent deserted him on 4.5.12 when she left the matrimonial home in Mombasa for her parents' home in Mumbai, India and has not returned since. The Petitioner further avers that the Respondent has subjected him to cruelty. The particulars of cruelty as set out in paragraph 12 of the Petition include emotional and physical abuse; that the Respondent being of a violent nature has physically assaulted the Petitioner and fractured his finger twice over a period of two years; that the Respondent has subjected the Petitioner to psychological and mental abuse causing him to suffer depression; that by reason of the desertion, the Respondent has denied the Petitioner his conjugal rights and access to the issue of the marriage, causing him mental and emotional anguish. He therefore prays for the dissolution of the marriage and for custody of the issue of marriage.
3. The Respondent in her Answer to Petition denies the allegations by the Petitioner. The Respondent states that since the celebration of the marriage, the Petitioner and his parents were hostile to her; that the marriage was not consummated until five months after the wedding ceremony; that the Respondent's attempt to discuss the issue with the Petitioner and his mother were met with hostility; that the Petitioner's parents released the maid and thereafter the Respondent was treated as a maid and had to do all the household chores amid insults from the Petitioner's parents; that the Petitioner's mother found fault in all the food that the Respondent cooked; that the Petitioner's parents locked all rooms in the house except the kitchen and the bedroom; that the Petitioner and his parents constantly abused her and her parents calling them beggars;
4. The Respondent further claims that the Petitioner is of ungoverned temper and physically assaulted her. She states also states that the Petitioner side-lined her in all his affairs choosing instead to involve his parents; that the Petitioner's parents were very possessive of him and accused the Respondent of snatching their son from them; that sometime in October 2009 after cleaning the house, the Petitioner's mother accused the Respondent of stealing her money and the Petitioner did not defend her yet they were

both together the whole time; that the conduct of the Petitioner's parents led to frequent quarrels between the Petitioner and the Respondent and caused a strain on the marriage.

5. The Respondent also alleges that all her efforts to please her in laws were never appreciated; that the Petitioner's father interfered with her medical care during pregnancy and even colluded with the doctor to subject the Respondent to have surgery instead of normal delivery; that when the Respondent appealed to the Petitioner to get another doctor the Petitioner insisted that the Respondent shall go by what his father wanted; that fearing for herself and for her unborn baby, the Respondent asked the Petitioner to send her to India for delivery which he did; that it took the Petitioner nine months after the birth of the baby to travel to India to see her; that he however did not stay with the Respondent and the child and refused to take them back to Kenya with him.

6. The Respondent has filed what is titled "Application for Objection as regards to maintainability of the present Petition". In it she avers that the marriage herein was solemnised in India under Hindu Vedic rites and thus the Courts in India have jurisdiction to hear and determine the matrimonial dispute between the parties; that there is no cause of action available to the Petitioner and that the Petition should be dismissed with costs; that the ground of desertion relied on by the Petitioner is not maintainable; that the Petitioner seeks to take advantage of his own wrongdoing in that he made her life in the matrimonial home unbearable and then sent her to India but refused to take her and their son back.

7. Despite of service of the hearing notice the Respondent did not make an appearance on the hearing date. The Petitioner testified that he and the Respondent got married on 24.1.08 at the [particulars withheld] Hotel in Bandra, Mumbai, India under Hindu Vedic rights; that the marriage was later registered in Kenya at the Registrar's Office in Mombasa; that after the marriage they cohabited in Ganjoni, Mombasa where they lived together with the Petitioner's parents; that all was well for the first three months but thereafter the Respondent began to change; that the Respondent wanted her own home but the Petitioner was unable to afford the same; that in 2011 when she got pregnant, she insisted against her doctor's advice, on travelling to India to have the baby there; that she delivered a son on 9.6.12 but she refused to come back to Mombasa insisting she would return when the Respondent got a home of their own; that he went to India in February 2013 to see his wife and son and that while there his maternal uncle and aunt tried to reconcile them; that he went to see them again in May 2013 but returned on the second day of the visit as the Respondent was hostile to him; that he has since tried to communicate with her but she does not respond. He prayed that the marriage be dissolved and also for custody of the child.

8. I have considered the Petition and the Reply to Petition. I have also considered the uncontroverted testimony of the Petitioner. The Petitioner met and married the Respondent on 24.1.08 at the [particulars withheld] Hotel in Bandra, Mumbai, India under Hindu Vedic rights. Though no certificate was produced, the fact is not disputed. The marriage was later registered in Kenya at the Registrar's Office in Mombasa on 29.10.08. The marriage certificate serial number [particulars withheld] is sufficient proof of the fact of the marriage.

9. The marriage herein appears to be one of those unfortunate situations where a young couple upon marriage lives together with the husband's parents and there is total disharmony. The boundaries in the matrimonial home of the Petitioner and the Respondent herein were skewed. The couple and the Petitioner's parents are all a part of the pie. This was an enmeshed relationship bereft of healthy emotional and physical boundaries. The Respondent's desire to have a home of her own independent of her in-laws was rebuffed by the Petitioner. This contributed to the breakdown of the marriage and caused the Respondent to flee the matrimonial home.

10. Section 70 of the Marriage Act, 2014 lists the following as the grounds upon which a Hindu marriage may be dissolved:

- a. the marriage has irretrievably broken down;
- b. the other party has deserted the petitioner for at least three years before the making of the petition;
- c. the other party has converted to another religion;
- d. since the celebration of the marriage, the other party has committed rape, sodomy, bestiality or

- adultery;
- e. the other party has committed cruelty on the other; and
- f. the other party has committed exceptional depravity on the other

11. In his Petition the Petitioner cites the grounds of cruelty and desertion.

12. On the ground of cruelty, the Petitioner in his Petition states that the Respondent being of a violent nature has physically assaulted the Petitioner and fractured his finger twice over a period of two years; that the Respondent has subjected the Petitioner to psychological and mental abuse causing him to suffer depression; that by reason of the desertion, the Respondent has denied the Petitioner his conjugal rights and access to the issue of the marriage, causing him mental and emotional anguish. The Petitioner in his testimony made no mention of being assaulted by the Respondent nor did he provide any proof that he suffered from depression. The denial of conjugal rights by reason of desertion is however undisputed. This clearly has caused the Petitioner mental and emotional anguish. I therefore find that the ground of cruelty has on this score been proved.

13. On the ground of desertion, the Petitioner testified that the Respondent left for India in May 2012 and has never returned. I find that this ground has been proved as it has been over three years since the Respondent deserted the Petitioner. The law requires that desertion be for a period of at least three years.

14. It is clear from the foregoing that the marriage herein has irretrievably broken down. The Petitioner testified that the Respondent is categorical that she would only return upon the Petitioner getting a home of their own separate from his parents. The Petitioner on the other hand maintains that he cannot afford to have a home of his own. I find that the Petitioner is not unable but unwilling to provide a separate matrimonial home for his wife, yet living with his parents has been a major cause of the disharmony in his marriage. There appears to be no hope for this marriage. Accordingly, I pronounce a decree of divorce and order that the marriage between the Petitioner and the respondent be and is hereby dissolved. Decree nisi to issue and the same to be made absolute within 1 month. The matter of custody of the child of the marriage shall be placed before the Children's Court for determination.

15. Costs shall be in the cause.

DATED, SIGNED and DELIVERED in MOMBASA THIS 26th day of January, 2016.

M. THANDE

JUDGE

In the presence of: -

..... **for the Petitioner**

..... **for the Respondent**

..... **Court Assistant**