



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**CIVIL SUIT NO. 3 OF 2011**

**S M M .....PLAINTIFF**

**-VERSUS-**

**M N K .....DEFENDANT**

**JUDGMENT**

1. By a plaint dated 15<sup>th</sup> June, 2011 and filed in Court on 30<sup>th</sup> June, 2011, the plaintiff prays for a declaration that the cohabitation between him and the defendant amounts to a marriage between them, and for a prayer that the marriage between them be dissolved.
2. The suit is premised on the grounds that during the subsistence of the marriage, the defendant has been guilty of cruelty to the plaintiff, and that she has, for a period of more than three (3) years preceding the filing of this cause, been guilty of constructive desertion.
3. The particulars of cruelty are contained at paragraph 9 of the plaint. It is averred that during the cohabitation, the defendant failed to display any love towards the plaintiff, as a result of which the plaintiff suffered emotional trauma and mental anguish. It is further averred that the defendant is a habitual liar and has, throughout the cohabitation, lied to the plaintiff about her family background, relatives and other issues affecting the marriage, thus causing a great mistrust in the marriage. The defendant is said to have lied to the plaintiff both before and during the cohabitation that her parents were dead while all along they were alive and the plaintiff only discovered the same when his children informed him of the same after attending a funeral at the defendant's rural home in 2006. The defendant is also said to have failed to disclose to the plaintiff that she had children from a previous marriage which the plaintiff discovered accidentally. It is averred that in December 2007 the defendant hired unknown persons to end the life of the plaintiff. The plaintiff reported the same to the Kasarani Police Station in January 2008 when the hired persons contacted the plaintiff to confess to him, after which the hired assassins recorded their statements with the police at the said police station.
4. Particulars of the constructive desertion are contained at paragraph 10 of the plaint. It is said that in June 2007, the plaintiff was forced to leave the matrimonial home due to the defendant's lies and unreasonable behavior. It is further averred that since June 2007, the plaintiff and the defendant have not resumed co-habitation and have resided separately. During the constructive separation no conjugal intercourse has taken place between the parties. It is submitted that the marriage between the parties is consequently at an end.

5. The defendant in her statement of defence, dated 22<sup>nd</sup> September 2011 and filed in court on the even date, denies the contents of paragraph 6 of the plaint and puts the plaintiff to strict proof. On cruelty, she denies that she is guilty of cruelty during the subsistence of the marriage as alleged in paragraph 9 of the plaint or at all. She also denies not displaying love to the plaintiff and avers that the plaintiff engaged in adulterous liaisons during the subsistence of their marriage. She further denies that she lied about her family background and relatives, saying that the plaintiff had every opportunity during their courtship to find out all details regarding her relatives. Further, she denies that she is guilty of constructive desertion as alleged by the plaintiff, and denies the particulars of constructive desertion as set out in paragraph 10 of the plaint.
6. In her counterclaim, the defendant avers that the plaintiff has been guilty of cruelty during the subsistence of their marriage. The particulars of cruelty are set out. It is averred that the plaintiff is a violent person of ungovernable temper, and he is guilty of battering and physically abusing her during the subsistence of their cohabitation. It is pleaded that on or about the year 2004, when the plaintiff was working in Italy, the defendant and the children went to visit him and found a woman whom he claimed to be his wife, and on asking him about this state of affairs, the plaintiff beat the defendant mercilessly and caused her grievous bodily harm and had to be assisted to walk by their children. It averred that on his return to Kenya from Italy in the year 2005, he began drinking alcohol heavily and would come home and beat up the defendant whilst verbally abusing her, in the presence of the children. It is averred further that the plaintiff was disrespectful to the defendant and would constantly abuse her verbally even in the presence of the children. The defendant avers that during the subsistence of the marriage, the plaintiff has left the financial burden of bringing up their children substantially on the shoulders of the defendant and he fails, refuses and or neglects to meet their children's needs as they fall due. It is specifically pleaded that in January 2007, the plaintiff caused the defendant to be arrested on trumped up allegations, and confined for a whole week, and during this period, he entered into their matrimonial home which he had deserted since the year 2005 and took away with him all her original documents relating to their family car, registration mark and number [*Particulars withheld*] her passport, and the cheque books to their joint account.
7. On adultery, she claims that during the period 1999 and 2005, when the plaintiff was based in Italy, he was involved in an intimate affair with an Italian woman, and that the said woman confirmed to the defendant that she had been living with him as his wife. She states that in the year 2005, the plaintiff confessed to being involved in an adulterous affair with a woman by the name of L N K it is alleged that he moved out of the matrimonial home and has been living with the said L N K since 2005, and that he has children with the said woman.
8. The defendant prays that the plaintiff's suit be dismissed in its entirety, with costs to her; that the marriage between them be dissolved on her counterclaim; that the plaintiff be ordered to pay alimony to the defendant; and that the plaintiff be ordered to pay maintenance for the children of the marriage.
9. To the defence and counterclaim, the Plaintiff filed a reply dated 6<sup>th</sup> October 2011 and filed in court on 11<sup>th</sup> October 2011. He has denied the allegations made therein.
10. The suit was heard on 5<sup>th</sup> November 2015 when the plaintiff and defendant gave sworn testimonies.
11. The parties herein have shown that they started cohabiting as husband and wife in 1984, and the said union was blessed with two children, the first child being born on 15<sup>th</sup> February 1985 and the second on 21<sup>st</sup> June 1990. The said cohabitation took place several places as shown in the plaint. There is no doubt that there was long cohabitation that would under the circumstances give rise to presumption of marriage. Indeed, in *Hortensiah Wanjiku Yawe vs. The Public Trustee, Civil Appeal No.13 of 1976*, it was held that a prolonged cohabitation as a man and wife may give rise to a presumption of marriage in favour of the party asserting it.

12. Further, the doctrine of presumption of marriage is based on Section 119 of the Evidence Act, Cap 80, Laws of Kenya, which provides as follows:-

*“119. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case”.*

13. The facts of this case is apparent that the parties herein are fed up with the said union and each party is accusing the other for its breakdown, and they are both seeking an order for divorce.

14. The plaintiff's grounds for seeking an order for divorce are cruelty and constructive desertion, whose particulars are contained in paragraphs 9 and 10 respectively. He accuses the defendant among others of having lied to him about her family background, that her parents were dead, yet they were alive. This court finds the defendant's response to the said allegation interesting. She denies having lied about her parents' background, and also states that the plaintiff had every opportunity to find out all the details regarding her relatives. I find this kind of response very casual. One wonders from whom the plaintiff would have found the said details if not from the defendant herself. The plaintiff states that he only came to know about all this in 2006 from his children. I find this kind of behavior amounts to cruelty as it is weighty and grave and would cause reasonable apprehension on part of the plaintiff. For reasons only known to herself, the defendant chose to lie to her husband for nearly twenty-three (23) years about her own parents.

15. The defendant's behavior pushed the plaintiff from the matrimonial home in June 2007 which informs his second ground of constructive desertion. It is the plaintiff's case that since then the parties have not resumed cohabitation and that no conjugal relations have taken place since then and therefore the marriage between the parties is at an end.

16. This court is satisfied that under the circumstances the Plaintiff has established cruelty and constructive desertion as grounds for divorce as regards the standard of proof required to satisfy the court that the matrimonial offence of cruelty has been proved, the court, in *Kamweru vs. Kamweru* (2000) eKLR, stated as follows:

*“Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established.”*

17. The said children of the marriage are now adults and therefore are not entitled to maintenance orders. Equally important is the fact that the court is not satisfied that a case for alimony has been made by the defendant to warrant the making of the said orders.

18. Accordingly, the plaintiff's suit succeeds and the marriage between the plaintiff and the defendant is hereby dissolved.

**DATED, SIGNED and DELIVERED at NAIROBI this 24<sup>TH</sup> DAY OF MARCH, 2016.**

**W MUSYOKA**

**JUDGE**