



REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI
FAMILY DIVISION
DIVORCE CAUSE NO. 58 OF 2015

D.N.M.....PETITIONER

-VERSUS-

J.N.M.....RESPONDENT

JUDGMENT

PLEADINGS

By the Petition filed on 08th April 2015 by D.N.K, the Petitioner, he sought to have the marriage between him and J.N.M, the Respondent be dissolved. The Court grants costs and any other relief.

The Petitioner and Respondent were married on the 26th July 1997 as evidenced by the marriage certificate attached to the Petition. They had two children D. M.N. born on 6th October 1997 and T.M.N. born on 28th August 1999 during the marriage. They lived together in Githurai from the 06th July - 09th October 1997.

The Petitioner claimed that the Respondent treated him in a cruel manner by using abusive language and caused him mental anguish, on 27th September 1997 the Respondent threatened to kill the Petitioner, and she had said so while holding a knife, the Respondent denied him conjugal rights, spent nights away from the matrimonial home without explanation or consent and deserted him and their matrimonial home.

The Petitioner pleaded that the Respondent was involved in an adulterous relationship during the marriage.

The Respondent filed answer to petition and cross petition on 4th June 2015. The Respondent denied the particulars of desertion, adultery and cruelty attributed to her by the Petitioner.

The Respondent stated that she and the Petitioner were indeed married on the 26th July 1997 and they had two children together and worked for gain in Kenya. The Respondent deposed that they have Children's Court **Case No. 496 of 2015** with regard to the Petitioner's children support payment.

The Respondent disagrees with the Petitioner's claim that they lived together from the 06th of July to the 09th of October 1997 and insists that they lived together from 1997 to 1999. The Respondent claims that the Petitioner committed adultery since 1999 with named parties. During the year 1999 according to the Respondent the Petitioner disappeared from their matrimonial home and started cohabiting with a lady in

Githurai.

The Petitioner beat her in front of their eldest son and threw the Respondent out of their matrimonial home. The Petitioner showed no interest in the children from their marriage, he failed to maintain his family and instead neglected them. The Respondent deposed that when the Petitioner left their matrimonial home in 1999 he intended to end to the marriage. According to the Respondent the Petitioner is a man of loose morals and has had romantic liaisons with other women namely Rosete Mutevu and Janet Titus and from those liaisons he sired two children.

The Respondent sought the marriage be dissolved, the Respondent is granted custody of the children, the Petitioner to provide alimony *pendete lite* until conclusion of this case and to pay costs of the suit and any other relief the Court may deem fit.

HEARING

The Respondent was served with the hearing notice as per the Affidavit of Service filed on 20th April 2016 but did she did not appear on the 21st April 2016 during the hearing. She had however filed her cross petition in the court file.

The Petitioner resides in Ruiru. He stated that he works in the Financial Markets Department in Kenya. He is the husband to J N M they were married on the 26th July 1997 in Nairobi. They cohabited at Githurai and they have two children.

The Petitioner also stated that they parted in 1997 and for more than one year they did not see each other and he didn't know where she was until they later reconciled in 1998 and were on and off together until February 1999. Since 1999, they haven't been together again.

The Petitioner told the Court in reliance of the contents of the petition; the marriage between him and the Respondent has irretrievably broken down. He told the Court that the last time the Respondent came to his father's house with the Police Officers and destroyed his house. He stated that the Respondent's father is violent and accompanied the Respondent to his home. The Petitioner needs to protect the said property. He sought the dissolution of the marriage.

DETERMINATION

The Marriage Act provides,

Section 66 (2) A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the parties or the dissolution of the marriage on the following grounds-

- (a) adultery by the other spouse;***
- (b) cruelty by the other spouse;***
- (c) exceptional depravity by the other party***
- (d) desertion by the other spouse for at least three years; or***
- (e) the irretrievable breakdown of the marriage***

The Petitioner raised particulars of cruelty, adultery and desertion against the Respondent and the Respondent denied and pleaded particulars of the same grounds against the Petitioner who denied in the Reply to Answer to Petition and Cross Petition filed on 24th June 2015. It is one's word against the other and this court cannot conclusively determine who is responsible for what between the 2 parties. Suffice is

to state that from the evidence on record the marriage has irretrievably broken down. The Petitioner and Respondent have moved their separate ways. There is no evidence of attempts at reconciliation and salvage of the marriage is not feasible. Whereas the Court ought to preserve and support the family unit under **Article 45 of Constitution 2010**; the Court cannot force parties to live together if they have manifested their choice to part ways. Therefore the marriage between the Petitioner and Respondent is dissolved.

The Respondent sought alimony *pendete lite* from the Petitioner till the conclusion of the case. The court relies on the following legal provision;

Section 77 of The Matrimonial Act 2014 provides;

The Court may order a person to pay maintenance to a spouse or former spouse–

- (a) If the person has refused or neglected to provide for the spouse or former spouse as required by this act;*
- (b) If the person has deserted the other spouse or former spouse, for as long as the desertion continues;*
- (c) During the course of any matrimonial proceedings;*

The Court finds that the application ought to have been lodged heard and determined during the pendency of the petition. Although the Respondent is entitled to pursue alimony, it is at the tail end of the proceedings and the matrimonial proceedings are at a close unless a review or appeal is lodged. The Court finds the application for alimony at this stage unsuccessful and especially in light of ongoing Children Court case to provide for the upkeep of the children. Secondly, for this Court to determine the issue of alimony, both parties should file affidavits of means to inform the Court and enable fair determination on payment or non- payment of alimony. In the absence of such evidence the issue is moot at this stage.

COURT ORDERS

- 1. The marriage solemnized on 26th July 1997 between the Petitioner and Respondent is dissolved**
- 2. The decree nisi to issue forthwith and decree absolute in 30 days**
- 3. The issue of custody, upkeep and maintenance of the children shall be determined in Children Court Cause 496 of 2015**
- 4. The Application for alimony *pendete lite* is dismissed.**
- 5. Each party to bear own costs.**

DELIVERED AND SIGNED IN OPEN COURT IN THE PRESENCE OF PARTIES AND COUNSEL ON 31ST MAY 2016.

MARGARET W. MUIGAI

JUDGE

In Presence of

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