



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
DIVORCE CAUSE NO. 5 OF 2014

J. S. P PETITIONER

VERSUS

S . K. R RESPONDENT

JUDGMENT

1. In the petition dated 4th March, 2014, the petitioner *J.S.P* prays that his marriage to *S.K.R* (hereinafter the respondent) be dissolved. The petition is premised on the ground of desertion on account of which it is alleged that the marriage between the parties has irretrievably broken down.
2. The Petitioner pleaded in his petition that his marriage to the respondent was solemnized on 6th December, 2009 under the ***Hindu Marriage and Divorce Act***; that after the celebration of the marriage, they both cohabited in Eldoret until July 2010 when the respondent left to visit her parents in Kisumu but she thereafter refused to go back to their matrimonial home; that her failure to return to their matrimonial home for over 3 years constituted desertion which has resulted in their marriage irretrievably breaking down and that the marriage ought to be dissolved.
3. Though served with the Petition, the respondent did not file an answer to the petition or a cross-petition. On 24th April, 2014, the petitioner obtained a Registrar's Certificate under ***Rule 29(2)*** of the ***Matrimonial Causes Rules*** to the effect that the petition should proceed for hearing as an undefended cause.
4. During the hearing of the petition on 30th November, 2015, the petitioner re-iterated and expounded on the averments in his petition. To prove the existence of the marriage, he produced in evidence a certificate of marriage dated 6th December, 2009 issued in Kisumu.

He testified that the respondent voluntarily left their matrimonial home in Eldoret in July 2010 and went to live with her parents in Kisumu and that despite his efforts of going to Kisumu to persuade her to return, she has completely refused to do so.

5. Having considered the petition, the evidence adduced by the petitioner and the written submissions filed by his advocates *Ms. Manani, Lilan, Mwetich & Company Advocates*, I find that the marriage herein was contracted under the ***Hindu Marriage and Divorce Act*** which has now been repealed and replaced by the ***Marriage Act No. 4 of 2014*** – See schedule under ***Section 97*** and ***Section 98*** of the ***Marriage Act***.
6. ***Section 98(2)*** of the ***Marriage Act*** provides that “***proceedings commenced under any written law shall, so far as is practicable, be continued in accordance with the provisions of this Act***”.

It is clear from both the petition and the evidence tendered by the petitioner that the instant proceedings were commenced under the ***Hindu marriage and Divorce Act*** (hereinafter the

Repealed Act) before the enactment of the **Marriage Act** (the Act). It is thus safe to conclude that going by the provisions of **Section 98(2)** of the Act, the repealed Act is still applicable to the present proceedings but it must be read together with the Act of 2014.

7. That said, I now wish to turn to a consideration of the merits of the petition. Under **Section 10(1)** of the Repealed Act and **Section 70** of the Act, the grounds for dissolution of a Hindu marriage includes

Inter alia desertion of a spouse for at least three years before the making of the petition; that the marriage has irretrievably broken down; that since the celebration of the marriage, the other party has converted to another religion or has committed rape, sodomy, bestiality or adultery or acts of cruelty against the petitioner.

8. As stated earlier, the instant petition is anchored on the ground of desertion. The only issue then arising for my determination is whether the petitioner has established this ground to the standard required by the law which is proof on a balance of probabilities or on a preponderance of probability – See: **M.S.V V S.J.V & Another Divorce Cause No.30 of 2008 (2015) eKLR.**
9. The petitioner in his evidence testified that the respondent on her own accord left their matrimonial home on July 2010 and had not returned at the time the petition was filed or at the time he testified in court. He also testified that he did not do anything to force her to leave and that he had even tried to persuade her to return to their matrimonial home without success. This evidence has not been controverted by any other evidence since the respondent chose not to defend the petition.
10. As the above evidence is not challenged, I find it as a fact that the respondent voluntarily left the petitioner in their matrimonial home and went to live with her parents in July 2010. The act of walking away from the marriage and choosing to live away from the respondent is in my view sufficient evidence of desertion. The desertion in this case is the kind contemplated in **Section 10(1) (b)** of the Repealed Act and **Section 70** of the **Marriage Act** as a ground for divorce since the petition was filed on 9th March, 2014 over 3 years since the respondent left her matrimonial home.
11. The petitioner testified that in view of the respondent's desertion, their marriage has irretrievably broken down. I wholly concur with the petitioner in this regard because having not lived together as husband and wife for over five years, the parties can no longer enjoy the intimacy and companionship that is expected to be present in a marriage. In fact **Section 66(6)** of the Act defines a marriage that has irretrievably broken down as one in which the parties have been separated for at least two years. Given the petitioner's evidence, it is clear that this is a marriage that cannot be salvaged.
12. For all the foregoing reasons, I am satisfied that the petitioner has met the legal threshold for grant of the orders sought in the petition. The petition is thus merited and it is accordingly allowed.

Consequently, the marriage between the petitioner and the respondent celebrated on 6th December, 2009 is hereby dissolved. A decree Nisi to issue forthwith to be made absolute after the next 30 days.

It is so ordered.

C.W. GITHUA

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 17th Day of May, 2016

In the presence of:-

Mr. Manani for the Petitioner

Ms. Naomi Chonde Court Clerk.