



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO. 186 OF 2013

O M IPETITIONER

VERSUS

S W M.....RESPONDENT

JUDGMENT

1. The Petitioner has filed a petition dated 26th August 2013 seeking the dissolution of his marriage to the respondent. He got married to the respondent on 19th June 2009 at the office of the Registrar of Marriage in Nairobi District. After the said marriage, the petitioner and the Respondent cohabited for a short time in Kikuyu, Kiambu County. Their marriage was blessed with three issues namely;

i. N W M born on 6th June 2003

ii. N S N born on 19th April 2008

iii. NW M born on 18th April 2010

2. The petitioner is a volunteer worker with the U N V S while the respondent is a receptionist at [Particulars withheld] road and also runs a clothes shop. The petitioner alleges that the respondent has been guilty of cruelty and desertion, which he particularized as follows; That the respondent on 17th February 2013 whilst the petitioner was at work in Sudan the respondent left their matrimonial home carrying away their house hold goods with her to live in an unknown place and abandoned the children to the care of the petitioner's parents. That the respondent has denied the petitioner his conjugal rights without just cause and has at times moved to the children's room and has refused to communicate with the petitioner denying him love and affection which amounts to constructive desertion.

3. On cruelty, the petitioner alleges that the respondent left the matrimonial home to unknown place causing him anxiety, pain and distress. That the respondent has gone on drinking sprees leaving the children of the marriage without care and wasting money intended for children's basic necessities on uncontrolled drinking and partying therefore subjecting the children of the marriage to distress and a life of penury. That the respondent has occasionally used abusive language on him and had at one time threatened the petitioner with a knife. That the respondent has on various occasions falsely accused him of having another wife and family and has at time stated that the petitioner may not be the father to the children of the marriage subjecting him to emotional pain and distress.

4. The petitioner alleges that the marriage has irretrievably broken down and efforts to reconcile the parties have failed. He denied conniving with the respondent to file this petition. He prays that the marriage between him and the respondent be dissolved, that he be awarded custody of the children of the

marriage and that the respondent be condemned to pay cost of the petition. Colloquium

5. The respondent in her reply to the petition and cross petition admitted to marrying the petitioner and having three issues of the marriage however, she denies the allegation of deserting her matrimonial home claiming that it was the petitioner who assaulted and threw her out of the matrimonial home something she alleges the petitioner normally did. She denies carrying away matrimonial goods claiming she only packed her stuff and the children's personal effects when the petitioner introduced to her his girlfriend and her son and demanded that she leaves the matrimonial home. She denies the allegations of cruelty levied against her by the petitioner. Further she denied denying the petitioner his conjugal rights claiming that the petitioner had made the same impossible having deserted the respondent. She denies having threatened the petitioner claiming that it is indeed the petitioner who threatened her alleges that the petitioner and added that she took the car since it was a birthday gift to her on her birthday.

6. The petitioner in his reply to the petition and cross petition reiterates that the respondent is guilty of desertion and cruelty and denies allegations that he had been adulterous or that he had any other child out of wedlock. He denies being a drunkard or even denying the respondent her conjugal rights. He further denies causing the respondent to abandon the matrimonial home carrying away their household goods. He denies giving the respondent the car as a gift and indicates that she should return the same to him. He prays that his petition be allowed and the respondent's cross petition be dismissed with costs.

7. The matter came up for hearing on 19/5/2016 the petitioner in his testimony reiterated the averments of the petition. He stated that the respondent left the matrimonial home in February 2013 whilst he was away for work in Juba and any efforts to contact her or the children were futile. He stated that though he sent her money she was not paying rent or feeding the children and had even given his car to her family without his consent. He denied cohabiting with B stating that it was only in 2015 when he got someone to look after his things. That efforts to reconcile with her proved futile.

8. On cross examination he admitted that he was living with B whom he termed as a partner adding that though B had a child it was not his and he is called E and he denied knowing another child called I. He stated that there is a children's case pending in the lower court which was filed before this cause was filed and he had even gotten a court order to see the children.

9. The respondent S in her evidence reiterated the averments in her reply to the petition. She stated that on 1/1/2013 at night the petitioner went with B to where they lived and told her that he was having an affair with B and that they had a son. That she even had a sit down with the petitioner and B who admitted to having his son and she even took B home at Jacaranda where she met B two children older child from her previous marriage and a younger one 4 months old. That the petitioner lives with B at Ruaka and when their girls go to visit him they tell her stories of how they played with B two boys. She testified that the petitioner is physically abusive and though she stayed in the matrimonial home until 14/1/2013 when he told her he wanted a divorce and did not want to find her in the house when he came back from Juba. She denied petitioner claim of reconciliation. It was her evidence that the marriage has irretrievably broken down.

10. On the cross petition the respondent alleged adultery on the part of the petitioner. In her testimony she stated that the petitioner informed her of the affair and disclosed that he had had a child with B. Though the petitioner had denied these allegations in his testimony, he admitted to cohabiting with B who he referred to as his partner.

11. I have considered the evidence adduced by the parties and the grounds for divorce. The petitioner alleges desertion and cruelty on the part of the respondent. In the case of **NUNZIO COLAROSSO V. MICHELINA COLAROSSO [1965] E.A. 129, NEWBOLD, JA** had this to say on cruelty

“An essential element of every petition based on cruelty is, however, that the party seeking relief must prove actual or probable injury to life, limb or health. For this reason, it is seldom indeed that a decree is granted upon a single act of cruelty though, should that act be serious enough and result in injury, then the court will grant the decree.” In his testimony he has narrated various incidences

which he stated were acts of cruelty however in my view he failed to persuade this court of the probable injury to his life or health. It's evident that they had some kind of disagreements in their marriage but the acts as narrated don't amount to cruelty, am also aware acts of cruelty depend on the facts of each case. On desertion though the respondent admits to deserting the matrimonial home due to cruelty meted against her by the petitioner, it was her testimony that it is the petitioner who asked her to leave as he did not want to find her there upon his return from Juba. Desertion is one of the grounds provided for under the Matrimonial Causes Act Cap 152 (now repealed) and also in the Marriage Act 2014. From the foregoing it is clear that the respondent due to hostility in the said home chose to move out of their matrimonial home despite the petitioner being away in Juba as such I find that the respondent is guilty of desertion and as such the petitioner's petition succeeds in part. Adultery too is one of the grounds provided for under the Matrimonial Causes Act Cap 152 (now repealed) and also in the Marriage Act 2014. The petitioner admits that he stays with a partner called Bella. He admitted that they share the same room and bed as partners, am persuaded that the respondent has proved that the petitioner despite still being married to her is living with another woman whom he refers to as his partner, a modern term used by couples who are not formally married but living together. From the foregoing it is clear that the petitioner is actually guilty of adultery as such the respondent's cross petition succeeds.

12. I therefore dissolve the marriage between the petitioner and the respondent that was celebrated at Nairobi Office on the **19th June 2009** at the Registrar's office in Nairobi. The petitioner has sought custody of the children of the marriage and in his testimony has stated that there is a matter pending determination before the children's court and as such this court will not make any orders touching on child custody or maintenance and the same might lie in this court as a matter of appeal from the court's decision. I make no order as to cost. It is so ordered.

Dated, Signed and delivered this **19th** Day of **August** 2016.

R. E. OUGO

JUDGE

In the presence of:

.....**Petitioner**

.....**Respondent**

Ms. Charity

Court Clerk