



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 184 OF 2011**

**BETWEEN**

**MLM .....PETITIONER**

**AND**

**CSM.....RESPONDENT**

**J U D G E M E N T**

1. On 7<sup>th</sup> July 1983, the Petitioner then a spinster known as MLM was lawfully married to the Respondent CSM then a bachelor and a certificate Serial No [Particulars Withheld] duly issued to them. The marriage was celebrated at the Civil Status Registration Office of the Russian Federation and thereafter they cohabited as husband and wife in Russian Federation until 1996. Thereafter they relocated to Kenya and lived and cohabited in [Particulars Withheld] and in various estates in Nairobi. They were blessed with two issues of the marriage, as follows:

a) MC – OM born on 27<sup>th</sup> December 1984.

b) KM born on 31<sup>st</sup> October 1986.

2. At the time of filing the Petition Both the Petitioner and Respondent were domiciled in Kenya where the Petitioner worked as an Assistant Lecturer at the [Particulars Withheld] University and the Respondent is a part-time Lecturer at [Particulars Withheld] University.

3. The Petition filed on 19<sup>th</sup> December, 2011 is premised on grounds of cruelty and desertion said to have been occasioned by the Respondent against the Petitioner. In sum, the particulars of cruelty are that the Respondent wilfully failed to give the Petitioner emotional support in difficult times experienced by the Petitioner. That the Respondent has abdicated his domestic responsibilities to his family since 2005, leaving the entire burden of raising their two children to the Petitioner. The Petitioner also stated that the Respondent was physically abusive to her and assaulted her on several occasions causing serious bodily injuries.

4. The acts of desertion as set out in the petition and in the oral evidence of the Petitioner are that sometimes in the year 2005, the Respondent without any cause or justification, compelled the Petitioner to leave their matrimonial home in [Particulars Withheld], Nairobi and the two have not cohabited since then. The Respondent resides in their matrimonial home alone while the Petitioner has had to put up in a hostel for almost nine years.

5. On 29<sup>th</sup> September, 2012 the Deputy Registrar certified that the matter was suitable to proceed for

hearing as a defended cause for one day in Nairobi, on condition that the Respondent filed his answer within 30 days. This is because on 3<sup>rd</sup> May 2012 the Respondent had been allowed extension of time to file his answer and he had failed to do so.

6. The Petitioner stated that due to the aforesaid acts of cruelty and desertion she and the Respondent could not continue to hold out as husband and wife. She, therefore, asked the court to dissolve the marriage between her and the Respondent. She had also prayed that the court grants her such sums of money by way of alimony, secured provision and such monthly maintenance for herself and the two issues pending suit as may be just. She did not however pursue this prayer.

7. The Petitioner confirmed that this Petition had not been presented or prosecuted in collusion with the Respondent, nor had she connived or condoned the acts of cruelty, and desertion complained of.

8. The Respondent did enter appearance on 23<sup>rd</sup> February, 2012 and thereafter filed an Answer to the petition on 26<sup>th</sup> October 2012. In the Answer to petition he denied the allegations made against him, dismissing them as false and inaccurate.

9. At the hearing on 12<sup>th</sup> February 2015, the Petitioner testified and reiterated what she had set out in the Petition. The Respondent who was present in court when the Petitioner testified cross-examined her at length. The gist of his lengthy cross-examination seemed to suggest that there was no marriage celebrated between himself and the Petitioner and for that reason the court could not purport to dissolve that which did not exist. Indeed in a Notice of Motion dated 7<sup>th</sup> November 2014 that he filed before the cause was heard, the Respondent stated as much.

10. The Respondent did not tender oral evidence in his defence. In my observation the Respondent has made it very difficult for this matter to proceed. Indeed the record shows that he placed road blocks at every stage of the trial and employed all manner of tactics to try and stop the matter from proceeding on the dates it was listed for hearing. The chronology of events set out below is instructive.

11. When the matter first came for hearing before the court on 29<sup>th</sup> January 2015 the Respondent had filed a Notice of Motion dated 7<sup>th</sup> November 2014, in which he purported to object to the Registrar's Certificate which had directed that the matter proceeds for hearing. He was not receptive of the courts explanation to him that this was a necessary procedural step without which the cause would not be set down for hearing.

12. The record reflects that this issue had to be captured as a ruling of the court to direct him to proceed. Thereafter he stated that he was not ready to proceed for hearing and asked to be given another date for hearing. The court gave the parties a mutually agreed date of 12<sup>th</sup> February 2015 for the hearing although the Petitioner was ready to proceed on 29<sup>th</sup> January 2015.

13. On the 12<sup>th</sup> February 2015 the Respondent filed what he called a Preliminary Objection, but which turned out to be some sort of analysis of the grounds of the Petition and his own response. The Respondent also stated in the so called Preliminary Objection that he had lost confidence in the court for insisting that the parties should proceed with the hearing of the Petition.

14. The court considered the Preliminary Objection and in its ruling thereto, observed that the Respondent was a well-educated person having a University education but was feigning ignorance to stall the cause for reasons which were not apparent to the court. Having laid no basis for the court to recuse itself, the court after considering the Preliminary Objection, dismissed it and ordered the parties to proceed with the hearing.

15. On that date the Petitioner testified and the Respondent cross-examined her ably and at length. Due to the lengthy cross-examination and the fact that a lot of time had already been taken up over the Preliminary Objection the witness was stood down for re-examination on 23<sup>rd</sup> April 2015. On 23<sup>rd</sup> April

2015 however, the matter was taken out of the Cause list because the Court was not sitting, having been deployed elsewhere on official duties. On 23<sup>rd</sup> September 2015 the Petitioner took the date of 10<sup>th</sup> December 2015 *ex parte* for further hearing.

16. On the 10<sup>th</sup> December 2015 the Respondent did not attend court. Miss Namisi, learned counsel for the Petitioner had filed an affidavit of service indicating that she and the Petitioner had personally served the Respondent. In the premise and since there was no communication from the Respondent as to his absence, the Petitioner closed her case there being no other witness to be called. The matter was thereafter reserved for judgment on the 21<sup>st</sup> January 2016.

17. On 21<sup>st</sup> January 2016 the date of the judgment the court was notified that on the 19<sup>th</sup> January 2016, just two days before the judgment the Respondent had presented a letter dated 17<sup>th</sup> January 2016 in the Registry. In that letter he stated that he was not able to attend court on 10<sup>th</sup> January 2016 because he was attacked and assaulted on that same date, by his tenants. In court he went on at length about his constitutional right to be heard

18. In the interest of justice and being mindful of **Article 159** of the **Constitution** that justice should be administered without undue regard to procedural technicalities the court converted the Respondent's letter dated 17<sup>th</sup> January 2016 and filed in court on 19<sup>th</sup> January 2016 into his application to reopen the case. The court granted the Respondent's wish and directed him to tender his defence, even as the Petitioner contested that this was just another of the Respondent's time wasting gimmicks.

19. The Respondent now stated that he was not able to defend himself since he was still feeling poorly from the thorough beating he had received from his tenants. This is notwithstanding the fact that he had addressed the court at length about his wife's shortcomings without appearing to labour under any impairment. The court nonetheless adjourned the matter at his behest, so as not to give him grounds to complain that he had not been accorded a fair hearing.

20. On 17<sup>th</sup> March 2016 the court was away on official duties when the matter came up for hearing. A mention date was taken for the 28<sup>th</sup> July 2016 on which date both parties attended court. It is notable that on that date the court was willing to grant the parties an early date for hearing but, the Respondent argued that the date of 15<sup>th</sup> September, 2016 would afford him ample time to prepare his defence. The Petitioner agreed to the date and the matter was set down on that date for hearing.

21. On 15<sup>th</sup> September 2016 the Respondent did not attend court. The matter was placed aside until 10.05 a.m. when it was called out in the court room and on the court corridors but there was no response. The court marked the defence case as closed and reserved the matter for judgment on 22<sup>nd</sup> September 2016.

22. For purposes of the judgment the court has considered the grounds of the petition, the Petitioner's oral evidence in chief and in cross examination the Respondent's Answer to Petition filed on 26<sup>th</sup> October 2012 and find that there are two issues for determination:

(a) Whether there is a legal marriage in existence between the Petitioner and the Respondent.

(b) If the answer to the above is yes, whether the Petitioner has made a case for the dissolution of the said marriage.

23. In her testimony the Petitioner exhibited a marriage certificate No. [Particulars Withheld] issued by the Civil Status Registration Office, the Russian Federation, as confirmation that she and the Respondent did contract a marriage. She also produced in court an old frayed photograph of the two of them together during their wedding.

24. The Petitioner testified that the parties have lived apart since 2005 to date and the burden of catering

for the issues of marriage and putting them through college was left to her alone. She asserted that attempts by the Petitioner and the Respondent's extended family at reconciliation, have not been reciprocated by the Respondent. The Petitioner further produced in evidence a medical report and P3 dated 23<sup>rd</sup> May 2005 as proof of her averments that the Respondent visited physical abuse upon her.

25. The Respondent in his answer to Petition stated that there never existed a valid civil marriage between him and the Petitioner. He asserted that there was no registration of such marriage either in the Kenyan Embassy in Moscow or in the hometown of the Petitioner. He pointed out that the annexed copy of the marriage certificate is a duplicate issued on 20<sup>th</sup> July 2000 seventeen years after the alleged marriage and in which his name was misspelt.

26. The Respondent admitted that he and the Petitioner cohabited from July 1983 upto June in 1984 in [Particulars Withheld] region, after which the Petitioner relocated to her hometown of [Particulars Withheld], in [Particulars Withheld] region where she continued her relationship with her former boyfriend one G. The Respondent stated that he was denied a visa permit to enter the Petitioner's hometown, and thus he remained alone in [Particulars Withheld] town, where he begun to cohabit with one SPP up to June 1985 and in the process begetting a child who was born on 8<sup>th</sup> November, 1985.

27. The Respondent states that at his invitation in December, 1985 the Petitioner visited him in Sweden where he lived at the time. This was with the aim of renewing their relationship, which in the Respondent's vie constituted a marriage under customary Native Law. That after he was denied permit to enter the Petitioner's home town he relocated his family back to Kenya.

28. The Respondent denied having failed to emotionally support the Petitioner in difficult times or having abdicated his domestic responsibilities since 2005. Of interest is the Respondent's acknowledgment that it is the Petitioner who moved from their "**common matrimonial house in Kileleshwa on 1<sup>st</sup> November 2005**". On the one hand therefore, the Respondent acknowledged that he and the Petitioner were in a marriage, even as on the other hand, he denied the existence of valid marriage.

29. The court notes that the Respondent denied having caused the marriage to breakdown irretrievably. He averred that the incident of violence said to have been reported to the Kenya Police by the Petitioner was a false statement which the Petitioner withdrew on her own accord when she realized that she would be proved wrong. The Petitioner explained that she withdrew the complaint to preserve her marriage.

30. The Respondent admitted that he and the Petitioner had lived separately for the seven (7) years leading up to the petition although, he insisted that they were in constant communication with each other.

31. From the pleadings this would be a marriage which was contracted and the divorce proceedings commenced before the **Marriage Act No. 4 of 2014** of the Laws of Kenya came into force. **Section 98 (1)(2)** of the said Act bears saving clauses to the effect that:

**(1) A subsisting marriage which under any written or customary law hitherto in force constituted a valid marriage immediately before the coming to force of this Act is valid for the purposes of this Act.**

**(2) Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act.**

32. According to the Petitioner she and the Respondent contracted a legal marriage on 7<sup>th</sup> July 1983 in the Civil Status Registration Office of the Russian Federation. The Respondent on the other hand, oscillated between there being no valid marriage in existence and there being a customary one. Under **Section 59** of the **Marriage Act** a marriage may be proven in Kenya by **Section 59(1)**.

(a).....

(b) **a certified copy of a certificate of marriage issued under this Act or any other written law;**

(c) .....

(d) **a certified copy of an entry in a register of marriages, maintained under this Act or any other written law;**

(e) .....

The Petitioner did produce in evidence a copy (re-issue) of the marriage certificate given to them when they celebrated their marriage in Ivanovo. In my view therefore, she has proved the marriage.

33. From the foregoing and by the provision of **Section 59(b)(d)**, the court makes a finding that a civil marriage was celebrated between the Petitioner and the Respondent on 7<sup>th</sup> July 1983 in the Civil Status Registration Office at [Particulars Withheld] Town Council of the Russian Federation. The duplicate of the marriage certificate given to the couple when they celebrated their marriage in [Particulars Withheld] bears the three names of the Petitioner and the three names of the Respondent respectively. The misspelling of the Respondent's name is not material in the circumstances of this cause.

34. Under **Section 66(2)** of the **Marriage Act, 2014** a party to a marriage under Part IV of the Act which governs civil marriages may only petition the court for the separation 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 spouse;**

**(d) desertion by the other spouse for at least three years; or**

**(e) the irretrievable breakdown of the marriage.”**

It is not denied that the parties have not cohabited since the year 2005 to date and that attempts at reconciliation have been unproductive. The court is also satisfied that the Respondent did not manage to debunk the medical evidence of physical abuse tendered by the Petitioner by way of medical report and P3.

35. From the foregoing the court makes a finding that the Petitioner has proved the matrimonial offences of desertion and cruelty as found in **Section 66(2)(b)(d)** of the **Marriage Act** on a balance of probabilities. It is also evident that the marriage celebrated between the parties herein has irretrievably broken down and cannot be salvaged.

36. There being merit in the petition, it is hereby allowed with the following orders:

(a) That the marriage celebrated between the Petitioner and Respondent at Civil Status Registration Office, [Particulars Withheld] Region of the Federation of Russia on 7<sup>th</sup> July 1983 is hereby dissolved.

(b) That Decree nisi dissolving the said marriage is hereby issued to be made absolute thirty (30) days from the date of this judgment.

(c) There shall be no orders as to costs.

**SIGNED DATED and DELIVERED** in open court this **22<sup>nd</sup>** day of **September 2016**.

.....

**L. A. ACHODE**

**JUDGE**