



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NANYUKI

DIVORCE. NO. 1 OF 2015

C N M.....PETITIONER

VERSUS

Z N N.....RESPONDENT

JUDGMENT

1. **C N M** has petitioned for divorce on three grounds. That is on the grounds of adultery, cruelty and desertion. **Z J N** defended that petition and cross petitioned for divorce on the grounds of adultery and cruelty. There are two issues that I wish to deal with at first initial point.

2. Firstly is on jurisdiction. The petition was filed on 2nd November, 2007 although heard on 15th June, 2016. It was filed under the Matrimonial Causes Act Cap 152. That Cap 152 was repealed by the Marriage Act No. 4 of 2014. The respondent's Learned Counsel Mr. Kiget argued in his submissions that the applicable law, as this court considers this judgment, is Act No. 4 of 2014. I am however of a contrary view. Section 23(3)(b) and (c) of the Interpretation and General Provisions Act, Cap 2, is the section that leads me to hold that contrary view. That Section provides as follows:

Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not-

a.

b. affect the previous operation of a written law so repealed or anything duly done or suffered under a written law so repealed; or

c. affect a right, privilege obligation or liability, accrued or incurred under a written law so repealed.; or

In my view Section 97 of Act of No. 4 of 2014 did not affect the previous operations the law in Cap 152 nor did it affect the accrued rights or privileges under Cap 152. Since the petitioner petitioned for divorce in the year 2007, way long before Act No. 4 of 2014 came to being, the petitioner acquired rights and privileges under Cap 152 which were not affected by its repealing. It follows that in this judgment the court will be guided by Cap 152.

3. The second issue is that since **C N M** was required, as the husband, by Section 9 of Cap 152 to make the alleged adulterer a co-respondent, which indeed he did in the amended petition, the alleged adulterer needed to have been served with that amended petition. He was no. As a consequence the adulterer did

not participate in the hearing which I believe was the intent of Section 9 of Cap 152. As a consequence the pleadings and the evidence adduced by C N M on the alleged adultery of Z J N cannot be considered in this judgment. It is important , in order to appreciate the courts stand, to see the exact provision of Section 9 (1) of Cap 152 it is as follows:

“On the petition for divorce presented by the husband or in the answer of a husband praying for divorce, the petitioner or respondent, as the case may be, shall make the alleged adulterer a co-respondent unless he is excused by the court on special grounds from so doing.”

PETITIONER’S CASE

4. Petitioner is an officer at the Kenya Defence force. He got married to Z J N on 3rd January, 1997 at the Attorney General’s Office. They were blessed with two Male children (names withheld). Z J N had a child in a previous relationship whom the petitioner accept as a child of the family. Z J N was not employed but tried her hand business.

5. C N M in his evidence stated that Z J N often deserted the matrimonial home. He stated that Z J N was more away from the matrimonial home than she was there. He indeed stated that during the subsistence of their marriage Z J N was away from their home 60% of that period. C N M stated that desertion began in 1998, intermittently and that each time Z J N deserted without any valid reason. He narrated how, while he was on military duties abroad he often telephone their home and it was his sons who would tell him that Z J N was not at home. C N M’s concern was that Z J N deserted the children when he was away on military duties. The most recent time Z J N has left their home, he stated, Z J N took away household goods and sold them.

6. C N M stated that he has always provided for his family. That when he was first posted abroad he arranged for his brother to provide finances to Z J N so that she could take care of the children. He provided his bank statement to prove that subsequently he raised an standing order in favour of Z J N with his bank of Ksh. 40,000. That amount was to enable Z J N to provide for the children’s needs. He also stated, which was not denied by Z J N, that he used to give her Ksh 10,000/= for her personal use. According to C N M what however he found unacceptable was the extravagance of Z J N. He narrated how he used to give Z J N capital to start business but those businesses always failed.

7. C N M also testified that Z J N had obtained loans from banks which she had failed to service. One such loan was guaranteed by a junior Army officer and when that junior officer was called to pay the bank the guaranteed amount he reported C N M to the army alleging that he was being harassed by C N M’s wife. According to C N M such reporting of an officer to the army has serious repercussion to one’s military career. He attributed his slow promotion to that reporting. He stated that he had to repay the bank loan which had been guaranteed by the junior.

8. C N M, as much as Z J N, was of the view that their marriage had irretrievably broken down. He summed up his marriage in this sentence.

“There is no bad blood with her (Z J N). We do not fight we do not share a joke. Our marriage is not going to work.”

RESPONDENT’S CASE

9. Z J N stated , as she began to be examined in chief, that she resides in Nairobi and after confirming the names of the children of the marriage Z J N stated:

“It is true our marriage cannot work.”

That statement is one which the petitioner and the respondent repeated in their evidence as they testified.

10. Z J N acknowledged that C N M did raise a standing order in the year 2012 for monthly payment into

her account of Ksh. 40,000 for provisions for the children and gave her Ksh. 10,000 for personal use. She however said that C N M called her a house girl and stated that he was giving her Ksh. 10,000 as a maid.

11. Z J N denied that she was extravagant with money stating there was no much money for her to be extravagant. In own words Z J N stated:

“I do not spend a lot money. Even that money is not there. He only gives me Ksh. 40,000.”

12. Z J N narrated cruelty she suffered in the hands of C N M which she attributed her frequent movements out of the matrimonial home. Z J N described C N M as a violent man who has in the past held a knife and threatened to use a gun against her. At one time she said that the big children of the marriage restrained C N M as he threatened her. To this end Z J N reported the threats to the officer in charge of station at Nanyuki police station who then wrote a letter to the military police relating the compliant them. Z J N in evidence however said she did not deliver that letter to the military police.

13. Z J N also stated that C N M had sent her threatening and vulgar text messages in her cell phone but those messages were not extracted nor were they produced in evidence.

COURTS ANALYSIS AND DETERMINATION

14. I had an opportunity to hear and observe the parties as they testified before court. In my view Z J N was not a truthful witness. It was clear from my observation of her as she testified. More importantly is that she kept changing her testimony. At one time she denied that C N M provided finances for the family. Indeed she attributed her indebtedness to various one to the fact that she was left my C N M to financially provide for the children. Later she acknowledged she did get money from C N M ‘S brother when C N M was on military duties abroad, and also acknowledge receiving monthly amount of Ksh. 40,000/= by bank standing order and Ksh. 10,000/. Having not believed Z J N her testimony regarding claim of cruelty and threats by C N M are rejected.

15. On the other hand C N M came across as a truthful witness. He narrated how Z J N had shown scant interest in the marriage life and more importantly how she deserted the children when he was abroad on military duties. He testified that in the recent past when Z J N deserted the home. She went away with school fees for their youngest child which led to the child being sent back home for lack of school fees and more importantly how she went away with the car C N M had purchased to enable her take the youngest child to school. As a consequence that child was now uses motor cycle (popularly called Boda Boda) to go to school.

16. Having considered the parties evidence I am satisfied that the petitioner has satisfied this court that the respondent has been cruel to him by frequently going away from the matrimonial home without reason and obtaining credit which involved a junior officer without informing him. It was clear to me as I heard the evidence that the acts of Z J N deeply wounded C N M and that any further married life with Z J N was unthinkable.

17. Z J N prayed that the custody of the children be awarded to her. At present the first two children are over the age of 18 years and cannot be the subject of such an award. The only child that can be considered for an award is the youngest who was born on in the year 2004 and is presently in school at standard 6.

18. In considering the prayer for custody this court can only be guided by one principle, that is the best interest of child. The child live in the matrimonial home, which Z J N deserted. He goes to school within Nanyuki area, where the home is. With the frequent incidents of unexplained desertion by Z J N, I am of the firm view that the best interest of the child would best be served by custody being awarded to C N M, which I hereby do. That would ensure continued stability of that child.

19. Z J N also prayed for maintenance. C N M stated that when Z J N last deserted the home, taking with her matrimonial moveable property, he stopped the standing order into her account which was intended for taking care of the children. C N M further stated in evidence that he did not wish to continue making

that payment once the marriage is dissolved.

20. I have noted that the Learned counsel for Z J N has stated in his written submission that C N M should continue remitting Ksh. 50,000/= to Z J N, however my response is that Z J N needed to lead evidence on the amount of maintenance she was praying for and in doing so she should have indicated whether C N M is able, from his earnings to meet the same. She did not. It ought to be recalled that Ksh. 40,000 was for the care of the children and the maintenances of the matrimonial home. It was not for personal use by Z J N. The question which was not addressed by Z J N was how much does she require for her maintenance and is C N M able to meet it. The only amount this court can order to be remitted to Z J N is Ksh. 10,000 which C N M was remitting to her for her personal use.

21. Bearing the above analysis in mind I make the following orders.

- a. **The marriage solemnized between C N M and Z J N on 3rd January, 1997 is hereby dissolved and a decree nisi shall issue which shall be made absolutely within thirty (30) days from the date of this judgment.**
- b. **C N M shall pay maintenance to Z J N of Ksh. 10,000 per month starting from 1st November 2016 and thereafter to be paid not later than the 5th day of each succeeding month.**
- c. **Custody of the youngest children of the marriage is awarded to C N M.**
- d. **Each party shall bear their own costs.**

Dated and Delivered at Nanyuki this 27th October, 2016

MARY KASANGO

JUDGE

Coram

Before Justice Mary Kasango

Court Assistant – Njue

For Petitioner

For Respondent

COURT

Judgment delivered in open court

MARY KASANGO

JUDGE