



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

SEPARATION AND MAINTENANCE CAUSE NO. 37 OF 2010

M N N.....PETITIONER

VERSUS

J N MRESPONDENT

JUDGEMENT

1. The Petitioner herein is the wife of the Respondent. The parties lawfully got married on 18th September 1982 at the Registrar of Marriages at Kisumu under the Marriage Act (Cap.150). A copy of Certificate of Marriage Serial No. [particulars withheld] is annexed to the Petition filed herein on 8th April 2010. They then lived and cohabited at Kakamega, Kisumu, Eldoret and Kiserian (Rimpa). The said marriage was blessed with three (3) children.

2. The Petitioner seeks in the main an order for judicial separation. There are also prayers for ancillary reliefs. One is for the legal and physical custody of the children of the marriage – that is to say N N, E N and V N. The second one is for maintenance for the children of the marriage and maintenance for the Petitioner. The third prayer is for an order to restrain the Respondent from evicting the Petitioner from the matrimonial home, and an order to compel the Respondent to refund the salary of the Petitioner withheld from 1993 and 2005.

3. The Petitioner has sought an order for judicial separation on several grounds, namely: unfaithfulness, neglect and cruelty. Particulars of the cruelty are specified in the petition – these include withholding the Petitioner’s share of the salary that was due to both of them from their employment in Mission Moving Mountains, failing to provide clothing for the Petitioner forcing her to use second-hand clothes, denying the petitioner conjugal rights as from 2002 and ceasing all communication as from 2004, deserting the matrimonial home in 2006, falsely accusing the Petitioner to the police, ceasing to maintain the Petitioner and her children and cheating her for fifteen (15) years that he was paying for her life and medical insurance. The particulars of unfaithfulness are that in 1996 the Respondent had forced sex with her niece while she was living with them and committing adultery with several women.

4. When the petition was served upon the Respondent, he filed his Answer to Petition and Cross-petition. In his Answer to Petition, he has conceded to certain facts relating to his marriage to the Petitioner, but has denied all the allegations in the petition relating to matrimonial wrongs pleaded. He has pleaded that he is no longer in employment but asserts that the Petitioner is still in employment. On the children, he has pleaded that they are all adults.

5. The Respondent has cross-petitioned for dissolution of the marriage. He accuses her of the matrimonial

offences of cruelty and adultery, and of unsoundness of mind. The particulars of cruelty are set out in the cross-petition, they include jealousy and mistrust, being rude and aggressive to the Respondent's co-workers accusing them falsely of having extra-marital affairs with him, accusing him falsely of having contracted HIV/AIDS and of denying her conjugal rights, exposing him to insecurity by dismissing security personnel and disconnecting security apparatus, shaming and embarrassing the Respondent at his place of work. On adultery, he accuses her of spending too much time with her business partners and having a sexual affair with a neighbour. He alleges that the Petitioner has displayed signs of unsoundness of mind, and gives particulars thereof.

6. He pleads that the marriage has broken down completely and that instead of judicial separation the court ought to dissolve the marriage.

7. Regarding the matrimonial property, the respondent pleads that he has no objection to the property acquired during matrimony being transferred to the names of Petitioner and the children to be held jointly. On maintenance, he pleads to have been paying school fees, granting access of his cars to the Petitioner, allowing her to collect rent from two of the family assets and providing for their grandchildren.

8. The Respondent prays for the dissolution of the marriage, for transfer of the assets acquired during the marriage to the Petitioner and the children, an order that both parties do maintain and support the last born child of the marriage until she completes university education and that the children of the marriage be allowed to interact freely with the parties as adults.

9. The parties gave oral evidence which gave vent to their respective cases as set out in their pleadings. Counsel appearing for the parties filed written submissions which they subsequently highlighted. Having carefully considered the petition, answer to petition and cross-petition, the oral evidence recorded from the parties as well as the rival submissions by counsel for the respective parties, I have formed the view that the main issue for consideration is whether the marriage should be dissolved or whether the parties should be judicially separated.

10. I note that the Petitioner prays for judicial separation on the grounds of cruelty on the Respondent's part. The said ground is one of the grounds on which a Petition for divorce might be presented. Indeed **Section 17 (1) of the Matrimonial Causes Act (Cap 152, Laws of Kenya) (now repealed)** provides:

“A Petition for judicial separation may be presented to the court by either the husband or the wife on any grounds on which a Petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, and the provisions of this Act relating to the duty of the court on the presentation of a Petition for divorce, and the circumstances in which such a Petition shall or may be granted or dismissed, shall apply to a Petition for judicial separation.”

11. The Petitioner herein seeks to obtain a decree for judicial separation and the Respondent from his cross-petition and submissions has no difficulty with dissolution of the marriage and in fact prays that the marriage be dissolved. My considered view would be, bearing in mind that a normal marital relationship has not existed between the spouses for a long time, divorce would be a much better option because judicial separation does not really allow the parties to move on. Certainly, the testimony the Court has received from both parties shows that the marriage has irretrievably broken down due to opposing views towards it by both parties. It is further undeniable that the couple has treated each other with a measure of cruelty. They have not shared conjugal relations for a long time and they have lived separately for a long time too. Clearly, they have not shown this court that they have made effort to reconcile since then. It is my view that indefinite separation would unnecessary yoke parties who are in a dead marriage. As has been stated here above, this would not be in anyone's interest.

12. I have observed and noted that both the petition for judicial separation and the cross-petition are premised on cruelty and the parties have given elaborate particulars of cruelty. The ground of cruelty and the particulars therein meet the threshold that the said marriage has irretrievably broken down and as a

result satisfies the ground for which this marriage should be dissolved. In view of the foregoing, the cross-petition filed by the Respondent should be allowed and the order that the marriage in fact solemnized between the parties herein be dissolved should be granted.

13. Both sides accuse each other of adultery. None of them named any of the paramours as co-respondents. None of them gave any credible evidence on the alleged adultery. The standard of proof required is very high, the material before me is not anywhere near what the law expects.

14. On whether the petitioner is entitled to maintenance as sought, I note that the parties have been living separately for some time. The Petitioner is working and earning a salary. She is living in one of the family assets where she does not pay rent. I am not persuaded in the circumstances that a case has been made out for maintenance of the Petitioner by the Respondent. The children are all adults and the issue of their maintenance does not arise. No orders are available regarding the grandchildren for the legal duty to maintain them does not fall on their grandparents, such children should primarily be the responsibility of their parents. A case has not been made out for the maintenance of the grandchild by the Respondent.

15. On transfer of the assets acquired in matrimony, I note that the pleadings have not clearly identified the said assets sufficiently for any orders to be made on them. There are no particulars whatsoever relating to the said assets, whether in the pleadings or in the oral testimony.

16. In the end I hereby make the following orders-

- a) That the marriage celebrated on 18th September 1982 between the petitioner and the respondent is hereby dissolved;**
- b) That the children of the marriage are all adults and no orders are necessary concerning their custody and maintenance;**
- c) That the parties shall be at liberty to move the court appropriately with regard to the assets, or apply for division of matrimonial property in separate proceedings;**
- d) That decree *nisi* shall issue forthwith, to be made absolute after 30 days; and**
- e) Each party shall bear their own costs.**

17. It is so ordered.

DATED, SIGNED and DELIVERED at NAIROBI this 25TH DAY OF NOVEMBER, 2016.

W. MUSYOKA

JUDGE