

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO.101 OF 2008

J W KPETITIONER

VERSUS

H N W RESPONDENT

JUDGMENT

1. The petitioner J W K via his petition dated 4th September 2008 avers that he got married to the respondent in 2000 but formalized their marriage on 7th August 2004 at [particulars withheld] Church, Parklands. After the said marriage the parties cohabited as man and wife in Thogoto Kikuyu and Donholm in Nairobi. The petitioner seeks dissolution of his marriage to the respondent, custody of the 2 issues of the marriage and cost of the cause.

2. The petitioner is a clerk at [particulars withheld] in Nairobi and the respondent a secretary at [particulars withheld] Nairobi. Both are Kenyan citizens and domicile in Kenya. The petitioner avers that after the formalization and celebration of the said marriage, the respondent deserted the petitioner and the matrimonial home and has stayed away continuously for 3 years. The petitioner's best couple attempted to intercede but the respondent refused to return home to-date. The petitioner also alleges that the respondent has treated him with outmost cruelty by refusing to wash his clothes, share utensils or even cook his meals after she came to know his HIV status to be positive.

3. The respondent filed her answer to Petition and Cross Petition on 18th September 2008. She stated that she and the petitioner cohabited in the year 2000 at the said time they only had one child E I from the petitioner's former relationship. Later on they were blessed with a child, P W . She denies deserting the matrimonial home stating that it was the petitioner who actually moved out of the matrimonial home while she was away at work sometime in January 2007. She avers that she approached parents from both sides to intervene due to the petitioner's unfaithfulness to no avail adding that the petitioner's health status did not bar him from getting what he needed from a wife apart from conjugal rights because of the advice given to her by the doctor. She alleges that the petitioner used to sleep out of the matrimonial home with different women unknown to her and upon deserting their matrimonial home he started cohabiting with a woman unknown to her to-date. She was not opposed to dissolution of the marriage and medical follow up of the respondent and custody of the issues of the marriage.

4. This matter was partly heard before Justice Gacheche on 29th January 2009 with the consent of the parties this court proceeded to hear the evidence of the respondent. The petitioner testified as follows in court; that they solemnized their marriage in August 2004. That he was discovered with HIV in September 2006 and since then the respondent denied her conjugal rights and also ensured that he used specific utensils and left him under the care of the househelp. That the respondent moved out of the matrimonial home in December 2006 and efforts to reconcile them proved futile. He sought custody of the children and relied on his averments in the petition. During cross examination he testified that their problems emanated from the discovery of his health status and that he got to know his status in September 2006 and told her about it in December 2006. The respondent on her part reiterated the averments raised in her answer to the petition. She stated that she had custody of the issue of the marriage P W who was now 16 years, that she and the petitioner parted ways in 2006 and it is now more than 10 years and the petition has been overtaken by events as parties have moved on with their lives and she had since been granted custody of the children of the marriage by the children's court. That the petitioner has since gotten married to someone else and they have children. She was agreeable to the dissolution of the marriage.

5. The petitioner alleges cruelty and desertion as basis for his petition for divorce and the respondent relies on the ground of desertion and adultery. The three form grounds as provided for under the Matrimonial Causes Act Cap 152 (now repealed) and also the Marriage Act 2014. For the court to grant divorce on grounds raised it must be satisfied that the petitioner has established a case on cruelty, desertion and adultery. In the case of **Alexander Kamweru v Anne Wanjiru Kamweru [2000] eKLR**, it was held that, “*Certainly cruelty or desertion may be proved by a preponderance of probability, that is to say that the Court ought to be satisfied as to feel sure that the cruelty or desertion, or even adultery (all being matrimonial offences) has been (as the case may be) established*”.

6. From the evidence adduced it is apparent that the parties separated after it was discovered that the petitioner was HIV positive. The petitioner did not challenge the respondent evidence that he deserted the matrimonial home and moved on or that he used to move around hence his status. It is now 10 years since the petitioner and the respondent parted and therefore the marriage between them has irretrievably broken down. The parties admitted that they have moved on with their lives. In the case of **NMM v SJC, Divorce Cause No. 1 of 2013**, Karanja J held that, “... *it has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives ...*”

7. I find that the petitioner deserted the matrimonial home and the marriage between the two has irretrievably broken down. Efforts to reconcile them have been futile. The parties have moved on with their lives. The respondent told this court that she has already been granted custody of the children who are in her custody; I will therefore not make any orders on the same. This court dissolves the marriage between the petitioner and the respondent that was celebrated at on 4th August 2004. A decree nisi to issue and to be made absolute within 30 days. It is so ordered

Dated signed and delivered this **8th** Day of **December**, 2016.

R. E. OUGO

JUDGE

In the presence of:

.....**Petitioner**

.....**Respondent**

Ms. Charity Court Clerk