



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

DIVORCE CAUSE NO.3 OF 2011

J M M PETITIONER

VERSUS

E K M 1ST RESPONDENT

C M O alias D K B 2ND RESPONDENT

JUDGMENT

1. By the amended petition of divorce dated 31st January 2013, the petitioner prays that:-

- a. *The marriage herein between the petitioner and the 1st respondent be dissolved.*
- b. *The honourable court be pleased to order the release of the petitioner's goods and money in respondent's custody.*
- c. *Tthe permanent custody of the two (2) issues and or children be with the petitioner.*
- d. *Such other or further relief as it may deem fit and necessary to this honourable court to grant.*

2. Briefly the petitioner alleges that he was married to the 1st respondent on the 7th September 2004 at the D.C's office Nyamira under the Marriage Act Cap 150 Laws of Kenya and the two lived together as husband and wife at their matrimonial home at Mosobeti in Nyamira County. That in April 2009 the 1st respondent deserted the matrimonial home and went to live with another man at Nyagachi Chief's Camp, but before the desertion the marriage was blessed with two issues namely:-

1. *M M – 8 years old*
2. *D K M – 5 years old*

3. The petitioner alleges that since the celebration of the marriage, the 1st respondent has subjected the petitioner and the two issues of the marriage to torture and mental anguish by running away from the matrimonial home and eloping with other men. He claims that since June 2009 to date the 1st respondent has lived with the 2nd respondent at Daraja Mbili in Kisii town.

4. Further the petitioner claims to have paid fees and upkeep for the 1st respondent at [particulars withheld] Teachers Training College to the tune of KShs.209,000/= which amount he now wants refunded. He claims that the 1st respondent has committed adultery, has been cruel to him and the children and caused them embarrassment and mental torture which he has particularized in the petition. He also claims that the 1st respondent has on several occasions carried away properties bought by himself from the matrimonial home. He prays that the court orders the return by the 1st respondent of the said properties.

5. By a joint statement of defence, the 1st and 2nd respondents have denied every allegation in the petition. They aver that if indeed the marriage ever existed, the dowry was not paid in addition to the allegation that celebration and participation of both parents was not there and that the said marriage was not consented to by both parents. The 1st respondent blames the petitioner for the breakup of the marriage and refers to him as being conspicuously adulterous. She (1st respondent) maintains that she has observed and abides by the provisions of their marriage. The respondents further deny the particulars of adultery, cruelty, embarrassment and mental torture as particularized by the petitioner and puts him to strict proof. They pray that the petitioner's petition be dismissed with costs.

6. The petition for divorce came up for hearing on the 12th November 2013 and 25th November 2013. It should be noted from the outset that it is only the petitioner who gave his testimony although in his pleadings he had a list of witnesses he intended to call and documents which he wished to rely on.

7. Briefly, the petitioner, a High School teacher at [particulars withheld] Girls Secondary School told the court that he married the 1st respondent in the year 2000 under customary law and later solemnized the same under the **Marriage Act Cap 150** at the DC's Office Nyamira where he obtained a marriage certificate dated 7th September 2004. A copy of the marriage certificate is produced as "**P. Exhibit 1**" and the letter confirming the marriage as "**P. Exhibit 2**". He testified that he did not have the original marriage certificate because it was taken by the 1st respondent when she left the matrimonial home.

8. The petitioner stated that before his wife left, they had two (2) children namely:-

- *B M M born on 31st October 2002 whose birth certificate is marked "**P. Exhibit 3**" and*
- *D K M born on 20th April 2006 whose birth certificate is marked as "**P. Exhibit 4**".*

9. He testified that he took a medical cover with NHIF for his wife "**P. Exhibit 4**" and further told the court that he took her to [particulars withheld] Teachers College in 2002 to train as a P1 teacher where she graduated in 2004 "**P. Exhibit 6.**"

10. He claimed to have paid a total Kshs.209,000/= in tuition fees and expenses. He produced as **P. Exhibit 7** the admission letter dated 9th January 2002. He told the court that before the 1st Respondent ran away with them, the children were studying in [particulars withheld] Academy Nyamira but were transferred to [particulars withheld] Academy. Produced and shown to the court are the report cards from [particulars withheld] Academy and from [particulars withheld] Academy are **P. Exhibit 10 (a) and (b)**, while an exercise book for D K is marked **P. Exhibit 11**. He also produced a bunch of letters written to him by the 1st respondent when she was at [particulars withheld] Teachers Training College as **P. Exhibit 12**.

11. He told the court that his wife left him with the children in 2009 and he stayed with them for three (3) years before she took them away between 2010 and 2011 and he has never seen the children since. He further testified that his wife now cohabits with the 2nd respondent hence his reason for wanting the marriage to be dissolved and to get custody of the children as well as a refund of dowry and fees paid at Narok [particulars withheld] College. He testified that he paid Kshs.60,000/= in lieu of 3 heads of cattle and Kshs.60,000/= in cash to the 1st respondents parents. He testified that his wife has committed adultery and has a child with the 2nd respondent. He produced **P. Exhibit 13 (a) and (b)** being pay slips for August and September 2013 which confirmed that he was a teacher who has been promoted to Job Group "M" as per **P. Exhibit 14**.

12. On cross examination by Mr. Ochoki the petitioner confirmed that there was a children's case before Nyamira Court being Case No.11 of 2009 where his wife was given temporary custody of the children but when she delayed following up the case he applied for it to be dismissed. That the case was later reinstated since the children were taken away. He told the court he made contribution for the children's up keep. He maintained that his wife should not have the children because she has no income and he is not sure whether she even has shelter for them.

13. The respondents did not give any evidence to rebut and/or controvert the petitioner's allegations. They however filed written submissions through their counsel, M/S Ochoki & Company Advocates and highlighted two issues for determination that is:-

- a. Whether the marriage between the petitioner and the 1st respondent has irretrievably broken down and should therefore be dissolved; and
- b. Whether the petitioner is entitled to the goods and money in the 1st respondent's custody.

14. It is claimed in the submissions that marriage is a sacred institution that should not just be dissolved on mere allegations that cannot be proved and that in the instant case, the petitioner has failed to prove any of the particulars in the petition. Further that the petitioner has not prayed for custody of the children of the marriage and that in any event, there are no exceptional circumstances showing why the 1st respondent should not continue having custody of the children and therefore that the petition herein should be dismissed.

15. Secondly the respondents submitted that the petitioner has not pleaded any special damages as required by law and therefore the same cannot be awarded and that this court cannot order for the release of goods whose details and particulars are unknown.

16. This court has carefully considered the petition as filed and the evidence adduced by the petitioner. The petitioner and 1st respondent solemnized their marriage at the D.C.'s office Nyamira under the **Marriage Act Cap 150 Laws of Kenya** on the 7th September 2004. The petition in this matter was filed in 2011 and amended in 2013 which means that the petitioner and 1st respondent had been together for more than three (3) years prior to the filing of the petition. This court thus finds that the petition here is competent having been filed within the provisions of **Section 6** of the **Matrimonial Causes Act (Cap 152) Laws of Kenya**.

17. The grounds for dissolution of marriage are stipulated under **Section 8 (1)** of the **Matrimonial Causes Act** thus:-

“A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent:-

- a. **has since the celebration of marriage committed adultery; or**
- b. **has deserted the petitioner without cause for a period of at least three (3) years immediately preceding the presentation of the petition; or**
- c. **has since the celebration of marriage treated the petitioner with cruelty; or**
- d. **is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition and by the wife on the grounds that her husband has since the celebration of the marriage been guilty of rape, sodomy or bestiality.”**

18. It is alleged by the petitioner that since the celebration of the marriage, the 1st respondent has deserted the matrimonial home in 2007, 2009 and 2011 and eloped with other men beside the petitioner. The petitioner has mentioned the 2nd respondent as the one who now cohabits with the 1st respondent. I hold as true the testimony of the petitioner herein as to the alleged adultery. The same has not been challenged by the 1st respondent and therefore I am satisfied that the petitioner has proved adultery against the 1st respondent.

19. As regards desertion, the petitioner states that the wife left him in June 2009 and to date has been living together with the 2nd respondent at Daraja Mbili Kisii. For desertion to constitute a ground of divorce it must run for a period of at least three (3) years immediately preceding the presentation of the petition for divorce. The petition herein was filed in 2011 and amended in 2013. It was thus brought within the right time in so far as the ground of desertion is concerned considering the time of initial

desertion in 2007. I am therefore satisfied that the respondent deserted the matrimonial home without reasonable cause.

20. I also find that cruelty has been proved within the parameters considered in the 1977 case of N.-vs-N. [2008] 1 KLR (G & F) wherein Madan J (as he then was) held, *inter alia*, that:-

“Whether cruelty as a matrimonial offence has been established is a question of fact and degree which should be determined by taking into account the particular individuals concerned and the particular circumstances of the case rather than by any objective standards.”

21. At paragraphs 8 and 9 of the petition, the petitioner has mentioned the instances when the 1st respondent left the matrimonial home and this was while the children were of tender age. She left the children under his care and that of his mother. He (the petitioner) has also mentioned occasions when the 1st respondent fought him and threatened him and many instances when he was denied his conjugal rights. All these allegations have not been controverted.

22. I am convinced that the marriage herein has broken down irretrievably even though the petitioner did not call any other witnesses. I have read through the statements made by the petitioner's witnesses namely ZOI and Prof. B A. O both made on the 31st January 2013. I especially refer paragraph 3 of Prof. B A. O statement where he says that as a close relative of the family of the petitioner and 1st respondent they tried to reconcile the said family but the 1st respondent became unco-operative, rude and abusive. He confirms that the 1st respondent had on several occasions run away from her matrimonial home and gone to her former boyfriends thereby leaving the petitioner and his mother with the children who were still minors.

23. In the circumstances, I find that the marriage herein is dead and I see no reason why the court should not grant the order sought as it is obvious to the court that the couple herein have lost all love for each other and the likelihood for a re-union is remote.

24. Accordingly, I hereby pronounce a decree of divorce and order that the marriage solemnized on 9th September 2004 at the D.C.'s office Nyamira between J M M and E K M be and is hereby dissolved. Decree Nisi shall issue forthwith and the same shall be made absolute after expiry of a period of thirty (30) days from the date hereof. Issue of custody shall be determined by the children's court Nyamira as there is an application pending therein being Children's case No.11 of 2009. Since the petitioner has shown that he paid fees and upkeep for the 1st respondent while the latter was at college, which evidence has not been challenged, the 1st respondent is hereby to refund half of the school fees and half the dowry paid for her by the petitioner. In all the 1st Respondent shall refund to the Petitioner a sum of KShs.205,000/= together with interest thereon until payment in full. The costs of this petition shall be borne by the Respondents.

Judgment written and signed by

RUTH N. SITATI

JUDGE.

**Judgment, delivered, dated and countersigned in open court at Kisii this 27th day of February 2015
by**

C. NAGILLAH

JUDGE

In the presence of:-

----- for Petitioner

----- for Respondents

----- Court Assistant