



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
DIVORCE CAUSE NO 162 OF 2014

C N NPETITIONER

VERSUS

O K MRESPONDENT

JUDGMENT

1. The Petitioner, C. N. N., filed a petition together with a verifying affidavit before this Court on 22nd July 2012 seeking to have the marriage between her and the Respondent, O. K. M., dissolved on the ground of desertion. Her petition was filed pursuant to a court order made on 3rd July 2014 in Misc App No. 85 of 2014, which allowed her to file a Petition for divorce notwithstanding that three (3) years have not elapsed since the marriage. A certified copy of the relevant order is in the Court's record.
2. The Petitioner stated that she and the Respondent were lawfully married on 4th January 2012, and their marriage was solemnized at the Chambers of the Registrar of Marriage at Sheria House in Nairobi. The Petitioner attached a copy of the Certificate of Marriage, which copy has been certified as a true copy of the original.
3. On 8th January 2012, four days after the celebration of the marriage between the Petitioner and the Respondent, the Respondent travelled to the United Kingdom where he was working at the relevant time. The Petitioner stated that before his departure, the Respondent paid two (2) months house rent for a residential house that was occupied by the Petitioner and the Respondent's two sisters.
4. The Petitioner stated that both parties to the present case are currently domiciled in Kenya and therefore are within the jurisdiction of this Court.
5. The Petitioner explained that sometime in March 2012, while the Respondent was living and working in the United Kingdom, the Respondent sent her some money to facilitate her acquisition of a visa, but her application was unsuccessful. Subsequent to this, the Petitioner stated that the Respondent abruptly stopped sending her money for payment of her house rent and also suspended all his communication with the Petitioner without any explanation.
6. The Petitioner avers that in July 2012, the Respondent returned to Kenya from the United Kingdom but he never informed the Petitioner about his arrival. The latter only came to know of his presence in the country when the Respondent contacted her and disclosed that he was traveling back to the United Kingdom the next day. Both parties met in Nairobi town that day and held discussions.
7. The Petitioner further stated that she and the Respondent had agreed to meet on 15th July 2012 at the home of the Respondent's parents in Makuyu, but she was surprised to find that, contrary to their earlier agreement, the Respondent was not answering his phone when she called.

8. Later in November 2013, the Petitioner stated that she received information that the Respondent had returned to Kenya from the United Kingdom, and she did not understand why he could not inform her of his return to or presence in Kenya. The Petitioner subsequently sent an e-mail to the Respondent inquiring after him and with a view to finding out why he was not communicating to her. In answer to the Petitioner's question, the Respondent stated that he was not interested in the marriage and also that he was seeking to get a divorce. A print-out of this e-mail exchange has been produced by the Petitioner, and it is in the Court's record.
9. On the strength of the Respondent's conduct and his statements, the Petitioner stated that the Respondent has clearly demonstrated his lack of interest in the marriage. The Petitioner illustrated this by averring that the marriage between her and the Respondent has not been consummated for three (3) years. This fact led the Petitioner to conclude that the Respondent has deserted her. The particulars of desertion set forth in the Petitioner's petition specified that the Respondent has refused to:
 - a. communicate with her;
 - b. interact with her;
 - c. cater for her basic needs, including payment of her house rent; and
 - d. answer her calls and e-mails.
10. The Petitioner deposed that the Respondent is currently living and working in Nairobi, where he is in the employ of **[particulars withheld]** situated along Waiyaki Way. But she also expressed her uncertainty as to whether or not he will ever go back to the United Kingdom. In light of this and of the particulars of desertion set forth in paragraph 11 of her petition, the Petitioner averred that she cannot keep herself in abeyance when the marriage between her and the Respondent has irretrievably broken down.
11. The Petitioner stated that there are no issues of the marriage, and there is no other petition or suit pending between the Petitioner and the Respondent in any other court over the same subject matter. She further deposed that she has neither condoned the Respondent's cruelty and adultery nor has she presented her petition in collusion with the Respondent.
12. The Petitioner therefore prayed that:
 - a. The marriage between the Petitioner and the Respondent be dissolved;
 - b. The Respondent be condemned to pay costs; and
 - c. Any further or better relief that the Court may deem just and fit.
13. The Petitioner served the Respondent with the Petition and the Notice to Appear on 15th August 2014, and the Respondent filed a Memorandum of Appearance on 26th August 2014.
14. On 2nd September 2014 the Respondent filed an answer to the petition and cross-petition together with a Statement made under Order 3 Rule 2 (c) of the Civil Procedure Rules in which he admitted some of the allegations made by the Petitioner and categorically denied others.
15. In his cross-petition, the Respondent stated that contrary to what the Petitioner's averments in her petition, it was the Petitioner who was not interested in the marriage from the onset. He also stated that the reasons why the Petitioner left the matrimonial home for an unknown place without informing him remain a mystery. Accordingly, the Petitioner sought to have the marriage dissolved on the grounds of fraud, cruelty, desertion, and because the marriage had irretrievably broken down. The Respondent specified the particulars of the above grounds for dissolution of the marriage between him and the Petitioner, and highlighted the following alleged conduct of the Petitioner:
 - a. Failing to live as a wife married to the Respondent by failing to follow up the issue of the visa as advised;
 - b. Carting away valuable household goods and destroying others without any provocation whatsoever;
 - c. Subjecting the Respondent to shame and malice as a result of the failed marriage;
 - d. Deserting the matrimonial home without notifying the Respondent;
 - e. Being bothersome and nagging the Respondent to grant her a divorce soon after the celebration of their marriage;

- f. Presenting herself to the Registrar of Marriages knowing very well that she was not interested in the marriage.
 - g. Living in a place and under circumstances unknown to the Respondent after having deserted the matrimonial home.
16. In light of the above grounds, the Respondent prayed for a judgment against the Petitioner and for the following orders:
- a. An order for dissolution of the civil marriage between the Petitioner and Respondent;
 - b. An order compelling the Petitioner to refund all items of value that the Respondent carted away from the matrimonial home and also costs incurred by the Respondent towards the false union.
 - c. Costs of the petition be borne by the Petitioner; and
 - d. Any other relief that the Court may deem fit.
17. On 8th October 2014, the Petitioner moved the Court by way of a chamber summons filed under Rule 29 of the Matrimonial Causes Rules seeking to have the Registrar's certificate issued for the matter to proceed as a defended cause. This application was allowed and the hearing date was set down for 30th October 2014. Counsel for the Respondent was duly served with a hearing notice on 28th October 2014.
18. A further hearing date was given by this Court, which fixed the hearing for 15th January 2015. Counsel for the Respondent was duly served with a hearing notice on 18th December 2015. The affidavit of service was filed on 12th January 2015 and is in the Court's record.
19. At the hearing, on 15th January 2015, the Petitioner testified under oath that she was lawfully married to the respondent on 4th January 2012, which marriage was solemnized at the Attorney General's office. She stated that she had the original Certificate of Marriage and produced a copy as P Exhibit I. She reiterated the contents of her petition detailing how the Respondent had deserted and neglected her, and even produced a printout of e-mail correspondence as evidence of the Respondent's lack of interest in their marriage. This printout was admitted into evidence as P Exhibit II.
20. Upon being cross-examined by Counsel for the Respondent, the Petitioner stated that it was the Respondent who advised her not to appeal her unsuccessful visa application to the United Kingdom, but instead to wait for him to return to Kenya. She also stated that she lived in the matrimonial home with the Respondent's two sisters, but she left the home on 1st June 2012 when the Respondent no longer sent her any money, and went to live in another house where she could afford the rent. She stated that she informed the Respondent about her new place of residence. She also explained that the marriage was not consummated since the Respondent left for the United Kingdom four (4) days after the celebration of their marriage.
21. The Respondent also testified under oath on 15th January 2015 and reiterated the averments set forth in his statement that was filed in Court on 3rd September 2014. The Respondent stated that he gave the Petitioner money to apply for a visa to the United Kingdom but she did not get it, and afterward they disagreed and parted ways for reasons related to that.
22. When the Respondent was cross-examined by Counsel for the Petitioner, he stated that the Petitioner deserted the matrimonial home while he was away in the United Kingdom. He also stated that he had been sending money to the Respondent during his stay in the United Kingdom, and further that he sent Kshs. 50,000 for the visa application. The Respondent confirmed that there were e-mail correspondences between himself and the Petitioner, and he also admitted that the e-mail produced by the Petitioner was part of their correspondence. However, the Respondent stated that it was important to note that there were other e-mails in which the Petitioner asked the Respondent whether she could file a petition for divorce, and the Respondent approved. The Respondent further explained that the reason for his failure to inform the Petitioner of his presence in Kenya was the fact that she was no longer living in the matrimonial home, having deserted it much earlier. The Respondent also stated that he traveled to Kenya from the United Kingdom for a second time without informing the Petitioner. He further explained that his reason for not sending her money was because she like him was a salaried employee.

23. Upon an examination of the Certificate of Marriage attached to the Petitioner's petition, the Petitioner's pleadings and evidence detailing the marriage between her and the Respondent, and the Respondent's admission of the same, the Court finds that there was a voluntary union of the parties and thus they were married within the meaning of Section 3(1) of the Marriage Act, 2014. The Court has also satisfied itself that the marriage between the Petitioner and the Respondent is a civil marriage within the meaning of Section 6(1)(b) and in accordance with Part IV of the Marriage Act, 2014.
24. Section 66(1) of the Marriage Act, 2014 stipulates that a party to a civil marriage may not petition the Court for the dissolution of the marriage unless three years have lapsed since the celebration of that marriage. But it is important to note that, pursuant to an order of this Court, the Petitioner was allowed to petition for a divorce notwithstanding that three years had not passed since the date of the solemnization of her marriage to the Respondent. Section 66(2) of the Marriage Act, 2014 prescribes the only valid grounds that can justify the dissolution of a civil marriage, and it includes adultery, cruelty, desertion and the irretrievable breakdown of the marriage.
25. The Petitioner's petition for the dissolution of the marriage between her and the Respondent is founded primarily on the ground of desertion. The Petitioner has specified certain instances to support her allegations, but has tendered little evidence to back this claim. Indeed, the only evidence to support the Petitioner's claim that is in the Court record is a print out of e-mail correspondence between the two parties. The Respondent has also counterclaimed that the Petitioner is guilty of deserting the matrimonial home and deliberately refusing to follow up the issue regarding her visa to the United Kingdom. Likewise, the Respondent has not produced any evidence to support this claim. Nonetheless, the pleadings and proceedings in this case make clear the intention of the parties to no longer live as husband and wife in the bond of matrimony.
26. The fact that the Respondent explicitly declined to reconcile with the Petitioner as indicated in their e-mail correspondence of 12th November 2013, where the Respondent expressly stated that he would request a cancellation of the certificate in January so that both parties can move on with life and the fact that the Petitioner subsequently initiated proceedings to dissolve the marriage is a strong indicator of the wishes of both parties. The above conduct of the parties to this case suggests that by the time the Petitioner sought leave of this Court, by way of Misc Application No. 85 of 2014, to file petition for divorce notwithstanding that three (3) years had not yet elapsed since the marriage, the marriage had irretrievably broken down. However, it is important to note that Section 66(2) of the Marriage Act, 2014 prescribes an exhaustive list of the only grounds for lawful dissolution of a civil marriage. This indicates that the grant of a divorce should only be issued in exceptional cases that satisfy any of the criteria set forth in that provision. Accordingly, the Court should interpret these grounds restrictively in order to protect the institution of marriage.
27. The institution of marriage is important and is the subject of legal protection. So important is the institution of marriage that our Bill of Rights expressly affords it special protection. In particular, Article 45(2) of the Constitution of Kenya, 2010 recognizes the right of every adult to marry a person of the opposite sex on the basis of the free consent of the parties. Article 45(1) of the Constitution of Kenya, 2010

The family is the natural and fundamental unit of society and the necessary basis of social order, and shall enjoy the recognition and protection of the State.

It is thus clear that both the family and the institution of marriage are explicitly protected in the Bill of Rights in the Constitution of Kenya, 2010. This is significant for two reasons. First, Article 19(1) of the Constitution of Kenya, 2010 makes clear that the Bill of Rights provides the framework for social, economic and cultural policies. Secondly, Article 19(3) establishes the primacy of the rights enshrined in the Bill of Rights vis-à-vis other rights conferred by any other law; it envisages the possibility that certain provisions in the Bill of Rights may exclude other rights and fundamental freedoms recognized by law to the extent that the latter are inconsistent with the Bill of Rights. This underscores the import of the recognition and protection of marriage in the Kenyan legal order.

28. Despite the recognized importance of the institution of marriage, there are certain exceptional circumstances that would warrant the dissolution of marriage, and these are set out in Section

66(2) of the Marriage Act, 2014. Based on the pleadings and proceedings in this case, the Court finds that the Petitioner has proved her case on a balance of probabilities that the Respondent, who had been supporting her at the start of their marriage, has willfully neglected her. This has led the Court to only one reasonable conclusion; that, the marriage has irretrievably broken down in accordance with Section 66(6)(c) of the Marriage Act, 2014. This provision recognizes the willful neglect of one spouse by the other spouse for at least two years immediately preceding the date of presentation of the petition as a valid ground for divorce.

29. On the basis of the foregoing, the Court hereby orders as follows:

- a. The petition is upheld.
- b. The marriage between the Petitioner and Respondent that was solemnized on 4th January 2012 has irretrievably broken down due to willful neglect by the Respondent and is hereby dissolved under Section 66(6)(c) of the Marriage Act, 2014.
- c. Decree nisi to issue forthwith.
- d. Decree absolute to issue in six (6) months.
- e. There are no orders regarding the claim of any property or financial support.
- f. Each party to bear its costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16TH DAY OF FEBRUARY_2015

M. MUIGAI

JUDGE

In the presence of:

Mr Gicheru holding brief for Mr Nyamweya

Mr Mwangi for the Respondent