



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
DIVORCE CAUSE NO 29 OF 2013

P D F aka P D M.....PETITIONER

VERSUS

E C M.....RESPONDENT

JUDGMENT

The Petitioner, P.D.F. a.k.a P.D.M., filed a petition on 11th February 2013 seeking to have the marriage between her and the Respondent, E.C.M., dissolved on the ground of desertion. The Petitioner and the Respondent were lawfully married on 30th November 1987, and the marriage was solemnized at the Office of the District Commissioner of Kilifi the Registrar of Marriages in Nairobi. A certified copy of the Certificate of Marriage is annexed to the Petitioner's petition as proof of their valid marriage. The Petitioner is a housewife while the Respondent is an architectural designer. Both parties to this case are currently domiciled in Kenya and are within this Court's jurisdiction. The Petitioner lives in the matrimonial home in Nairobi while the Respondent currently lives in Mombasa.

The Petitioner stated that she and the Respondent lived together as husband and wife in various residents namely;

- i. 1987 to 1989 - Bofa Beach, Kilifi
- ii. 1989 to 1992 - Raskitau, Lamu
- iii. 1992 to 2003 - Shela Village, Lamu and Manda Island
- iv. 2003 to 2005 – At the Matrimonial Home L.R. No. *[particulars withheld]*, Muthaiga -Nairobi at various times when the marriage subsisted. Their marriage has been blessed with two (2) issues, both of whom are now adults. The Petitioner deposed that during the subsistence of the marriage, the Respondent deserted her from 2005 and is guilty of desertion for more than (3) years. This is elaborated in the particulars of desertion in the Petitioner's petition. The Petitioner detailed that in December 2005, the Respondent left the matrimonial home in Muthaiga, Nairobi, failed to return despite numerous requests, and has continued to live separately from the Petitioner. From 2005 to 2012, she lived alone in the matrimonial home in Muthaiga, Nairobi. The Respondent has now lived separately and apart from the Petitioner for a period in excess of six (6) years.

The Petitioner served the Respondent with the petition and the Notice to Appear on 13th February, 2013. The Respondent entered appearance on 14th March 2013 represented by Adeel Haq, Advocate. However,

he neither filed an answer to the petition, nor a cross-petition. On 8th April 2013, the Petitioner, through Counsel, moved the Court by way of an application made pursuant to **Rule 29(2)** of the **Matrimonial Causes Rules** seeking to have the Registrar's Certificate issued for the matter to proceed for hearing. This Court gave a ruling on this matter on 23rd May, 2013 in which, among others, the following orders were made: i) the Registrar's certificate to issue that the pleadings are in order; and ii) the matter to proceed as an undefended cause.

The matter was heard on 19th February, 2015 and the Petitioner gave both oral and documentary evidence reiterating the averments in her petition. She testified that she was lawfully married to the Respondent on 30th November 1987 and she produced the original copy of their marriage certificate as evidence of the same number 18542.

The Petitioner further testified that the Respondent left the matrimonial home in December 2005 without any justifiable cause and failed to return in spite of repeated requests to return. The Respondent, despite due service of the petition, did not file an answer to the petition, nor did he file a cross-petition. Hence, the allegations and particulars of cruelty and desertion as set forth in the petition and reiterated in oral evidence are not challenged by way of pleadings or testimony from the Respondent.

From the pleadings and oral evidence of the parties in this case, this Court finds that the following are the issues for determination to which the Court will focus its legal analysis:

- a. Whether the Petitioner has adduced sufficient evidence her presentations to warrant the grant by this Court of a divorce on the ground of desertion;
- b. Whether the marriage has irretrievably broken down.

The Petitioner and the Respondent were married under the **Marriage Act Cap 150** and thus the issues of divorce would ordinarily fall under the provisions of the **Matrimonial Causes Act Cap 152**. However, the **Marriage Act 2014** amended and consolidated into one statute all the various existing laws relating to marriage and divorce. While **Section 8(1)** of the **Matrimonial Causes Act Cap 152** outlines the grounds for divorce, the analogous provisions of the **Marriage Act 2014** are more pertinent to the present case because the **Marriage Act 2014** is the latter law that governs matters of marriage and divorce. **Section 98(2)** of the **Marriage Act 2014** further supports the priority of the provisions of the **Marriage Act 2014** over the provisions of any other earlier written law in respect of ongoing matrimonial suits that were commenced under any such earlier law. **Section 98(2)** of the **Marriage Act 2014** provides:

c. Proceedings commenced under any written law shall, so far as practicable, be continued in accordance with the provisions of this Act.

d. The above approach is accepted in our case law; for example, in the case of **RAF v SML [2014] e KLR** Muriithi J confirmed the view that:

e. The Marriage Act of 2014 (commencing 20th May 2014) ... provides under its section 98 (2) that pending proceedings be, so far as practicable, continued in accordance with the provisions of the new Act.

Accordingly, the relevant provisions of the **Marriage Act 2014** will be instructive in disposing of the matter before this Court. **Section 66** of the **Marriage Act 2014** provides:

1. A party to a marriage celebrated under Part IV may not petition the court for the separation of the parties or the dissolution of the marriage unless three years have elapsed since the celebration of the marriage.

2. A party to a marriage celebrated under Part IV may only petition the court for the separation of the parties or the dissolution of the marriage on the following grounds –

- a. *adultery by the other spouse;*
- b. *cruelty by the other spouse;*
- c. *exceptional depravity by the other spouse;*
- d. *desertion by the other spouse for at least three years; or*
- e. *the irretrievable breakdown of the marriage.*

...

6. *A marriage has irretrievably broken down if –*

- a. *a spouse commits adultery;*
- b. *a spouse is cruel to the other spouse or to any children of the marriage;*
- c. *a spouse willfully neglects the other spouse for at least two years immediately preceding the date of presentation of the petition;*
- d. *the spouses have been separated for at least two years, whether voluntary or by decree of the court, where it has;*
- e. *a spouse has deserted the other spouse for at least three years immediately preceding the date of presentation of the petition; ...*

The ground of desertion is a question of fact which requires this Court to assess it based on the evidence adduced by the parties. The standard of proof in establishing desertion is a preponderance of probability. This view is supported by the Court of Appeal judgment in the case of ALEXANDER KAMWERU V. ANNE WANJIRU KAMWERU (2000) eKLR, where it was observed 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.

Desertion is a question of fact and the establishment by a court of law of the fact of desertion depends on the circumstances of each case. In the present case, in order to prove the Petitioner's allegation of desertion on the part of the Respondent, this Court must satisfy itself that there is evidence indicating that the Respondent, without any justifiable cause, deliberately left the matrimonial home without an intention of returning. As a general rule, there has to be proof that the party who is alleged to have deserted voluntarily left the matrimonial home and that the party left behind neither provoked nor condoned the desertion. In the present case, the Petitioner maintains that the Respondent deserted her. She gave evidence that the Respondent left of the matrimonial home in December 2005. The Petitioner did not give any direct proof of desertion but this can be reasonably inferred from factual circumstances of the case. While it remains unclear why the Respondent moved out of the matrimonial home, it is significant that the Respondent's conduct in willfully refusing to participate in the present divorce proceedings despite due service indicates that he has deserted the Petitioner. This Court is satisfied that the Petitioner has proved her case, on a balance of probabilities, that the Respondent deserted her during the subsistence of their marriage.

Upon an examination of the Petitioner's petition and her unchallenged evidence, this Court finds that both parties were lawfully married to each other. Their marriage constituted a civil marriage within the meaning of the Marriage Act, 2014. It thus follows from the pleadings and proceedings that the Court can reasonably make a finding that on the basis of **Section 66(6)(e) of the Marriage Act, 2014**, the marriage between the Petitioner and Respondent has irretrievably broken down because the Respondent deserted

the Petitioner for a period of more than six (6) years. This exceeds the minimum statutory period of three (3) years immediately preceding the date of the presentation of the petition. The fact that the Respondent has neither answered nor challenged the allegations set forth in the Petitioner's pleadings and testimony, and the fact that he has not made any presentations in this matter despite living within the jurisdiction of this Court is indicative of his disinterest in the marriage. This Court, therefore, finds on a balance of probabilities that the marriage between the Petitioner and the Respondent has irretrievably broken down.

In the final analysis, this Court orders that the marriage between the Petitioner and the Respondent that was solemnized on 30th November 1987 is hereby dissolved, and further orders as follows:

- a. Decree nisi to issue forthwith;
- b. Decree absolute to issue thereafter within 30 (thirty) days;
- c. Each party is at liberty to apply;
- d. No orders as to costs.

DATED AT NAIROBI THIS 24TH DAY OF APRIL 2015

M. MUIGAI

JUDGE

Mr. Mwenda holding brief for Mr. Sevany for Petitioner.