



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 167 of 2014

J M GPETITIONER

VERSUS

M M O.....1ST RESPONDENT

D O M.....2ND RESPONDENT

JUDGMENT

1. The petitioner and the 1st respondent got married on 2nd May 2011 at Nairobi at the office of the Registrar of Marriages and were issued with a marriage certificate. After their marriage they agreed that the 1st respondent resigns and join the Petitioner in Geneva which she did on 6/8/2011 and they continued living as husband and wife. Along the way the respondent got pregnant and stopped talking to him at one time and he could not tell what was happening. They continued staying together she continued staying together although communication was a problem and he could at times give her a break and go out but she did not change and they did not talk for about one month or 3 weeks.
2. On the 25/10 2011 the petitioner went back home to find a note saying that she was leaving to visit a friend, Lorna at Zuri only to find out that it was a ploy and that she was flying to Nairobi. The next day she left and switched off her phone. Later a close friend on the 27th told him she was in Nairobi. That she did not return to him since she left in 2011. The petitioner denied beating the respondent. That in February 2012 he came to sort out the matter and his mother told him what was happening. The respondent was not willing to settle it. His mother tried to intervene and they met and talked before he went back and she told him that she made a mistake she told him she was staying with her brother Tony. When he met the 2nd respondent he told him that she was his wife and that they are married under customary law. The petitioner filed his petition dated 31st of July 2014 filed in court on the 5th August 2014 and prays for dissolution of the marriage plus costs of the suit.
3. The petitioner grounds for divorce are adultery and desertion. The particulars of adultery are as follows;
 - i. That respondent carried out an affair with the 2nd respondent D M and has been living with him since the year 2011 and have both sired a son by the name D M.
 - ii. The respondent has since the year 2011 been living and cohabiting with the said D M as husband and wife.

The particulars of desertion are that since the respondent left their home in 2010 she has not returned and that it has been (3) three years since she ever stayed in their matrimonial home.

4. The 1st respondent filed an answer to the petition and a cross- petition dated the 12th of September 2014. The 1st respondent avers that they got married on the 2nd May 2011 at the Attorney General's place. After the marriage the petitioner left for Geneva in August 2011. That the marriage was not happy and though the petitioner treated her well at first, he has two sons with different women. The mother to one of the children would call and they would argue about it. When she got pregnant she began spotting and the doctor advised that she take bed rest and not to have sex. The petitioner would not listen and would force himself on her telling her that she was letting the doctor come between and it was because of this that she left. She further avers that since the celebration of the marriage with the petitioner he has been adulterous and that during her two (2) month period with the petitioner at Geneva the petitioner became unbearable to live with, he abused her calling her a parasite among other names and he continuously threatened to deport her back to Kenya her to escape from the abusive marriage. That she and the petitioner argued constantly and the petitioner on various occasions slapped her. She avers that she found inappropriate messages and photographs from women both known and unknown to her suggesting that the petitioner was guilty of adultery with these women, that the petitioner constantly hacked into her email addresses and face book accounts and sent unwarranted threatening messages to her friends, causing embarrassment and emotional distress to the 1st respondent. That after withdrawing from the marriage the petitioner has also been guilty of adultery with one Sherry Moraa who confirmed to her relationship to the petitioner. She particularized cruelty as follows;

- i. The petitioner has physically and emotionally abused the 1st respondent by pushing her, slapping her and calling her names
- ii. The petitioner's abusive acts affected the 1st respondent emotionally as she was constantly put down.
- iii. The petitioner forcefully sought coitus with full knowledge of a doctor's advice against the same while the 1st respondent was expectant;
- iv. the petitioner's acts of force led to emotional distress and consequent miscarriage of the foetus by the 1st respondent;
- v. The petitioner threatened to deport the 1st respondent on several occasions;
- vi. the petitioner hacked into the 1st respondent's email addresses and face book accounts and threatened the 1st respondent's friends causing emotional distress and embarrassment to the 1st respondent.
- vii. The petitioner treated the 1st respondent with resentment and contempt owing to her staying and home and not working while at Geneva and would refer to the 1st respondent as a parasite.

She further particularized Adultery as follows;

- i. The petitioner has since the withdrawal of the 1st respondent from cohabitation been guilty of adultery with women known to the 1st respondent by the name S M.
- ii. The petitioner is currently cohabiting with a woman unknown to the 1st respondent by the name B whom he has plans of marriage.

She prays that the prayers sought by the petitioner be rejected and that this honorable Court grants in her favor a decree of dissolution of marriage plus costs.

5. The 2nd respondent denies the allegations raised by the petitioner in his petition adding that he met the 1st respondent in 2012 and denied knowing that she was married to the petitioner at the time. He avers that the petitioner's claim against him lacks merit, is misconceived, bad in law and a clear abuse of the judicial process as the petitioner has not demonstrated any wrong doing on his part and redirects the petitioner to the 1st respondent to deal with the allegations raised in his petition.
6. The parties testified in court. The petitioner reiterated what is deponed in his petition on how they met, married and lived together. He testified further that he paid Kshs. 200,000/- as dowry and

then Kshs. 50,000/-. Subsequent to the said marriage the 1st respondent joined him on 6th August 2011 where they lived as husband and wife until she got pregnant and stopped talking to him and despite him giving her a break she did not communicate with him. That on 25/10/2011 he went back to the house to find a note telling him that she had gone to visit her friend Lorna in Zuri only to be later informed by a close friend on 27th that the 1st respondent was in Nairobi. In 2012 he come to try sort out the matter but the 1st respondent was not willing to solve the issue. In April he come again and they communicated and she told him that she made a mistake and was staying with her brother T. When he went to see her the 2nd respondent came out and told him that he had married the 1st respondent under customary law. That the two have a child D M. He sought refund of the dowry as per Kisii customary law and cost of suit.

7. The 1st respondent reiterated the contents of her reply and cross petition. She testified at first the petitioner treated her well but when he discovered she was pregnant he was not excited. That the mother of his other sons would call and they would argue. That when she began spotting he dropped her at the gynecologist and left and the doctor ordered her to take bed rest and avoid sex however the petitioner would not hear of it and would force himself on her telling her that the doctor was coming between them and at this point she left him. That he once pulled her out of the bed she realized that her pregnancy was in danger and she decided to come back to Kenya and that he started sending threatening emails that he would have her deported. She testified that the 2nd respondent was a friend of hers from high school and they started going out in October 2012 she testified that though they are not married they had a son together. She added that she resigned her job to go and be with him and had since moved on and did not want to go back to him. She admitted that the respondent paid dowry of Kshs. 250,000/-. She added that the petitioner was cruel to her while in Switzerland but she was not taken to hospital and that she did not report the same. She however could not prove that the petitioner had a relationship during their marriage.
8. The 2nd respondent reiterated the contents of his reply to the petition to the effect that he did not know the 1st respondent was married to the petitioner when they started dating.
9. The petitioner has raised various grounds; desertion, adultery and cruelty Section 66(2) of the Marriage Act 2014 outline the grounds for dissolution of a marriage. The 1st respondent admits to deserting the petitioner but alleges that she was pushed to do so due to his cruelty. In the case of **DM -VS- TM (2008) 1 KLR**, 5 the court held, *“To establish cruelty the complainant must show to the satisfaction of the court:- misconduct of a grave and weighty nature real injury to the complainant's health and reasonable apprehension of such injury that the injury was caused by misconduct on the part of the Respondent, and that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.”*
10. The 1st respondent narrated instances of cruelty and adduced email communications that went to support her allegations as such I find that she has proved her cross petition on grounds of cruelty. However it has also been proved that the 1st respondent upon her return to Kenya began a relationship with the 2nd respondent and they have a child together, hence the ground of adultery has been proved by the petitioner. The 1st respondent's admits to having deserted the petitioner in Switzerland on grounds of cruelty. As such I find the petitioner's petition and the 1st respondents both have contributed to the breakdown of their marriage, which has irretrievably broken down and as such I allow the petitioner's petition and the respondent's cross petition. The petitioner in his petition did not seek a refund of the dowry in his petition. This court therefore dissolves the marriage between the Petitioner and the Respondent celebrated on the 2nd May 2011. A *decree nisi* to issue forthwith and to be made absolute within 30 days. No orders as to cost. It is so ordered.

Dated, signed and delivered this 28th day of **May** 2015.

R. E. OUGO

JUDGE

In the presence of:

..... **For the Petitioner**

..... **For the Respondent**

..... **Court Clerk**