



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 136 OF 2013

BETWEEN

P A C MPETITIONER

AND

C D W N.....RESPONDENT

JUDGEMENT

1. On 30th August 1999, the Petitioner, then a bachelor known as P A C M, a Dutch national was lawfully married to C D W N then a spinster and a certificate Serial No. *[particulars withheld]* issued to them in accordance with the **Marriage Act Cap 150 Laws of Kenya**. The marriage was celebrated at the office of the Registrar in Nairobi and thereafter they cohabited as husband and wife at Arwings Kodhek, Kilimani Nairobi and later moved to Fort Madagascar in January 2002 where they lived until 2009.

2 . They were blessed with three issues of the marriage, who were aged as follows at the time of filing this cause:

- 1) G S aged 11 years
- 2) J J aged 9 years and
- 3) Z aged 7 years.

Both the Petitioner and Respondent are domiciled in Kenya where the Petitioner is a businessman while Respondent is a financial Analyst.

3. The Petition filed on 4th July 2013 is premised on grounds of desertion and cruelty. The acts of desertion are that around 2009, the Respondent deserted the matrimonial home without any provocation and cause whatsoever and has remained away to date. That in September 2011 the Petitioner and the Respondent separately relocated to Kenya where they continue to reside separately. The particulars of cruelty are that the Respondent is quarrelsome, and that she denied him the enjoyment of conjugal rights and consortium during the pendency of the marriage. That the acts of cruelty and desertion caused the Petitioner mental anguish.

4. The Petition is supported by the Petitioner's affidavit sworn on 2nd July 2013 in which he reiterates the contents of his Petition. He therefore prays that the marriage celebrated between him and the Respondent

be dissolved as it has irretrievably broken down, and there is no hope of salvaging it.

5. The Respondent was served with the Petition and she filed an Answer to the Petition dated 26th August 2013. She also filed a Cross-Petition. The Respondent stated that she left the matrimonial home for two months and not six months as alleged by the Petitioner. She states that this was due to the Petitioner's drunkenness, ungoverned temper, refusal to maintain the Respondent and the extra marital affairs that the Petitioner had with other women. She contends that her departure was therefore, for her safety and that of the children. That upon moving back to Kenya, the Petitioner as a consequence of an adulterous liaison impregnated a married Kenya woman who is currently living in Germany.

6. The Respondent stated that the Petitioner persuaded her to resign from her job as a Financial Manager in a Non-Governmental Organisation, only for the Petitioner to abandon his responsibility towards maintaining her and the children of the marriage. That the Petitioner has since moved in with yet another Kenyan girlfriend and continues and persists in his adulterous relationship. That therefore, the Petitioner's claim that the marriage has irretrievably broken down is a calculated scheme to break down the marriage so as to free him to pursue and legitimize his present adulterous relationship.

7. The Respondent set out particulars of cruelty in the Cross-Petition and stated that the Petitioner had treated her with cruelty. She too urged the court to dissolve the marriage. She prayed that custody of the children of the marriage be granted to her and that the Petitioner be ordered to pay alimony pending the hearing and determination of these proceedings. She also prayed that the Petitioner be ordered to pay for the upkeep and maintenance of the children of the marriage and the costs of these proceedings.

8. On 23rd January, 2014 the Deputy Registrar certified that the matter was suitable to proceed for hearing as a defended cause for one day in Nairobi. On 6th November 2014, the Petitioner testified and reiterated what he had set out in the Petition. He admitted that there had been infidelity on his part and that he is currently living with one Fiona since 2011. He further stated that he supports the Respondent by contributing to the payment of school fees, uniforms and Kshs.200,000/- monthly to the Respondent, to cater for the half of the time that she stays with the children.

9. Both the Petitioner and the Respondent confirm that the Petition and cross-petition have not been presented or prosecuted in collusion with one another, nor have they connived or condoned the acts of desertion, cruelty and adultery which each has complained of. They also certify that there have been no previous proceedings filed regarding the marriage.

10. The issue for determination in the petition for dissolution of marriage is whether the matrimonial offences alleged by each side have been proved. It is not denied that attempts at reconciliation made by the Petitioner's parents have failed and that the Petitioner and the Respondent have lived separately for the last six years. In my view each party has proved the matrimonial offences they have accused the other of in the petition and cross-petition respectively. It is therefore evident that the marriage between the Petitioner and the Respondent has irretrievably broken down and has no chance of being salvaged.

11. On the issue of maintenance, Mr. Chacha learned counsel appearing for the Respondent submitted that pending a suit for the dissolution of marriage, and/or upon dissolution of marriage on any of the legally recognized grounds, the court is empowered to order for the payment of alimony and maintenance by a party to the suit. The law recognizes that such payments can be made as the court thinks reasonable. He referred to **Section 25(2) of the Matrimonial Causes Act, Cap 152 Laws of Kenya**, Mr. Chacha submitted that in the exercise of its discretion in awarding maintenance, the court should consider:-

- a) The wife's fortune;
- b) The ability of the husband; and
- c) The conduct of the parties generally.

12. He referred the court to the case of **WN versus PB Msa HCMC No. 8 of 2013**, wherein Serгон J,

quoting GBM Kariuki J in **WMM versus BML [2012]eKLR** said:

“No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse onto a beast of burden BUT where a spouse deserves to be paid maintenance in the event of divorce or separation, the law must be enforced to ensure that a deserving spouse enjoys support so as to maintain the standard of life he or she was used to before separation or divorce.”

Mr. Chacha submitted that the Respondent has made over five hundred job applications, but has not secured a job while on the other hand the Petitioner has not filed an affidavit of means nor produced any records to show that his circumstances have changed so as to reduce the level of maintenance he had got his wife accustomed to. Mr. Chacha therefore submitted that by reason of the foregoing the Respondent should be paid a monthly sum of Kshs.400,000/- and that the Petitioner should continue paying school fees for the children. Further that as custody is not contested, the Respondent should have custody of the children.

13. In rebuttal Learned counsel Mr. Sichale for the Petitioner submitted that the Respondent is not entitled to any payment from the Petitioner for maintenance or at all, since **Article 45(3)** of the Constitution is very clear that parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage. He too referred to the case of **W.M. vs B.M.L [2012] eKLR (supra)** that:

“In considering a claim for maintenance, regard must be heard to the provisions of Article 45(3) of the Constitution of Kenya ... the rights enshrined in this Article connote equality of parties in a marriage and are intended to ensure that neither spouse is superior to the other in relation to enjoyment of personal rights and freedoms. In light of Article 45(3) the criterion in determining the rights and obligations of spouses in a marriage must treat the husband and the wife as equals and neither has a greater or lesser obligation than the other in relation to maintenance.....”

14. Mr. Sichale contended that the Respondent is an able and educated woman with financial background and as such is capable of finding employment or engaging in income generating activities to take care of herself. Mr. Sichale told the court that there was no evidence of the five hundred job applications she said she had made. That she was already getting a monthly allowance of 200,000/- from the Respondent and it would not be reasonable to expect the Petitioner to carry the entire burden of maintaining her while she did nothing. Mr. Sichale argued that the question of the custody and maintenance of the children belonged to the children’s court but that in any case the petitioner was maintaining them.

15. I have considered the petition, answer to the petition and also the cross-petition and answer to the cross-petition. I have also considered the rival submissions and the pertinent law applicable. **Section 25(2)** of the **Matrimonial Causes Act, Cap 152** Laws of Kenya states:

“The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as having regard to her fortune, if any, to the ability of her husband and to the conduct of the parties, the court may deem to be reasonable.

Further, sub-section (3) provides:

In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (2) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable.

Provided that:-

(i) If the husband, after any such order has been made, becomes from any cause unable to make the payments, the court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid, and subsequently revive it wholly or in part as the court thinks fit; and

(ii) Where the court has made any such order as is mentioned in this subsection and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.

16. As Mr. Chacha rightly stated the foregoing provisions require that in the exercise of its discretion in awarding maintenance, the court should consider the wife's fortune, the ability of the husband, and the conduct of the parties generally.

The Respondent testified that she has not secured employment in spite of sending out over five hundred job applications. It was also submitted that the Petitioner has without cause failed to file an affidavit of means as required under **Rule 44** of the **Matrimonial Causes Rules**, and has made a bare allegation that he is not able to offer maintenance at the level he had previously done, without presenting any cogent evidence on change of circumstances.

17. I note however that the Respondent has also not supplied a breakdown of needs to arrive at the Kshs.400,000/= a month prayed for. I note also that the Petitioner pays her the Kshs.200,000/= monthly, even for the period when the children are with him. The Respondent is also under duty to carry some of the load in ensuring her survival and that of their children. In the case of W. M. M. (supra) GBM Kariuki J put it succinctly that:

“Under the Constitution the Respondent has a duty to support and maintain herself no less than the Petitioner has to support himself.....”

On the custody of the children neither of the parties has complained about current arrangement of shared custody of the children that they arrived at on their own. Needless to state it is in the children's best interest to have both parents in their lives. It is not disputed that the Petitioner pays the children's school fees and caters for other school related expenses. He also stays with the children for half of the time, takes them on holiday with him and provides a medical cover for them.

18. That being the matrix of this cause and in the circumstances of this cause I order as follows:

- a) That the marriage celebrated between the Petitioner and the Respondent at the office of Registrar, Nairobi on 30th August 1999, is hereby dissolved.
- b) That Decree Nisi dissolving the said marriage is hereby issued, to be made absolute thirty (30) days from the date of this Judgment.
- c) The Petitioner shall continue paying Kshs.200,000/= to the Respondent for her upkeep. The Respondent shall contribute the difference for her own upkeep.
- d) That matters concerning the custody and maintenance of the issues of the marriage shall be determined by the Children's Court. In the meantime the current arrangement arrived at by the parties themselves concerning the issues shall remain in place.

There shall be no orders as to costs.

SIGNED DATED and DELIVERED in open court this **21st** day of **May 2015**.

.....

L. A. ACHODE

JUDGE

In the presence ofAdvocate for the Petitioner

In the presence ofAdvocate for the Respondent