



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 66 OF 2014**

**B.A.K .....PETITIONER**

**VERSUS**

**T.D.K .....1<sup>ST</sup> RESPONDENT**

**M.M.G .....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The Petitioner B.A.K filed a petition with a verifying affidavit before this court on the 21<sup>st</sup> of May 2014 seeking to have the marriage between her and the 1<sup>st</sup> Respondent T.D.K dissolved on ground of adultery and cruelty.

The Petitioner and the 1<sup>st</sup> Respondent were lawfully married on 22<sup>nd</sup> July 1997 and their marriage was solemnized in the AG's chambers.

The Petitioner attached a certified true copy of the marriage certificate. The Petitioner cohabited with the 1<sup>st</sup> Respondent as husband and wife in different places including Kinoo, Uhuru Gardens, Karen, Hardy and finally in Kibiko Ngong.

During their subsisting marriage, they were blessed with one son S L M aged 14 years.

The Petitioner is a Personal Assistant while the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent are co-workers at **[particulars withheld]** Camp. Both the Petitioner and the 1<sup>st</sup> Respondent now reside in Nairobi.

During the subsistence of the marriage, the 1<sup>st</sup> Respondent treated the petitioner with extreme cruelty. The 1<sup>st</sup> Respondent emotionally neglected the petitioner. The particulars of cruelty are as follows;

- a. The 1<sup>st</sup> Respondent has treated the Petitioner with utter disrespect.
- b. The 1<sup>st</sup> Respondent came back home late and very drunk.
- c. The 1<sup>st</sup> Respondent had a sexual affair with one S K A claiming that it was a business relationship.
- d. The 1<sup>st</sup> Respondent verbally abused and insulted the Petitioner in the presence of the house help and his brother.
- e. The 1<sup>st</sup> Respondent physically and verbally assaulted the Petitioner and at some point threatened to kill her.
- f. The 1<sup>st</sup> Respondent brought the 2<sup>nd</sup> Respondent into their matrimonial home when the Petitioner was away on a business event.

g. The 1<sup>st</sup> Respondent verbally abused the child of the marriage.

The Petitioner deponed that the marriage between her the Respondent had irretrievably broken down. The Petitioner did not condone the cruel and adulterous behavior of the Respondent.

The Petitioner prayed for orders that;

- a. The marriage between her and the Respondent be dissolved,
- b. The Petitioner be granted the custody of the said children of the marriage,
- c. The Petitioner be awarded costs and maintenance,
- d. This Honourable court to award the matrimonial property to the Petitioner,
- e. Any other relief court deems,

The Petitioner served the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent with the petition with the notice to appear on 14<sup>th</sup> April 2014. The 1<sup>st</sup> Respondent acknowledged receipt of the documents on his behalf and on behalf of the 2<sup>nd</sup> Respondent according to the affidavit of service sworn on 12<sup>th</sup> May 2014 by the Petitioner. However, the 1<sup>st</sup> Respondent and the 2<sup>nd</sup> Respondent neither entered appearance nor did they file their answers to the petition within the specified time that was stated in the notice.

The Petitioner moved court by way of Chamber Summons filed under **Order 29 of the Matrimonial Causes Rules** on the 15<sup>th</sup> May 2014 seeking issuance of a certificate for the matter to proceed for hearing as an undefended cause. The Registrar certificate was issued and the matter was scheduled for hearing on the 14<sup>th</sup> of May 2015.

During the hearing, the Petitioner gave sworn evidence and stated that she and the 1<sup>st</sup> Respondent were lawfully married on 22<sup>nd</sup> July 1997. She is currently unemployed. The 1<sup>st</sup> Respondent is now the Operations Manager of *[particulars withheld]* Camp. The Petitioner and the 1<sup>st</sup> Respondent had one child called S aged 14 years. She sued the 2<sup>nd</sup> Respondent because she is the 1<sup>st</sup> Respondent's mistress. The 1<sup>st</sup> and the 2<sup>nd</sup> Respondent had an affair for three years and have a child called T C. She got to know about the affair when she was pregnant with a child. When the Petitioner inquired from the 1<sup>st</sup> Respondent about the 2<sup>nd</sup> Respondent, he verbally abused the Petitioner. The 1<sup>st</sup> Respondent had another marital affair with another woman from his other workplace in 2005. The 1<sup>st</sup> Respondent left the matrimonial home to go live with a friend in 2015. The Petitioner prayed to court to dissolve the marriage between her and the 1<sup>st</sup> Respondent.

The court has evaluated the evidence adduced by the Petitioner. The Petitioner based her application on adultery and cruelty. According to **Section 66(1) of the Marriage Act**, a party to a civil marriage may not petition the court for separation of the parties or for the dissolution of the marriage unless three years have lapsed since the celebration of marriage. The Petitioner and the Respondent celebrated their marriage in 1997. The petition was thereby accepted by court as three years had lapsed.

**Section 66(2) of the Marriage Act** stipulates for grounds of divorce to include among others adultery, cruelty, desertion for more than two years and irretrievable breakdown of marriage.

Regarding adultery, the Petitioner alleged that the 1<sup>st</sup> Respondent had a marital affair with the 2<sup>nd</sup> Respondent. They had a child called T C. The 1<sup>st</sup> Respondent brought the 2<sup>nd</sup> Respondent to their marital home in Kiboko when the Petitioner was away on a business event. The 1<sup>st</sup> Respondent other marital affairs with one S K A and another person called M S. Hon Justice Madan (then was) stated in **N V N (2008) 1 KLR 17** that;

*“To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, elicit undue familiarity and guilt attachment are some of the instances that create an inference upon which court can act. Circumstantial evidence can prove and establish*

***adultery provided that the circumstances are relevant, cognate and compellable”.***

The 1<sup>st</sup> and the 2<sup>nd</sup> Respondent had a marital affair. They had a child as a product of the affair during the subsistence of the Petitioner and Respondent’s marriage. The Petitioner at one point found pajamas in the 1<sup>st</sup> Respondent’s suitcase belonging to a woman when he came back from his trip from South Africa. The 1<sup>st</sup> Respondent claimed it could have been extra luggage. This is all circumstantial evidence to prove that the 1<sup>st</sup> Respondent committed adultery. This is construed by court that the Petitioner’s evidence proves on a balance of probability that the Respondent committed adultery.

As regards cruelty, the Respondent verbally abused the Petitioner in the presence of the house help and his brother. He treated the Petitioner with utter disrespect. The Respondent came back home late and very drunk. The Respondent physically and verbally assaulted the Petitioner and at some point threatened to kill her. The 1<sup>st</sup> Respondent verbally abused the child of the marriage. This caused mental anguish not only to the Petitioner but also the child of the marriage. The **Black’s Law Dictionary** defines cruelty to include both mental and physical cruelty. The dictionary further defined mental cruelty to mean;

**“one spouse’s course of conduct (not involving actual violence) that creates such anguish that it endangers the life, physical or mental health of the other spouse.”**

The 1<sup>st</sup> Respondent’s conduct to the Petitioner amounted to mental cruelty. The petitioner suffered from mental anguish resulting from threats from the 1<sup>st</sup> Respondent to kill her.

Under **Section 66(6) of the Marriage Act**, marriage is said to have irretrievably broken down if;

- a. ***A spouse commits adultery;***
- b. ***A spouse is cruel to the other spouse or to any child 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 or at least three years immediately preceding the date of presentation of the petition;***
- f. ....

The 1<sup>st</sup> Respondent in this case committed adultery with the 2<sup>nd</sup> Respondent. They had a child out of the marital affair. There was circumstantial evidence to prove that the 1<sup>st</sup> Respondent committed adultery with other women. The 1<sup>st</sup> Respondent was cruel towards the Petitioner and the child of the marriage. This signifies that the marriage between the Petitioner and the Respondent had irretrievably broken down with no possibility of salvaging it and promoting reconciliation.

On the basis of the foregoing, the court hereby orders as follows;

- a. The petition is upheld.
- b. The marriage between the Petitioner and the Respondent that was solemnized on 22<sup>nd</sup> July 1997 is dissolved.
- c. Custody of the child S L M is granted to the Petitioner and visits by the Respondent as may be agreed by the parties.
- d. The Respondent shall pay **Ksh. 30,000/= each month** as maintenance and upkeep for the child of the marriage until each party files affidavit of means.
- e. Decree nisi to issue forthwith.
- f. Decree absolute to issue in six (6) months.
- g. The Respondent shall bear the costs of the case.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF JUNE 2015.**

**M. MUIGAI**

**JUDGE**