



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**DIVORCE CAUSE NO. 232 OF 2014**

**D.M .....PETITIONER**

**VERSUS**

**H.M.....1<sup>ST</sup> RESPONDENT**

**JUDGMENT**

The Petitioner D.M filed a petition together with a verifying affidavit before this court on the 24<sup>th</sup> of November 2014 seeking to have the marriage between her and the Respondent H.M dissolved on ground of desertion.

The Petitioner and the Respondent were lawfully married on 11<sup>th</sup> March 2008 and their marriage was solemnized in the Registrar's Office in Nairobi.

The Petitioner attached a certified true copy of the marriage certificate. The Petitioner cohabited with the Respondent as husband and wife in Nairobi in 2008. They moved to Switzerland until when the Respondent went to Mozambique.

During their subsisting marriage, they were blessed with one child D G aged 11 years.

The Petitioner is a Doctor while the Respondent is a Business Woman. Both the Respondent and the Petitioner reside and domicile in Kenya.

During the subsistence of the marriage, the Respondent deserted the Petitioner and their matrimonial home. The particulars of desertion are as follows;

- a. The Respondent developed a temper and abandoned her son alone at their matrimonial home when the Petitioner was away on official duty.
- b. The Respondent wanted to move back to her native Country Mozambique.
- c. The Respondent left the matrimonial home without any justifiable cause for six years.
- d. The Respondent denied the Petitioner conjugal rights.
- e. The Petitioner and the Respondent lived separately and the attempts of reconciliation have been fruitless.

f. The Respondent maintained little or no communication with the Petitioner since 2009.

g. The Respondent vandalized the household equipment with the intention of breaking the marriage.

The Petitioner deponed that the marriage between him and the Respondent had irretrievably broken down due to irreconcilable differences. The Petitioner did not condone acts of the Respondent of deserting the matrimonial home.

The Petitioner prayed for orders that;

a. The marriage between him and the Respondent be dissolved,

b. The Respondent to bear the costs of the case,

c. Any other relief court deems.

The Petitioner served the Respondent with the petition together with the notice to appear on 17<sup>th</sup> of December 2014. The Respondent acknowledged receipt of the documents according to the affidavit of service sworn on 28<sup>th</sup> of January 2015 by the Micheal Njonjo. However, the Respondent neither entered appearance nor did she file their answer to the petition within the specified time that was stated in the notice.

The Petitioner moved court by way of Chamber Summons filed under **Section 66 of the Marriage Act** on the 29<sup>th</sup> of January 2015 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 he now resides in Switzerland. He is a Medical Doctor. The Petitioner and the Respondent were lawfully married on 11<sup>th</sup> of March 2008. He and the Respondent cohabited in Nairobi as husband and wife. They had one child D G aged 11 years. The Respondent left the matrimonial home in July 2009 and never came back. The Respondent had a severe alcohol addiction. She abandoned the child of the marriage. The Respondent and the Petitioner had not been together for 6 years. She was violent and destructive. The child is now in the custody of the Petitioner in Switzerland. The Petitioner prayed to the court to dissolve the marriage.

The court has evaluated the evidence adduced by the Petitioner together with her submissions. The Petitioner based her application on ground of desertion. **Section 66(1) of the Marriage Act** provides that 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 2008. The petition was thereby accepted by court for the three years had lapsed.

Desertion is one of the major grounds of divorce as per **Section 66(2) of the Marriage Act**. Desertion involves a spouse living the matrimonial home without the consent of the other spouse and without any justifiable cause. In this case the Respondent left her matrimonial home. She abandoned the child of the marriage with the Petitioner. The Respondent had been away from her matrimonial home for 6 years and never returned. The Respondent did not file an answer to the petition nor did she attend court to contravene this evidence. The court construes that the evidence adduced by the Petitioner is proved on the balance of probabilities.

For a marriage to have irretrievably broken down, one or more of the conditions under **Section 66(6) of the Marriage Act**. The conditions may be 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 Respondent deserted the matrimonial home for 6 years and never returned. She neglected her marital duties since 2009 when she left the matrimonial home. The Petitioner and the Respondent voluntarily separated for more than two years. The Respondent abandoned the child with the Petitioner and there has been no communication despite attempts of reconciliation. This signifies that the marriage between the Petitioner and the Respondent had irretrievably broken down with no possibility of salvaging the marriage and no likelihood of 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 11<sup>th</sup> march 2008 has irretrievably broken due to desertion by the Respondent for more than six years. The Petitioner and the Respondent voluntarily separated for more than two years.

c. Custody of the child D G is granted to the Petitioner with visitation rights to the Respondent.

d. Decree nisi to issue forthwith.

e. Decree absolute to issue in six (6) months.

f. 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**