



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

DIVORCE CAUSE NO 206 OF 2014

H. R.PETITIONER

VERSUS

N. J. A. C.RESPONDENT

JUDGMENT

Before this Court is the petition of H.R., hereafter “the Petitioner”, which was filed on 24th October 2014 seeking to have the marriage between him and N.J.A.C., hereafter “the Respondent”, dissolved on the grounds of cruelty and constructive desertion. The Petitioner and the Respondent lawfully married each other on 27th February 2005, and their marriage was solemnized at the Greg Curry Registry of Births, Deaths and Marriages at Milsons Point in Sydney, New South Wales Australia. A copy of the Marriage Certificate is annexed to the petition as proof of his marriage to the Respondent. After the celebration of the marriage the parties cohabited variously in Australia and Dubai between February 2005 and 2012. The marriage has been blessed with two issues, D and D, who were born on 27th February 2006 and 26th October 2009 respectively. The Petitioner currently lives in Iraq while the Respondent and the two issues of the marriage live in Nairobi.

In his petition of 24th October 2014, the Petitioner stated that since December 2012 the Respondent has treated him with a lot of cruelty and has by her conduct been guilty of constructive desertion which caused him mental anguish. This led him to move out of the matrimonial home. In his particulars of cruelty and constructive desertion the Petitioner specifies certain instances that he suffered mental anguish due to the Respondent’s conduct including, inter alia, refusing him access to their bedroom, denying him conjugal rights for two (2) years, being unsupportive of his business in Iraq, and refusing to move back into the matrimonial home with him. The Petitioner also specified that the Respondent was distrustful of him, distant and uncommunicative, hostile and verbally abusive, neglectful and undutiful, secretive and temperamental, and also contemptuous and disrespectful. Furthermore, it was the Petitioner’s case that the behaviour of the Respondent towards him has been severely detrimental to his well being and caused him emotional distress. In conclusion, he contended that the Petitioner’s cruelty coupled with her willful neglect and constructive desertion has led to an irretrievable breakdown in the marriage which can no longer be salvaged.

The Petitioner served the Respondent with the petition and the Notice to Appear on 7th November May 2014. Despite service of the petition, the Respondent entered appearance but she neither filed an answer to the petition, nor a cross-petition. On 19th January 2015, the Petitioner, through Counsel, moved the Court by way of an application made pursuant to **Rules 3(3) & Rule 29(2)** of the **Matrimonial Causes Rules** seeking to have the Registrar’s Certificate issued for the matter to proceed for hearing as an

undefended cause.

The matter was heard on 4th June 2015, and the Petitioner gave both oral and documentary evidence reiterating the averments in his petition. He testified that he was lawfully married to the Respondent on 25th February 2005 after having met in Australia. He restated that the couple lived together in Australia for seven (7) months before moving to Dubai where they lived from 2005 till 2012. While he elected to rely primarily on the content of his petition, the Petitioner also gave oral evidence concerning the alleged cruelty and desertion of the Respondent. He stated that the Respondent refused to be with him in the same house and the same bed, accusing him of not being a man and claiming he was unfaithful to her. It was also the Petitioner's testimony that he tried thrice to reconcile with the Respondent in order to resolve their marital problems, but all his efforts were unsuccessful and the couple have been separated for 3½ years. He anticipated that the state of separation would continue and that he wished to officially end the marriage so that he could proceed with his life.

The Respondent, despite due service of the petition, did not file an answer to the petition, nor did she 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 in their respective presentations to warrant the grant by this Court of a divorce;
- b. Whether the Respondent should bear the costs of this suit as prayed by the Petitioner.

The evidence on record shows that the Petitioner and the Respondent contracted a civil marriage, and thus the applicable law concerning the dissolution of their marriage is to be found in **Section 66** of the **Marriage Act 2014** which 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; ...***

By his application of 24th October 2014 the Petitioner seeks to have the marriage dissolved because of the alleged cruelty of and constructive desertion by the Respondent. The grounds of cruelty and desertion are questions of fact which require this Court to assess them based on the evidence adduced by the parties. It

is useful to underscore the fact that standard of proof in establishing the above grounds of divorce is a preponderance of probability. This point was elaborated by the Court of Appeal in the case of **ALEXANDER KAMWERU v ANNE WANJIRU KAMWERU (2000) eKLR**, where it was stated:

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.

To support the dissolution of marriage on the ground of cruelty this Court must satisfy itself that there is evidence indicating that the Respondent, without any justifiable cause, deliberately conducted herself in such a manner as to endanger the Petitioner's physical or mental health, or make him anxious over such imminent danger. The standard of proof for cruelty was elaborated in the case of **DM v TM (2008) 1 KLR 5**, where Chesoni J (as he then was) stated that:

To establish cruelty the complainant must show to the satisfaction of the court: –

- i. misconduct of a grave and weighty nature***
- ii. real injury to the complainants health and reasonable apprehension of such injury***
- iii. that the injury was caused by misconduct on the part of the Respondent, and***
- iv. that on the whole the evidence of the conduct amounted to cruelty in the ordinary sense of that word.***

The evidence on record makes clear that the relationship between him and the Respondent was beset by marital problems and was devoid of the intimacy and companionship that characterize the institution of marriage. It does not establish the constitutive elements set out in the standard of proof of cruelty as set out in the case of **DM v TM (2008) 1 KLR 5**. There was never a complaint of real injury, for instance, one that would threaten the health of the Petitioner or cause him to apprehend such injury. The alleged misconduct of the Respondent also appears to have been in the form of being emotionally withdrawn from the Petitioner rather than cruelty in the ordinary sense of the word. The misconduct can hardly amount to misconduct of a grave and weighty nature. On the above basis, it is difficult for this Court to find that the Respondent was cruel to the Petitioner, and to have that ground as the basis for the dissolution of the marriage as contemplated by **Section 66(2) of the Marriage Act 2014**.

But it is important to recall that the Respondent did not make any presentations before this Court in response to the content of the petition for divorce, and thus this Court will have to rely on both the factual and circumstantial factors of the case in its analysis. The circumstantial factors are useful in assessing the objective and subjective aspects of a particular case in order to determine whether the evidence can sustain the allegation of cruelty. In the case of **RAF v SML [2014] e KLR Divorce Cause No 25 of 2011**, Muriithi J observed that:

The test for cruelty in matrimonial causes is both objective and subjective. A petitioner is required to prove conduct on the part of the respondent that may be construed to be cruel in an objective sense and to a standard of beyond reasonable doubt or, as otherwise put, that the court must feel sure of the commission of the offence ...

An examination of the pleadings and the evidence before this Court provides little basis on which to conclude that the Respondent was cruel to the Petitioner. The circumstances of the case similarly do not make it easy to conclude on a balance of probability that the Petitioner was the victim of cruel treatment meted out by the Respondent. The Petitioner testified that the marital problems between the couple began in December 2012 and that this caused him to move out of the marital home. His oral evidence during trial relied primarily on the content of his petition and did not elaborate further on the particulars of cruelty or constructive desertion that can enable this Court evaluate the specific circumstances of his case.

While the Petitioner stated that he had to move out due to the petitioner's cruelty and constructive desertion, it remains his testimony that he moved out and not that he was evicted from the house. As a general rule, it is necessary for the party claiming constructive desertion to show that the other party had

abandoned him for another person. In the case of **SCC v MKC [2014] e KLR Divorce Cause No 16 of 2012** Justice Ngenye-Macharia observed that no more evidence than that the other spouse has began living with another man or woman, as the case may be, is required to prove desertion. In the present case, however, no such allegation has been raised by the Petitioner, nor do the circumstances known to this Court suggest that such is the case. Hence, this Court finds it difficult to hold that the Respondent is guilty of cruelty or desertion.

Nonetheless, **Section 66(6)(d)** of the **Marriage Act 2014** provides that a marriage has irretrievably broken down if the spouses have been separated for at least two (2) years, irrespective of whether such separation is voluntary or by dint of a court decree. In the present case, it is the Petitioner's unchallenged evidence that the parties have been having marital problems since December 2012 and have been living separately and apart for a period of more than 3½ years. The evidence on record makes clear that the parties can no longer live together, and this is a valid basis on which to conclude that the marriage has irretrievably broken down and to release the parties from the bonds of matrimony. In the case of **N v N [2008] 1 KLR 16**, Madan J (as he then was) observed that:

If two spouses have reached the point of not being able to live together reasonably happily for causes some of which may appear trifling to an outsider but are of vital effect upon their lives and which are felt by them to be intolerable, or unreasonable to continue to bear then, they are entitled to be released from their matrimonial union ...

In the circumstances of this case where the Petitioner has repeatedly claimed that he has been undergoing emotional anguish due to the Respondent's conduct, the most reasonable cause of action is to dissolve the marriage. In this regard, this Court is persuaded by the reasoning in **NMM v SJC, Divorce Cause No. 1 of 2013** where Karanja J stated that:

... it has all along been apparent that the marriage between the two has irretrievably broken down such that any attempt to give them time to resolve their marital problems by sustaining it would cause both of them untold anxiety and/or psychological torture. It is in their own interest and the interest of justice that the marriage be dissolved and they be allowed to move on with their respective lives ...

This Court thus finds that the marriage between the Petitioner and Respondent has irretrievably broken down, and that it is in both their interest and the interests of justice to dissolve the marriage. Moreover, the fact that the Respondent neither answered nor challenged the allegations set forth in the Petitioner's pleadings and testimony, and the fact that she made no presentations in this matter despite living within the jurisdiction of this Court is indicative of her disinterest in the marriage. The Court, therefore, finds that the marriage has irretrievably broken down.

As regards the issue of which party should bear the costs of this suit, it is crucial to begin by pointing out that this Court is a family court; as such it is a Court of law, evidence and equity. As a general rule the parties in such cases will be required to bear their own costs, and this is often the decision of the Court having taken into account the purposes for which such an order is given as well as its effect on the parties. Another important consideration which the Court must take in making orders as to costs is the interests of justice and the integrity of the judicial system as regards the efficient dispensation of justice. An examination of the records on file shows that the Petitioner was diligent as regards filing his applications and duly serving the Respondent. By contrast, the Respondent appears to have been disinterested in the matter, electing to be a passive party in the case. There are instances in which the Respondent's conduct caused a delay in the proceedings by frustrating the execution of service upon her. This no doubt caused the Petitioner to incur some unnecessary expenses. In the premises therefore, it would only be fair to have the Respondent bear the costs of the suit as this will be in the broader interests of justice and equity.

In the final analysis, this Court orders that the marriage between the Petitioner and the Respondent that was solemnized on 25th February 2005 is hereby dissolved:

- a. Decree nisi to issue forthwith;

- b. Decree absolute to issue thereafter within 30 days;
- c. The custody of the children to remain with the Respondent, but with access rights to the Petitioner;
- d. The maintenance of the children of the marriage may be canvassed upon each of the parties filing affidavit of means;
- e. Any aggrieved party is at liberty to apply;
- f. The Respondent to bear the costs of the suit.

DATED AT NAIROBI THIS 19TH DAY OF JUNE 2015

M. MUIGAI

JUDGE

In the presence of:

Parties/Counsel absent