



**REPUBLIC OF KENYA**

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

**DIVORCE CAUSE NO. 105 OF 2009**

**BETWEEN**

**W W M.....PETITIONER**

**AND**

**P M M.....RESPONDENT**

**JUDGEMENT**

1. Marriage was celebrated between the parties herein on 10<sup>th</sup> December 2003 at the St. Marks Church, Westlands, Nairobi. A certificate of marriage serial number *[particulars withheld]* was issued to them in accordance with the Marriage Act. The couple was blessed with issue, two children, named I M M (born on 15<sup>th</sup> September 2000) and B N M (born on 9<sup>th</sup> May 2003).
2. The petition in this matter was filed in court on 9<sup>th</sup> July 2009. The petitioner accuses the respondent of cruelty and desertion. The particulars of cruelty being that the respondent deceived her by failing to disclose to her about a previous marriage where she had two children, she only discovering the same after the celebration of the marriage, a matter which has caused her to distrust the respondent and which exposed her to distress and mental anguish. She also alleges that the respondent had been physically violent to her during the course of the marriage, citing one incident which occurred on 20<sup>th</sup> January 2008 when she suffered serious injury as a result and had to report the matter to the police. She also says that he has been using agents to threaten and intimidate her using violence.
3. On desertion she has pleaded that the respondent's cruelty to her eventually drove her out of the matrimonial home in 2007, and since then the parties have lived separately. All efforts thereafter to bring the parties together have not borne fruit.
4. Upon being served with the petition, the respondent appeared vide a Memorandum of Appearance filed in court on 17<sup>th</sup> August 2009 and he also filed an answer to the petition on even date.
5. In the answer the respondent denies the allegations levelled against her by the petitioner, and instead accuses her of having deserted and exposed him to cruelty. He alleges that she deserted him on an undisclosed date and relocated to the United Kingdom. The particulars of cruelty pleaded against her are the desertion mentioned here before, false accusations of assault leading to his indictment with criminal charges, denial of conjugal rights and keeping the children away from him. He also pleads that the marriage has irretrievably broken down.
6. On 5<sup>th</sup> November 2009, the Deputy Registrar certified that the matter proceeds for hearing as a defended cause.
7. The cause came up for hearing on 12<sup>th</sup> February 2015. The respondent attended court for the hearing of the matter, the petitioner was absent. There is an affidavit of service on record sworn by a process server on 4<sup>th</sup> February 2015 and filed in court on 9<sup>th</sup> February 2015. It shows that a hearing notice was served on counsel for the petitioner, Messrs. Jessee Kariuki & Co., Advocates, on 3<sup>th</sup> February 2015. The petitioner's advocates acknowledged service by embossing their date

stamp and affixing the signature of the officer who received service on the face of the hearing notice dated 20<sup>th</sup> January 2015 duly returned with the affidavit of service.

8. The respondent testified, breathing life to the allegations of fact made in his answer to the petition. He asked me to order the dissolution of the marriage celebrated between the parties on 10<sup>th</sup> December 2003.
9. The pleading filed by the respondent is an answer to the petition. He did not file a cross-petition. An answer to the petition is just that, a pleading responding to the allegations made in a divorce petition. A respondent, who wishes to counter the petition by the petitioner, by asking the court to dissolve the marriage on his terms, should file his own petition for the dissolution of the marriage founded on grounds to be set out in the counter petition. Although the respondent has prayed for the dissolution of the marriage in his answer to the petition, it is my view that the said prayer is without foundation so long as there is no counter-claim or counter-petition.
10. The upshot of the above is that the orders sought in the answer to the petition are not available for the reasons given above. The petitioner did not attend court, despite being served, to prove her petition, and therefore the same is hereby dismissed. The answer to the petition is also dismissed. There shall be no order as to costs.

**DATED, SIGNED and DELIVERED at NAIROBI this 31<sup>ST</sup> DAY OF JULY, 2015.**

**W. MUSYOKA**

**JUDGE**

**In the presence of Mr. Mungai for the respondent.**