



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 83 OF 2014

E A O.....PETITIONER

VERSUS

M A K.....RESPONDENT

JUDGMENT

The Petitioner E A O filed a petition with a verifying affidavit before this court on the 23rd April 2014 seeking to have the marriage between her and the Respondent M A K dissolved on grounds of cruelty and desertion.

The Petitioner and the Respondent were lawfully married on 31st August 1990 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 [Particulars Withheld] , and Lucky Summer in Nairobi.

During their subsisting marriage, they were blessed with three children;

- a. K A K aged 23 years
- b. L A K aged 18 years, and
- c. A K J aged 13 years.

The Petitioner is a Teacher employed by Teacher's Service Commission while the Respondent is an employee of [Particulars Withheld] . Both the Respondent and the Petitioner resided and domiciled in Kenya.

During the subsistence of the marriage, the Respondent treated the Petitioner with utmost cruelty. The particulars of cruelty are as follows;

- a. The Respondent physically assaulted the Petitioner.
- b. The Respondent deserted the matrimonial home and the children of the marriage.
- c. The Respondent insulted the Petitioner on several occasions at her workplace and in the presence of her workmates.
- d. The Respondent verbally abused the Petitioner causing undue stress and trauma.
- e. The Respondent maintained ungoverned temper which caused tension in their matrimonial home.
- f. The Respondent neglected his duties as a father and a husband during the subsistence of the marriage.

- g. The Respondent's rude and arrogant behavior caused stress to the Petitioner.
- h. The Respondent caused the Petitioner to move out of the matrimonial home despite intervention from relatives and friends.
- i. The Respondent was continuously disrespectful to the Petitioner and demand divorce at some point.
- j. The Respondent threatened to kill the Petitioner with a panga and the children of the marriage.

The Respondent deserted the matrimonial home and the Petitioner. The particulars of desertion were as follows;

- a. The Respondent denied the Petitioner conjugal rights when he deserted the matrimonial home.
- b. The Respondent denied the Petitioner spousal association without any justifiable reason.

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 and his cruel behavior.

The Petitioner prayed for orders that;

- a. The marriage between him and the Respondent be dissolved,
- b. The Petitioner be granted legal custody of the children of marriage,
- c. The Respondent to bear the costs of the case,
- d. Any other relief court deems fit.

The Petitioner served the Respondent with the petition with the notice to appear on 29th of August 2014. The Respondent acknowledged receipt of the documents according to the affidavit of service sworn on 14th October 2014 by a Process Server George Nyakundi. However, the Respondent neither entered appearance nor did he file his answer to the petition within the specified time.

The Petitioner moved court by way of Chamber Summons filed under **Rule 29 of the Matrimonial Causes Rules** on the 14th October 2014 seeking issuance of a certificate for the matter to proceed for hearing as an undefended cause.

The Registrar's certificate was issued and the matter was scheduled for hearing on 12th June 2015.

During the hearing, the Petitioner gave sworn evidence and reiterated whatever she deponed in the pleadings. She and the Respondent were lawfully married in 1990. They lived as husband and wife in [Particulars Withheld]. The marriage was blessed with three children K A K aged 23 years, L A K aged 18 years, and A K J aged 13 years. The Petitioner was a Lecturer while the Respondent worked with [Particulars Withheld]. The Petitioner and the Respondent separated in 2012 due to domestic violence, neglect and desertion. The Respondent did not pay dowry to the Petitioner's parents. The Respondent deserted the matrimonial home and abandoned the children with the Petitioner. The Petitioner prayed to the court to dissolve the marriage and grant her custody of the children.

The court has evaluated the evidence adduced by the Petitioner with her submissions. The Petitioner based her application on grounds of cruelty and 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 1990. 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 in 2012.

He abandoned the children of the marriage with the Petitioner. The Respondent had been away from her matrimonial home for 4 years and never returned. The Respondent neglected his marital duties and duties as a father. The Respondent did not file an answer to the petition nor did he attend court to controvert this evidence. The court construes the evidence adduced by the Petitioner as proved on the balance of probabilities.

As regards cruelty, the Petitioner alleged that the Respondent physically assaulted her. The Respondent insulted the Petitioner on several occasions at her workplace and in the presence of her workmates which caused her mental anguish. The Respondent verbally abused the Petitioner causing undue stress and trauma. The Respondent maintained ungoverned temper which caused tension in their matrimonial home. The Respondent threatened to kill the Petitioner and the children of the marriage with a panga. In **DM v TM (2008) 1 KLR 5**, where Hon. Justice Chesoni (as 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 complainant's 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.***

In the Black's Law Dictionary, eighth edition, cruelty is defined to include both mental and physical cruelty. In the case before court, the Respondent physically assaulted and verbally abused the Petitioner caused mental anguish to the petitioner. The Respondent's behavior was a misconduct that amounted to cruelty.

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 4 years and never returned. He neglected his marital duties since 2012 when he left the matrimonial home and abandoned the children of the marriage with the Petitioner. The Petitioner and the Respondent had voluntarily separated for more than two years. This signifies that the marriage between the Petitioner and the Respondent had irretrievably broken down with no possibility of salvaging the marriage or likelihood of reconciliation. In **NVN (2008)1 KLR 16**, Hon. Justice Madan (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.....”

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 11th March 2008 is hereby dissolved.

- a. Custody of the child A K J, being a minor, is granted to the Petitioner with visitation rights to the Respondent. Since the other two children are adults, the Petitioner and the
- b. Respondent shall share parental responsibilities of the children.

- c. Decree nisi to issue forthwith.
- d. Decree absolute to issue in six (6) months.
- e. The respondent shall bear the costs of the case.

It is so ordered.

READ AND SIGNED IN OPEN COURT AT NAIROBI THIS 28TH DAY OF JULY 2015.

M. MUIGAI

JUDGE