



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

DIVORCE CAUSE NO. 52 OF 2013

J. K. M.....PETITIONER

VERSUS

C. O. O.....RESPONDENT

JUDGMENT

The Petitioner, J.K.M., filed a petition on 13th March 2013 seeking to be divorced from the Respondent, C.O.O., dissolved on the ground of cruelty. The Petitioner and Respondent were lawfully married on 1st October 1999, and their marriage was solemnized at the Office of the District Commissioner in Mwingi. A copy of the Certificate of Marriage is annexed to the Petitioner's petition as proof of the marriage. There are three (3) children of the marriage, namely M.O.M., L.M. and W.M. The Petitioner also seeks to have the custody of the three (3) children of the marriage granted to her and to have the Court compel the Respondent to provide for the children's upkeep and maintenance. The Petitioner further sought for an order compelling the Respondent to vacate the matrimonial home situated in **Title No. KJD/KITENGELA/ [particulars withheld]** for the use of the Petitioner and the children of the marriage.

In her petition, the Petitioner stated that the Respondent has treated her with cruelty since the celebration of their marriage. She specified that the Respondent eschewed providing for the Petitioner's and children's upkeep despite having a source of income; refused to buy medicine for the first born child; persistently quarreled the Petitioner, their children and house-helps; allowed an unknown woman to spend the night with him in their matrimonial bed; regularly kept to himself, remained uncommunicative for weeks and refused any discussion with the Petitioner; deliberately gave contradicting instructions to house-helps with a view to causing domestic strife; attempted to forcibly prevent the Petitioner from travelling to her rural home in order to vote in the 2013 general election, and on being prevailed upon by the Petitioner and a neighbor resorted to expelling the Petitioner and the children from the matrimonial home; threatened the Petitioner with grievous harm and warned her never to return to the matrimonial home. The Petitioner maintained that as a consequence of the Respondent's violent conduct towards her and the children, she moved out of the matrimonial home on 9th March 2013.

The Petitioner also made statements in her petition regarding the ownership of certain properties. She maintained that in 2002 she solely financed the purchase of **Title No. KJD/KITENGELA/ [particulars withheld]** where the matrimonial home was built. She stated that she fully funded the construction of the matrimonial home except the roofing which the Respondent paid for. In addition, the Petitioner averred that she is the lawful owner of a parcel of land adjacent to their matrimonial home for which she paid the entire purchase price, and the said amount was transmitted to the vendors by the Respondent because they were exclusively known to him. The Petitioner accused the Respondent of deliberately refusing, despite

her numerous requests, to introduce her to the vendors of the said land for the purposes of processing the title document. She further stated that she co-owns a piece of land with the Respondent situated in Rongo for which they jointly contributed towards its purchase.

The Petitioner further deponed that when she returned to the matrimonial home on, 10th March 2013, to collect her personal effects and those of the children, the Respondent demanded that she return the children to the matrimonial home. This made the Petitioner anxious that the Respondent may take custody of the children without consulting her and in the process disrupt their school program. That is part of the reason that the Petitioner applied for and was granted interim orders for legal custody and control of the children by this Court on 11th April 2013. It was the Petitioner's conclusion that the marriage between her and the Respondent had irretrievably broken down due to the Respondent's cruelty. All her efforts, she further explained, to rebuild the marriage had been frustrated by the Respondent's conduct and behavior which contravened all rules of purposeful matrimony.

The Respondent filed an answer to the petition and cross-petition on 22nd January 2015. He categorically denied the Petitioner's averments that she purchased the property **Title No. KJD/KITENGELA/ [particulars withheld]** and financed the entire construction of the matrimonial home save for the roofing which was paid for by the Respondent. He also denied that he was in possession of or had denied the Petitioner access to the certificate of title of land situated next to the matrimonial home which was purchased by the Petitioner from persons known to the Respondent. He further dismissed as unfounded the Petitioner's allegations that he was cruel to her and the children of the marriage, arguing instead that he had always been a loving husband and responsible father during the marriage. The Respondent stated that he had supported and financed the Petitioner's master's degree studies and had taken full psychosocial and financial responsibility over the children during that period. According to the Respondent, the Petitioner was by contrast extremely cruel, adulterous, abusive and quarrelsome during their marriage.

The Respondent specified certain instances to illustrate the Petitioner's cruelty towards him. He alleged that the Petitioner prevented the children from going to visit the home of the Respondent's parents; insulted the Respondent's parents; sent him a message informing him that that M.O.O., their 1st born child, was not the Respondent's son and that he knew and had met his real father; deserted the matrimonial home with the children and carted away all household goods that she could carry; unilaterally transferred the children from schools where the Respondent had already paid fees and took them to an unknown place; habitually mistreats the children of the marriage; has refused to inform the Respondent of the children's whereabouts and continues to deny him access to them; and stole all title the documents for the Respondent's properties and took them to her co-adulterer, one M.M.

The particulars of the Petitioner's alleged adulterous lifestyle were also specified by the Respondent. He specified that on 3rd March 2013 the Petitioner returned to the matrimonial home at 10 a.m. in the morning after spending the night with M.M.; told him that the children of the marriage were not his biological children and that he had the option of remarrying and having his own; and entertained a late night phone call from M.M. for 20 minutes and subsequently kissed her phone loudly telling M.M. that she loved him. The Respondent also alluded to text message correspondence between the Petitioner and M.M. which suggest the extent of their illicit intimacy particularized in the petition.

The Respondent concluded that, in light of the particulars of cruelty and adultery set out in his cross-petition, the marriage between him and the Petitioner had irretrievably broken down. The Respondent further took issue with the fact that the Petitioner had raised matters concerning matrimonial property and intimated that he would challenge this by way of preliminary objection on point of law and seek to have those matter canvassed in a different suit.

On 5th March 2015 the Petitioner filed a reply and answer to the Respondent's cross-petition. She rejected the Respondent's claim that he financed her studies, stating that she solely paid for her studies partly from the shares that she had in Mwalimu Cooperative SACCO and partly from a bank loan that she obtained from Cooperative Bank. She also stated that the Cooperative Bank loan, which she is still repaying, was

also used to purchase a welding machine, to buy a water tank and piping for the matrimonial home, to install electrical wiring in the home, and to buy an incubator for hatching chicks. She dismissed the allegations of cruelty to the Respondent and the children and stated that she has always been a dutiful wife and responsible mother. She specified that the Respondent was interdicted and later resigned without informing her while she was studying for her master's degree, thereby causing her to bear the family's entire financial burden alone. In response to the particulars of cruelty specified in the Respondent's cross-petition, the Petitioner said that she never prevented the children from visiting the home of the Respondent's parents but only raised concerns regarding the comfort of the children during the visit. She denied ever insulting the Respondent's parents or saying that the children of the marriage were not sired by the Respondent, and stated that the Respondent harassed the children and failed to spend time with them thus causing them to feel neglected.

More details were provided by the Petitioner regarding the alleged eviction by the Respondent of the Petitioner and the children from the matrimonial home on 3rd March 2013. The additional information was that the Respondent openly and publicly told the Petitioner and the children never to return to the matrimonial home, and he subsequently pushed the last born child with such force that he hit the car. Regarding the allegation that she unilaterally changed the schools that the children attended, the Petitioner explained that this was prompted by the Respondent's refusal to pay the children's educational and medical expenses. She also disclosed that since the separation the Respondent has only communicated twice by way of text message but has never called either the Petitioner or the children. The Petitioner denied the allegation that she had taken the title deeds of the Respondent's properties but admitted to having the title deed of the property **Title No. KJD/KITENGELA/ [particulars withheld]** where the matrimonial home stands.

The Petitioner responded to the Respondent's allegations that she had committed adultery with one M.M. who was her co-adulterer and with who she was in an illicit relationship. To the allegation that she spent the night of 2nd March 2013 with M.M., the Petitioner sought to discredit it by stating that she was attending a friend's pre-wedding on that evening and that the Respondent was privy to that information. She dismissed as false fabrications all the allegations of adultery with M.M., attributing them to the Respondent's irrational insecurity; she explained that the Respondent constantly scrolled her phone and called all male contacts to inquire whether they knew she was his wife. She also stated that the Respondent would habitually forward the Petitioner's text messages to himself, and specified an instance in which the Respondent's attempt to access the Petitioner's phone caused it to block.

From the pleadings and oral evidence presented in this matter, this Court finds that the following are the issues for determination to which the Court will focus its legal analysis:

- a. Whether the Petitioner or the Respondent or both have adduced sufficient evidence in their respective presentations to warrant the grant by this Court of a divorce;
- b. Whether this Court can dispose of the issues related to the properties in contention;
- c. If the answer to (b) is in the affirmative, how should this Court proceed with the division of the contested properties between the Petitioner and the Respondent.

The Petitioner and the Respondent contracted a civil marriage in 1999 and this is evident from a copy of their marriage certificate. Accordingly, the substantive law concerning its dissolution 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.*

The statutory period of 3 years has elapsed since the parties got married and thus this Court has proper jurisdiction to determine the matter. The Petitioner's action for dissolution is premised on the ground of cruelty as elaborated in particulars of this marital offence specified in her petition. For his part, the Respondent denies that he conducted himself in a manner that was cruel to the Petitioner and has accused the Petitioner of cruelty and adultery, the particulars of which are set out in his answer to petition and cross-petition. Both parties however agree that the marriage has irretrievably broken down because of the respective faults of the other party. Since our laws prescribe that divorce can only be granted on the basis of a finding of fault, this Court has to carefully evaluate whether the evidence tendered before it is sufficient to establish adultery on the part of the Petitioner and/or cruelty on the part of both parties. The allegations raised and respective evidence adduced by the parties regarding both grounds for the dissolution of the marriage will be analyzed in turn.

The Respondent accused the Petitioner of committing adultery with M.M. on two occasions. One was a few days before 27th November 2011 when she had gone to Mombasa to visit M.M., and the other was on the night of 2nd March 2013 when the Petitioner spent the night away from the home and returned in the morning of 3rd March 2013 at 10 a.m. He also cited text message correspondence between the Petitioner and M.M. in which the common theme was the unhappiness that the Petitioner was enduring in her marriage and a longing for a time when M.M. and the Petitioner could be together. He also cited an instance when M.M. called the Petitioner at night, and she talked with him for 20 minutes and later kissed the phone loudly professing her love for him. But no actual evidence was adduced by the Respondent to demonstrate that the Petitioner and M.M. had committed adultery.

Nonetheless, the very nature of adultery is that it will seldom be apparent since the participants thereto are apt to keep it carefully hidden. As was succinctly put in the case of **MEKM v GLM [2015] eKLR**, that: ***"The culprits do not have to be caught red handed. Illicit affairs are generally not transacted in public."*** Our law obviates the necessity of actual evidence of the commission of adultery and, as was laid down by Madan J (as he then was) in the case of **N v N (2008) 1 KLR 17**, accepts that circumstantial evidence can in certain cases suffice to establish adultery:

To prove adultery, it is not necessary to have evidence of the same. Association coupled with opportunity, illicit affection, undue familiarity and guilt attachment are some of the instances which create an inference upon which the court can act. Circumstantial evidence can prove and establish adultery provided the circumstances are relevant, cogent and compelling.

The probative value of the intimate text messages alluded to in the Respondent's pleadings has been opposed by the Petitioner who dismisses them as falsehoods. She also stated that the Respondent habitually scrolled her phone and forwarded messages to himself. By this she implies that the Respondent may have sent those messages to her phone then subsequently forwarded the same to him. This Court finds that theory unconvincing at best. How would the Respondent have access to M.M.'s phone to reply the messages which the Respondent had composed? Even if it is to be accepted, which this Court does not, that the Respondent composed the text messages, the fact that M.M. replied to them in so affectionate a manner certainly suggests illicit affection and undue familiarity. The Petitioner confirmed that the Respondent would habitually call all male contacts on her phone to inquire whether they knew that she was his wife. This may explain how he came to find out about M.M. and it may also explain why the Petitioner subsequently changed her PIN number hence restricting the Respondent's access to her phone.

The circumstantial evidence examined above would appear to suggest that the Petitioner has a case to answer in respect of the allegations of adultery. However, adultery cannot be so easily established by relying on the circumstances discussed above; it must be shown that circumstantial evidence of the guilty party's conduct are in a context in which they are "**relevant, cogent and compelling.**" Evaluated from an objective perspective, it would seem to be too much of a speculative leap to conclusively say on the basis of circumstances that the Petitioner committed adultery with M.M. The Petitioner has denied any knowledge of M.M. or that she returned home on the morning of 3rd March 2013 after spending the night with the said M.M. Besides text messages and an alleged late night call, there is little else in the form of circumstantial evidence on which an inference of adultery can be made. This Court therefore finds it difficult to conclude that the Petitioner did commit adultery during the marriage.

Both parties have accused each other of physical and emotional cruelty. Likewise to adultery, cruelty is a question of fact and degree, and it can be established on the basis of circumstantial evidence. Two instances of alleged cruelty stand out from the pleadings of the parties. The Respondent gave evidence that the Petitioner came home on the morning of 3rd March 2013 and launched into verbal abuse and told the Respondent that the children of the marriage were not his. For her part the Petitioner testified that she wanted to travel with the children so as to vote in the general election but the Respondent forcefully attempted to prevent her from leaving. She also gave evidence that in the ensuing scuffle, the last born child was violently pushed by the Respondent. Later on the Petitioner left the house with the children and went back to collect some items the following day. This Court has found that the ground of cruelty has been proved on the basis of circumstantial evidence. It is evident that some verbal and physical violence was used by both parties on that day. It is also plausible that the Respondent did kick out the Petitioner. The Respondent did not participate in the trial where he could have challenged that Petitioner's evidence of his cruelty. It can also be reasonably concluded that since the Respondent remained in the matrimonial home after the disagreement, it is likely that he had the upper hand in the fight. This becomes convincing when the fact that the Petitioner had to come with her relatives to collect her items and the children's items. The Respondent's conduct in this regard is sufficient to establish cruelty.

The pleadings of the parties and the evidence on record also make clear that the relationship between the parties has broken down. Both parties have confirmed that irreconcilable differences arose in the marriage, and they would prefer to be divorced from each other. The Petitioner and Respondent have been living separately and apart since March 2013, a period of more than two (2) years. The voluntary separation of the parties can thus be relied on as a conclusive indicator that a marriage has irretrievably broken down, and it provides a valid ground for the dissolution of the marriage. **Section 66(6)(d)** of the **Marriage Act 2014** provides:

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; ...

The final issue concerns the division of the contested properties. The Petitioner gave evidence that she purchased property **Title No. KJD/KITENGELA/ [particulars withheld]** by herself, financed 90% of the construction of the matrimonial home thereon, and also bought an adjacent property to the matrimonial home. The Respondent opposed this as false. The evidence makes clear that the Petitioner has the title document to the matrimonial home, while it is unclear whether the Respondent has processed

the title document for the adjacent property. There is little proof however of the purchase by either parties of the contested properties or their respective contributions towards the purchase. **Section 6** of the **Matrimonial Property Act, 2013** provides that the matrimonial home constitutes matrimonial property and thus this will have to be divided equally between the two (2) parties and the children at an appropriate time.

At this moment, this Court is guided by the provision of **Section 4** of the **Children Act** which prescribes that the best interests of the child shall be of paramount consideration when making any decision affecting the child. The Petitioner who has the custody of the children has given evidence that she is struggling to pay rent and wishes to return to her home in order to afford the children the comfort and stability of living in their own home. This Court has carefully evaluated the facts of this case and it finds that it is only just that the children should not suffer by having to live as tenants elsewhere when they have their own home. The rent money can be used more beneficially to ensure that they get the necessary basic needs. This Court therefore finds that the children of the marriage and the Petitioner should be allowed to return to their home pending the conclusion of the division of matrimonial property. This Court recognizes that the Petitioner who has had custody of the children for the 2 years during which the parties have been living separately and apart should continue to have the custody, care and control of the children. The Respondent should also discharge his legal and moral obligations to contribute towards the welfare of the children which includes but is not limited to paying child maintenance until the children reach the age of majority.

In the premises therefore, this Court finds it just and equitable to order that the marriage between the Petitioner and the Respondent that was solemnized on 1st October 1999 be and is hereby dissolved:

- a. Decree nisi to issue forthwith;
- b. Decree absolute to issue thereafter within 6 months;
- c. The Petitioner and the Respondent to file their respective affidavits of means in Court within 60 days to enable the Court dispose of the issue of the maintenance of the children by the Respondent;
- d. The property known as **Title No. KJD/KITENGELA/ [particulars withheld]** be the exclusive home of the Petitioner and the children of the marriage pending the final determination of the ownership and respective contribution towards the acquisition and development of the contested properties.
- e. The Respondent and the Petitioner to file in Court the relevant information concerning the purchase of the property adjacent to the matrimonial home for the final disposal of the division of matrimonial property.
- f. Any aggrieved party is at liberty to apply;
- g. No orders as to costs.

READ, SIGNED AND DATED AT NAIROBI THIS 28TH DAY OF JULY 2015

M. MUIGAI

JUDGE

In the presence of:

Counsel for the Applicant Ms. Nyambura for Nungo Oduor & Waigwa