



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

DIVORCE CAUSE NO. 2 OF 2015

E.N.CPETITIONER

VERSUS

D.M.NRESPONDENT

J U D G M E N T

1. Before this court is the petition of E.N.C, herein “*the Petitioner*” which was filed on 5th January 2015 seeking to have the marriage between her and D.M.N, herein after “*the Respondent*”, dissolved on the ground of desertion.

2. The Petitioner and the Respondent lawfully married each other on 23rd December 2009 and their marriage was solemnized at the Office of the District Commissioner in Kajiado North District. A copy of the Certificate of Marriage is annexed to the Petitioner's petition as proof of the marriage.

3. There is one child of the marriage, namely J.N.M born on 24th January 2011. The Petitioner seeks to have the custody of the child of the marriage granted to her. The Petitioner currently lives in Nairobi with the child of the marriage while the Respondent lives in Dubai.

4. In her Petition of 5th January 2015, the Petitioner stated that the Respondent shortly after the celebration of their marriage left the matrimonial home and has never returned since. It was for this sole reason that the Petitioner was asking the court to be divorced from the Respondent.

5. The Petitioner served the Respondent with the petition and the Notice to appear on 9th January 2015. Despite service of the petition, the Respondent did not enter appearance neither did he file an answer to the petition nor a cross-petition.

6. On 7th May 2015, the Petitioner, through Counsel, moved the court by way of an application made pursuant to **Rule 29 (1)** of the **Matrimonial Causes Rules** seeking to have the Registrar's certificate issued for the matter to proceed as an undefended cause.

7. The matter was heard on 30th July 2015, and the Petitioner gave both oral and documentary evidence reiterating the averments in her petition. She testified that she lawfully married the Respondent on 23rd December 2009. She told the court that at the time she married the Respondent, the Respondent worked in Dubai.

8. The Petitioner testified that the Respondent left the matrimonial home in the year 2011 and has since not returned. She testified that all efforts at salvaging the marriage have borne no fruit. She told the court

that the Respondent has moved on and now has a child with another woman.

9. The Respondent, despite due service of the petition, did not file an answer to the petition, nor did he file a cross-petition. Hence, the allegation of desertion set out in the petition and reiterated in oral evidence is not challenged by way of pleadings or testimony from the Respondent.

10. From the pleadings and the oral evidence adduced in this case, the issue for determination by this court is whether the Petitioner has adduced sufficient evidence in her presentation to warrant the grant by this court of a divorce.

11. 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 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

12. The statutory period of three years has lapsed since the parties got married and thus this court has proper jurisdiction to determine the matter. The Petitioner seeks to have the marriage dissolved because of the alleged desertion by the Respondent. The ground of desertion is a question of fact which requires the court to assess it on the evidence adduced by the Petitioner. The standard of proof in establishing the ground of divorce is a preponderance of probability.

13. This was elaborated by the Court of Appeal in the case of **ALEXANDER KAMWERU VERSUS 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.

14. The evidence on record shows that the Respondent left the matrimonial home in the year 2011 and has not returned since then. It is important to recall that the Respondent did not make any presentation before this court to the content of the petition for divorce, and thus this court will have to rely on the evidence adduced in court by the Petitioner. This court therefore finds that the Petitioner proved the matrimonial offence of desertion to the required standard of proof.

FINAL ORDERS

In the premises therefore, this court orders;

a) That the marriage between the Petitioner and the Respondent that was solemnized on 23rd December 2009 be and is hereby dissolved;

- b) Decree nisi to issue forthwith;
- c) Decree absolute to issue thereafter within 60 days;
- d) Any aggrieved party is at liberty apply;
- e) No orders as to costs.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 25TH DAY OF SEPTEMBER, 2015

M. W. MUIGAI

JUDGE

In the presence of;

Guduto holding brief Mr. Okello for the Petitioner