



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII
DIVORCE CAUSE N0.7 OF 2013

E M A.....PETITIONER/APPLICANT

VERSUS

K O O.....RESPONDENT/RESPONDENT'

JUDGMENT

The Petitioner herein **E M A** in her Petition dated 25th June 2012 prays for judgment against the respondent herein **K O O** for:-

- a) A declaration that the marriage between her and the Petitioner is a nullity and void.**
- b) Costs of the Petition.**

The Petitioner has stated that she was lawfully married to the Respondent under the **Marriage Act Cap.150 Laws of Kenya** and their marriage was solemnized at District Commissioner's Office, Nyamira on 3rd May 2007. At the time of solemnizing the said marriage she (*Petitioner*) was a spinster aged 25 years old while the respondent was a bachelor aged 28 years old. Immediately after the solemnization of the said marriage, the respondent refused to consummate the said marriage and to date (*more than 5 years*) their marriage has never been consummated. She has further contended that the respondent did not take her to the matrimonial home and all this time she has been living with her parents at her maiden home. Hence she contends that the respondent has deserted her without cause for a period of over five (5) years since the celebration of the said marriage.

The Petitioner has particularized her particulars of none consummation as follows:

- i) Willful refusal of the respondent to consummate the marriage,**
- ii) Willful refusal of the respondent from taking your humble Petitioner to his matrimonial home or any other place for purposes of consummating the marriage.**

She has also particularized particulars of desertion as follows:

- i) Immediately after the celebration of the marriage the respondent deserted your humble Petitioner.**
- ii) The respondent has deserted your humble Petitioner without cause for over five (5) years since the celebration of the said marriage.**

Since the celebration of the said marriage, the Petitioner has further contended that the respondent has

willfully refused to consummate the marriage and has completely withdrawn from her and thus refused to take her to his matrimonial home. She is now staying with her parent's in her maiden home. Hence the Petitioner's claim against the Respondent is for a declaration that since the marriage was never consummated, the same is a nullity.

Under **Section 13** of the **Matrimonial Causes Act Cap.152**, a husband or wife may present a Petition to seek a declaration that his or her marriage is null and void on any of the grounds stipulated in **Section 14** of the said **Act**. These include non-consummation of the marriage.

The respondent appears to have been served with the above petition but nevertheless declined to file a Memorandum of Appearance and reply to the Petition. Hence the petitioner instructed her advocate to make an application **(an Originating Summons ex parte under Rule 30(2) of the**

Matrimonial Causes Rules) for the Deputy Registrar of this court to issue a certificate as required by **Rule 30(2)** for the matter to be fixed for directions. The matter was fixed for directions before the Deputy Registrar of this court who allowed the matter to proceed for hearing *ex parte* before this court.

The above matter came for hearing before me on 10th June 2015. The petitioner herein E M A told the court that she knew the respondent herein K O O in 2007 when he proposed for marriage and they married on 31st July 2007 at the DC's office, Nyamira. That at the time she was aged 25 years while the respondent was aged 28 years. They were then issued with a certificate of marriage which she produced as P. Exh.1. Immediately after the solemnization of their marriage, the respondent and his cousin disappeared during their wedding reception and did not come back. She then opted to go back to her maiden home embarrassed and she alleged not to have seen the respondent since that time. She further stated that she did not know his (*respondents*) parents.

She further stated that there was no consummation of the marriage since 31st July 2009 to date, she has not heard from him as his phone had been switched off and that notwithstanding, the respondent had moved from where he was staying. On consulting her advocate, she was advised that she waits for 3 years to lapse so that she can file a case. She contended that their marriage was never consummated and the respondent also deserted her. She denied of ever conspiring with the respondent to bring this proceeding to this court. Hence she prayed that this court declares her marriage to the respondent a nullity.

The marriage between the parties is valid and will continue to exist until the court pronounces a decree of nullity. Petitioner has instigated the proceedings to have the marriage nullified. The marriage is voidable in law if no consummation has taken place. So as to succeed in obtaining a decree nullifying, a marriage on the ground of non consummation, the Petitioner must prove willful refusal to consummate the marriage; this connotes a deliberate decision without lawful excuse not to have sexual intercourse with the Petitioner. To determine this, it is incumbent for the court to look at the history of the marriage. The Petitioner must show she has acted reasonably and has unsuccessfully taken such steps as a reasonable wife would take in the circumstances. She must show that the marriage has not been owing to the respondent's willful refusal which implies a conscious act of volition if the petitioner has acquiesced, he cannot come around and make a charge of non-consummation against the respondent.

The marriage was on 31st May July, 2007 the respondent disappeared during the reception of the said marriage with a cousin and has never been seen again by the Petitioner. According to the Petitioner's testimony, she had never met the respondent's parents, she tried to call him from his mobile number but the same had been switched off. Furthermore, she tried to look for the respondent at his place of abode, but it turned out that he had moved out. The Petitioner in the end went back to her maiden home a situation she termed embarrassing

In my humble view all the above facts point to the fact that the petitioner was ready and willing to be a wife to the respondent. Even after being abandoned during their wedding reception by the respondent, she took steps to try and save her marriage. She tried to reach out to the respondent via phone calls and even going to look for him at his place of residence but to no avail. In my mind it seems the respondent

was set on abandoning her immediately after taking their vows never to return to her again. The respondent's character to my mind demonstrates the fact that he willfully deserted the Petitioner on the day of their wedding; the Petitioner took reasonable steps to reach out to him but to no avail hence he (respondent) was set on not consummating their marriage. Therefore the respondent has willfully and unreasonably refused to have their marriage consummated.

For this reasons, I find merit in the petition and allow the same. I hereby declare that the marriage between the petitioner and the respondent is a nullity and void and award costs of the petition to the petitioner. ·

Dated, signed and read in open court at Nyamira this 27th day of November, 2015.

HON C. B. NAGILLAH

JUDGE

In the presence of:

Ombachi hold brief for Momanyi Aunga for the Petitioner Respondent in person (absent) for the respondent

Omayio - Court Clerk