



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**FAMILY DIVISION**  
**JUDICIAL SEPARATION CAUSE NO. 55 OF 2008**

**J L M.....PETITIONER**

**-VERSUS-**

**J L M.....RESPONDENT**

**JUDGEMENT**

1. The Petitioner herein is the wife of the Respondent. The parties lawfully got married on 24<sup>th</sup> August 2002 at the AFC Complex Gardens in Nairobi District under the African Christian Marriage and Divorce Act (Cap.151). A copy of Certificate of Marriage No. *[particulars withheld]* is annexed to the Petition filed herein on 21<sup>st</sup> May 2008. They then lived and cohabited at Convent Drive, *[particulars withheld]*, Nairobi. The said marriage was blessed with two children. The Petitioner was a house wife at the time whereas the Respondent was a Consultant at *[particulars withheld]*.
2. The Petitioner seeks in the main an order for judicial separation. There are also prayer for ancillary reliefs. One is for the custody, care and control of the children of the marriage – that is to say J M M *[minor]* and J W M *[minor]* - until they attain the age of majority. The second one is for maintenance for the children of the marriage and maintenance for the Petitioner. The third ancillary order is for injunctions to restrain the respondent and/or his servants or agents from evicting the Petitioner from the matrimonial home and/or in any way interfering with the Petitioner's peaceful living, and to restrain the respondent and/or his servants or agents be restrained from harassing, abusing, threatening and or in any way interfering with the Petitioner.
3. The Petitioner has sought an order for judicial separation on one ground, cruelty. Particulars of the cruelty are specified in the petition – these include the alleged uncaring attitude of the respondent towards the petitioner, refusal of the petitioner by the respondent to drive the family car, refusal by the respondent to give the petitioner a lift when he found her at a bus stop, being asked by the respondent to leave the matrimonial home as the same was not a lodge and that the marriage had ended, lack of communication between the parties, humiliation of the petitioner by the respondent who communicates with house-helps on the welfare of the children of the marriage instead of addressing the petitioner personally and directly, taking the children and their servants on holiday to Mombasa and excluding the petitioner, verbal abuse, intimidation, removal of all her photographs from the matrimonial home, being chased out of the matrimonial bedroom and being forced to stay in a guest-house, denial of conjugal rights, among others. She avers that as a consequence of the Respondent's cruelty, the marriage has irretrievably broken down.
4. When the petition was served upon the Respondent, he filed his Reply to Petition and Cross-Petition. In his Reply to Petition, he denied all the allegations in the petition and specifically the particulars of cruelty as contained in paragraph 7 of the Petition. In the cross-petition, the

Respondent states that during the subsistence of the marriage, the Petitioner treated him with cruelty. The particulars of cruelty are set out in the cross-petition, they include physical assault, pathological suspicion and mistrust, deception, rudeness and disrespect, defiance and arrogance, embarrassing the respondent in the presence of his juniors and co-workers, abandoning the family, stealing, non-communication, denying the respondent her company and consortium, spreading falsehood and malicious allegations about the respondent, among others. As a result, the marriage has irretrievably broken down, making it difficult for the parties to cohabit as husband and wife.

5. The Respondent prays that the Petitioner's petition be dismissed and that judgment be entered for the Respondent for the principal prayer that the marriage between the Petitioner and the Respondent be dissolved. He also seeks that custody of J M M [minor] and J W M [minor] be granted to him. He also prays that the Petitioner be restrained from removing J M M [minor] and J W M [minor] from the jurisdiction of this Honourable Court without a Court order, with the subsidiary order that the Petitioner be ordered to deliver the passports and birth certificates of J M M [minor] and J W M [minor] in Court. He also prays that the Petitioner be ordered to return common property taken out of the matrimonial home.
6. In her answer to cross-petition, the Petitioner denies each and every averment contained in those pleadings. As a result, the petitioner prays that the Respondent's answer and cross Petition be dismissed and judgment be entered as prayed in the Petition.
7. The parties gave oral evidence which gave vent to their respective cases as set out in their pleadings. Counsel filed written submissions which they subsequently highlighted. Having carefully considered the petition, answer to petition and cross-petition, the oral evidence recorded from the parties as well as the rival submissions by counsel for the respective parties, I have formed the view that the main issue for consideration is whether the marriage should be dissolved or whether the parties should be judicially separated.
8. This court had earlier on dealt with the issue of custody and indeed granted joint legal custody of the issues of the marriage to the Petitioner and the Respondent. The parties had recorded their consent in as far as legal custody of the issues of the marriage is concerned.
9. Mrs. Thongori, Counsel for the Petitioner, submitted that the marriage can be saved and argued that separation might help heal the rift. Learned counsel further contended that parties having lived separately since 2010, there has been no cruelty since then. She submitted that most of the allegations of cruelty show that there was condonation. She further submitted that the Petitioner had not dropped her prayer for maintenance for herself, and that the petitioner still requires contribution for maintenance of the children. It was submitted the sum of Kshs. 70,000 that parties had agreed on still subsists and that the Respondent has not been paying it. She submitted that the court should order for judicial separation and that the Respondent should meet the Kshs. 70,000 that the petitioner had asked for.
10. On her part Mrs. Mbugua counsel for the Respondent contended that the marriage has irretrievably broken down as way back in 2007 and that both the Petitioner and Respondent have said so. She submitted that the Petitioner in 2010 wrote to say that there was no marriage; no conjugal rights since 2007 and that no process leading to reconciliation was underway. Counsel submitted that the Petitioner admits contributing to the break down of the marriage. Further, it was counsel's submission that the children are catered for and that there are consent orders on the children dated 20<sup>th</sup> August, 2010 and 30<sup>th</sup> November 2010. She argued that the Petitioner is now independent and that she has a good job and earns Kshs. 348,000.00 per month since 2010.
11. I note that the Petitioner prays for judicial separation on the ground of cruelty on the Respondent's part. The said ground is one of the grounds on which a Petition for divorce might be presented. Indeed **Section 17 (1) of the Matrimonial Causes Act** provides:

***“A Petition for judicial separation may be presented to the court by either the husband or the***

*wife on any grounds on which a Petition for divorce might have been presented, or on the ground of failure to comply with a decree for restitution of conjugal rights, and the provisions of this Act relating to the duty of the court on the presentation of a Petition for divorce, and the circumstances in which such a Petition shall or may be granted or dismissed, shall apply to a Petition for judicial separation.”*

12. For reasons best known to the Petitioner, she asks for an order of judicial separation and yet she states at paragraph 8 of her petition that as a consequence of the alleged Respondent's cruelty, the marriage had irretrievably broken down. Apart from the ground of cruelty, the petitioner has not given any reasons or explanations as to why she is seeking a decree of judicial separation rather than a divorce. Generally speaking, there are three more or less valid reasons why the parties to a marriage may seek a decree of judicial separation rather than a divorce. Firstly, at least one of the parties to the marriage is opposed to divorce for some reason - typically for religious or cultural reasons. Secondly, there is an absolute bar to divorce within the first three years of a marriage and so judicial separation may be all that is available if the parties are determined to formalize the break by court proceedings within the first year. Finally, for some reason it may be difficult to prove the irretrievable breakdown of the marriage necessary for a divorce. It is obvious that none of the three conditions do exist in this instant case or have not been pleaded by the petitioner. It has to be said that unless both parties to the marriage are opposed to a divorce for religious or conscientious reasons it is difficult to see how it can ever be in anyone's interest to petition for a decree for judicial separation instead of a divorce.

13. The petitioner herein wants to obtain a decree for judicial separation and the Respondent from his cross-petition and submissions has no difficulty with dissolution of the marriage and in fact prays that the marriage be dissolved. My considered view would be, bearing in mind a normal marital relationship has not existed between the spouses for almost seven years and considering that both parties are in one mind on the fact that the said marriage has irretrievably broken down, divorce would be a much better option because judicial separation does not really allow the parties to move on. Certainly, the testimony the Court has received from both parties shows the marriage has irretrievably broken down due to opposing views towards it by both parties. It is further undeniable that the couple has treated each other cruelly. They have not shared conjugal rights since 2007 and they have lived separately since August, 2010. Clearly, they have not shown this court that they have made effort to reconcile since then. I agree with the counsel for the Respondent that indefinite separation would yoke parties who by their own admission are in a dead marriage. As has been stated here above, this would not be in anyone's interest. Furthermore, **Section 8** of the Matrimonial Causes Act clearly provides for the grounds of petition for divorce, and one of such ground is cruelty. **Section 8(1)** (c) states that-

*“A petition for divorce may be presented to the court either by the husband or the wife on the ground that the respondent has since the celebration of the marriage treated the Petitioner with cruelty.”*

14. I have observed and noted that both the petition for judicial separation and the cross-petition are premised on cruelty and the parties have given elaborate particulars of cruelty. The ground for cruelty and the particulars therein meet the threshold that the said marriage has irretrievably broken down and as a result satisfies the ground for which this marriage should be dissolved. In view of the foregoing, the cross-petition filed by the Respondent should be allowed and the order that the marriage in fact solemnized between the parties herein be dissolved should be granted.

15. On whether the petitioner is entitled to maintenance as sought, I refer to the Consent dated 20<sup>th</sup> August 2010 where the Respondent agreed to pay a sum of Kshs. 70, 000.00 until the case was heard in October 2010, and that if the case was not concluded in October 2010, the parties may renegotiate an infinite period during which the Respondent would continue to pay maintenance to the petitioner. Counsel for the Petitioner has contended that the Respondent paid the said Kshs. 70,000.00 until mid-2011 and then stopped and that it is the petitioner's case that she still requires the said sum of Kshs. 70,000.00 to bring up the children. The Respondent has however, objected

to an award of Kshs. 70,000 per month and states that it is totally against the letter and spirit of the consent which was adopted as the order of the court on maintenance and custody at the interlocutory stage and at the final stage. It was further submitted that a consent can only be varied by consent of the parties as expressly stated in the consent itself and that the respondent has solely taken the growing bills relating to the children's education relieving the petitioner of her legal duty to provide education. It was also submitted that the court should not set aside the consent unless there exists grounds that would vitiate a contract. None of these have been pleaded and proven. It was further submitted that if the Respondent is ordered to pay the petitioner Kshs. 70,000.00 per month, she would be left with a balance of Kshs. 50,000.00 from her unsupported and unproven budget, arguing that the Respondent has a home to run, school fees and school related expenses to pay, household and living expenses for the children when they are in his care, maintenance for the first child as well as to meet his living expenses from a salary of Kshs. 430,000.00 a month and that such an order would be oppressive and unjust to him.

16. I do not accept that the Petitioner has established the grounds that would satisfy this court to set aside the said consent whose terms are fairly clear. I agree with the respondent that the petitioner has not pleaded and proved any ground that would warrant the setting aside of the said consent. In view of the fact that the issues of custody, care, control and maintenance of the children have been settled by consent of the parties, I hold that the petitioner is not entitled to the said sum of Kshs. 70,000.00 and that the parties should stick to the terms of the said consent.

17. In the end I make the following orders-

- a. That the marriage celebrated on 24<sup>th</sup> August 2002 between the petitioner and the respondent is hereby dissolved;
- b. That custody and maintenance of the children of the marriage shall be governed by the terms of the consents on record dated 20<sup>th</sup> August 2010 and 30<sup>th</sup> November 2010;
- c. That decree *nisi* shall issue forthwith, to be made absolute after 45 days
- d. Each party shall bear their own costs.

18. It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI this 28<sup>th</sup> DAY OF March, 2014.**

**W. MUSYOKA**

**JUDGE**