



REPUBLIC OF KENYA



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**SCC v MKC (Succession Cause 16 of 2012)
[2014] KEHC 6070 (KLR) (20 March 2014) (Judgment)**

S C C v M K C [2014] eKLR

Neutral citation: [2014] KEHC 6070 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 16 OF 2012
GWN MACHARIA, J
MARCH 20, 2014**

BETWEEN

SCC PETITIONER

AND

MKC RESPONDENT

JUDGMENT

1. By a Petition dated 2nd October, 2012, the Petitioner, S C C prays for the following orders:-
 - (a) That the marriage between the Petitioner and the Respondent be dissolved.
 - (b) That the Petitioner be granted the custody of the child.
 - (c) That the Respondent to provide maintenance to the Petitioner and child.
 - (d) Alimony pending petition.
 - (e) Mandatory injunction to restrain the Respondent from interfering with the Petitioner.
 - (f) That the Petitioner be awarded costs of this cause.
 - (g) That the Petitioner may have such further or other reliefs as this Honourable Court may deem fit and just to grant.

2. It is the Petitioner's case that she started cohabiting with the Respondent M K C sometime in the year 1997. They later legalized their marriage in the year 2005 at the District Commissioner's office at Nandi Hills. They thereafter lived in Nandi Hills. They were not blessed with any issue but adopted a child by the name E C. The Petitioner avers that since the celebration of her marriage with the Respondent, the latter has treated her with cruelty as a result of which the marriage has irretrievably broken down.



3. She has stated the particulars of cruelty, desertion and fraud by the Respondent in paragraph six (6) of the Petition as constituting the reasons she wants the marriage to be dissolved.
 - (a) The Respondent is a person of quarrelsome disposition and has on many occasions been disrespectful and arrogant to the Petitioner.
 - (b) The Respondent is rude and abusive to the Petitioner and her relatives.
 - (c) The respondent willfully and intentionally leaves the matrimonial home and spends long unexplained moments away engaging in acts of immorality. Though with several requests and demands from the Petitioner that such habit should cease he has failed to take heed.
 - (d) The Respondent is contemptuous of the Petitioner and has no commitment whatsoever with marriage.
 - (e) The Respondent deserted the matrimonial home for the last four – five years without any plausible explanation.
 - (f) The Respondent has severally forged documents of the Petitioner and fraudulently obtained/ received Petitioner's shares, dividends and other benefits of the Petitioner without her authority or consent.
 - (g) The Respondent has made the Petitioner a pauper after secretly and fraudulently inducing her to secure loans and credit facilities and solely utilized by the Respondent.
 - (h) The Respondent has shown utter contempt towards their marriage and total lack of matrimonial commitment.
 - (i) The Respondent has been totally unable to perform his matrimonial responsibilities causing embarrassment to the Petitioner before members of the society.
 - (j) Failing to dialogue and communicate with the Petitioner during the subsistence of their marriage.
4. She states that she has not been accessory to or connived with the Respondent or condoned his conduct in particular the above cruelty or the fraud.
5. On 12th November, 2012 the Respondent filed an answer to Petition. He concedes that they were not blessed with any child but denies they adopted the child E C. He has denied ever treating the Petitioner with cruelty but agrees that the marriage has irretrievably broken down.
6. In cross-Petition, the Respondent avers that since the celebration of their marriage, the Petitioner has been guilty of matrimonial offences, particulars of which are as follows:-
 - (a) Using abusive language against the Respondent.
 - (b) Denying the Respondent conjugal rights.
 - (c) Being extremely hostile to the Respondent.
 - (d) Barring the Respondent from accessing the matrimonial home.
 - (e) Causing the Respondent mental torture.
7. He has also listed particulars of adultery as follows:-
 - (a) Bringing several men to the matrimonial home.



- (b) Committing adultery with the aforesaid men.
8. He prays that the Petition be dismissed with costs, that the cross-petition be allowed and the marriage between both parties be dissolved and for costs of the cross-petition.
 9. The Petitioner testified as PW1. She produced the marriage certificate which shows that the marriage between herself and the Respondent was celebrated on 1st July, 2005 at District Commissioner's office, Nandi North. In addition to the averments in the Petition, she testified that she had a problem with conceiving and when she sought medical help she was told that her fallopian tubes had blocked and it was therefore impossible for her to get (bear) a child. That this caused the Respondent to start beating her and calling her barren. That it is then the Respondent sent his sister-in-law to her to tell her that he had married another woman with whom he already had a child. She stated that in 2008, the Respondent deserted the matrimonial home and went to live with the other woman in Kapsabet.
 10. The Petitioner further testified that during the subsistence of their marriage the Respondent would force her to take loans from which she never benefited. She said that the Respondent also fraudulently transferred some of the Petitioner's shares from Siret Tea Factory Sacco to himself and the said shares were only reinstated after she lodged a complaint with DCIO Nandi Hills.
 11. It was the Petitioner's evidence that she adopted the child E C who is her relative after the Respondent had deserted the matrimonial home. She states that the Respondent has however refused to maintain the said child, who in any event, is an orphan.
 12. The Petitioner denied she had ever used abusive language toward the Respondent or denied him his conjugal rights. She also denied bringing any men to their matrimonial home. She said, to the contrary, the Respondent could not allow her female friends to visit her in their house.
 13. On cross-examination, the Petitioner said that a neighbour and a house-help heard the Respondent insulting her. She however said that the Respondent did not force her to take the loans contrary to her earlier assertion. She said she contributed to the acquisition of the matrimonial property, and that it was after her separation with the Respondent that her parents decided that she should not stay alone after which she brought the young boy to live with her.
 14. In re-examination she said she took the loans to help her husband who needed the money and this she did in good faith. She said the Respondent contributed very little money to the construction of the matrimonial home which is not yet complete.
 15. The Respondent who testified as DW1 stated that his marriage with the Petitioner was all well until the year 2008 when they started fights. He said the Petitioner was cruel to him and would lock him outside the house and then start screaming while shouting that he wanted to beat him. He narrated that one day he went home only to find Petitioner with three men who ran out of the home through the back door on seeing him. He said he lives on the family house as opposed to Kapsabet as claimed by the Petitioner.
 16. In response to the claim of the alleged fraudulent transfer of shares, he said that they planted tea together on a piece of land and sold it to the Co-operative (Siret) Society. He said both agreed that the Petitioner be the registered shareholder but later they agreed that the shares be transferred into his name. He denied that the said shares were fraudulently transferred to him.
 17. It was also the Respondent's testimony that the child E C was not legally adopted and that he was not involved in bringing him to their matrimonial home. He said he would not maintain the child because he did not know to whom he belonged. He however said that he did not wish to divorce the Petitioner and his prayer was that they continue to live together as husband and wife.



18. In cross-examination, the Respondent said that he had filed the Cross-Petition in anger and he does not at all want to divorce the Petitioner. He however admitted to having married another woman with whom he has two children. He also admitted to having beaten the Petitioner as a result of which he was charged with assault, convicted and fined Kshs 3,000/=. He said that he and the Petitioner agreed that he marries another woman but the Petitioner refused to live with this other woman.
19. On the issue of loans, the Respondent said that although the Petitioner borrowed loans, he did not know how she spent the money. He said that the Petitioner had never given him any of the cash from the borrowed loans.
20. I have accordingly considered the evidence by both the Petitioner and the Respondent and I find the issues for determination to be:-
- (a) Have both parties proved their cases against each other to warrant the dissolution of the marriage?
 - (b) Is the Petitioner entitled to both alimony and maintenance of both herself and the child?
 - (c) Should the court grant a mandatory injunction to restrain the Respondent from interfering with the Petitioner?
 - (d) Who is entitled to the custody of the child?
 - (e) Who should pay the costs of the Petition and the Cross-Petition?
21. With respect to issue for determination No (a), the main grounds advanced by both parties as to why the marriage should be dissolved are:-
- (i) Cruelty
 - (ii) Adultery
 - (iii) Desertion
 - (iv) Fraud
22. But before I address myself to the above it is important to first determine what the standard of proof of an offence in a divorce cause is. In Divorce Cause Appeal Between *Alexander Kamweru v Anne Wanjiru Kamweru* (2000) eKLR being an appeal from a Judgment of the High Court of Kenya Divorce Cause No 75 of 1992, the Court of Appeal gave guidelines on the applicable burden of proof as:-
- “Applying the yardstick of the burden and standard of proof as set out above we would say that the feeling of some certainty by Court, that is being satisfied as to be sure; means being satisfied on preponderance of probability. 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.”
23. On cruelty in *DM v TM* (2008) 1 KLR, 5, Chesoni, J. as he then was, said:-
- “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.”

24. In the instant case, the Petitioner stated that the Respondent physically beat her, a fact the Respondent conceded to on cross-examination. The cruelty was so grave that it culminated into the Respondent being charged with assault, an offence for which he was convicted. She also said that after it was medically confirmed that she could not conceive to give birth, the Respondent mentally tortured her by calling her a barren. To ensure that the Petitioner got the information that she was barren correctly, the Respondent started cohabiting with another woman with whom he has two children. In furtherance of the mental torture, the Respondent sent his own sister to inform the Petitioner that he already had a child with the woman he was living with. Such a move was not only painful but pretty insensitive. The combination of all these commissions leave no doubt in my mind that the Respondent was both physically and mentally cruel to the Petitioner. Indeed, notwithstanding that adoption of the child E C was not in accordance with the legal procedure (albeit I will revisit the issue hereafter), the Petitioner did the 'adoption' in search of warmth that every woman yearns for in a marriage – which is the company of a child.

25. I am also convinced that, although the Petitioner may have locked out the Respondent from the house, she did so due to the cruelty (especially physical) she experienced under the hands of the Respondent. Therefore, if the Respondent was subjected to any form of cruelty by the Petitioner, it was in response to self defence by the Petitioner and so the Respondent was the author of his own misfortunes. For this reason, I hold it is the Respondent who was cruel to the Petitioner and not the vice versa.

26. On adultery, Madan J, as he then was, in *N v N* (2008) 1 KLR, 17, said:-

“ Adultery is that physical act of sexual union between two married persons of the opposite sex not lawfully wedded to each other. To prove adultery, it is not necessary to have direct 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.”

27. And in *DM v TM* (*supra*), Chesoni, J. as he then was, held:-

“ that the evidence required to establish adultery must be more than the mere suspicion and opportunity; evidence of guilty inclination or passion was necessary, nevertheless the evidence of a single witness might suffice to establish adultery, unless that evidence aroused the suspicion of the court when corroboration would be required. The husband in the present case, having raised no more than a state of facts consistent with adultery beyond reasonable doubt.”

28. In this case, the Petitioner has proved the illicit affair the Respondent has had with another woman. This relationship has given rise to two children. Even worse is that the Respondent currently cohabits with this other woman. This state of affair does not only offer an opportunity which has given the parties undue familiarity, but has provided full-prove evidence that indeed the Respondent has committed adultery with his association.



29. It is however impossible to conclude that the three men found in the Petitioner's house by the Respondent were his lovers, or at least one of them. The circumstances under which the Respondent purportedly found them in the Petitioner's house did not provide an opportunity that would be conclusive that there existed an illicit relationship between any of the men with the Petitioner. All the Respondent said is that he found three men in his house and on his arrival they ran away through the back door. The question then begs; which of the men was affectionate to the Petitioner? What was the purpose of their visit? It is my view that the mere fact that the men ran away is not a good enough reason to persuade this court to arrive at the conclusion that the Petitioner had committed an act of adultery with them or one of them. Indeed such action does not meet the thresholds set out in both cases of *N v N* and *DM v TM* (*supra*).
30. On desertion no more evidence than that the Respondent has already gone to live with another woman as husband and wife is required to prove it.
31. In the same spirit, I would rule in favour of the Petitioner with regard to the issue of fraud, given that it was not until the Petitioner reported the complaint of the transfer of the shares into the Respondent's name to the police, that the said shares reverted into the name of the Petitioner. Fraud however is not a ground for divorce. But the acts constituting the fraud demonstrate the cruelty the Petitioner was subjected to by the Respondent.
32. As to the issue of alimony and maintenance, Section 25 of the [Matrimonial Causes Act](#) provides as follows with regard to alimony:-

“25

- (1) In any suit under this Act, the wife may apply to the court for alimony pending the suit, and the court may thereupon make such order as it may deem just:

Provided that alimony pending the suit shall in no case exceed one-fifth of the husband's average net income for the three years next preceding the date of the order, and shall continue in the case of a decree nisi of dissolution of marriage or of nullity of marriage until the decree is made absolute.

- (2) The court may, if it thinks fit, on any decree for divorce or nullity of marriage, order that the husband shall, to the satisfaction of the court, secure to the wife such gross sum of money or annual sum of money for any term, not exceeding her life, as, having regard to her fortune, if any, to the ability of her husband to the conduct of the parties, the court may deem to be reasonable.

- (3) In any such case as aforesaid the court may, if it thinks fit, by order, either in addition to or instead of an order under subsection (2) of this section, direct the husband to pay to the wife during the joint lives of the husband and wife such monthly or weekly sum for her maintenance and support as the court may think reasonable:

Provided that-



- (i) if the husband, after any such order has been made, becomes from any cause unable to make the payments, the court may discharge or modify the order, or temporarily suspend the order as to the whole or any part of the money ordered to be paid and subsequently revive it wholly or in part as the court thinks fit; and
 - (ii) where the court has made any such order as it mentioned in this subsection and the court is satisfied that the means of the husband have increased, the court may, if it thinks fit, increase the amount payable under the order.
- (4) Where any decree for restitution of conjugal rights or judicial separation is made on the application of the wife, the court may make such order for alimony as the court thinks just.
- (5) In all cases where the court makes an order for alimony, the court may direct the alimony to be paid either to the wife or to a trustee approved by the court on her behalf, and may impose such terms or restrictions as the court thinks expedient, and may from time to time appoint a new trustee if for any reason it appears to the court expedient to do so.”
33. The court exercises its discretion in granting alimony based on the above prescribed law and depending on circumstances of each case. In exercising this discretion, I have considered the statement by Odero, J in WN v PB [2013] eKLR, that,
- “... The concept of Alimony originated in England. A wife was deemed to be totally reliant on her husband and would not own property or earn money to support herself. As such upon divorce alimony would provide an economic means to enable the divorced wife to support herself and to prevent her from becoming a public charge ...”
- “.. Although in making orders for alimony the court must exercise its discretion it must be remembered that what is before this court is a prayer for alimony pending suit and not a prayer for permanent alimony. The amount to be awarded in the latter case would require a full interrogation and consideration of the merits of the suit as well as a full inquiry into the income, expenses and needs of each spouse. The purpose of an award of alimony pending suit is to provide temporary support to a spouse (in this case the wife) so that she is not left destitute for the duration of the suit”
34. On maintenance, Justice G.B.M. Kariuki (as he then was) in the case of WMM v BML [2012] eKLR as referred to in WN v PB [2013] eKLR stated that:-
- “In considering a claim for maintenance, regard must be had to the provisions of Article 45 (3) of the Constitution of Kenya which recognizes that “parties to a marriage are entitled to equal rights at the time of the marriage, during marriage and at the dissolution of the marriage”. No spouse who is capable of earning should be allowed to shirk his or her responsibility to support himself or herself or turn the other spouse into a beast of burden



but where a spouse deserves to be paid maintenance in the event of divorce or separation the law must be enforced to ensure that a deserving spouse enjoys spousal support so as to maintain the standard of life he or she was used to before separation or divorce.”

35. Applying the above yardsticks, I am minded that the Petitioner is in permanent employment as a nurse and earns a gross pay of Kshs 72,000/= . She exhibited a pay slip for the month of June, 2012 (P. Exhibit 3) in prove thereof. On the other hand the Respondent is engaged in livestock and tea business. He however did not disclose how much he earns from the two businesses. He was also not cross-examined on this issue by counsel for Petitioner to ascertain what his earnings are. Be that as it may, what is important is that the Petitioner must justify why she thinks she is entitled to the alimony and maintenance. This would require an exhaustive interrogation of specific monetary requirements she thinks she deserves from the Respondent. This factual evidence was not tendered before Court. She also did not state what the Respondent earns as to justify additional support from him vis a vis her needs. For this reason, it is my view that she did not candidly mitigate this justification.
36. While borrowing the noble observation by G.B.M Kariuki, J, as he then was, in *WMM v BML* (Supra) neither alimony nor maintenance should be paid as a matter of course. It should not be used as a field where spouses cash in on their partners. It should be established that the party claiming such alimony or maintenance is incapacitated to make his/her own earnings and therefore deserves the support of the other partner. Further, alimony or maintenance can be paid where, even if a party is earning, is disadvantaged to fully meet the family needs already placed on her/him before the final divorce is pronounced or upon dissolution of the marriage respectively. The Petitioner’s case presents none of these scenarios and I think she cannot benefit from either alimony or maintenance. I think her earnings are sufficient, and if well utilized should cater for herself and the child she adopted.
37. Having said so, it is important to observe that the adoption of the child E C was not legal. It was also done after the separation of the parties and without the consent of the Respondent. As such, the Petitioner must fully shoulder all burden that comes with bringing up the said child.
38. On request for mandatory injunction, the Petitioner testified how the Respondent has threatened to kill her. The assault the Respondent inflicted on the Petitioner was the culmination of actual cruelty against the Petitioner. It is important that each of the parties (especially the Petitioner) lives in peace away from the memory of a soured relationship. This then justifies the need to injunct the Respondent from transferring with the Petitioner.
39. In granting the mandatory injunction, I am persuaded by Onyango Otieno J, as he then was, in *SBI v VMI* (2003) eKLR while citing *Malindi Air Services And another v Halima Abdinoor Hassan* Kenya Court of Appeal (nairobi) Civil Application No 202 of 1998 in which it was stated that “A mandatory injunction at an interlocutory stage is rarely granted; only when the Plaintiff’s case is clear and incontrovertible” The Merriam-webster online dictionary defines incontrovertible as: “not able to be doubted or questioned”. I have no doubt in my mind that the Petitioner is deserving of this relief.
40. Finally, as for custody of the child, the Petitioner took up the child out of her own volition and she should therefore continue with its custody.
41. In the upshot, I find that the marriage between the Petitioner and the Respondent has irretrievably broken down on grounds of cruelty, adultery and dessertion by the Respondent. I declare the same legally dissolved and a decree nisi should forthwith issue. I also issue a mandatory injunction restraining the Respondent from interfering with the life of the Petitioner in any way. Each party shall meet its own costs of both the Petition and the Cross-Petition.

It is so ordered.



DATED AND DELIVERED AT ELDORET THIS 20TH DAY of MARCH, 2014.

G. W. NGENYE - MACHARIA

JUDGE

In the presence of:

Mr. Omboto Advocate for the Petitioner

Mr. Kibii holding brief for Kamau Lagat for the Respondent

