



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**

**DIVORCE CAUSE NO. 16 OF 1999**

**IN**

**G K W.....PETITIONER**

**-VERSUS-**

**R N K.....RESPONDENT**

**JUDGEMENT**

1. The divorce petition herein is dated 12 February, 1999. The Petitioner thereby prays for orders for judicial separation, dissolution of his marriage to the respondent, permanent custody of the three children of marriage, and such other or further relief as this Honourable Court may deem fit and proper to grant.
2. The main ground upon which the Petition is based is cruelty. The particulars thereof are set out in paragraph 7 of the Petition. These include the respondent treating the Petitioner with cruelty by being persistently hostile in her attitude towards him; causing the Petitioner to suffer from mental cruelty and stress and general ill health by the respondent's persistent undesirable conduct of insults, deprivations, selfishness and sheer indifference and negative attitude, belittling the Petitioner when in the presence of the Petitioner's friends and/or business partners and/or acquaintances, deserting matrimonial home on and off without a just cause, the Respondent's very strange habit of deserting the suckling child of the marriage at the age of nine months old thus denying the child motherly love, failing to give solace and companionship to the petitioner, leaving the country for good without a just cause, the Respondent refusing to discuss affairs pertaining to their marriage with the Petitioner, mismanagement of the family's financial account to the tune of Kshs. 800, 000.00, the denial of conjugal rights, and refusal to act in the manner expected of a married woman.
3. The Respondent filed an answer to the petition and a Cross-Petition on 11<sup>th</sup> July, 2008, in which she denied the allegations made in paragraph 7 of the petition. She denied that cohabitation ceased in 19<sup>th</sup> January, 1999 as alleged or at all. She expressly denied being cruel to the Petitioner as alleged in paragraph 7 of the Petition and further denied the particulars of cruelty set out thereunder. Further, and in answer to the particulars, statement and/allegations of cruelty stated in the said paragraph 7 the Respondent states that she has always treated the Petitioner with love, affection, tender care and respect; she denies causing the Petitioner to suffer physical and mental health as alleged or at all; she avers that she has never been selfish, indifferent and negative towards the Petitioner; further she denies belittling or insulting the Petitioner in the presence of third parties as alleged and that she has always conducted herself in a manner befitting her status as a wife and mother; she denies mismanaging finances as alleged and avers that their various business have flourished due to hard work by both of them; she further denies

leaving a suckling baby as alleged or leaving the country for good, and that she left for about a month due to the Petitioner's cruelty and returned back to the matrimonial home where cohabitation was resumed. It is her statement that she has been committed to the marriage and has made a lot of emotional and financial investment in the marriage and the family generally. She denies treating the Petitioner with indifference or denying the petitioner conjugal rights and that the allegations are surprising and a mere excuse to obtain a divorce.

4. In her cross-petition, the Respondent accuses the petitioner of having treated her with cruelty since the celebration of the marriage, and as a result of which the marriage has irretrievably broken down. The particulars of cruelty are that the undermining of the Respondent's self-worth by the petitioner by his persistently insulting her, the petitioner has withheld love and affection from the Respondent, that the petitioner has constantly and frequently displayed a violent uncaring attitude towards the Respondent and the children of the marriage, physically assaulted and verbally abusing the Respondent and the children, abandoning the Respondent in dangerous places in the middle of the night, forcing the Respondent out of a vehicle without caring about the Respondent's safety or wellbeing, failing over the years to spend time with the Respondent or the children of the marriage and always returning home in the wee hours, having several extra-marital affairs with women unknown to the Respondent and thereby causing the respondent untold pain and suffering, threatening to kill her, attempting to kill the respondent by shooting at her, assaulting the Respondent by kicking and strangling her, forcing the Respondent to leave the matrimonial home at 4.30 am, treating the respondent's relatives with cruelty coldness and in the most unacceptable manner, being very unkind when the Respondent's sister J died by refusing the Respondent to fully engage and participate in the funeral arrangement, refusing J's son to stay in their matrimonial home and has continued to use very unkind words towards the deceased which has distressed the Respondent a great deal, among others.

5. Further, the Respondent alleges that the petitioner has since the 24<sup>th</sup> June, 2008 been guilty of constructive desertion. That on the said 24<sup>th</sup> June, 2008, the Respondent left the matrimonial home due to the petitioner's cruelty and since then they have not resumed cohabitation and have resided separately, and no conjugal relations have taken place between the parties for a while and more particularly since the constructive desertion.

6. It is her case that the petitioner has failed and is guilty of failing in his duties as a husband and father. He is alleged not to be caring for the wellbeing of the Respondent and the children, failing to perform his husbandly duties and obligations causing the Respondent great embarrassment and reducing her self-esteem in the presence of others and that the marriage between the parties have come to an end. As a consequence of the Petitioner's cruelty, constructive desertion and willful neglect, the respondent takes the position that the marriage has irretrievably broken down. She therefore prays for the dismissal the Petitioner's Petition with costs, dissolution of the marriage on the grounds set out in her petition, custody of the children of the marriage with reasonable access to the Petitioner, alimony for herself and maintenance for the children of the marriage, and costs of the petition and cross-petition.

7. The petitioner filed his reply to answer to petition and answer to cross petition on 17<sup>th</sup> March 2009. In his reply to answer to petition, the petitioner reiterates that cohabitation between the parties ceased on 19<sup>th</sup> January, 1999 when the Respondent left the matrimonial home without just cause and went to Europe. He avers further that the petitioner embarked on divorce proceedings and a decree *nisi* and absolute were issued by the Honourable Court. The petitioner denied that the two have cohabited as husband and wife up to and including 24<sup>th</sup> June, 2008, and the petitioner reiterates the contents of the petition and particulars of cruelty set out therein and seeks the reliefs prayed in the petition.

8. In his answer to the Cross-Petition, the petitioner whilst admitting that the marriage has irretrievably broken down denies treating the Respondent with cruelty. He denies directing unkind and cruel verbal insults and or done anything to strip and undermine the Respondent's self-worth adding that he treated the Respondent with respect which she did not reciprocate; he further denies that he withheld love and affection from the Respondent and the children of the marriage adding that it is the Respondent who left a suckling baby with him and the left the children with no one to take care of them; he denies that he has

constantly and frequently displayed a violent, uncaring attitude towards the petitioner and the children and or physically assaulted and verbally abused the Respondent and the children; the petitioner denies having severely abandoned the Respondent in dangerous places in the middle of the night or forcing the Respondent out of the vehicle without caring about her safety and he avers that the Respondent has always had a vehicle for her use and the allegations are wild and far-fetched; on the allegation that he has failed over the years to spend time with the Respondent and the children, the petitioner's avers that the Respondent was nowhere to spend time with but he has treated the children as is expected of a reasonable parent; he further denies having had extra-marital affairs with women known or unknown to the Respondent adding that it is the Respondent who has been engaged in such affairs against the advice from her relatives; he denies threatening the Respondent or attempting to shoot her in 2005 in the bedroom or that he fired 2 bullets which destroyed beddings and made holes on the bedroom wall adding that the same is a figment of the Respondent's imagination; he further denies assaulting the Respondent by kicking and strangling her or threatening the Respondent's life or forcing her to leave matrimonial home at 4.30 a.m. on 24<sup>th</sup> June, 2008. In short, the Petitioner has denied all the particulars of cruelty as set out in the cross-petition.

9. Further, that the Petitioner denies the particulars of willful neglect set out in the Cross-Petition and states that the Respondent was well provided for and that she took enough money and properties when she left. The petitioner avers that the Respondent is not a fit and proper person to be granted custody, and that she has her own properties business and wealth siphoned out of the over the years and is not entitled to alimony. Finally, it is his case that he has taken care of his children including all their needs and will continue to do so to the best of his ability with or without a court order as a responsible parent.

10. The parties testified before me on 23<sup>rd</sup> May 2013. It was indicated to me by counsel that the parties had reached agreement on the children and that the only issue outstanding was on maintenance. During the hearing, both sides made motions for the amendment of their pleadings to introduce fresh grounds founded on desertion. The petitioner sought to plead constructive desertion while the respondent wanted to plead desertion as the petitioner had since 2008 moved out of the matrimonial house to a guest house within the matrimonial home, and that there had been no conjugal cohabitation since then. Both applications were made orally, they were not opposed, and I granted them both.

11. Arising from the above pleadings and the position by both the Petitioner and the Respondent, it is obvious that both spouses are unhappy in their marriage. They both admit that their differences are irreconcilable which leads to mental and anguish and mental cruelty to each one of them. Indeed they cannot continue to live lovingly and each one of them blames the other and they both agree that the marriage has irretrievably broken down. In my view, it does not pay to let them continue causing each other unnecessary mental cruelty. It would serve their best interests if each of them were to follow their own life instead of forcing them to continue living together when clearly they have become incompatible.

12. The grounds for dissolution of the marriage are stipulated in Section 8 (1) of the Matrimonial Causes Act thus:

*'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 committed adultery; or*

*(b) has deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition; or*

*(c) has since the celebration of the marriage treated the petitioner with cruelty; or*

<sup>(d)</sup> is incurably of unsound mind and has been continuously under care and treatment for a period of at least five years immediately preceding the presentation of the petition,

and by the wife on the ground that her husband has, since the celebration of the marriage, been guilty of rape, sodomy or bestiality.’

13. The main ground in these proceedings is cruelty, particulars of which are clearly set both in the petition and cross-petition.

14. In **A.M.A. vs. G.S.B. Nairobi HCDC No. 134 of 2010, Kariuki J ( as he then was)** had this to say:

*‘It is said that for cruelty to constitute a ground for divorce in law, it must be grave and weighty and must cause injury to the Petitioner’s health or reasonable apprehension of such injury. Cruelty is willful and unjustifiable conduct of such a character as to cause danger to life, limb, or health, bodily or mental or so as to give rise to a reasonable apprehension of such a danger (see Russell vs. Russell [1895] P. 315, 322. See also D. Tolstoy on The Law and Practice of Divorce, Sixth Edn. It is important to point out that it is settled law that intention is not a necessary ingredient of cruelty and neither a malevolent intention, nor a desire to injure, nor knowledge that the act done is wrong and hurtful, need be present for conduct to amount to cruelty (see Gollins vs. Gollins [1964] AC 644; Williams vs. Williams [1964] AC 698, 760. Tolstoy, 6thEdn states that the question in all cases is whether the Respondent’s conduct was cruel, rather than whether the Respondent was himself or herself a cruel person (see Gollins vs. Gollins (supra) at page 670 and Williams vs. Williams (supra) at pg 721. It is however worth noting that intention is not totally irrelevant because conduct which is intended to hurt strikes with a sharper edge than conduct which is the consequence of mere obtuseness or indifference (see Jamieson vs. Jamieson [1952] A.C. 525, 535. Moreover, a deliberate intention to hurt may turn into “cruelty conduct” which, without such intention, would not constitute cruelty.’*

15. As the Petitioner and the Respondent in this case both allege cruelty, they are both enjoined to prove the acts of cruelty alleged against each party. In *E.J.M.K vs. J.W.K Nairobi HCDC No. 21 of 2009*, Kariuki J (as he then was) had this to say at paragraph 26:

*‘As long ago as 1862, it was accepted in English law that, “the law does not require that there should be many acts (of cruelty) and if one act should be of that description which should induce the court to think that it is likely to occur again and to occur with real suffering, there is no rule that should restrain the court from granting a decree of divorce”, It has been held where in the case of a single act of cruelty “the court takes the view that the injured spouse would be in danger of further ill-usage, then cruelty is sufficiently established. In short, the real question that the court has to determine is whether the conduct complained of and its consequences are so deplorable that the complaining spouse must have a remedy.’*

16. It is my considered view that the allegation of cruelty and its particulars as claimed by the parties so undermine the matrimonial relationship that no person could be expected to live with a person who made such allegations. In the instant case it is abundantly clear that the relationship as to between the couples is not working, and their marriage has become cold and dead, and therefore is not only unhealthy to the couples but to the children of the marriage. It must be pointed out that, where the relationship has become unworkable, it is better that the parties formally end their relationship and minimize the potential bitterness and hostility between them. The said marriage is not in any party’s interest and should be ended.

17. As regards desertion, the Respondent states in her cross-petition that she left the matrimonial home on 24<sup>th</sup> June, 2008 due to the Petitioner’s cruelty. I note that the cross-petition was filed on 11<sup>th</sup> July, 2008. For desertion to constitute a ground for divorce, it must run for a period of at least three years

immediately preceding the presentation of the petition for divorce. The petition for divorce was thus brought prematurely in so far as the ground of desertion is concerned. The petition fails on the ground of desertion but succeeds on the ground of cruelty.

18. For the above reasons, I hereby find that sufficient grounds have been established for the dissolution of the marriage celebrated between the parties hereto on 12<sup>th</sup> October, 1996 at Nairobi.

19. I now turn to the Respondent's Chamber Summons dated 21<sup>st</sup> May, 2009 and taken out under Section 3, 25, 30(1) of the Matrimonial Causes Act and Rules 3(3) and 39 of the Matrimonial Causes Rules and all other enabling provisions of the law. I note that the main issue outstanding in the said application is the provision of maintenance. It is the Applicant/Respondent's position that despite the Respondent/Petitioner being a man of means, he has neglected his parental responsibility and has failed and/or refused to provide maintenance and or adequate maintenance for the children. Opposing the said application, the Respondent/Petitioner filed in a replying affidavit sworn on 1<sup>st</sup> July, 2009, where he avers at paragraph 9 that he has always single handedly provided for the financial and needs of the children, where he has paid the children's school fees, provided for all the household requirements, met all their medical expenses and took the children on holidays. He avers that despite the Applicant/Respondent having sufficient financial ability through her successful businesses, she has failed and/or refused to assist in providing for the children's daily upkeep and needs and has left the Respondent/Petitioner to shoulder the children's financial needs and general household requirements alone.

20. Further, at paragraph 16 of the said replying affidavit, he avers that he has and continues to provide for the Respondent's personal upkeep by the monthly deposit of Kshs. 100,000 into her Barclays Bank Account Number [*particulars withheld*] at the Karen Branch. He reiterates that he single handedly takes care of all the needs of their matrimonial home including; car fuel, medical expenses, the children's educational expenses, household requirements, car insurance, holidays.

21. As mentioned earlier/ the parties were heard on 23<sup>rd</sup> May 2013, where they gave their testimonies in detail. I note that on cross-examination by Mrs. Thongori, Counsel for the Applicant/Respondent, the Petitioner/Respondent who testified as PW1 agreed to provide for the needs of the children at 100%. Indeed the Petitioner/ Respondent during the hearing agreed to specifically provide for; food and personal expenses Kshs. 100,000, school fees for the children of the marriage, Kshs. 16,000 per month for fuel, home security, 1 gardener, 1 domestic worker, pool maintenance, medical cover for the children of the marriage, utility bills of the matrimonial home, insurance and maintenance of the Motor Vehicle, internet access in the matrimonial home, clothing and grooming expenses for the children as and when the children require them. I note too that only one of the children is a minor.

22. In view of the foregoing, the only issue for determination is whether the Respondent is entitled to maintenance if so how much the Petitioner herein should pay. The Respondent sought Kshs. 200,000.00 per month and yet the Petitioner/Respondent offered Kshs. 100,000 which she stated was grossly insufficient and would adversely affect the quality of life that she was accustomed to.

23. Section 25 (1) of Matrimonial Causes Act Cap. 152 provides thus:

*'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.'*

24. It must be borne in mind that the Respondent has filed a suit for division of matrimonial property, and I note that Counsel for the Applicant/Respondent has submitted that the Respondent's pending claim for division of matrimonial property should not be used to deny her maintenance, and that the suit is still pending and once decided and if does have an impact on the resources available to the parties, the

petitioner should be at liberty to seek any necessary orders for review.

25. It is however not lost on this court that it has already reached a conclusion that the said marriage should be dissolved. What then is the lot of the Applicant/Respondent? Does the order of this court nullifying the said marriage render the application for maintenance inept? I do not think so. Section 25(2) of Cap 152 provides as follows:

*'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 fortunes, if ....., to the ability of her husband and to the conduct of the parties, the court may deem reasonable.'*

26. The above provision of the law evidently empowers this court to direct the husband upon granting a decree of divorce to provide alimony either by way of a lump sum payment or by way of periodic payments. In determining whether a party is entitled to any alimony payment a court must look at the peculiar circumstances of each individual case. This Court is chary that in determining the sum payable as alimony the court must also consider the means and earning capacity of the petitioner. The provisions of Section 25 of the Matrimonial Causes Act require that any order for maintenance and/or alimony on a decree of divorce or nullity must take into account the wife's fortune (if any), the ability of the husband, the conduct of the parties and the reasonableness of the maintenance.

27. I have observed that the Petitioner/Respondent has agreed to pay Kshs. 50, 000.00 towards the Respondent's maintenance stating that the Applicant/Respondent was capable of meeting expenses of Kshs. 31, 000.00 as contained in her affidavit sworn on 21<sup>st</sup> May, 2009 to which the Applicant Respondent has responded by merely stating that was then and that circumstances have changed and she does not have the same capacity. I find this response implausible as she has failed to show what circumstances have changed.

28. In light of the above, it would be reasonable pending the outcome of the division of matrimonial property and in order to meet the justice of this case to order that the Petitioner should pay to the Respondent Kshs. 120, 000.00 per month for her own maintenance.

29. For the avoidance of doubt, the final orders made in this matter are-

- a. That the marriage celebrated between the parties hereto on 12<sup>th</sup> October, 1996, is hereby dissolved;
- b. That Decree *nisi* shall issue forthwith, to be made absolute after forty-five (45) days;
- c. That joint custody of the youngest child of the marriage, T N, is awarded to both the parties for as long as he is still a minor;
- d. That the petitioner shall pay to the respondent the sum of Kshs. 120. 000.00 per month for her own maintenance until otherwise ordered by the court;
- e. That the petitioner shall also pay to the respondent monthly sums of Kshs 20, 000.00 as fuel allowance and Kshs. 10, 000.00 for car maintenance, until otherwise ordered by the court;
- f. That the petitioner shall bear the costs of the petition.

**DATED, SIGNED and DELIVERED at NAIROBI this 25th DAY OF April, 2014.**

**W. MUSYOKA**

**JUDGE**

**In the presence of ..... advocate for the petitioner.**

**In the presence of ..... advocate for the respondent.**