



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERICHO

DIVORCE CAUSE NO. 1 OF 2009

B C KPETITIONER

-VS-

D K K.....RESPONDENT

JUDGMENT

B C K, hereinafter referred as the Petitioner, took out the Petition dated 27th March 2009 in which she sought for an order to dissolve her marriage with **D K K**, the Respondent herein. When served with the Petition the Respondent filed an answer to the Petition to oppose the same. When the Petition came up for hearing, the Petitioner was allowed to proceed for hearing *ex-parte* when the Respondent failed to attend court despite having notice of the hearing date.

The Petitioner testified alone without summoning any independent witnesses. It is the evidence of B C K that she got married to the Respondent in 1995 under the Marriage Act. She produced the marriage certificate as an exhibit in evidence. The aforesaid certificate shows that the marriage between the couple was solemnized at the District Commissioner's Office, Kericho on 28th April 1995. The duo established a matrimonial home at [particulars withheld] village, Kiptere Location, Kericho District and that they had one issue namely **L C** who is now aged 17 years. The Petitioner stated that she deserted the matrimonial home in 1997 together with her daughter due to the Respondent's threats and behavior. The Petitioner is of the opinion that her differences with the Respondent are irreconcilable. The Petitioner accused the Respondent of alleging that she practiced witchcraft yet he knew those allegations are false. The Respondent is said to have completely refused to take the Petitioner's meals. The Petitioner further alleged that the Respondent committed acts of adultery by marrying another woman. The Respondent in his answer to the Petition accused the Petitioner of deserting the matrimonial home thus denying him conjugal rights. He admitted that he is married to another wife. The Respondent has also averred in the answer to the Petition that his marriage with the Petitioner has irretrievably broken down. He urged this court to have it dissolved.

I have considered the Pleadings and the Petitioner's evidence. Two issues remain undisputed. **First**, is that the couple's marriage was registered under the Marriage Act. **Secondly**, that the marriage has broken down with no hope of resuscitation. Both parties have asked this court order for the marriage to be dissolved. The Petitioner has put forward two grounds. **First**, she has urged this court to find that the Respondent has been cruel to her. She has averred that the Respondent has accused her of practicing witchcraft. She has also stated that the Respondent no longer takes her meals and has threatened her with dire consequences. The Petitioner states that she left the matrimonial home for fear of her dear life. She has basically asked this court to find the Respondent guilty of constructive desertion. **Secondly**, the Petitioner has beseeched the court to find the Respondent guilty of adultery. The Respondent has on the

other hand has accused the Petitioner of conducting herself in a manner which made him get married to another wife. After a careful consideration of the evidence, it is now crystal clear that the Respondent having contracted a statutory marriage with the Petitioner i.e under the Marriage Act, he had no capacity to contract another marriage while that marriage was still substituting. **Section 37 of the Marriage Act** provides as follows:

37."Any person who is married under this Act, or whose marriage is declared by this Act to be valid, shall be incapable during the continuance of such marriage of contracting a valid marriage under any native law or custom, but, save as aforesaid, nothing in this Act contained shall affect the validity of any marriage contracted under or in accordance with any native law or custom, or in any manner apply to marriages so contracted."

The Respondent has averred in paragraph 7 of the answer to Petition as follows:

"Further, in answers to paragraph 8(a) and (d) of the Petition, the Respondent states that the Petitioner deserted the matrimonial home thereby denying the Respondent the conjugal right thus making him to marry another wife."

The moment the Respondent married the Petitioner under and in accordance with the provisions of the Marriage Act, he lost the capacity to contract any other marriage as long as his marriage to the Petitioner remained valid and undissolved. The Respondent cannot justify his action to marry another wife on the basis that he had been denied conjugal rights by the Petitioner. The Court of Appeal in **Wangari Matheri Vs=Mwangi Mathai (1980) K.L.R 154** restated the standard of proof in matrimonial offences as follows:

"When considering the question of the standard of proof requisite to establish the commission of a matrimonial offence, the safe and proper direction should be that the court must be satisfied beyond reasonable doubt or satisfied so as to feel sure that guilt has been proved against the Respondent."

Applying the above stated standard of proof, I am convinced the Petitioner has established that the Respondent committed adultery. The resultant consequence is the dissolution of the marriage.

The Petitioner has put forward a strong case to show that the Respondent threatened her and that he was cruel to her forcing her to leave the matrimonial home. The Petitioner alleged that the Respondent treated her as a witch hence he did not take her meals unless she first tasted. The Respondent did not specifically deny this allegation. He did not also deny the accusation that he was a violent man. The above allegations forced the Petitioner to desert the matrimonial home. In the circumstances, I find the Respondent guilty of constructive desertion.

In the end, I am satisfied that the Petitioner has proved her Petition to the required standards. I hereby order that the marriage between the Petitioner and the Respondent be dissolved. Decree nisi be issued and the same to be made absolute at the lapse of six months from date hereof. The Petitioner was categorical that she is not pursuing for costs, therefore I will not make any order on costs.

Dated, signed and delivered in open court this 20th day of June, 2014.

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J.K.SERGON

JUDGE

In the presence of:

Petitioner present in person

Respondent absent