

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

FAMILY DIVISION

DIVORCE CAUSE NO.128 OF 2010

R J W.....PETITIONER

VERSUS

F M W.....RESPONDENT

JUDGMENT

The Petitioner, R J W filed a petition seeking to be divorced from the Respondent, F M W. According to the amended petition for divorce, the Petitioner averred that he married the Respondent on 6th September 1991 under the then **Marriage Act**. The marriage has been blessed with two (2) issues. They have reached the age of majority. The Petitioner and the Respondent have, during the subsistence of their marriage, resided in Nanyuki and Nairobi in Kenya and in the United Kingdom. According to the Petitioner, during the subsistence of their marriage, the Respondent had treated him with cruelty. He set out the particulars of the cruelty in his petition. The particulars ranged from the allegation that the Respondent had unjustifiably denied the Petitioner his conjugal rights, failure to provide emotional and psychological support, to negatively influencing the children against him. The Petitioner accused the Respondent of sending correspondence to his friends and family members claiming that he (the Petitioner) was insane. This caused the Petitioner to suffer humiliation and embarrassment. The Petitioner accused the Respondent of burning his books and private documents while he was out of the country. He also averred that the Respondent had attempted to defraud him of his shares in the family business. He averred that at various times during their marriage, the Respondent had engaged in inappropriate sexual contact with persons both known and unknown to him. This caused the Petitioner to suffer embarrassment and humiliation. In the premises therefore, the Petitioner prayed that the court dissolves his marriage to the Respondent. The Petitioner further prayed that the Respondent be ordered to surrender the Petitioner's personal documents in her possession. Finally, he prayed that the Respondent be excluded from the Nanyuki family house.

When the Respondent was served, she duly entered appearance. She filed answer to the Petition. She denied the allegations made by the Petitioner that she had treated him with cruelty. She denied the averment made by the Petitioner that she had either neglected or emotionally abused the Petitioner. She denied committing adultery. She denied interfering with the Petitioner's shareholding in the family business. She denied behaving negatively in a manner that would cause the Petitioner embarrassment and humiliation as pleaded in the petition. In all these allegations, the Respondent put the Petitioner to strict proof thereof. The Respondent averred that, in her view, her marriage to the Petitioner has not irretrievably broken down and therefore prayed that the petition for divorce be dismissed with costs.

There were several applications that were filed by both the Petitioner and the Respondent in this petition. The applications related to the determination of the question whether the Respondent was entitled to reside in the family house at **[particulars withheld]** Ranch, Nanyuki, and whether, the Petitioner should provide maintenance for the Respondent. One of the applications was disposed of by the court. The Respondent was aggrieved by one of the decisions. She filed notice of her intention to appeal to the Court of Appeal. The Respondent made an application to stay the giving effect of the said decision of this court in regard to her residence pending the hearing and determination of the intended appeal. The application was granted. From the court record, it is not clear whether the Respondent has prosecuted the appeal.

During the hearing of the petition for divorce, this court heard oral evidence adduced by the Petitioner. He

gave his testimony in chief. The Respondent, who was acting in person, declined to cross-examine the Petitioner. Instead she made a statement explaining why the court should not grant the petition for divorce. In his testimony, the Petitioner told the court that he had four (4) cases pending before court between himself and the Respondent. One of the pending cases relates to division of matrimonial property. The other two cases are in the Commercial Division of the High Court relates to shares in two companies where the Petitioner and the Respondent are directors. Another case involved custody and maintenance of one of the children. That case has been resolved. The Petitioner testified that he wants his marriage to the Respondent dissolved on account of cruelty. He narrated instances which he alleged the Respondent was cruel to him. He testified that on 3rd December 2010, the Respondent went to Muthaiga Club and took away his personal documents. To date, the Respondent was still in possession of the documents. He further testified that the Respondent in a letter dated 22nd January 2011, accused him of being mentally unstable. He stated that the Respondent had communicated to their children while in school with allegations meant to poison his relationship with the children. He produced copies of the emails as exhibits in the case. He told the court that he had been separated from the Respondent since 8th June 2005. The separation was witnessed by a deed of separation of the same date. The deed was produced as an exhibit in court. He testified that the reason why he still remained married to the Respondent was for the sake of their children who were then minors. He reiterated that since 2010, he had not shared the same roof with the Respondent.

The Petitioner further testified that he was of the view that the Respondent is not mentally stable when she claims that she was willing to return to the matrimonial home and take care of him. He was categorical that there was no hope whatsoever that he would be reconciled with the Respondent. He referred to an affidavit sworn by the Respondent on 18th July 2011 where she admitted that the marriage had indeed irretrievably broken down. He stated that he was meeting all the financial needs of their children, including their education, now that both children are in university. He testified that in May 2011, the Respondent attempted to poison him. He produced a report dated 13th May 2011 prepared by the Ministry of Public Health. The report showed that the samples analyzed contained strychnine, a poisonous substance. He further testified that the Respondent had attempted to influence his children to enable her deprive him of the shares in the family business. He stated that the Respondent had inappropriate sexual contact with two men. He explained that he had adequately financially provided for the Respondent both in Kenya and in England. He urged the court to dissolve the marriage.

As stated earlier in this Judgment, the Respondent opted not to cross-examine the Petitioner. Instead, she gave a statement in court. She stated that she wanted the court to give her an opportunity to again take care of her family. She hoped to resume her work of helping members of rural society in Kenya. She told the court that she had worked hard to ensure the wellbeing of her family. She helped the Petitioner develop the family business at the farm. She stated that although she had worked hard to improve the income of the family, the Petitioner had not paid her any salary. She accused the Petitioner of denying her the opportunity of having a third child. She stated that in the period that she had lived with the Petitioner, she had done her best to take care of her family. She explained that since June 2010, the Petitioner had taken away all that is important to her: she was deprived of her family home, she was cut off from communicating with her children, she was denied the use of the family cars, she was deprived of her club membership in Nairobi and Nanyuki and finally, the Petitioner refused to renew her long term residence visa in Kenya. The Respondent was emphatic that it was her duty and responsibility to protect the integrity and prosperity of her family. She reiterated that the family farm was the basis of their identity. She asked the court to provide her with an opportunity to live in the family farm. She asked the court to give her a stable platform upon which to take care of the family. She pleaded with the court to treat her with equality in light of **Article 27(3)** of the **Constitution** that behooves the court to accord both men and women equal treatment. She asked the court to grant her equal treatment by ensuring that she is given an opportunity to bond with her family in Kenya as the mother of her children. She urged the court to refer to three affidavits that she had presented to the court on 4th March 2011, 29th July 2013 and 19th March 2014.

This court has carefully considered the Petitioner's evidence and the statement made by the Respondent in opposition to the petition for divorce. The issue for determination by this court is whether the Petitioner

established a case for this court to grant his petition for divorce. It is important at this juncture to point out that the issue that was placed for determination before this court was the divorce. The other issues regarding maintenance of the Respondent will be determined after the conclusion of these divorce proceedings. As noted by the Petitioner, there is a pending suit before this court where the Respondent has sought division of matrimonial property. This court will not therefore address any question relating to the right to property of either the Petitioner or the Respondent. That issue will await the hearing and determination of the division of matrimonial property case. Another issue that this court will not determine is in regard to the question whether the Respondent will be allowed to resume residency in the family farm at Nanyuki. That issue is awaiting determination by the Court of Appeal. This court granted conditional stay of the order which had granted the Respondent access to her residential house within the family farm. The Petitioner was ordered to give the Respondent a sum equivalent to British Pounds 100,000. The Petitioner complied with this order.

From the evidence adduced by the Petitioner, it was clear that the Petitioner was relying on three grounds of divorce. The first ground was cruelty. The Petitioner testified that the Respondent had treated him with cruelty by firstly, questioning his sanity, creating a wedge between himself and his children and thirdly by taking possession of his personal documents without his permission or authority. The Petitioner testified that the Respondent attempted to poison him hence rendering his continued stay with the Respondent as husband and wife untenable. The evidence adduced by the Petitioner in this regard was uncontroverted. The Respondent spurned the opportunity to cross-examine the Petitioner on the allegations that he made against her. This court took it to mean that the Respondent was not challenging the veracity of what the Petitioner had testified on oath. This court can in the circumstances reach the conclusion that the evidence adduced by the Petitioner is credible. For the Respondent to question the sanity of the Petitioner, especially in communication to their children clearly amounts to cruelty. What constitutes cruelty as a ground of divorce is broad. It includes both physical and emotional cruelty. It depends on the type of evidence adduced and the assessment by the court of that evidence. It was apparent from the evidence adduced by the Petitioner that the Respondent made this allegation questioning the sanity of the Petitioner because she wanted to take over the control of the family estate. The Petitioner accused the Respondent of attempting to manipulate the shares of the two companies owned by the family. This court will not make a finding in respect to whether there was such manipulation of shares because the issue is *sub-judice*. It will suffice for this court to say that the alleged events must have emotionally traumatized the Petitioner. The Petitioner further stated that the Respondent attempted to poison him. He produced a copy of a report which established that the substance that was intended for his consumption was indeed poison. This evidence was not contradicted by the Respondent. This court, upon evaluating this evidence, formed the view that indeed the Petitioner had established the matrimonial offence of cruelty to the required standard of proof on a balance of probabilities.

The second ground was that of desertion. It was clear from the evidence adduced by the Petitioner that the Petitioner and the Respondent have been separated since 8th June 2005. The separation was witnessed in a deed of separation signed on the same date. The Petitioner and the Respondent have not lived together as husband and wife for a period of more than nine (9) years. According to the Petitioner, he had not lived under the same roof with the Respondent since 2010. Again, the Respondent did not dispute this fact. The Petitioner explained that the reason why he opted to separate from the Respondent instead of divorcing her at the time was for the sake of their children. The Petitioner was categorical that his marriage to the Respondent was beyond salvage. There was absolutely no chance that they would be reconciled. On her part, the Respondent stated that despite of all the events that had taken place, she was still willing to remain married to the Petitioner for the sake of her family. She urged the court to take all this into consideration and refuse to grant the petition for divorce. Upon evaluating the evidence adduced in this regard, it was clear to this court that the marriage between the Petitioner and the Respondent had indeed irretrievably broken down with no possibility to salvage. A married couple that has been separated for a period of more than nine (9) years cannot be said to be in a healthy state of relationship. The separation of nine years is sufficient proof that the marriage between the Petitioner and the Respondent is not capable of sustenance and should be dissolved.

The third ground for divorce which was presented by the Petitioner is that of his constitutional right to associate with anyone of his choice. This court notes that under **Article 45** of the **Constitution** the family

is recognized as the foundation and fundamental unity of the society. It is in that regard that the Constitution specifically provides that the family shall enjoy recognition and protection by the State. However, where it is established that a spouse in the marriage is living in such condition of misery and unhappiness, the court is under obligation, nay, duty to uphold the aggrieved spouse's right to freedom of association as provided under **Article 36(1)** of the **Constitution**. The Respondent cannot therefore compel the Petitioner to associate with her when clearly the Petitioner has no wish or desire to consort with her. It was clear from her statement that the Respondent did not wish, under any circumstances to be divorced from the Petitioner. This court cannot grant the Respondent's wish because to do so would amount to subjecting the Petitioner to a relationship which he is categorical he does not desire or wish to be party to.

In the premises therefore, this court holds that the Petitioner established a case for this court to grant his petition for divorce. The marriage celebrated between the Petitioner and the Respondent on 6th September 1991 at the Office of Registrar of Marriages in Laikipia District Kenya is hereby dissolved. Decree nisi dissolving the marriage is hereby issued. The decree nisi shall be made absolute thirty (30) days from the date of this Judgment. There shall be no orders as to costs. The parties are ordered to list the case for hearing for the maintenance case of the Respondent. It is so ordered.

DATED AT NAIROBI THIS 31ST DAY OF JULY, 2014.

L. KIMARU

JUDGE