



IN THE HIGH COURT OF KENYA AT ELDORET

DIVORCE CAUSE NO. 15 OF 2013

A K S.....PETITIONER

VERSUS

J M K.....RESPONDENT

JUDGMENT

1. The petitioner prays that his marriage to the respondent be dissolved. Their union was celebrated on 8th September 2000 at [Particulars Withheld], Nairobi. The marriage was registered under the Marriage Act. A copy of the certificate of marriage number [Particulars Withheld] was produced as evidence.
2. The petition is based on the ground desertion. The respondent has filed an answer to the petition. The petitioner is an advocate of the High Court of Kenya. The respondent is a project officer at Action Africa and now based in South Sudan. The couple at first set up their matrimonial home in rented premises at [Particulars Withheld], Nairobi. There is one issue of the marriage, a son, E.R.Y., born on 14th January 2001. The couple share custody of the minor.
3. The petitioner testified that in the year 2006, he proceeded for further studies to the USA. He returned to Kenya a few times. It is during that period that disputes between the couple intensified. In 2008 when he visited from the USA, he found that the respondent had deserted the matrimonial home. The respondent at some point left and established a residence in Eldoret. The petitioner returned for good to the Republic in 2010.
4. The petitioner testified that throughout the marriage, he has been a responsible father and has taken good care of his son. The minor is now a class eight pupil. The petitioner said that he paid for the minor's school fees. He also maintained his education policy worth Kshs. 600,000 with ICEA-Lion Insurance (Exhibit 1). The petitioner stated that the couple has not lived together since 2006. Efforts to reconcile the parties were fruitless because the respondent and her family accused him of desertion and infidelity. He said the differences are irreconcilable.
5. The respondent filed an answer to the petition on 25th October 2013. She accuses the petitioner of desertion and adultery with one F E. The latter is not a party to these proceedings. The respondent testified that in 2003 she was a student at [Particulars Withheld] pursuing a communication course. The couple was then living on [Particulars Withheld], Nairobi. She said the petitioner left for South Africa in 2004 and later to the USA. She said she was forced to get temporary work to meet the rent and other needs. In 2008, she got a job and moved to Eldoret. She said she was taking care of the child and the bills. She disputed the assertions by the petitioner that he was a responsible father. She said she would communicate with the petitioner by email but the petitioner would often claim he had no money. Her mother assisted her with the bills. By the time the petitioner returned to the Republic, she had "moved on and got another child with another man".
6. From that evidence, I have reached the conclusion that the marriage has completely broken down. The couple has not lived together since the year 2004. Although the respondent accuses the

petitioner of infidelity, it is clearly a case of the pot calling the kettle black. The respondent herself admitted candidly of having another child with another man. I am also satisfied that all efforts at reconciliation have been unrewarding.

7. Desertion is defined in *Halsbury's Laws of England* 4th Edition Vol. 29 at paragraph 265 as the “*intentional permanent forsaking and abandonment of one spouse by the other without that other's consent and without reasonable cause*”. The learned authors clarify what does not constitute desertion:

“Desertion is not the withdrawal from a place but from a state of things, for what the law seeks to enforce is the recognition and discharge of common obligations of the married.”

8. Section 8 (1) (b) of the Matrimonial Causes Act provides 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 deserted the petitioner without cause for a period of at least three years immediately preceding the presentation of the petition. In the present case, the desertion has lasted for nearly fourteen years preceding the presentation of this petition. I am satisfied that the matrimonial offence of desertion has been proved well beyond a balance of probabilities. See *Wangari Maathai v Mwangi Maathai* [1980] KLR 154.
9. The differences between the parties are clearly irresoluble. I have no evidence that these proceedings were brought by connivance or collusion. Although the respondent in her answer to the petition prays for *dismissal* of the petition, her evidence and conduct in fact supports the allegations in the petition. She conceded that she has *moved on*. She has in the process mothered another child from a different father.
10. In a nutshell this marriage is a dry shell; it has irretrievably broken down. As Madan J (as then was) said in *N v N and another* (2008) 1 KLR (G&F) 16 at 17, this husband and wife got themselves into a “*real grand-sized matrimonial tangle...there are winds of sorrow where their voice was, silence where their love was...*”.
11. Granted all those circumstances I will allow the petition for divorce on the ground of desertion. The marriage celebrated on 8th September 2000 at [Particulars Withheld], in Nairobi between the petitioner and the respondent is hereby dissolved. A decree *nisi* shall issue forthwith. The decree *nisi* shall be made absolute after *thirty days* of today's date. As regards the prayers for custody of the minor, and this being the court of first instance, the proper forum will be the Children's Court under section 73 of the Children Act. I make no order on costs.

It is so ordered.

DATED, SIGNED and DELIVERED, at **ELDORET** this 28th day of October

2014.

GEORGE KANYI KIMONDO

JUDGE

Judgment read in open court in the presence of:

Mr.....for the petitioner instructed by E.C. Rotich & Company Advocates.

Ms.....for the respondent instructed by Kalya & Company Advocates.

Mr. J. Kemboi, court clerk.