



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Divorce Cause 62 of 2011**

**D. B..... PETITIONER/APPLICANT**

**VERSUS**

**B. P. B.....RESPONDENT/RESPONDENT**

**JUDGEMENT**

The divorce Petition dated 07.04.2011 was filed in this court on 11.04.2012. It shows that the Petitioner, **D. B.**, is an Italian national domiciled in Kenya and that he has been residing in Kenya for many years. He seeks in his petition dissolution of his marriage to his wife, **B. P. B.**, the Respondent in the Petition, on the ground that she deserted him in November 2005 without good cause.

The divorce petition was served on the Respondent who did not defend it by appearing and/or filing answer to the Petition. As a result, the Deputy Registrar, satisfied as regards service of the petition on the Respondent, certified the petition as an undefended cause. It came up for hearing before me on 01.03.2012. The Petitioner testified but did not call any witnesses. His advocate, Mr. K. Osmond, urged the court to dissolve the marriage as prayed in the Petition.

I have perused and considered the Petition for divorce and the testimony of the Petitioner. The evidence shows that the Petitioner, a dental technician, then a bachelor, and the Respondent, a travel agent, then a Spinster, solemnized their marriage on 16<sup>th</sup> April 1996 at the Offices of the Registrar of Marriage, Sheria House, Nairobi following which they cohabited as man and wife at Gitanga Road, Lavington, Nairobi, from April 1996 to November 2005 when the Respondent left. During their cohabitation, the parties had two children born in Nairobi, namely, G. A. B. born on 7<sup>th</sup> May 1996 and A. A. B., born on 22<sup>nd</sup> October 1994.

The Petitioner runs a restaurant business at Valley Arcade, Nairobi known as *{particulars withheld}*, which the Petitioner stated in evidence is owned by a limited liability company in which the Petitioner and the Respondent each holds 50% shares. The Respondent told the court that he has no other assets.

It was the Respondent's evidence that the Respondent deserted him without any good cause in November 2005 and went to Switzerland with the children. The children are now in school in Switzerland and the Petitioner seems happy about this. He told the court that he would like to see his children. In his Petition for divorce, the only relief the Petitioner has sought is dissolution of the marriage although in evidence he ventured to say that he would like to have joint custody of the children. The Petition was, however, never amended to include such relief. As the court cannot give reliefs that are not sought, especially where, as here, the Petitioner has legal representation, I shall proceed to consider only whether the Petitioner has proved that he is entitled to dissolution of the marriage on the ground of desertion.

The law applicable to the marriage between the parties is The Matrimonial Causes Act, Cap 152, of the Laws of Kenya. Under Section 8(1)(b) of the Act, 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. As can be seen, 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 divorce petition. In this case, the desertion was in November 2005 and the divorce petition was presented on 11.04.2011, well after the expiry of the three (3) year period. Such desertion must also be without cause. There is no evidence to show that the Respondent left due to the Petitioner's acts of misconduct nor is there evidence that the Petitioner did anything that made it impossible for the parties to live properly together. There is also no evidence that the Petitioner has condoned the alleged desertion nor that the divorce petition is presented in collusion with the Respondent.

I have duly examined the pleadings and evidence in this case. It is my finding that desertion has been proved.

Accordingly, I allow the Petition against the Respondent.

I pronounce a decree of divorce and hereby dissolve the marriage between the Petitioner and the Respondent on the ground of desertion on the part of the Respondent.

In the first instance, a decree nisi shall issue forthwith, and subject to the provisions of Section 15 of the Matrimonial Causes Act, Cap 152, the decree nisi shall be made absolute on application after the expiry of three months after this pronouncement.

Each party shall bear its own costs.

**G. B. M. Kariuki, SC**

**JUDGE**

**Dated, delivered and signed on this 15<sup>th</sup> day of February 2013 by the Honourable Justice W. Musyoka on behalf of Justice G.B.M. Kariuki.**

**JUDGE**

**Counsel appearing**

**Mr. Osmond, Advocate, of K. H. Osmond & Co. Advocates, for the Petitioner**

**Court Clerk - Kugwa**